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Contemporary Principles and Perspectives

Gideon Boas

Associate Professor, Faculty of Law, Monash University, Australia

Edward Elgar
Cheltenham, UK • Northampton, MA, USA

sometimes conflicting and politically motivated recognition of existing members of the international community.[100]

The Institut de Droit International had emphasized in its resolution on recognition of new states and governments as early as 1936 that the 'existence of the new state with all the legal effects connected with that existence is not affected by the refusal of one or more states to recognise'.[101] While the position remained (and probably still remains) unclear, in 1991, with the beginning of the disintegration of the Socialist Federal Republic of Yugoslavia, the Arbitral Commission of the Conference of Yugoslavia (the Badinter Commission) was asked to determine the status of the emerging entities in the region.[102] In its first opinion of 29 November 1991, the Commission stated that 'the effects of recognition by other States are purely declaratory',[103] a statement that has been heralded as important support for the declaratory model as the applicable modern doctrine.

While the position taken by the Badinter Commission has been considered to be influential, without clarification from the International Court of Justice there continues to be some uncertainty. The ICJ had just such an opportunity in its recent Advisory Opinion on the *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*.[104] Regrettably, it declined to shed further light on the question of the primacy of the declaratory or constitutive theories of recognition. Citing the wording of the question posed to it by the General Assembly, the Court confined its opinion to whether or not the declaration of independence by Kosovo itself was in accordance with international law (which it answered in the affirmative),[105] and did not concern itself with

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[100] Crawford, above note 10, 20; Rich, above note 56, 56; Shaw, above note 56, 460–62.

[101] 39 Annuaire de L'Institut de Droit International (1936), 300. See also, Shaw, above note 56, 445–50.

[102] The Badinter Commission was set up by the Council of Ministers of the European Economic Community on 27 August 1991 to provide the Conference on Yugoslavia with legal advice. See below, section 4.9.3, for a detailed discussion of the break-up of Yugoslavia and its effect on the development of international law relating to self-determination.

[103] Opinion 1, Badinter Commission, 29 November 1991, 92 ILR 165; cf 'Declaration on the Guidelines on Recognition of the New States in Eastern Europe and the Soviet Union', *Focus* (Special Issue), Belgrade, 14 January 1992, at 149 where the European Community outlined that it thought that recognition as a simple declaration of an ascertainable fact did not provide sufficient means to allow the EC to influence the situation in Eastern Europe.

[104] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, above note 69.

[105] Ibid., 79.

the legal consequences of that declaration. In particular, the Court did not consider whether or not Kosovo had achieved statehood. Nor did it enquire about the validity or legal effects of the recognition of Kosovo by the states which recognized it as an independent state.[106] Therefore, it appears that, for the time being at least, the report by the Badinter Commission remains the most authoritative statement on the role of recognition in international law.

4.5 CONTEMPORARY DEVELOPMENTS AND THE ROLE OF OTHER CRITERIA IN THE DEVELOPMENT OF STATEHOOD

In this light, it is apparent that, while the four traditional criteria of the Montevideo Convention remain integral to the concept of statehood, contemporary developments in international law have raised the possibility that additional criteria – such as recognition by other states and a willingness to adhere to international law – may now also be necessary elements for statehood. In practice, however, it seems that the interpretation and application of the criteria for statehood will depend on the particular circumstances and context in which the claim for statehood is made. As discussed above, recent developments in international law suggest that while a prospective state must still exhibit the four Montevideo criteria, unless an entity is accorded recognition as a state by a sufficiently large number of other states (particularly powerful ones), it cannot realistically claim to be a state with all the corresponding rights and obligations.[107] Additionally, a willingness to observe international law, or at the very least the principles set out in Article 2 of the UN Charter, are increasingly seen as essential.[108]

4.5.1 Willingness to Observe International Law and Fundamental Rights

The observance of international law has frequently been referred to as an additional criterion in determining the admission of states into the international legal arena. Signatories to the UN Charter have agreed, pursuant to

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[106] Ibid., 51.

[107] Christopher J. Borgen, 'The Language of Law and the Practice of Politics: Great Powers and the Rhetoric of Self-Determination in the Cases of Kosovo and South Ossetia' (2009) 10 *Chicago Journal of International Law* 2, 2; Wallace and Martin-Ortgea, above note 5, 76.

[108] Brownlie, above note 2, 71–6.

