

Expert opinion on denial of the right to self-determination in the context of prolonged occupation, and legal consequences thereof

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Executive summary

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. The law of occupation is a regulatory framework that applies in warfare if a hostile army comes into uninvited effective control of foreign territory. The law of occupation preserves meaning in an occupied people's right to self-determination, by limiting the scope for changes to be made to an occupied territory, its demography, and infrastructure. Prolonged occupations, extending over many years, challenge this logic. The risks of population movement and a failure to preserve the capital of a natural resource increase in line with the length of an occupation and the extension and deepening of an occupier's control. Prolonged occupations call for closer attention to the relevance of the right to self-determination. The right to self-determination may serve as an interpretative aid, adding meaning to provisions of the law of occupation. The right to self-determination is also relevant as a standalone basis for assessing an occupation. Occupation in and of itself is a breach of the right to self-determination. The right to self-determination requires an end to occupation. Under a traditional conception of invasion of a territory by a foreign state, this will require withdrawal. Where there are additional factors, such as uncertainty about the status of components of the occupied territory, the right to self-determination points towards a political process undertaken in good faith. In addition, the right to self-determination is a basis for assessing specific actions of the occupier. In a shorter-term occupation, the terms of the law of occupation may be sufficient to preserve meaning in the right to self-determination. In situations of prolonged occupation or other circumstances that lead to uncertainty about whether the law of occupation applies in its entirety or where adherence to the law of occupation starts to be neglected, the right to self-determination serves a backstop role. It precludes practices that will pre-empt the choices on the organisation, utilisation, and status of a territory that are available to the people at the end of the occupation. This has implications for peace processes. The consistency of a peace agreement with the right to self-determination will be increased to the extent that it is based in a direct mandate from the occupied people. The right to self-determination has *erga omnes* status. This gives all states a basis to invoke responsibility and call for an end to an act in breach of the right. The right also has *jus cogens* status. This requires states to desist from recognition of the situation created by a breach of the right. It places states under an obligation not to render aid or assistance in the maintenance of the situation. States should also cooperate to end the situation constituting a breach of the right to self-determination. This can be facilitated in situations of prolonged occupation through a greater focus on not only how the occupation but also specific actions of the occupier and occupied relate to the right to self-determination. The occupation of Palestinian territory by Israel has lasted for over 50 years. The overall occupation, the Oslo Accords, the circumstances of Gaza, the settlements and the wall, and the use of natural resources, all raise significant issues from the perspective of the right of the Palestinian people to self-determination.

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1. Introduction

This expert opinion provides a holistic account of the role of the right to self-determination in situations of prolonged occupation, with a particular focus on the occupied Palestinian territory (oPt).

The law of occupation limits the scope for changes to an occupied territory, its demography, and infrastructure. In so doing, the law of occupation preserves meaning in the right of the occupied people to self-determination. However, the law of occupation expects temporary occupations. Prolonged occupations, extending over many years, challenge the sufficiency of the law of occupation as a means of protecting the right to self-determination. The risks of population movement and a failure to preserve the capital of a natural resource increase in line with the length of an occupation and the extension and deepening of an occupier's control.

Scholars have examined the right to self-determination as a basis for developing the meaning of the law of occupation.¹ The right to self-determination is also applicable as a standalone basis for assessment of an occupation. The International Court of Justice (ICJ) has utilised the right to self-determination in assessing the legality of Israel's conduct in relation to the oPt.² In its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ provided only a brief account of the meaning and relevance of the right to self-determination.³ Moreover, it hinted at, but did not explicitly address whether or not the right to self-determination has *jus cogens* status.⁴ The ICJ's approach may reflect that the right to self-determination is one of the most fundamental but also uncertain norms in international law.⁵

This expert opinion identifies and examines the significance of the right to self-determination for the meaning of the law of occupation and as a standalone basis for assessing the conduct of the occupier.

The opinion proceeds with an account of the meaning of the right to self-determination in international law and its relation with the law of occupation. This provides a basis for reflection on how circumstances of prolonged occupation affect the relevance of the law of occupation as a means of preserving the right to self-determination for the people of an occupied territory (section 2).

Subsequently, the prolonged occupation of the Palestinian territory is assessed from the perspective of the right to self-determination. This includes attention to the following: the circumstances of the occupation overall; the Oslo Accords; the circumstances of Gaza; the settlements and the wall; and the use of natural resources (section 3).

This is followed by an assessment of the options for reparations and the legal implications for third states. The focus is on the law of state responsibility and the normative status of the right to self-determination, especially its *erga omnes* and *jus cogens* status (section 4).

The conclusion summarises the key findings and highlights policy implications in relation to three sets of guiding questions that motivate the opinion and shape its structure: *what is the role of the right of all peoples to self-determination in the context of a prolonged occupation? How is the right to self-determination relevant in the oPt, including for the peace process? What are*

¹ See A. Pellet, 'The Destruction of Troy Will not Take Place', in E. Playfair, (ed.), *International Law and the Administration of Occupied Territories* (Oxford University Press, 1992) 169; E. Benvenisti, *International Law of Occupation* (Princeton University Press, 1993) 171, 215; I. Scobbie, 'An Intimate Disengagement: Israel's Withdrawal from Gaza, the Law of Occupation and of Self-Determination', 11 *Y.B. of Islamic & Middle Eastern Law*, (2004 – 2005) 3, 21.

² *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p. 136; see also Gareau, 'Shouting at the Wall: Self-Determination and the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory' (2005) 18 *Leiden Journal of International Law* 489.

³ *Legal Consequences of the Construction of a Wall* (ICJ Reports 2004), para. 88, also paras. 115 -122; also Separate Opinion of Judge Higgins, paras. 29–30.

⁴ *Legal Consequences of the Construction of a Wall* (ICJ Reports 2004), para 159.

⁵ See M. Saul, 'The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?' (2011) 11 *Human Rights Law Review* 609.

international legal consequences and remedies for denial of the right to self-determination? (section 5).

The opinion's central argument is as follows. In situations of prolonged occupation, the practical relevance of the law of occupation is at greater risk of being eroded through the conduct of the occupying power. This increases the importance of attending to the role of the right to self-determination as a standalone legal backstop, which precludes practices that will pre-empt the choices on the status, organisation, and utilisation of a territory that should be available to the people at the end of the occupation.

2. The Right of all Peoples to Self-Determination and the Law of Occupation in Prolonged Occupations

A. The Status and Meaning of the Right to Self-Determination

One of the purposes of the United Nations is to pursue the development of friendly relations amongst nations 'based on respect for the principle of equal rights and self-determination of peoples'.⁶ Yet, the development of the legal right to self-determination occurred subsequent to the signing of the UN Charter, as part of the movement for decolonisation during the 1960s.⁷ Thus, the core meaning of the legal right to self-determination centres on the idea of freedom from subjugation.⁸

The legal status of the right to self-determination is grounded in several UN General Assembly Resolutions,⁹ and its inclusion as common article 1 in the two International Covenants of Human Rights.¹⁰ These instruments do not limit the legal right to self-determination to the colonial context.¹¹ Still, the broad formulation of 'all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development', which is repeated in almost all the relevant UN documents, entail that the meaning of the right has been and continues to be the source of contestation.¹² To clarify the meaning of the legal right to self-determination, it is useful to consider how it relates to self-determination as a political principle.

As a political principle, self-determination has at least three key dimensions. One is that the people of a state as a whole should be free, within the boundaries of the state, to determine, without outside interference, their social, political, economic, and cultural infrastructure.¹³ Another is focused on each ethnically or culturally distinct group, being free to choose how it

⁶ The UN Charter, Article 1 (2); see R. Higgins, *Problems and Process: International Law and How We Use It* (Clarendon, 1994) p. 111.

⁷ See M. Weller, *Escaping the Self-Determination Trap* (Martinus Nijhoff, 2008) p. 35; J. Salmon, 'Internal Aspects of the Right to Self-Determination: Towards a Democratic Legitimacy Principle?', in C. Tomuschat (ed.), *Modern Law of Self-Determination* (Dordrecht: Martinus Nijhoff, 1993), 253, pp. 254–5.

⁸ GA Res. 1514 (14 December 1960), The Declaration on the Granting of Independence to Colonial Countries and Peoples, specifies that 'the subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental rights, [and] is contrary to the Charter of the United Nations'. It also provides that 'all peoples have the right to self-determination' and that 'by virtue of their right they freely determine their political status and freely pursue their economic, social and cultural development'. This is the basis for a people subject to colonial rule to be given the choice of how they wish to be constituted: independence, integration, or association, which is specified in GA Res. 1541; see *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276* (1970), Advisory Opinion, ICJ Reports 1971, p. 16, at pp. 31–2, paras. 52–3.

⁹ GA Res. 1514 (14 December 1960); GA Res. 1541 (15 December 1960); GA Res. 2625 (24 October 1970).

¹⁰ International Covenant on Civil and Political Rights (ICCPR) 1966; International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966; see also *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, ICJ 2019, paras. 146 – 161.

¹¹ See Gareau, 'Shouting at the Wall', p. 500; also ICJ, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, para. 144 'The Court is conscious that the right to self-determination, as a fundamental human right, has a broad scope of application. However, to answer the question put to it by the General Assembly, the Court will confine itself, in this Advisory Opinion, to analysing the right to self-determination in the context of decolonization.'

¹² Weller, *Escaping the Self-Determination Trap*, p. 23; see also D. Cass, 'Re-Thinking Self-Determination: A Critical Analysis of Current International Law Theories' (1992) 18 *Syracuse Journal of International and Comparative Law*, 21, 22–3.

¹³ J. Waldron, 'Two Conceptions of Self-Determination', in S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law* (Oxford University Press, 2010), 397, 406.

constitutes itself.¹⁴ And a third is that a state should be constituted along democratic lines to enable the people – including distinct groups - to participate in the state’s social, political, economic, and cultural systems.¹⁵ Attempts have been made, with varying levels of success, to identify each of these dimensions within the international legal concept of self-determination.

The second dimension, on particular groups, is a potential challenge to the territorial integrity of existing states and the stability of the international system. This underpins why, although it is often invoked by liberation groups (within existing states) that seek to align their cause with peoples that are subject to colonial rule, it has received little support amongst states, at least in the sense of a right to secession for such groups.¹⁶

The democratic dimension is associated with the debate on the meaning of internal self-determination.¹⁷ Internal self-determination refers to the political entitlements - the opportunities to participate in governance - available to the people of a state.¹⁸ There is debate as to the exact nature of these entitlements. The Declaration on Principles of International Law fuels this debate with the ambiguous requirement that a government must be representative of ‘the whole people belonging to the territory without distinction as to race, creed or colour’.¹⁹ Scholars debate whether this requires democratic government.²⁰ Much may depend upon how democracy is defined²¹ – with a narrower concept likely to match the position of a greater number of states.²² Still, a government that complies with international human rights law on political participation and political communication (freedoms of expression, association, and assembly) has a stronger claim to be consistent with the right to internal self-determination than a government that disregards these rights.²³

The most successful of the political components, in terms of the acceptance by states of its international legal status, has been the first dimension. Not only is it deemed politically important, but it is also an international legal requirement that the population of a state as a whole be free to ‘determine, without external interference, their political status and to pursue their economic, social and cultural development’.²⁴ The core accepted meaning of the right to

¹⁴ Waldron *Ibid.*, 398.