Article 2 of the Charter, to 'settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered'. In cases such as Cyprus, Israel and Kosovo, recognition by other states of the new entity has been held to be contingent upon the observance of international legal norms. Because the Charter of the United Nations still only accepts states as its primary constituents, it is becoming increasingly necessary for entities seeking admission to the UN to recognize the importance of the pacific settlement of disputes, international human rights and fundamental freedoms which all UN members have agreed to promote and respect.[109]

State practice seems to suggest that an attempt to create new states, or extend the territory of existing states, by the use of force is unlikely to lead to the widespread recognition of statehood necessary. For example, the Turkish Republic of Northern Cyprus, located in the northern portion of the island of Cyprus, came about through military means. The result was a partitioning of the island, resettlement of many of its inhabitants, and a subsequent unilateral declaration of independence by the north, which was controlled by Turkey, in 1983. The Turkish Republic of Northern Cyprus has received recognition from only one state – Turkey, upon which it is entirely dependent for economic, political and military support. Northern Cyprus has so far been denied recognition before the UN on the basis that it was established by the illegal use of force and is in violation of the territorial integrity of the Republic of Cyprus.[110] In the circumstances, it is difficult to count the Turkish Republic of Northern Cyprus, as far as international law is concerned, as anything more than an illegal occupation.

The state of Israel's forcible acquisition and subsequent occupation of the West Bank and East Jerusalem in 1967 has led to the non-recognition of Israeli sovereignty over these areas, based on the impermissibility of the use of force to acquire the territory.[111] The same holds true for the Israeli annexation of the Golan Heights in 1981.[112] Despite attempts by the US in the 1990s to alter the legal status of these areas through diplomatic statements,[113] such state views cannot, and have not, generated a change in their legal status as occupied territory. This has been most recently

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[109] Sellers, above note 9, 2; Charter of the United Nations (1945), Arts 55 and 56.

[110] UNSC Resolutions 541 (1983), 550 (1984); *Loizidou v Turkey*, EctHR, Series A-310, 23 March 1995.

[111] UNSC Resolutions 242 (1967), 252 (1968), 267 (1969), 465 (1980).

[112] UNSC Resolution 497 (1981).

[113] Orakhelashvili, above note 64, 383.

confirmed in the ICJ's Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.[114]

In contrast, the unilateral declaration of independence by the provisional government of Kosovo on 17 February 2008 states at Article 2 that:

> We declare Kosovo to be a democratic, secular and multi-ethnic republic, guided by the principles of non-discrimination and equal protection under the law. We shall protect and promote the rights of all communities in Kosovo and create the conditions necessary for their effective participation in political and decision-making processes.

In its 2010 Advisory Opinion regarding the legality of this declaration, the ICJ considered that the claim by the authors of the declaration to statehood for Kosovo was reinforced by the fact that they 'undertook to fulfil the international obligations of Kosovo'.[115] While the Court made no determination as to whether the declaration actually brought about a new state, its comments do seem to suggest that the willingness of the Kosovo government to abide by international law certainly supported the legality of its unilateral declaration of independence.

Of course, Kosovo's independence can be viewed also from a somewhat different perspective – in some respects the inverse to that of Northern Cyprus. The history of Kosovo's developing claim to statehood has to be understood by reference to the persecution of its ethnic majority population by Serbia, the war Slobodan Milošević waged against the Kosovo Albanian population of the (then) province of Serbia, the Rambouillet Peace Agreement which Serbia refused to accept and NATO's subsequent bombing of Serbia – all of which set up the inevitable support by the US and many states within western Europe of Kosovo's claim to statehood.[116]

Given that the statehood of Kosovo was only made possible by a campaign of NATO bombing of Serbia – an armed attack unsanctioned by the

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[114] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, above note 41.

[115] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, above note 69, 105–6.

[116] Despite the categorical denial of the US and NATO that this was to be the result of international interference in Serbia and Kosovo: see Security Council Resolution 1244 (1999), 10 June 1999, forming the legal basis for international administration, which reaffirmed the commitment of all UN Member States 'to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia'; J. Norris, *Collision Course: NATO, Russia, and Kosovo* (Westport, CT; London: Praeger, 2005), 33.

UN Security Council – and subsequent massive entity building under the auspices of the United Nations,[117] one must remark that the use of armed force in the development of independent statehood very much depends upon who is using it and in what context. It is possible to view Kosovo's independence as something of a punishment to Serbia for its role in the wars of the former Yugoslavia and its long-standing persecution of the Kosovo Albanian people. While justification and legality of the use of force by NATO countries in Serbia will be discussed in Chapter 8, it seems reasonable to conclude that the international community, however selectively or hypocritically, puts considerable emphasis on a certain observance of fundamental aspects of international law relating to human and peoples' rights.