¹⁵ See Pomeroy, M., ‘The United States and Self-Determination: Perspectives on the Wilsonian Conception’ (1976) 70 *American Journal of International Law*, 1, 17 and 20; Cassese, A., *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press, 1995), p. 19; T. Musgrave, *Self-Determination and National Minorities* (Clarendon Press, 1997), pp. 22–4; see also Weller, *Escaping the Self-Determination Trap*, p. 23.

¹⁶ See Weller, *Escaping the Self-Determination Trap*, p. 31; on the relationship between political theory on this aspect of self-determination and international law, see S. Tierney, ‘The Search for a New Normativity: Thomas Franck, Post-Modern Neo-Tribalism and the Law of Self-Determination’ (2002) 13 *European Journal of International Law*, 941.

¹⁷ See, for example, Germany, Oral Statement, 2 December 2009, at para 39 (‘denial of the democratic right to internal self-determination’): made in relation to *Legal Consequences of the Construction of a Wall* (ICJ Reports 2004).

¹⁸ K. Knop, *Diversity and Self-Determination in International Law*, (Cambridge University Press, 2002), p. 18.

¹⁹ GA Res 2625.

²⁰ Compare R.A. Miller, ‘Self-Determination in International Law and the Demise of Democracy’ (2003) 41 *Columbia Journal of Transnational Law*, 601, 621; with S. Wheatley, ‘The Security Council, Democratic Legitimacy, and Regime Change in Iraq’, (2006) 17 *European Journal of International Law*, 531, 540.

²¹ J. Vidmar, ‘The Right of Self-Determination and Multiparty Democracy: Two Sides of the Same Coin?’ (2010) 10 *Human Rights Law Review*, 239, 266–7.

²² An assessment of states’ views is challenging because states continue to ‘rarely venture opinions on the nature of the right in their resolutions, reports, or diplomatic exchanges on the subject’, G. H. Fox ‘Self-Determination in the Post-Cold War Era: A New Internal Focus?’ (1995) 16 *Michigan Journal of International Law*, 733, 780.

²³ See General Comment No. 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (Art. 25), 12 July 1996, CCPR/C/21/Rev.1/Add.7; for a similar approach using international human rights law as a marker for a substantive concept of democracy, see J. d’Aspremont and E. De Brabandere, ‘The Complementary Faces of Legitimacy in International Law: the Legitimacy of Origin and the Legitimacy of Exercise’ (2010) 34 *Fordham Journal of International Law*, 190, 207; see, though, also J. Klabbers, ‘The Right to be Taken Seriously: Self-Determination in International Law’ (2006) 28 *Human Rights Quarterly*, 186, 204–5, querying the utility of merging a group right, self-determination, with an individual right, political participation.

²⁴ GA Res. 2625; common article 1 (2) of the Human Rights Covenants; see also HRC, General Comment No. 12 (13 April 1984), UN Doc. HRI/GEN/1/Rev.1 (1994), para. 6; Higgins, *Problems and Process*, p. 104; Cassese, *Self-Determination of Peoples*, p. 59; Mullerson, R., *International Law, Rights and Politics: Developments in Eastern Europe and the CIS* (Routledge, 1994) 90–1; for criticism of the concept of people that this generally accepted understanding of the right to self-determination reflects, see R. McCorquodale, ‘Self-Determination: A Human Rights Approach’ (1996) 43

self-determination overlaps with the right of a sovereign state to ‘freely choose and develop its political, social, economic and cultural systems’.²⁵ This overlap is support for the idea of popular sovereignty.²⁶ Advocates of popular sovereignty posit that sovereignty is now better seen as the consummation of the self-determination of people, rather than something that is worth protecting for its own sake. Yet in spite of a long history of governments subscribing to the concept of popular sovereignty,²⁷ popular sovereignty has yet to be fully reflected in international law, which continues to separate out the rights of the state from the rights of the people.²⁸ Accordingly, it is possible to view the right to self-determination as generating an additional prohibition on interference in the internal affairs of a state.²⁹

The question to be asked when determining whether external involvement in a territory is consistent with the right to self-determination is the following. Does the external involvement prevent the people in question from freely determining their political status and pursuing their economic, social, and cultural development? To identify the threshold for the engagement of a foreign state on a state’s territory to constitute a breach of the right to self-determination requires a factual assessment, specific to the case in point. It is clear, though, that an imposed governance arrangement would be in breach,³⁰ as this would hinder enjoyment of all of the elements that are covered in the standard definition of the right. This would also trigger application of the law of occupation. Circumstances of occupation change how we think about the right to self-determination. They put the focus on ending the occupation but also preserving meaning in the right to self-determination.

B. *The Law of Occupation and the Right to Self-Determination*

The law of occupation is a regulatory framework that applies in warfare if a hostile army comes into uninvited effective control of foreign territory.³¹ The content of the law has been informed by rationales that include servicing the humanitarian needs of the people and preservation of the occupied state’s sovereignty.³² This section shows how the law of occupation may also be read as a means of preserving meaning in the right of the occupied population to self-determination.

The primary sources of treaty law regulating situations of occupation are the Regulations Annexed to the Hague Convention IV 1907 (Hague law/Hague Regulations),³³ in particular Articles 42-56, and Geneva Convention No. IV 1949 (Geneva law/GC IV),³⁴ in particular Articles 27-34 and 47-78.

International and Comparative Law Quarterly, 857, 867; for discussion of criteria for identifying which individuals qualify as part of the people, when the definition is the population of the state as a whole, see Fox, ‘Self-Determination in the Post-Cold War Era’, 761.

²⁵ GA Res. 2625.

²⁶ See B. R. Roth, ‘The Enduring Significance of State Sovereignty’ (2004) 56 *Florida Law Review* 1017, 1042; C. Tomuschat, ‘International Law: Ensuring the Survival of Mankind on the Eve of a New Century’ (1999) 281 *Receuil des Cours*, 9, 165; Mullerson, *International Law, Rights and Politics*, pp. 90–1; A. Rosas, ‘Internal Self-Determination’, in C. Tomuschat (ed.), *Modern Law of Self-Determination* (Martinus Nijhoff, 1993), 225, 250–1.

²⁷ B. R. Roth, ‘Popular Sovereignty: The Elusive Norm’ (1997) 91 *Proceedings of the American Society of International Law*, 363

²⁸ M. Jamnejad and M. C. Wood, ‘The Principle of Non-Intervention’ (2009) 22 *Leiden Journal of International Law*, 345–81, 369; see also Cassese, *Self-Determination of Peoples*, p. 55; B. Conforti, ‘The Principle of Non-Intervention’, in M. Bedjaoui (ed.), *International Law: Achievements and Prospects* (Martinus Nijhoff, 1991), 467

²⁹ See also W. G. Werner, ‘Self-Determination and Civil War’ (2001) 6 *Journal of Conflict and Security Law*, 171; B. R. Roth, *Sovereign Equality and Moral Disagreement* (Oxford University Press, 2011), p. 81.

³⁰ See G.H. Fox, *Humanitarian Occupation* (Cambridge University Press, 2008), pp. 208–9; R. D. Caplan, ‘Transitional Administration’, in V. Chetail (ed.), *Post-Conflict Peacebuilding: A Lexicon* (Oxford University Press, 2009), 359, 364; also UN Doc. GA Res. 58/161 (22 December 2003), ‘Universal Realization of the Right of Peoples to Self-Determination’, para. 2; Wheatley, ‘The Security Council, Democratic Legitimacy’, 540.

³¹ *Prosecutor v. Mladen Naletili et al.*, Case No. IT-98-34-T, Judgment, Trial Chamber, ICTY, 31 March 2003, para. 217.

³² See A. Roberts, ‘Prolonged Military Occupation: The Israeli-Occupied Territories since 1967’, (1990) 84 *AJIL* 44, 46.

³³ Hague Convention (IV) Respecting the Laws and Customs of War on Land, with Annex of Regulations (Hague Regulations), 1907, T.S. No. 539, 1 Bevans 631, 36 Stat. 2277.

³⁴ Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War (GC IV), 1949, 75 *UNTS* p. 287.

As ‘Hague law’ was created at a time when there was not yet any general prohibition on the use of force,³⁵ or a legal right of all peoples to self-determination,³⁶ so that title to territory could still be acquired through the use of force, one might doubt its contemporary relevance as a legal framework for the safeguarding of sovereign rights. There was, however, a rule that during warfare, when territory of a state came under the authority of an army whose government did not have title to the territory, annexation of the territory was not permitted until the cessation of hostilities.³⁷ This created a transitional phase in which a legal framework for the preservation of sovereign rights was deemed necessary to prevent a further deterioration in the relations between belligerents and hopefully make a peace treaty more likely.³⁸ This rationale, an understanding based on contemporary experience that occupations would not be prolonged in nature, and a belief that the occupiers would not be particularly interested in civilian affairs, or that they would need to be, help to explain why the ‘Hague law’ does not concentrate on matters related to the civilians.³⁹ Instead, it concentrates on issues pertinent to the displaced sovereign. One example is Article 55 that classifies the occupier as only the administrator of public properties,⁴⁰ which must be done according to the rules of usufruct (prudent administrator).⁴¹ Another example is Article 43, which requires that the existing laws must be respected unless absolutely prevented in pursuit of ‘public order and safety [civil life]’.

The 1949 Diplomatic Conference in Geneva was a response to developments in the nature of the state and in the conduct of warfare up to and during the world wars, which showed up the inadequacies of the ‘Hague law’ with regard to human welfare.⁴² The ‘Geneva law’ provisions of the law of occupation supplement rather than replace the ‘Hague law’.⁴³ The humanitarian rationale of the Conference greatly shaped the content of the law which is focused on the plight of civilians during occupation, typified in provisions such as the requirement not to create unemployment (Article 52),⁴⁴ and provisions regarding labour conditions (Article 51).⁴⁵

The law of occupation imposes obligations on the occupier and gives rights to the occupied in relation to how the administration is conducted. For example, Article 50 GC IV establishes obligations on the occupier pertaining to education of children, Article 55 GC IV the supply of foodstuffs and medical supplies to the civilian population,⁴⁶ and Article 48 of the Hague Regulations⁴⁷ governs collection of taxes. There is an emphasis on the indication of areas where administration must be conducted rather than on change and development.⁴⁸ The expectation is that change will be deferred until the end of the occupation.⁴⁹ Any attempts to make permanent changes would therefore be of doubtful legality.⁵⁰ There are, however, limited circumstances in which the law of occupation allows for temporary legislative changes to be made.⁵¹

³⁵ See C. Greenwood, ‘The Administration of Occupied Territory in International Law’, in E. Playfair, ed., *International Law and the Administration of Occupied Territories* (OUP 1992) 242, p. 245.

³⁶ See G. Simpson, ‘The Diffusion of Sovereignty: Self-Determination in the Post – Colonial Age’, (1996) 32 *Stan. JIL* 255.

³⁷ G. Schwarzenberger, ‘The Law of Belligerent Occupation: Basic Issues’, (1960) 30 *Nordisk Tidsskrift for International Ret* 10, 12-14.

³⁸ D.A. Graber, *The Development of the Law of Belligerent Occupation 1863-1914 – A Historical Survey* (Columbia University Press, 1949) pp. 37-40.

³⁹ E. Benvenisti, *International Law of Occupation* (Princeton University Press 1993) pp. 20-21.

⁴⁰ Art. 55 Hague Regulations.

⁴¹ This provision is returned to below in the discussion on the use of natural resources in the oPt.

⁴² See Benvenisti, *International Law of Occupation*, 23-27.

⁴³ See J. Pictet, ed., *Commentary: The Fourth Geneva Convention* (ICRC, 1958) p. 614.

⁴⁴ Art. 52 GC IV,

⁴⁵ Art. 51 GC IV,

⁴⁶ Arts. 50 and 55 GC IV.

⁴⁷ Art. 48 Hague Regulations.

⁴⁸ Greenwood, ‘Administration of Occupied Territory’, 246.

⁴⁹ See G.H. Fox, ‘The Occupation of Iraq’, (2005) 36 *Georgetown Journal of International Law* 195, 234-240.

⁵⁰ Greenwood, ‘Administration of Occupied Territory’, 245.

⁵¹ See H. McCoubrey and N.D. White, *International Law and Armed Conflict* (Aldershot 1992) 287.

Article 43 Hague Regulations,⁵² supplemented with Article 64 GC IV,⁵³ is thought to embody the *raison d'être* of the law of occupation: the 'conservationist principle'.⁵⁴ Article 43, as noted above, requires that the existing laws must be respected unless absolutely prevented in pursuit of 'public order and safety [civil life]'. The key term in Article 43 is 'absolutely prevented'. The nature of the term is aptly described by Stone, '[i]t has never been taken literally; and unless it is so taken, the boundaries of the occupant's legislative powers are still to be drawn.'⁵⁵ It has been seen as a matter of military necessity only.⁵⁶ However, most texts now link it with military necessity and necessity for public order and safety/civil life depending on language.⁵⁷

In sum, the law of occupation protects the right to self-determination by essentially freezing its exercise whilst the occupation continues. The justification may be found in the following logic. Attempts to exercise elements of self-determination, such as acts concerning the capital of natural resources, will be susceptible to direct and indirect influence from the occupier. Thus such acts should be prevented, as they are not acts of free determination (the representation problem). In addition, they should be prevented, as they will pre-empt/distort the self-determination choices that are available once the occupation has ended (the pre-emption problem). An occupier's adherence to the law of occupation should ensure that an occupied people are in a position to resume self-determination once the (temporary) occupation ends. This logic is most persuasive in a shorter-term occupation. In a prolonged occupation, to which we now turn, the feasibility of freezing change and development of the state and civil infrastructure is challenged.

C. The Right to Self-Determination in a Prolonged Occupation

In a prolonged occupation, extending over many years, the right to self-determination continues to generate an obligation for the occupier to end the occupation.⁵⁸ Moreover, adhering to the law of occupation will continue to protect the right to self-determination. Yet the sufficiency of this approach - protection of self-determination through preservation of the circumstances of the territory - will likely reduce as time passes. In an occupation that spans many years, limiting the scope for change and development of the territory may start to pre-empt matters of self-determination. Consider that infrastructure will start to become outdated. In addition, if resources are to be utilised/preserved in an effective manner, there are choices to make about what steps to take and about which actors should make these choices. Along these lines, prolonged occupation challenges the relevance of the conservationist approach in the law of occupation as an optimal response to matters of self-determination. Prolonged occupation brings into focus the role of the right to self-determination as a freestanding basis for assessment of the conduct of the occupier. Prolonged occupation is also a reason to reflect on the scope for the right to self-determination to have a bearing on the meaning of provisions in the law of occupation.

i) Developing the law of occupation in light of the right to self-determination

The content of the law of occupation may develop without formal amendment of the treaties.⁵⁹ This could be through repeated state practices leading to acceptance of amendment of the

⁵² Art. 43 Hague Regulations.

⁵³ Art. 64 GC IV.

⁵⁴ See McCoubrey and White, *International Law and Armed Conflict*, 286.

⁵⁵ J. Stone, *Legal Controls of International Conflict* (Reinhart and Company 1954) 698.

⁵⁶ See E.H. Schwenk, 'Legislative Power of the Military Occupant under Article 43, Hague Regulations', (1945) 54 *Yale LJ* (1945) 393 and the many citations therein.

⁵⁷ See M. Bothe, 'Occupation, Belligerent', in R. Bernhard (ed.), III *EPIL* (1996) 763, 765; McCoubrey and White, *International Law and Armed Conflict*, 284.

⁵⁸ See R. Wilde, 'Expert opinion on the applicability of human rights law to the Palestinian Territories with a specific focus on the respective responsibilities of Israel, as the extraterritorial state, and Palestine, as the territorial state', Provided for the Diakonia International Humanitarian Law Resource Centre in Jerusalem, 9 February 2018, p. 13.

⁵⁹ On formal modification see Arts. 39-41 Vienna Convention on the Law of Treaties (VCLT), 1969, 1155 *UNTS* p. 331.

treaties,⁶⁰ or the emergence of new customary international law.⁶¹ In both respects, there would be a need to present evidence of state practice and *opinio juris* to support the existence of the claimed new component of the law. It may be that a concern to maintain meaning in the right to self-determination for the people situated in an occupied territory is stimulating relevant practice. To determine this would require a survey of the practice of states in relation to circumstances of prolonged occupation.

The right to self-determination may also influence interpretation of the meaning of specific provisions in the law of occupation.⁶² This would be supported by reading protection of the right to self-determination as part of the object and purpose of the law of occupation; as well as through its status as a relevant rule of international law. Such an approach would have greatest potential where the terms of the law of occupation are especially vague and open to interpretation. One example where this idea has been explored in the academic literature is in relation to the conservationist principle.

Pellet has argued that originally the law of occupation was intended to protect the rights of the displaced sovereign, so the principle of conservation should determine the validity of any changes made in the interest of military or humanitarian necessity. Yet now, when it is the people who are sovereign, the limit should be the right of self-determination.⁶³ Hence, for Pellet, changes linked to humanitarian interests can be pursued to the extent that they do not affect the right to self-determination.⁶⁴ This for Pellet would allow such changes up to the point of 'physical character, demographic composition, institutional structure, or status of [...] territories.' In this reading, self-determination sets the limits to change and development. The approach foresees scope for more invasive changes than under the conservationist principle, but prevents foundational changes in the areas covered by the right to self-determination. One challenge is that a collection of small changes could add to an overall impact on the scope for exercise of the right to self-determination following the end of the occupation. In addition, the greater discretion increases the risk of changes to favour the interests of the occupier.

Pellet's approach would, though, be more restrictive than the argument put forward by Dinstein: that the limit for validity of changes introduced by an occupier should depend upon whether or not the occupier has displayed equal concern for their own population.⁶⁵ One challenge for Dinstein's argument is that the right to self-determination would remain in operation. The legal protection it offers an occupied people cannot be removed by changing the terms of the law of occupation.

ii) Exercising the right to self-determination to end the application of the law of occupation

May the representative of an occupied people exercise the right to self-determination to end the application of the law of occupation? If possible, this could be a means to enable the change and development of a territory and its infrastructure in circumstances of a prolonged occupation.

In relation to the end of application of the law of occupation, the Hague Conferences occurred at a time when it was expected that a peace treaty would resolve the matter, or absolute defeat would see the title of the territory pass to the occupier.⁶⁶ Now, with the prohibition on the annexation of territory, it should be a matter of waiting until the occupier leaves and the displaced sovereign returns. The displaced sovereign is presumed to still represent the state and its people on the basis of effective control being lost at the hands of external forces, rather than

⁶⁰ See *Case concerning the Temple Vihear (Cambodia v. Thailand)*, Merits, Judgment, *ICJ Rep.* (1962) p. 6 at pp. 33-34.

⁶¹ *North Sea Continental Shelf*, Judgment, *ICJ Rep.* (1969) p. 3 at p. 44.

⁶² Art. 31 Vienna Convention on the Law of Treaties (VCLT).

⁶³ A. Pellet, 'The Destruction of Troy Will not Take Place', 186.

⁶⁴ *Ibid.*, 202.

⁶⁵ Y. Dinstein, 'The International Law of Belligerent Occupation and Human Rights', (1978) 8 *IYHR* (1978) 104, 113.

⁶⁶ See Schwarzenberger, 'The Law of Belligerent Occupation', 17.

internal factors.⁶⁷ Alternatively, the law should apply until the occupier leaves and a new domestic government emerges to embody the rights of the state and its people.⁶⁸

As the issue of a new domestic government emerging to end the law's application was not adequately accounted for in the Hague Regulations, it occurred that some occupiers around World War II, keen to escape the restraints of the law, would create a local government with only the pretence of independence. Such a government would then provide an invite for the continued occupation and consequently end the law's application.⁶⁹ This undermined the law and its rationale.

Surreptitious circumvention of the law was addressed, albeit indirectly, in Article 47 GC IV: '[p]rotected persons [...] shall not be deprived [...] by any change introduced [...] into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories.'⁷⁰ This provision addresses the possible means of avoiding the application of the law of occupation, such as the appointment of new governments, creation of new states, or changes to the boundaries.⁷¹ It is commonly interpreted as an indication that the law continues to apply while factually the occupation continues, despite what formalities might have been entered into to try and disguise reality.⁷² While there is no explicit indication of how a competent domestic government is to be distinguished from a government that has been created simply to escape the restraints of the law, some indirect indication is found elsewhere.

Article 6(3) GC IV indicates that the law ceases to apply a year after the close of military operations, but that the occupying power is still bound by many of the most significant provisions, which includes Article 47, for the duration of the occupation. Further, Article 3(b) of the 1977 Additional Protocol⁷³ stresses that all humanitarian law is to apply until the end of the occupation.⁷⁴ There is no suggestion that a particular form of domestic government is to be favoured for ending the occupation while the occupying forces remain. A prominent position is that the situation must simply await the emergence of an effective domestic government. This could either be through the return of a displaced sovereign or, in its absence, the emergence of a new one.⁷⁵ The occupier's duty in this regard is one of non-interference.

As such, the law of occupation makes no particular allowance for domestic authorities to exercise the right to self-determination to end the application of the law occupation. The application of the law will end when the occupation has factually ended. At this stage, there is expected to be a domestic government, which due to its ability to control the territory independently will be assumed to represent the will of the people free from interference from the formerly occupying power.

In circumstances of prolonged occupation, the argument for a more permissive approach to identifying a voice for the occupied people and allowing it to exercise matters of self-determination is two sided. On the one hand, it may be desirable, in order to allow territorial infrastructure changes to be made and to keep pace with changing times, and so that opportunities for resource exploitation are not missed. On the other hand, it may be difficult to operationalise without also creating an opportunity for the occupier to pursue its own interests. This risk makes it unlikely that we will see change in the law of occupation to permit consent

⁶⁷ See B.R. Roth, *Governmental Illegitimacy in International Law* (Clarendon Press, 1999) 188.

⁶⁸ See L. Green, *Contemporary Law of Armed Conflict* (Manchester University Press, 1993) 258.

⁶⁹ Benvenisti, *International Law of Occupation*, 63-66.

⁷⁰ Art. 47 GC IV.

⁷¹ See Benvenisti, *International Law of Occupation* 99; M. Sassoli, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers', (2005) 16 *EJIL* 661, 682.

⁷² See Benvenisti, *International Law of Occupation*, 99; Sassoli, 'Legislation and Maintenance of Public Order', 682.

⁷³ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (AP I), 1977, 1125 *UNTS* p. 3.