At the very least, these examples illustrate the importance of the willingness of states to abide by international law as a potential additional criterion for admission to statehood. One might regard the Badinter Commission's opinions, and its treatment of the question of recognition, as a political expedient particular to the break-up of the former Yugoslavia, the finalization of which has been realized by Kosovo's apparently successful claim to independent statehood.[118] Another way of regarding these events is as the development of a new approach by the international community to statehood.[119] But what is that approach? Should we take its stated support for the declaratory theory at face value? Or is the acceptance of Croatia and Bosnia-Herzegovina into the community of nations before they fulfilled all the Montevideo criteria evidence that the constitutive theory is of greater weight to the development of statehood (a conclusion possibly supported by the independence of Kosovo)? It is difficult to determine at this point whether Russia's support for claims of independence by South Ossetia and Abkhazia – despite its

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[117] Created by Security Council Resolution 1244 (1999), 10 June 1999.

[118] Kosovo's declaration of independence and its path towards successful secession from Serbia is in some ways a scenario without precedent: see Report of the Special Envoy of the Secretary-General on Kosovo's Future Status, S/2007/168, 26 March 2007 ('Ahtisaari's Report'). On the other hand, it has a clear relationship with the atypical approach of the Badinter Commission (and, in turn Europe and the UN) to the creation of statehood that emerged out of the disintegration of the former Yugoslavia.

[119] See, e.g., Crawford, above note 10, 91–2; Rob Dickinson, 'Twenty-First Century Self-determination: Implications of the Kosovo Status Settlement for Tibet' (2009) 26 *Arizona Journal of International and Comparative Law* 547, 558; *Case concerning the Frontier Dispute* (*Burkina Faso*/*Mali*) [1986] ICJ Rep 554; Rich, above note 56, 62; Lowe, above note 5, 161.

claim that this does not serve as any kind of precedent[120] – reflects further evidence of such a trend.

What is clear is that the law regarding what it takes to fulfil the criteria for statehood and recognition is changing in ways that are yet to be entirely understood.

4.6 THE PRINCIPLE OF TERRITORIAL SOVEREIGNTY

Put simply, a state cannot exist without territory.[121] This is a fundamental paradigm of international law, the importance of which cannot be overstated.[122] As the international community comprises states, and the existence of states and the scope of their activities are defined by their territories, rules regarding territory are at the heart of international law. Indeed, Jennings suggests that the very 'mission and purpose of traditional international law has been the delimitation of the exercise of sovereign power on a territorial basis'.[123] Shaw, too, sees the central aim of many of the fundamental principles of international law as the 'protection and preservation of the dominant statist order founded upon territorial exclusivity'.[124] As such, an understanding of the rules governing territorial sovereignty, its acquisition, disposal and scope, are fundamental to any appreciation of the character and operation of international law.

Before examining the principle of territorial sovereignty in detail, it is worth noting that the territorially based state has not always been the conduit through which humans have conducted their interactions. The post-Roman era, for example, saw the organization of human societies centred upon individual and tribal allegiances rather than territory.[125] It was the signing of the Peace of Westphalia that marked a significant mile-

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120 'Abkhazia, S. Ossetia no precedents for other rebel regions – Lavrov', *RIA Novosti*, 18 September 2008, cited in Rein Müllerson, 'Precedents in the Mountains: On the Parallels and Uniqueness of the Cases of Kosovo, South Ossetia and Abkhazia' (2009) 8 *Chinese Journal of International Law* 1, 4.

121 Jennings and Watts, above note 13, 563; Malcolm N. Shaw, *Title to Territory* (Aldershot, UK: Ashgate, 2005), 3; R.Y. Jennings, *The Acquisition of Territory in International Law* (Manchester, UK: Manchester University Press, 1963), 2.

122 Cf. Kelsen who sees territory as little more than the space in which states may act: Kelsen, above note 4, 308.

123 Jennings, above note 121, 2.

124 Shaw, above note 121, 11.

125 Ibid., 4.

stone in the establishment of a world order based on defined territorial groupings, conferring exclusivity of state action within such territory. This emphasis on territory as the basis of legal rights, duties and immunities has been the dominant trend for the past 300 years and has come to form the basis of modern international law.[126]

4.6.1 Territory, Title and Sovereignty

Territory is a geographical concept. It includes land and subterranean areas, rivers, lakes, reefs, rocks, islets, islands, territorial sea and airspace.[127] Territory can be subject to one of four possible types of regime, of which territorial sovereignty is one. The other three regimes are:

- *res nullius* – territory that may be acquired by states but has not yet been placed under territorial sovereignty;
- *res communis* – territory not capable of being placed under state sovereignty, such as the high seas, the exclusive economic zones and outer space; and
- territory not subject to the sovereignty of any other state, but which possesses a status of its own (such as trust territories).[128]

Territorial sovereignty is best understood as a legal nexus, and has been defined variably as 'the relationship between the state and the physical area it encompasses',[129] and 'the framework within which the public power is exercised'.[130] In classical international law territorial sovereignty is thought to comprise both rights and duties.[131] These aspects were

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[126] Sharma notes that 'despite pressing integrationist trends contemporarily in operation in the world arena, the traditional model of territorial order based on the principle of state sovereignty stands firm. This underscores the continuing importance of the concepts of territory, independence and territorial sovereignty to the development of international law': Surya P. Sharma, *Territorial Acquisition, Disputes and International Law* (The Hague; London: M. Nijhoff, 1997), 327.

[127] But not the exclusive economic zone, or airspace above the exclusive economic zone or continental shelf: Shaw, above note 121, 8–9; Gillian D. Triggs, *International Law: Contemporary Principles and Practices* (Sydney: LexisNexis Butterworths, 2011, 2nd edn), 272.

[128] Brownlie, above note 2, 105.

[129] Shaw, above note 121, xii. See also Andrea Brighenti, 'On Territory as Relationship and Law as Territory' (2006) 21(2) *Canadian Journal of Law and Society* 65.

[130] *Nationality Decrees in Tunis and Morocco* (French Pleadings) (1923) PCIJ (Ser. C) No. 2, 106.

[131] *Island of Palmas* case, above note 17, per Judge Huber, 838.

recognized respectively by Judge Huber in the *Island of Palmas* case when he referred to 'the exclusive competence of the State in regard to its own territory', and 'the obligation to protect within the territory the rights of other States'.[132] Territorial sovereignty constitutes the scope of state jurisdiction, to the end that within its territory, a state exercises its supreme, and normally exclusive, authority.[133]

When we speak of title to territory, on the other hand, we are referring to 'the vestitive facts which the law recognises as creating a right'.[134] These are the factual circumstances required for a change in the legal status in international law of some area of territory. As Salmond puts it,

> every right (using the word in a wide sense to include privileges, powers and immunities), involves a title or source from which it is derived. The title is the de facto antecedent, of which the right is the de jure consequent.[135]

The very rules regarding acquisition of territory constitute no more than the circumstances in which a state is granted title and *ipso facto* acquires sovereignty (and its consequential legal rights and obligations) over that territory.[136] In the *Burkina Faso/Republic of Mali* case the ICJ recognized that the term 'title' has multiple accepted meanings, and that 'the concept of title may also, and more generally, comprehend both any evidence which may establish the existence of a right, and the actual source of that right'.[137]

4.6.2 The Role of Territorial Sovereignty

As already noted, territorial sovereignty serves as a fundamental characteristic of statehood, possession of which confers the necessary status to gain entry into the international community. However, territorial sovereignty also serves extralegal purposes. As Gottman has observed:

> If a territory is the model compartment of space resulting from partitioning, diversification and organization, it may be described as endowed with two main

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[132] Ibid.

[133] Brighenti, above note 129, 82–3; Jennings and Watts, above note 13, 564. For a discussion of territorial jurisdiction, see Chapter 6, section 6.3.1.

[134] Triggs, above note 127, 271. Jennings, above note 121, 4.

[135] Glanville Williams, *Salmond on Jurisprudence* (London: Sweet & Maxwell, 1957, 11th edn), 378.

[136] Jennings and Watts, above note 13, 679.

[137] *Frontier Dispute* (*Burkina Faso and Republic of Mali*), above note 119, 564.

> functions: to serve on one hand as a shelter for security, and on the other hand as a springboard for opportunity.[138]

Furthermore, by apportioning an area of the globe in which a group of people through their governing body has exclusivity of action, territorial sovereignty can entrench and enforce a people's sense of belonging and identity. While this traditional construct of international society may be under something of a challenge by an increasingly globalized world, it remains a quintessential aspect of international social, political and legal life.