⁷⁴ See Pellet, 'The Destruction of Troy Will not Take Place', 193.

⁷⁵ See Sassoli, 'Legislation and Maintenance of Public Order', 682; E. Milano, *Unlawful Territorial Situations in International Law* (Martinus Nijhoff, 2006) 94.

from a representative of the people to be a basis for removal of the application of the law of occupation while the occupation in fact continues. However, practice demonstrates that the views of the international community of states can be highly influential concerning questions of which individuals have the capacity to represent a state in specific circumstances.⁷⁶ International opinion may also exert an influence on questions of representation in relation to circumstances of prolonged occupation. How this would relate to the law of occupation would fall to be determined in light of the specific circumstances.⁷⁷

It is against this legal background that the next section turns to the relevance of the right to self-determination in the context of the occupation of the Palestinian territory.

3 Self-Determination of the Palestinian People in the oPt

In 1967, Israel occupied the Palestinian territory, consisting of the Gaza Strip and the West Bank, including East Jerusalem. The occupation, which has lasted now for over 50 years, is the longest military occupation existing today.⁷⁸ The history of the occupation is important for the analysis of the relevance of the right to self-determination in the sub-sections that follow.⁷⁹

Palestine was part of the Ottoman Empire. At the end of the First World War, a class "A" Mandate for Palestine was entrusted to Great Britain by the League of Nations ... The territorial boundaries of the Mandate for Palestine were laid down by various instruments, in particular on the eastern border by a British memorandum of 16 September 1922 and an Anglo Transjordanian Treaty of 20 February 1928.⁸⁰

In 1947 the United Kingdom announced its intention to complete evacuation of the mandated territory by 1 August 1948, subsequently advancing that date to 15 May 1948. In the meantime, the General Assembly had on 29 November 1947 adopted resolution 181 (II) on the future government of Palestine, which "Recommends to the United Kingdom . . . and to all other Members of the United Nations the adoption and implementation . . . of the Plan of Partition" of the territory, as set forth in the resolution, between two independent States, one Arab, the other Jewish, as well as the creation of a special international régime for the City of Jerusalem. The Arab population of Palestine and the Arab States rejected this plan, contending that it was unbalanced; on 14 May 1948, Israel proclaimed its independence on the strength of the General Assembly resolution; armed conflict then broke out between Israel and a number of Arab States and the Plan of Partition was not implemented.⁸¹

By resolution 62 (1948) of 16 November 1948, the Security Council decided that "an armistice shall be established in all sectors of Palestine" and called upon the parties directly involved in the conflict to seek agreement to this end. In conformity with this decision, general armistice agreements were concluded in 1949 between Israel and the neighbouring States through mediation by the United Nations. In particular, one such agreement was signed in Rhodes on 3 April 1949 between Israel and Jordan. Articles V and VI of that Agreement fixed the armistice demarcation line between Israeli and Arab forces (often later called the "Green Line" owing to the colour used for it on maps; hereinafter the "Green Line"). Article III, paragraph 2, provided that "No element of the . . . military or para-military forces of either Party . . . shall advance beyond or pass over for any purpose whatsoever the Armistice Demarcation Lines . . ." It was agreed in Article VI, paragraph 8, that these provisions would not be "interpreted as prejudicing, in any sense, an ultimate political settlement between the Parties". It was also stated that "the Armistice Demarcation Lines defined in articles V and VI of [the] Agreement [were] agreed upon by the Parties without prejudice to future territorial settlements or boundary lines or to claims of either Party relating thereto". The Demarcation Line was subject to such rectification as might be agreed upon by the parties.⁸²

⁷⁶ See Y. Dinstein, *Non-International Armed Conflicts in International Law*, (CUP, 2014) 102, para. 320.

⁷⁷ See Benvenisti, *International Law of Occupation* 171: describing how in relation to US intervention in Grenada in 1983, 'infringements of the law of occupation, if such existed, were healed by the institution of a democratic process through which the general public expressed its endorsement of the new political system.'

⁷⁸ Other situations which may be argued to constitute prolonged military occupations include the territories of: Moldova (by Russia since 1992), Azerbaijan (by Armenia since 1991), Western Sahara (by Morocco since 1975), Cyprus (by Turkey since 1974). There are other occupations that face the possibility of a prolonged reality, such as the territory of Ukraine (by Russia since 2014).

⁷⁹ See for a succinct account the history of the occupation, *Legal Consequences of the Construction of a Wall* (ICJ Reports 2004), paras. 70- 77.

⁸⁰ *Ibid.*, para. 70.

⁸¹ *Ibid.*, para. 71.

⁸² *Ibid.*, para. 72.

In the 1967 armed conflict, Israeli forces occupied all the territories which had constituted Palestine under British Mandate (including those known as the West Bank, lying to the east of the Green Line).⁸³

On 22 November 1967, the Security Council unanimously adopted resolution 242 (1967), which emphasized the inadmissibility of 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".⁸⁴

The rest of this section examines the occupation from the perspective of the right to self-determination. The discussion proceeds in the following order: (A) the circumstances of the occupation overall; (B) the Oslo Accords; (C) the circumstances of the Gaza Strip; (D) the settlements and the wall; (E) the use of natural resources.

A. The Overall Occupation and the Right to Self-Determination

The analysis in the preceding sections has focused on one state occupying another state. The circumstances of prolonged occupation of Palestine diverge from this model in two main respects.

First: The people of Palestine exist and have the right to self-determination. This is recognised in major, widely supported international instruments.⁸⁵ There is, though, contestation amongst certain states as to whether Palestine has yet the status as a state.⁸⁶ This contention complicates the reliance of Palestine on state based rights and obligations under international law. It raises the importance of the right to self-determination as a basis for legal protection from external interference.

Second: The Green Line from the armistice agreement of 1949 between Israel and Jordan 'is currently internationally recognised as the eastern limit of Israeli sovereignty'.⁸⁷ Yet, 'Israel has never recognised the Green Line as an international border and maintains it has claims to the West Bank.'⁸⁸ At the same time, Israel's annexation of East Jerusalem lacks international recognition.⁸⁹ The dispute as to the exact territorial borders and the failure to resolve it contributes to the explanation for the prolonged occupation.⁹⁰ The right to self-determination requires that an occupation be brought to an end. Standardly, this would entail withdrawal of the occupier. In the oPt context, exercise of the right to self-determination has come to focus on the resolution of the political dispute over the territorial claim. The right to self-determination requires that such negotiations proceed in good faith.⁹¹

Adherence to the law of occupation preserves meaning in the right to self-determination.⁹² Its conservationist principle preserves political, economic, social and cultural conditions, so that these matters may be freely determined when then occupation is ended (the representation problem). Disregard of the law of occupation to make changes in these areas may infringe the right to self-determination. However, it may be possible for violation of the conservationist principle not to reach a sufficient level as to entail also infringement of the right to self-determination. What matters for the right to self-determination is whether the occupier's actions

⁸³ Ibid., para. 73.

⁸⁴ Ibid., para. 74.

⁸⁵ Ibid., para.118.

⁸⁶ See A. Zimmerman, 'Palestine and the International Criminal Court Quo Vadis? Reach and Limits of Declarations under Article12(3)', (2013) 11 *Journal of International Criminal Justice* 303-329, 304 discussing how in November 2012 the UN General Assembly by 138 votes to 9, with 41 states abstaining, decided 'to accord to Palestine non-member observer State status in the United Nations' UN Doc. A/Res/67/19, 4 December 2012.

⁸⁷ O. Ben-Naftali, M. Sfard, H. Viterbo, *The ABC of the OPT: A Legal Lexicon of the Israeli Control over the Occupied Palestinian Territory* (CUP, 2018) 46.

⁸⁸ Ibid., 46.

⁸⁹ Ibid., 49.

⁹⁰ Gareau, 'Shouting at the Wall', 512.

⁹¹ See Article 26, Vienna Convention on the Law of Treaties.

⁹² It is generally agreed, although disputed by Israel in relation to Geneva law, that both of the main instruments of occupation apply to the oPt (although Israel still claims to follow Geneva law), see *Legal Consequences of the Construction of a Wall*, 171, paras. 89-101.

lead to pre-emption of the choices available to the people on the organisation, utilisation, and status of the territory following the end of the occupation (the pre-emption problem).

The contestation surrounding whether or not the people of Palestine have self-determined to the status of a state generates additional self-determination based obligations for third states. In particular, there is an obligation on third states to be respectful of the on-going process of determination.⁹³ This could involve not acting in such ways that would pre-empt the choice of final status: for example, removal/blocking of ties with a third state; or taking actions that have implications for the disputed territorial boundary.

Subsequent sub-sections address several aspects of the occupation that raise questions from the perspective of and can help to bring into clearer focus the relevance of the right to self-determination.

B. The Oslo Accords

In 1993, by putting aside the question of the final settlement of the dispute, the parties were able to agree on an interim settlement, which came to be known as the Oslo Accords. This provided for a degree of self-government for a five-year transitional period, leading to further negotiations on a permanent settlement.⁹⁴ The process has recently been described by a UN Special Rapporteur as 'lifeless'.⁹⁵ Still, the Accords have had a major impact on the infrastructure for governance and continue to be invoked and relied upon in judicial practice.

The framework for the interim period was set out in the Declaration of Principles (DoP) negotiated in Oslo,⁹⁶ and elaborated on in subsequent interim agreements.⁹⁷ The DoP provided for immediate transfer of limited authority to an interim Palestinian Authority (PA). This PA was to be appointed by the Palestinian Liberation Organisation (PLO) with Israeli approval,⁹⁸ with further authority being gradually transferred to an elected Palestinian Council,⁹⁹ such as has been provided for in subsequent agreements.¹⁰⁰

i) The Oslo Accords and the law of occupation

The governance arrangements as agreed upon in the Oslo Accords and as have evolved are complex.¹⁰¹ From the perspective of the law of occupation's conservationist principle, with its stress on maintenance of the status quo, they can appear problematic. Still, the extent of changes that may be permissible under the principle of necessity for public order and safety/civil life needs to be determined in the light of the circumstances. In this respect, the role of the governance arrangements in the pursuit of a resolution to the dispute may count in favour of viewing them as consistent with the requirements of the conservationist principle. The consent from the PLO could also support this reading. Still, Article 47 GC IV precludes any changes to political institutions or agreements between the occupied and occupier that would deprive

⁹³ See Gareau, 'Shouting at the Wall', 516.

⁹⁴ See A. Shlaim, *The Iron Wall: Israel and the Arab World* (Norton, 2000) 516-523.

⁹⁵ Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, 22 October 2018, A/73/45717, para. 47; on the legal status of the Oslo Accords, compare G.R. Watson, 'The 'Wall' decisions in legal and political context', (2005) 99 AJIL 6, 22-24; with Y. Shany, 'Faraway, so Close: The Legal Status of Gaza after Israel's Disengagement', Yearbook of International Humanitarian Law, Vol. 8, 2006. Available at SSRN: <https://ssrn.com/abstract=923151> pp. 16 – 17.

at pp. 22-24

⁹⁶ Declaration of Principles on Interim Self-Government Arrangements (DoP), Washington, 13 September 1993 (witnessed by US and Russian Federation).

⁹⁷ See, e.g., Interim Agreement between Israel and the Palestinians (Oslo II), 28 September 1995 (witnessed by US, Russian Federation, Arab Republic of Egypt, Hahemite Kingdom of Jordan, Kingdom of Norway, and EU).

⁹⁸ Art. VI DoP.

⁹⁹ Art. III DoP.

¹⁰⁰ See, e.g., for the long list of areas, Annex III, Oslo II,

¹⁰¹ See C. Bell, *Peace Agreements and Human Rights* (OUP, 2000) 157; on the jurisdictional allocations see O. Dajani, 'Israel's Creeping Annexation', (2017) 111 *American Journal of International Law* 51.

protected persons of the benefits of the GC IV.¹⁰² Thus the governance arrangements introduced by the Oslo Accords should be understood as still subject to the law of occupation.¹⁰³

Alternatively, arguments have been made for the scope of application of the law of occupation to be viewed as limited following the Oslo Accords. Malanczuk found that Israel retained jurisdiction over Israelis, controlled security and external relations and maintained residual power, so Israel was still an occupant 'with regard to the fields that it has not transferred to the Palestinians for self-government.'¹⁰⁴ The law of occupation does not contemplate the carving out of provisions to permit a degree of self-government. However, there is an inconsistency between circumstances in which self-government is developed in the pursuit of resolution to a dispute while the occupier retains the same duties as when it had full control.¹⁰⁵ Thus, the functional approach to the application of the law of occupation has practical relevance - it is returned to below in relation to the circumstances of the Gaza Strip.

ii) The Oslo Accords and the right to self-determination

How do the Oslo Accords relate to the right to self-determination? This requires attention to the specific nature of the consensual basis from the Palestinian side.

In 1993, when the DoP was agreed between the PLO and Israel, the PLO was a national liberation movement,¹⁰⁶ an umbrella organisation for a number of factions.¹⁰⁷ To support the PLO's representative status at the time, there were pledges of allegiance from significant Palestinian unions, as well as other Palestinian institutions such as newspapers, political parties and guerrilla groups.¹⁰⁸ On the other hand, it lacked the factual indicators most commonly used to support governmental status in established states: it did not have effective control of the territory (due to occupation); or a mandate derived from free and fair elections. It had, though, received widespread international recognition as the representative of the people's right to self-determination.¹⁰⁹

As a general matter, the actors with internationally recognised governmental status are argued to have the capacity to invite external actors to undertake governance activity within the remit of the right to self-determination.¹¹⁰ However, in the Palestinian context, the PLO received recognition as the representative of a people with a right to self-determination under circumstances of occupation.¹¹¹ There is limited practice to draw upon to make sense of the limits of the power of such a representative. The circumstances of occupation generate a risk that the occupier will dominate the decision making of the representatives.¹¹² In addition, the undetermined future status of the territory reduces the scope for assumptions about how the territory should be organised following the end of occupation. Along these lines, one may seek

¹⁰² Pictet, *Commentary*, 272 – 276.

¹⁰³ This is not altered by the fact that the Interim Agreement makes no mention of the law of occupation and directs the limits on Palestinian authority to be gauged by reference only to the provisions of 'the DoP, this Agreement, or any other agreement that may be reached between the two sides' Art. XIII Oslo II; see *Legal Consequences of the Construction of a Wall*, para 77; also I. Scobbie, 'Gaza', in E. Wilmschurt (ed.), *International Law and the Classification of Conflicts* (OUP, 2012) 280, 298; for the argument that the Oslo Accords contributed to indeterminacy about whether and to what extent the law of occupation continues to apply, see A. Gross, *The Writing on the Wall: Rethinking the International Law of Occupation* (CUP, 2017) 202.

¹⁰⁴ P. Malanczuk, 'Some Basic Aspects of the Agreements between Israel and the PLO from the Perspective of International Law', (1996) 7 *EJIL* 485, 487.

¹⁰⁵ See Gross, *The Writing on the Wall*, 215.

¹⁰⁶ F.L.M. Van de Craen, 'Palestine Liberation Movement', (1990) 12 *EPIL* 278.

¹⁰⁷ See E. Wing, 'The Palestinian Basic Law: Embryonic Constitutionalism', (1999) 31 *CWRJIL* 383, 392.

¹⁰⁸ O.M. Dajani, 'Stalled between Seasons: the International Legal Status of Palestine during the Interim Period', (1997) 26 *DJILP* 27, 50-51.

¹⁰⁹ In 1974, the UN General Assembly recognised the PLO as 'the principal party to the question of Palestine.' UN GA Resolution 3210 (1974).

¹¹⁰ See B. R. Roth, 'The Illegality of Pro-Democratic Invasion Pacts', in G. H. Fox and B. R. Roth (eds.), *Democratic Governance in International Law* (Cambridge University Press, 2000), 328, 330.

¹¹¹ See also Gareau, 'Shouting at the Wall', 498.

¹¹² See Pictet, *Commentary*, 67.

to give meaning to the right to self-determination by making an analogy with situations of the end of colonial rule.

The recognition of self-determination as a human right arguably had an impact on the requirements related to the exercise of an entitlement to self-determination in the colonial context. The earlier emphasis was on delegitimizing colonialism exclusively, and this had meant that only when an option other than independence was being considered, something more akin to colonialism, had consultation been deemed necessary.¹¹³ Articulating self-determination as a human right refocused the emphasis in the norm on to the right of a people to determine its external status. This meant that there was no longer a strong basis for prioritising independence over other forms of integration with other states. Hence, consultation became a requirement for all options that were available to a people that had been subject to colonial rule.¹¹⁴

This analogy supports the view that there should be a process involving the people of Palestine for determining the question of the final status of the territory. The same should also apply with regard to any choices that would serve to pre-empt matters related to self-determination, though it may be difficult in some instances to draw the line between actions that are temporary and reversible and those that are permanent and pre-emptive.

The Oslo process grew out of a secret channel of negotiations amongst leading Palestinians and Israelis, which subsequently were upgraded to official negotiations.¹¹⁵ That the negotiators on the Palestinian side were not operating with a definite mandate from the Palestinian people is indicated by the response to the resulting Accords. It is reported that there was a significant level of opposition to the Accords amongst Palestinians, and that the PLO Executive Committee was split, making it a struggle for Yasser Arafat, Chairman of the Executive Committee, to muster the necessary majority amongst the 18 members.¹¹⁶

To not ground the Oslo process in consultations with the Palestinian population is understandable in the light of the process being a pragmatic attempt to find points of agreement between the two sides that could be a basis to move forward. Still, the absence of broader popular engagement reduces the strength of the Oslo Accords as a legal basis to justify actions in the oPt that pre-empt choices on the right to self-determination. This would include attempts to rely on the Oslo Accords to justify occupier led activity in relation to natural resources and settlements, which are turned to below. It may also cover the Accord's governance arrangements. In this respect, two different readings are available.

One might consider that the Accords involve changes to the governance infrastructure to such an extent that they serve to pre-empt the right to self-determination: that there should not be such changes until the occupation is ended, and choices can be made free from the influence of occupation. One challenge with this approach is that it loses contact with the broader political context of the occupation and the difficulties in progressing towards resolution of the dispute.

Alternatively, one might read the Oslo process as furthering the Palestinian's right to self-determination, by starting to create an autonomous space for self-government. This is supported by the requirement included in the Accords of a move to democratic government – which links the practice to the logic of internal self-determination. From this perspective, one may be more inclined to accept the consensual basis from the PLO as sufficient to reconcile the practice with the right to self-determination. The challenge with this approach is that the continued Israeli

¹¹³ R. Wilde, *International Territorial Administration: How Trusteeship and the Civilising Mission Never Went Away* (Oxford University Press, 2008)160.

¹¹⁴ *Ibid.*, 160-1; see also ICJ, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, para. 172 'heightened scrutiny should be given to the issue of consent in a situation where a part of a non-self-governing territory is separated to create a new colony.'

¹¹⁵ Norway's Ministry of Foreign Affairs, 'Report: Norway's involvement in the peace process in the Middle East', 31.10.1999 available at <<https://www.regjeringen.no/en/dokumenter/involvement/id420034/>>.

¹¹⁶ See Shlaim, *The Iron Wall*, 521.

influence affects who is in office and how they operate; it may be more self-determination than previously, but it is still not full self-determination.

C. Circumstances in Gaza

The circumstances of Israel's partial disengagement in Gaza also raise challenging questions from the perspective of the law of occupation and the right to self-determination.

In September 2005, Israel withdrew its settlements and military installations from the Gaza Strip. The Prime Minister Ariel Sharon, in an address to the UN General Assembly, claimed that this represented 'the end of Israeli control over and responsibility for the Gaza Strip.'¹¹⁷ Yet Israel has continued to exercise control over the territory in a variety of ways. The Israeli NGO Gisha, in a report from 2007 (which remains accurate),¹¹⁸ highlighted and described the following elements:

- Substantial control of Gaza's land crossings;
- Control on the ground through incursions and sporadic ground troop presence ("no-go zone");
- Complete control of Gaza's airspace;
- Complete control of Gaza's territorial waters;
- Control of the Palestinian population registry (including who is a "resident" of Gaza);
- Control of tax policy and transfer of tax revenues;
- Control of the ability of the Palestinian Authority to exercise governmental functions;
- Control of the West Bank, which together with Gaza, constitute a single territorial unit.¹¹⁹

The absence of a complete end to Israeli control has prompted debate as to whether the application of the law of occupation can be said to have ended.¹²⁰ Israel has argued before the Israeli High Court of Justice (HCJ) that it has ended;¹²¹ the HCJ accepts this argument but does not view that all of the occupier's obligations are extinguished.¹²² The academic literature includes several approaches.

Shany has drawn upon traditional doctrine to argue that the test for determining the end of application of the law of occupation is the mirror image of the approach for determining its beginning: centred on the question of effective control.¹²³ Yet the question of what level of reduction in the control is sufficient to end the application of the law is subject to disagreement. For Shany, where both the occupier and the occupied control are exercising control to some degree, there should be a comparative assessment to determine where the balance lies.¹²⁴ Shany recognises that Israel maintains important points of leverage over Gaza, but finds that as Israel

¹¹⁷ Gisha, *Disengaged Occupiers: The Legal Status of Gaza: Executive Summary* (Jan 2007), p. 8 <http://www.gisha.org/UserFiles/File/publications_english/Publications_and_Reports_English/ExecutiveSummary.pdf>

¹¹⁸ See Special Rapporteur on the situation of human rights in the Palestinian territories (22 October 2018).

¹¹⁹ Gisha, *Disengaged Occupiers*, 10; also Gross, *Writing on the Wall*, 234 discussing how the sum of control is bigger than the parts.

¹²⁰ See Gross, *Writing on the Wall*, 204 – 215.

¹²¹ *Ibid.*, 212.

¹²² *Ibid.*, 216-17.

¹²³ Y. Shany, 'Faraway, so Close: The Legal Status of Gaza after Israel's Disengagement', p. 13.

¹²⁴ *Ibid.*, 14,17.

is not in a position to effectively govern Gaza and the Palestinian Authority is in a relatively better position, the application of the law of occupation should be viewed as ended.¹²⁵

In contrast, Scobbie highlights that under traditional doctrine it is significant whether the occupier is able to send military troops to make its authority felt within a reasonable time. Israel has demonstrated that this is the case. This is one reason why Scobbie takes the position that the occupation continues.¹²⁶ Scobbie's approach may also find support in the perspective developed in earlier sections of this opinion: the continued application of the law of occupation is a means to preserve meaning in the right to self-determination until the domestic authorities are in a position to govern free from the influence of the occupier.¹²⁷

Scobbie has also argued for the rules on the end of application of the law of occupation to include respect for the requirements of the right to self-determination.¹²⁸ On this basis, Scobbie argues that the law of occupation continues to apply for two related reasons: the withdrawal was unilateral, without an expression of the will of the people; and to give Gaza a different status to the West Bank would be to disrupt the territorial integrity of the self-determination unit.¹²⁹

Gross has addressed arguments for the continued application of the law of occupation based on the right to self-determination. Gross recognises that:

‘(o)ne might argue that, given the lack of full and substantive self-determination (which in the Palestinian case must include effective self-government in both the West Bank and Gaza), it is better to characterize the situation as one of occupation, consistently including the full scope of duties associated with occupation.’

However, Gross also asks ‘is reinforcing the occupant’s right and duty to intervene always desirable?’ Gross argues instead ‘for a functional approach, in which the occupier only has obligations for elements where control continues’.¹³⁰ The functional approach has practical relevance. How does it relate to the right to self-determination?

In reducing its involvement in the territory, Israel may be argued to have created some autonomous space for what goes on in the territory to be determined by the people of Palestine; and thereby to have reduced the level of infringement of the Palestinian’s right to self-determination that Israel’s presence represents. Under such an interpretation, the continued application of the law of occupation to the whole of the territory/all public functions might be viewed as no longer necessary from a self-determination perspective. Indeed, there are grounds for the continued application of the law of occupation to the whole of the territory/all public functions to be seen as an unjustified hindrance to the exercise of self-determination. For instance, the continued application of Article 43 ‘Hague law’ (noted above) places legal limits on the change and development of the infrastructure of Gaza that can be undertaken – if those Palestinians with governing authority are the legitimate representatives of the people, why should their discretion be limited by the law of occupation?¹³¹

However, there are reasons to query the quality of the autonomous space that has been created as a result of Israel’s partial disengagement. There is now greater autonomy. But one might query whether the identity of the actors with authority in Gaza would be the same if Israel did not still exercise the level of control that it does. That is, the circumstances within the Gaza Strip that are connected to Israel’s continued control might help to explain why it is that Hamas has been able to rise to and sustain authority. Moreover, the control that Israel continues to exert

¹²⁵ Ibid., 20-21.

¹²⁶ Scobbie, ‘An Intimate Disengagement’, 31.

¹²⁷ See Scobbie 663 ‘it is clear that Gaza is not formally or actually independent.’

¹²⁸ Scobbie, ‘An Intimate Disengagement’, 21

¹²⁹ Scobbie, ‘An Intimate Disengagement’, 24 – 25, 29.

¹³⁰ Gross, *Writing on the Wall*, 215.

¹³¹ See also Gross, *Writing on the Wall*, 214 discussing the double edge sword involved in arguing for the continued application of the law of occupation.

has an influence on the governance decisions that are taken by Palestinians with authority in the Gaza Strip. For instance, decisions in relation to the energy sector are affected by Israel's control of the electricity supply.¹³²

The quality of the autonomous space in the Gaza Strip is not the same as in an unoccupied territory. Is the political discretion of the Palestinian's in Gaza sufficiently hindered by Israel to justify the continued application of the whole of the law of occupation to the whole of the territory? In my earlier reflections on this question, I took the following view:

My suggestion is that while it remains reasonable to doubt the quality of the autonomy that has been created by a partial withdrawal, it is more consistent with a concern for self-determination for the law of occupation to continue to apply to the entire territory, rather than for it to be limited on a functional basis. One reason for this view is that it is difficult to evaluate the quality of the autonomous space. Whilst the occupier retains some control, there is always likely to be some way in which the occupier is able to indirectly influence governance. At what point has an occupier withdrawn enough so that the governance which fills the space created is sufficiently independent? Another reason is that the continued application of the law of occupation to the entire territory (particularly the obligations this creates for the occupier) is likely to provide more of a motivation for complete withdrawal. And a complete withdrawal will allow the space for genuine self-government.¹³³

However, it is important to keep in mind that accepting a functional approach to the law of occupation does not need to coincide with a view that the right to self-determination is being realised in areas where the law of occupation no longer applies. The right to self-determination continues to exist as a standalone basis for assessing the circumstances. The control that Israel exercises – especially when taken as a whole – continues to prevent exercise of the right to self-determination on the Gaza Strip. One might make sense of the situation legally by accepting the functional approach to the application of the law of occupation, whilst at the same time giving more attention to how the control that continues to be exercised is a denial of the right to self-determination.

D. Altering the demographic composition, character and status of the Palestinian territory

The UN Security Council (UNSC) has a long line of resolutions concerning the occupation of Palestinian Territory.¹³⁴ To take a recent example, in Resolution (2334) (2016), the UNSC *condemns*:

all measures aimed at altering the demographic composition, character and status of the Palestinian Territory occupied since 1967, including East Jerusalem, including, *inter alia*, the construction and expansion of settlements, transfer of Israeli settlers, confiscation of land, demolition of homes and displacement of Palestinian civilians, in violation of international humanitarian law and relevant resolutions.

This quote from the resolution encompasses various actions undertaken by Israel.¹³⁵ They include the establishment and expansion of settlements in East Jerusalem and in the West Bank.¹³⁶ They also include the establishment of a wall/security barrier, which the UN Secretary

¹³² See The World Bank, 'Cash-Strapped Gaza and an Economy in Collapse Put Palestinian Basic Needs at Risk: Press Release' (28 September 2018) <<https://www.worldbank.org/en/news/press-release/2018/09/25/cash-strapped-gaza-and-an-economy-in-collapse-put-palestinian-basic-needs-at-risk>>.

¹³³ Saul, 'The Functional Approach'.

¹³⁴ Including (as cited in SC Res 2334) resolutions 242 (1967), 338 (1973), 446 (1979), 452 (1979), 465 (1980), 476 (1980), 478 (1980), 1397 (2002), 1515 (2003), and 1850 (2008).

¹³⁵ See CERD/C/ISR/CO/14-16, para.25.

¹³⁶ See Special Rapporteur on the situation of human rights in the Palestinian territories (22 October 2018) p. 14; also CERD/C/ISR/CO/14-16, para.25 directing Israel to eliminate any policy of 'demographic balance' from its planning and zoning policy in the West Bank.

General has described as deviating ‘more than 7.5 kilometres from the Green Line in certain places to incorporate settlements, while encircling Palestinian population areas.’¹³⁷

Addressing the settlements and the wall together can help to indicate the relevance of the right to self-determination as a basis for assessing specific actions that impact on the demographic composition, character and status of the Palestinian Territory.¹³⁸

In its advisory opinion, the ICJ found that the settlements represent a breach of Article 49 paragraph 6 GC IV, which provides that the Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies. The ICJ found that the ‘provision prohibits not only deportations or forced transfers of population such as those carried out during the Second World War, but also any measures taken by an occupying Power in order to organize or encourage transfers of parts of its own population into the occupied territory.’¹³⁹

The ICJ also addresses the settlements in combination with the wall from the perspective of the right to self-determination. The ICJ finds first that:

the construction of the wall and its associated régime create a "fait accompli" on the ground that could well become permanent, in which case, and notwithstanding the formal characterization of the wall by Israel, it would be tantamount to *de facto* annexation.¹⁴⁰

The Court indicates here that it does not view the annexation of territory as having yet occurred. Others argue that it has.¹⁴¹ Annexation is a contravention of the right to self-determination.

The ICJ continues to find that:

the route chosen for the wall gives expression in *loco* to the illegal measures taken by Israel with regard to Jerusalem and the settlements, as deplored by the Security Council (see paragraphs 75 and 120 above). There is also a risk of further alterations to the demographic composition of the Occupied Palestinian Territory resulting from the construction of the wall inasmuch as it is contributing, as will be further explained in paragraph 133 below, to the departure of Palestinian populations from certain areas. That construction, along with measures taken previously, thus severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of Israel's obligation to respect that right.¹⁴²

In the absence of a decisive finding that annexation has yet occurred, the finding of breach of the right to self-determination may be best understood in terms of pre-emption.¹⁴³ The settlements do change – and have the potential to continue to change – the territory’s demographic, so that the population on the territory is not as it was at the commencement of the occupation. The settlements also impede the exercise of the right to self-determination in the sense that they do or have the potential to take land and other resources away from Palestinian exercise.¹⁴⁴ The construction of the wall compounds these elements; it creates conditions that do or may lead to further departures of Palestinian’s from the territory, and strengthens the hold of Israel over the land and the territory.

The ICJ’s approach brings into focus the argument that Israel as the occupier is under a duty to refrain from such actions that will pre-empt the process of self-determination – either

¹³⁷ Report of the Secretary-General prepared pursuant to General Assembly resolution ES-10/13, (24 November 2003) UN Doc A/ES-10/248, para 7.

¹³⁸ For an account of the HCJ’s jurisprudence, see Gross, *Writing on the Wall*, 262.

¹³⁹ *Legal Consequences of the Construction of a Wall* (ICJ Reports 2004), para. 120.

¹⁴⁰ *Legal Consequences of the Construction of a Wall* (ICJ Reports 2004), para. 121.

¹⁴¹ For arguments that there is annexation see Special Rapporteur on the situation of human rights in the Palestinian territories (22 October 2018) para 32; also O. Dajani, ‘Israel’s Creeping Annexation’ (2017) 111 *American Journal of International Law* 51, 53.

¹⁴² *Legal Consequences of the Construction of a Wall* (ICJ Reports 2004), para 122.

¹⁴³ Gareau, ‘Shouting at the Wall’, 516.

¹⁴⁴ See Gross, *Writing on the Wall*, 279, 284.

potentially or in fact do so.¹⁴⁵ This argument is also relevant with regard to the treatment of resources on the territory (turned to below).

There is an argument that the settlements are no longer an issue due to agreement in the Oslo Accords that they will be dealt with in the final status negotiations.¹⁴⁶ This overlooks the prohibition, as noted by Gross, against a consensual waiver of ‘the humanitarian rights to which protected people are entitled (including the right enshrined in Article 49(6) GC IV not to have civilian population from the occupying power transferred to their territory)’.¹⁴⁷ It also overlooks the scope to query the strength of the Oslo Accords as a basis for pre-emption of actions covered by the right to self-determination, due to the absence of a direct popular mandate to this effect (see above).

E. Exploiting natural resources

The UN General Assembly has expressed grave concern about a range of practices with a negative impact on Palestinian natural resources.¹⁴⁸ To bring the relevance of the right to self-determination into focus with regard to acts affecting natural resources, the practice of quarrying the land for the production of gravel is a useful example.

This practice was addressed by the HCJ in a case from 2011.¹⁴⁹ Yesh Din, an Israeli NGO, petitioned the HCJ to order the cessation of quarrying in Israeli-owned quarries in the West Bank and for a halt to the development of new quarries. The petition was dismissed. The HCJ recognised that the quarries were opened in the 1970s after the commencement of the occupation. It assessed them for consistency with Article 55 of the Hague Regulations: ‘[t]he occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.’ The essence of this provision indicates ‘that an occupying state is entitled to reap the fruits of the occupied territory’s assets but must not deplete their “capital” by harming the assets themselves.’¹⁵⁰ The HCJ saw that the practice affected the capital,¹⁵¹ but found it justified in light of the prolonged occupation, which required adjustment of the traditional laws of occupation to allow for economic development and growth.¹⁵² This reading of the law has been criticised for undervaluing the objectives and principles of the law of occupation anchored in Article 43 ‘Hague law’, which should have been the starting point for the interpretation.¹⁵³ The HCJ also supported its position with reference to terms of the Oslo Accords;¹⁵⁴ referring to Article 31 of the first Schedule to Appendix 3 (the civil appendix) of the Interim Agreement, which makes provision for transfer of the quarries to the Palestinians and to agreement that the quarries would remain active in the interim.¹⁵⁵ This position is criticised in light of the absence of attempts to transfer the quarries to the Palestinians.¹⁵⁶ In addition, it is criticised on the basis of the law of occupation, which precludes the curtailment of the rights of the occupied population by agreement with the occupier.¹⁵⁷

The practice is also questionable from the perspective of the right to self-determination. It is a contradiction of the right to self-determination for the occupier to open new quarries, which

¹⁴⁵ Gareau, ‘Shouting at the Wall’, 516.

¹⁴⁶ Gross, *Writing on the Wall*, 296

¹⁴⁷ *Ibid.*, 296.

¹⁴⁸ GA Res. 66/225, 29 March 2012: This includes the destruction of agricultural land and orchards, and the destruction of water pipelines and sewage networks, which negatively affects the water supply.

¹⁴⁹ H CJ 2164/ 09 Yesh Din v. IDF Commander in the West Bank (Dec. 26, 2011).

¹⁵⁰ Gross, *Writing on the Wall*, 199.

¹⁵¹ Yesh Din v. IDF Commander in the West Bank, para. 8.

¹⁵² *Ibid.*, para. 10.

¹⁵³ See G. Harpaz et al, ‘Expert Legal Opinion on H CJ 2164/09 Yesh Din’, January 2012, para. 101.

¹⁵⁴ Yesh Din v. IDF Commander in the West Bank, para. 6.

¹⁵⁵ Yesh Din v. IDF Commander in the West Bank, para. 6.

¹⁵⁶ Gross, *Writing on the Wall*, 201.

¹⁵⁷ *Ibid.*, 201.

deplete natural resources. Such a practice entails that once the people are in a position to self-determine, the resource will no longer be available in the same form. The Oslo Accords have been invoked to justify the practice, but the relevant terms refer to transferring the quarries to Palestinians, which has not occurred.¹⁵⁸ Moreover, the lack of a popular mandate for the Accords gives reason to query the strength of the legal justification they provide for actions that pre-empt the right to self-determination.

4. Legal Consequences

The preceding discussion has highlighted how the exercise of the right to self-determination in the oPt has come to focus on the resolution of the political dispute over the territorial claim through negotiations which the law requires proceed in good faith. The discussion has also highlighted occupier actions in relation to resources and settlements, which challenge the presumption of good faith and independently infringe the right to self-determination by pre-empting the choices that will be available for the Palestinian people at the end of occupation. This section identifies and examines some of the legal consequences that follow from denial of the right to self-determination under the law of state responsibility. The particular focus is on the normative status of the right to self-determination in international law. Whether or not we see the right to self-determination as generating obligations *erga omnes* and having *jus cogens* status has implications for the rules under the law of state responsibility that are applicable – and consequently what is possible and required in terms of a response from third states.

A. *Erga omnes*

One possible basis for an international response to denial of the right to self-determination stems from the *erga omnes partes* nature of the obligations created by human rights instruments such as the ICCPR.¹⁵⁹ This means that it is open to any other state party to invoke responsibility for a breach of the treaty, regardless of whether or not it is directly injured.¹⁶⁰ The more general concept of obligations *erga omnes* may also provide a basis for invoking the responsibility of an occupier in relation to the right of all peoples to self-determination.

In the Barcelona Traction case of 1970, the ICJ identified that there are obligations in international law that are owed by states ‘towards the international community as a whole’, and that, consequently, ‘all States can be held to have a legal interest in their protection’.¹⁶¹ This is the concept of obligations *erga omnes*. The concept has since been the subject of scholarly attention.¹⁶² To the extent that there is agreement on the nature of the concept of *erga omnes*, it is encapsulated in Cassese’s definition:

[O]bligations which (i) are incumbent on a State towards all the other members of the international community, (ii) must be fulfilled regardless of the behavior of other states in the same field, and (iii) give rise to a claim for their execution that accrues to any other member of the international community.¹⁶³

It has been asserted by authoritative bodies that the right of all peoples to self-determination is a norm with *erga omnes* status.¹⁶⁴ This provides for any third state to invoke state responsibility.

¹⁵⁸ *Ibid.*, 202.

¹⁵⁹ Israel (1991) and Palestine (2014) are parties to the ICCPR.

¹⁶⁰ Article 48, the International Law Commission’s Articles on State Responsibility, adopted by the International Law Commission at its 53rd session (2001), UN Doc. A/RES/56/83; see also article 41, ICCPR.

¹⁶¹ Case Concerning the Barcelona Traction, Light and Power Company Limited (Belgium v Spain) Merits, Judgment, ICJ Reports 1970 3 at 32, para 33.

¹⁶² See, for example, E. Katselli, *The Problem of Enforcement in International Law: Countermeasures, The Non-Injured State and the Idea of International Community* (Routledge, 2010); C. Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge University Press, 2005).

¹⁶³ Cassese, *Self-Determination of Peoples*, 134.

¹⁶⁴ Case Concerning East Timor (Portugal v Australia) Merits, Judgment, ICJ Reports 1995 4, 102 para 29; *Legal Consequences of the Construction of a Wall*, paras. 88 and 156.

Invoking responsibility includes the scope to demand cessation and to call for reparation for the injured party. Such steps could serve as part of a strategy to encourage a non-compliant occupier to become compliant, on the grounds that signalling that the occupier is not complying with its international legal obligations could impact its legitimacy both domestically and internationally.¹⁶⁵ For this sort of consideration to affect the occupier supposes a concern for its legitimacy and an understanding that complying with the law is a means to improve its legitimacy. It also assumes that any such legitimacy concerns outweigh – from the perspective of the occupier – the strategic benefits derived from maintaining the occupation.

Article 54 of the International Law Commission's (ILC) Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) provides a basis for countermeasures to coerce compliance. However, the specific nature of the measures that are permissible in this context remains uncertain. What general practice of countermeasures there has been includes examples of economic sanctions and cessation of certain types of relations.¹⁶⁶ It has been argued that the lack of practice can be partly explained by the absence of a clear incentive for third states to monitor and enforce human rights around the world.¹⁶⁷ This makes it important to reflect on the *jus cogens* status of the right to self-determination.

B. *Jus Cogens*

The establishment of the concept of *jus cogens* norms (peremptory norms) in international law has occurred through the 1969 Vienna Convention on the Law of Treaties (VCLT). Article 53 of the VCLT provides:

[A] peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Article 53 also indicates the consequence that '[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.' Scholarly attention has since been given to other legal consequences that appear to follow from the acceptance of a norm as *jus cogens*.¹⁶⁸ In the view of the ILC, if a state fails to fulfil an obligation that has a *jus cogens* status in a gross or systematic manner, all other states are prohibited from recognizing as lawful the resulting situation, and from rendering aid or assistance in maintaining the situation.¹⁶⁹ The ILC specifies that '[t]his not only refers to the formal recognition of these situations, but also prohibits acts which would imply such recognition.'¹⁷⁰

Does the right of all peoples to self-determination have *jus cogens* status? The ILC in its commentary to its articles on state responsibility includes the right to self-determination as an example. Yet it is not precise in its wording or explanation for this status, relying on a quote from the ICJ in the East Timor case; a quote which does not refer directly to peremptory norm (*jus cogens*) status.¹⁷¹ More recently, Dire Tladi, the ILC's Special Rapporteur on peremptory norms of general international law (*jus cogens*), has provided a wider range of state and judicial practice to support this position.¹⁷² This demonstrates that there is agreement amongst the

¹⁶⁵ See generally B. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge University Press, 2009) 124.

¹⁶⁶ See the ILC's commentary on article 54 of the articles on state responsibility, *Yearbook of the International Law Commission* (2001), Vol II, Part II, p. 137, para. 3; see also C.J. Tams and A. Tzanakopoulos, 'Barcelona Traction at 40: The ICJ as an Agent of Legal Development' (2010) 23 *Leiden Journal of International Law*, 781, 793-4.

¹⁶⁷ See Simmons, *Mobilizing for Human Rights*, 122.

¹⁶⁸ See A. Cassese, *International Law* (Oxford University Press, 2005) at 205-8; M. Shaw, *International Law* (5th edn, Cambridge University Press, 2003) 127.

¹⁶⁹ ILC, 'Commentary on the Articles on State Responsibility', Articles 40 and 41.

¹⁷⁰ ILC, 'Commentary on the Articles on State Responsibility', Article 41 para 5, p. 114.

¹⁷¹ ILC, 'Commentary on the Articles on State Responsibility', article 40 para. 6; in the *East Timor* case, the ICJ states that '[t]he principle of self-determination ... is one of the essential principles of contemporary international law';

¹⁷² International Law Commission, Fourth report on peremptory norms of general international law (*jus cogens*) by Dire Tladi, Special Rapporteur, A/CN.4/727, 31 January 2019, paras. 108 – 115.

international community of states on the particular importance of the right to self-determination. However, the practice referred to often uses terms such as ‘fundamental’ and ‘significant’, rather than *jus cogens*, to describe the right to self-determination. Moreover, Tladi’s report does not attempt ‘to solve the more complex problem of what constitutes the right to self-determination.’¹⁷³

Since the Vienna Conference of 1969, there has been extensive scholarly debate on the nature of *jus cogens* norms. This debate has focused on three justificatory theories: natural law, public order theory, and customary international law.¹⁷⁴ It is possible to find comments from states participating at Vienna¹⁷⁵—as well as in the debates at the ILC that preceded the Vienna Conference¹⁷⁶—that can support each of these explanations. How scholars present the right to self-determination in relation to the *jus cogens* concept is affected by which school they follow.

One approach is to draw on the moral significance of the norm. An example of this is found in Orakhelashvili’s wide ranging study of the legal effects of peremptory norms. For Orakhelashvili, ‘[t]he right of peoples to self-determination is undoubtedly part of *jus cogens* because of its fundamental importance’.¹⁷⁷ Thus, Orakhelashvili has argued that ‘[i]n order to validly commit the Iraqi people through the allocation of oil contracts, the government in question must be elected by the people, as required by the right to self-determination and the attendant permanent sovereignty over natural resources’.¹⁷⁸ This approach is challenging because it loses the link with state practice; but also because it promotes all potential components of the norm of self-determination (once established) to *jus cogens* status.

To take a positive law approach will require not only that the norm is accepted as an international legal norm, but also that it is accepted as a peremptory legal norm.¹⁷⁹ This latter aspect must be based on evidence of acceptance by an overwhelming majority of states.¹⁸⁰ This demanding test underlines why a positive law approach is often supplemented with reference to natural law.¹⁸¹ A prominent example is found in the often cited study prepared by Espiell, as Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1980, titled ‘The Right to Self-Determination: Implementation of United Nations Resolutions’.¹⁸² The mandate of the Special Rapporteur was limited to consideration of the right to self-determination as applied to peoples under colonial and alien domination.¹⁸³ Consequently, Espiell’s views on *jus cogens* must be seen as limited to this aspect of the norm.

¹⁷³ Ibid., para. 115.

¹⁷⁴ For a survey of the field, see K. Zemanek, ‘The Metamorphosis of Jus Cogens: From an Institution of Treaty Law to the Bedrock of the International Legal Order’, in E. Cannizzaro, (ed.), *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press, 2011), 381–410; see also R. Kolb, ‘The Formal Source of Jus Cogens in Public International Law’ (1998) 53 *Zeitschrift für öffentliches Recht* 69–105.

¹⁷⁵ For comments at the First Session, United Nations Conference on the Law of Treaties, Official Records, 1969, pointing to natural law, consider the statements made by Mexico (294) and Ecuador (320); for comments suggesting a link to the moral beliefs of mankind, consider the statements made by Uruguay (303) and Ivory Coast (320); for comments in support of a customary law basis, consider Greece (295) and Poland (302).

¹⁷⁶ See Yearbook of the International Law Commission (1963) at 63, 66–7; see also A. Verdross, ‘Jus Dispositivum and Jus Cogens in International Law’ (1966) 60 *American Journal of International Law* 55.

¹⁷⁷ A. Orakhelashvili, *Peremptory Norms in International Law* (Oxford University Press, 2006) 51.

¹⁷⁸ A. Orakhelashvili, ‘The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions’ (2005) 16 *European Journal of International Law* 59, 81; and A. Orakhelashvili, ‘The Post-War Settlement in Iraq: The UN Security Council Resolution 1483 (2003) and General International Law’ (2003) 8 *Journal of Conflict and Security Law* 307, 313; see also Wheatley, ‘The Security Council, Democratic Legitimacy’, 539–41.

¹⁷⁹ See U. Linderfalk, ‘The Effect of Jus Cogens Norms: Whoever Opened Pandora’s Box, Did You Ever Think About the Consequences?’ (2007) *European Journal of International Law* 853, 862; also J. Green, ‘Questioning the Peremptory Status of the Prohibition of The Use of Force’ (2011) 32 *Michigan Journal of International Law* 215, 244.

¹⁸⁰ M. Akehurst, ‘The Hierarchy of the Sources of International Law’ (1974–75) 47 *British Yearbook of International Law* 273 at 284–5.

¹⁸¹ See M. Weisburd, ‘The Emptiness of the Concept of Jus Cogens, as Illustrated by the War in Bosnia-Herzegovina’ (1995) 17 *Michigan Journal of International Law* 1, 32–40; R. Barnidge Jr, ‘Questioning the Legitimacy of Jus Cogens in the Global Legal Order’ (2008) 38 *Israel Yearbook on Human Rights* 199 at fn 54.

¹⁸² Espiell, ‘The Right to Self-Determination: Implementation of United Nations Resolutions’, E/CN.4/Sub.2/405/Rev.1 (1980).

¹⁸³ Ibid. para 42.

Espiell provides an account of statements by states on the *jus cogens* status of self-determination.¹⁸⁴

In particular, Espiell highlights statements made in favour of *jus cogens* status in 1966 in discussion of the draft articles of the ILC on the law of treaties in the Sixth Committee of the General Assembly, by representatives of Czechoslovakia, Pakistan, Peru, the Ukrainian Soviet Socialist Republic and the Union of Soviet Socialist Republics.¹⁸⁵ Espiell also highlights how similar statements were made at the UN Conference on the Law of Treaties (1968-69),¹⁸⁶ where six out of the 26 delegations that gave examples (66 delegations in total) identified self-determination as an example of a *jus cogens* norm.¹⁸⁷ This is not convincing evidence of the acceptance by an overwhelming majority of states.¹⁸⁸ And this might help to explain why Espiell decided to couch his conclusion in favour of the *jus cogens* status of the norm from his natural law theoretical viewpoint.¹⁸⁹

Whereas Espiell's account of self-determination as *jus cogens* was limited to the colonial and alien domination aspect of the right by his mandate as Special Rapporteur, Hannikainen's approach, in another study that is often cited by scholars who support the *jus cogens* status of self-determination in its entirety, was qualified in the same way for another reason. Hannikainen suggests that although '[m]any international instruments speak of 'the right of self-determination of all peoples'. . .the international community of States has not really required the realisation of internal self-determination within existing states.'¹⁹⁰ This leads Hannikainen to only explore state practice in relation to the implementation of the right of dependent peoples to external self-determination, defining 'dependent peoples' as those living in territories under colonial or other alien rule. Hannikainen accepts a similar sample of statements as Espiell as sufficient to establish the peremptory status of the norm.

Ultimately, the strength of the argument on *jus cogens* status will vary depending on how the notion of *jus cogens* is understood and the components of the right to self-determination that are in focus.¹⁹¹ The strongest arguments limit the claim to colonial and alien domination and supplement state practice with appeal to the moral strength of the obligation. This would cover situations of prolonged occupation. Indeed, the ILC specified in its work on state responsibility that the obligation on states to desist from recognition 'applies to "situations" created by these breaches, such as, for example, attempted acquisition of sovereignty over territory through the denial of the right of self-determination of peoples.'¹⁹²

The ICJ's opinion on the consequences of a denial of the right to self-determination in relation to the construction of the wall does not use the explicit terminology of *jus cogens*.¹⁹³ Still, it identifies obligations consistent with those flowing from a serious breach of *jus cogens* norms under ARSIWA Articles 40 and 41:

¹⁸⁴ Ibid. paras 71-87.

¹⁸⁵ Ibid. para 71.

¹⁸⁶ Ibid. para 73.

¹⁸⁷ See J. Sztucki, *Jus Cogens and the Vienna Convention on the Law of Treaties: A Critical Appraisal* (Springer-Verlag, 1974) 119.

¹⁸⁸ Espiell does stress the lack of denial by states of the *jus cogens* status, 'The Right to Self-Determination: Implementation of United Nations Resolutions', para 72.

¹⁸⁹ Ibid., paras 84-5.

¹⁹⁰ L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law, Historical Development, Criteria, Present Status* (Finnish Lawyers' Publishing Co, 1988) 357.

¹⁹¹ See Saul, 'Normative Status of the Right to Self-Determination'; also M. Craven, 'The European Community Arbitration Commission on Yugoslavia' (1995) 66 *British Yearbook of International Law* 333, 383.

¹⁹² ILC, 'Commentary on the Articles on State Responsibility', article 41 para. 5, p. 114; Dajani, 'Israel's Creeping Annexation', p 55.

¹⁹³ For criticism of the approach taken by the ICJ in the Wall Opinion for appearing to merge the *erga omnes* concept with the concept of *jus cogens*, see J. Crawford, 'International Crimes of States', in Crawford, Pellet and Olleson (eds), *The Law of International Responsibility* (Oxford University Press, 2010) 405 at 411-2; see also Gareau, 'Shouting at the Wall', 520.

Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They also are under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end.¹⁹⁴

5. Conclusion

This expert opinion has examined the relevance of the right of all peoples to self-determination in the context of prolonged occupations. The particular focus has been on the oPt. This conclusion provides a summary of key points from the opinion that are relevant in relation to three sets of questions that led to its production. It also notes several policy implications that follow from the opinion's analysis.

A. What is the role of the right of all peoples to self-determination in the context of a prolonged occupation?

The right to self-determination may be used as an interpretative aid, adding meaning to provisions of the law of occupation. This may provide a basis for some expansive interpretations of aspects of the law of occupation, such as the conservationist principle, to allow greater change and development of the state and civil infrastructure. This could help to avoid pre-emption of the right to self-determination through time related decay of its objects. However, the test associated with the right to self-determination – whether a change would pre-empt the choices available at the end of occupation – is more lenient than the test of necessity for public order/civil life under the conservationist principle. The risk of manipulation of the law of occupation to suit the interests of the occupier would be increased.

The right to self-determination is also relevant as a standalone basis for assessing the occupation. This is true in two ways.

First, occupation in and of itself is a breach of the right to self-determination. The right to self-determination provides a legal requirement that the occupation must be ended. Under a traditional conception of invasion of a territory by a third state, this will simply require withdrawal. Where there are additional factors, such as uncertainty about the status of components of the occupied territory, the right to self-determination points towards a political process undertaken in good faith.

Secondly, the right to self-determination may also be used as a basis for assessing specific aspects of the practice of the occupier. In a shorter-term occupation, this feature may not be engaged, as the terms of the law of occupation focused on conservation of existing infrastructure may be sufficient to preserve meaning in the right to self-determination. Its relevance emerges in situations of prolonged occupation or other circumstances that lead to uncertainty about whether the law of occupation applies in its entirety or where adherence to the law of occupation starts to be neglected. In such circumstances, the right to self-determination may be seen as serving a backstop role. It precludes practices that will pre-empt the choices on the organisation, utilisation, and status of a territory that are available to the people at the end of the occupation.

B. How is the right to self-determination relevant in the oPt, including for the peace process?

¹⁹⁴ *Legal Consequences of the Construction of a Wall* (ICJ Reports 2004), para. 159; see also Gareau, 'Shouting at the Wall', 517; compare with ICJ, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, para. 182; C. Eggett and S. Thin, 'Clarification and Conflation: Obligations Erga Omnes in the Chagos Opinion', EJIL Talk, May 21st 2019, <<https://www.ejiltalk.org/clarification-and-conflation-obligations-erga-omnes-in-the-chagos-opinion/#more-17212>>.

The political process aimed at ending the overall occupation of the oPt has led to significant developments, such as the occupier granting a degree of authority for self-governance to Palestinians through the Palestinian Authority which remains ultimately subject to the influence of the occupier in the vast majority of its public functions. These developments add complexity to law of occupation based questions about the nature/extent of the obligations established for the respective parties. In such circumstances, there is a heightened need to pay attention to the right to self-determination as a legal backstop, precluding actions that would pre-empt the eventual exercise of self-determination following the end of the occupation.

Israeli actions that pre-empt and thereby breach the Palestinian's right to self-determination include the settlements and the wall, along with the opening and operation of gravel quarries. There are arguments that rely on provisions from the Oslo process to justify aspects of practice such as the settlements and the use of resources. These arguments have been shown to run contrary to the law of occupation that prevents giving away occupation based rights of the occupied population. The strength of the Oslo Accords as legal justification for actions that pre-empt the right to self-determination has been queried due to the lack of a direct mandate from the Palestinian population for their creation. This is understandable in light of the process being a pragmatic attempt to find points of agreement between the two sides that could be a basis to move forward. Still, if a future peace process addresses issues concerning the status, infrastructure, and resources of the territory, its consistency with the right to self-determination will be increased to the extent that it is based in a mandate from the Palestinian people.

C. What are international legal consequences and remedies for denial of the right to self-determination?

It has been shown that the right to self-determination has *erga omnes* status. This gives all states a basis to invoke responsibility and call for an end to an act that is in breach of the right. It also has *jus cogens* status. This requires states to desist from recognition of a situation created by a breach of the right. It places states under an obligation not to render aid or assistance in the maintenance of the situation. States should also cooperate to end the situation constituting a breach to the right of self-determination. This can be facilitated in situations of prolonged occupation through a greater focus on not only how the occupation overall but also specific actions of the occupier and occupied relate to the right to self-determination.



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