4.6.3 Territory and the State

What exactly is the nature of the relationship between a state and territory? The oldest theory, patrimonial theory, claims sovereignty to be the result of an assumed natural right of the state to exercise power over territory. This theory eventually evolved into the object theory, or property theory. Both theories draw heavily upon the analogy of private law property owners exercising their right over possessions, and have been dismissed by contemporary authors for confusing the concepts of sovereignty and property,[139] known alternatively in Roman law as *imperium* and *dominium*. Such confusion appears to have arisen during the feudal era when a ruler was seen to own territory in a property law sense. These theories also cannot properly account for the concept of federal states; nor can it explain why a state ceases to exist upon disposal of all of its territory.[140]

The subjectivist doctrine, otherwise known as the space and quality theory,[141] is of the view that territory is not separate from the state. Rather, territory is seen as a crucial part of the personality of the state.[142] A major criticism of this theory is that it appears to suggest that change in the territorial composition or territorial extent of a state seriously affects its personality. Furthermore, like the patrimonial theory, this approach is difficult to reconcile with concepts of federal states, condominiums and leases.[143]

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[138] Jean Gottmann, *The Significance of Territory* (Charlottesville, VA: University Press of Virginia, 1973), 14.

[139] Shaw, above note 121, 17.

[140] W. Schoenborn, 'La Nature Juridique du Territoire', 30 *Hague Recueil* (1929 V) 108–12.

[141] Ibid., 114.

[142] J.H.W. Verzijl, *International Law in Historical Perspective*, Vol. III (Leiden: Sijthoff, 1970), 12–13.

[143] Shaw, above note 121, 18.

This can be contrasted with the objectivist or competence theory, which diminishes the importance of territory to merely the geographic space in which a state may rightfully exercise its jurisdiction.[144] This theory, however, is deficient in the sense that it fails to recognize that territory may be viewed not only as the sphere of jurisdiction, but also the legal underpinning for that jurisdiction.[145]

Shaw suggests, instead, that a 'composite approach' is the most acceptable explanation for the relationship between a state and territory.[146] Such an approach synthesizes the three major doctrines, views territorial sovereignty as a divisible element, and acknowledges that territory is both the basis upon which, and the area in which, jurisdiction is exercised.

4.6.4 The Acquisition of Territorial Sovereignty

While many writers still mould their analysis of the relevant rules around the traditional categories or 'modes' of acquisition formulated in the Middle Ages, it is now generally acknowledged that these categories are deficient in many respects.[147] For a start, these categories as laid out by Grotius and subsequent legal writers rely heavily on analogy with Roman laws regarding private property ownership.[148] The rules of territorial acquisition have evolved considerably since, and today such clear-cut categorization misstates the complex interplay of broad, overlapping principles at work in the acquisition of territory. Nor does such categorization accord with the realities of tribunal practice. Rarely, if ever at all, do today's tribunals engage in the artificial exercise of squeezing the facts before them into a traditional mode of acquisition.[149] Instead, they focus on principles such as effective occupation and administration.[150]

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[144] As Kelsen puts it, 'there is no relation at all between the State, considered as a person, and its territory, since the latter is only the territorial sphere of validity of the national legal order': Kelsen, above note 4, 218.

[145] Ibid.; Benedetto Conforti, 'The Theory of Competence in Verdross' 5 *European Journal of International Law* (1994) 1, 2.

[146] Shaw, above note 121, 19.

[147] See generally Brownlie, above note 2, 127; Shaw above note 56, 495; Triggs, above note 127, 212–3. Jennings and Watts, above note 13, 678–9.

[148] See generally Hersch Lauterpacht, *Private Law Sources and Analogies of International Law (with Special Reference to International Arbitration)* (New York: Longmans, Green & Co., 1927).

[149] What Brownlie refers to as a 'preoccupation' with orthodox 'labels': Brownlie, above note 2, 127.

[150] For example, in the *Island of Palmas* case, although the United States and the Netherlands made respective claims to territory based on discovery, cession,

Nonetheless, while traditional conceptions of territorial sovereignty are simplistic and misleading in terms of modern practice, it is important to understand them for two simple reasons. First, the doctrine of intertemporal law demands that a state's title to territory be judged in the context of the law of the time. In this way, historical acts of territorial acquisition remain relevant to many territorial disputes today. Secondly, modern practice has evolved out of traditional practice, so that perhaps in this area more than some others 'the old is necessary to an understanding of the new'.[151]

4.6.5 The Former Modes of Acquisition

There are five classical modes of acquisition: (i) occupation, (ii) accretion, (iii) cession, (iv) conquest (otherwise known as subjugation), and (v) prescription. Some writers also include adjudication as a sixth mode of acquisition.[152] It must also be noted that boundary treaties and boundary awards also constitute a root of title.[153] Such treaties will typically deal with the acquisition or loss of territory by the delineation or clarification of state borders.

4.6.5.1 Accretion

Accretion, erosion and avulsion (the abandonment of a river channel and the formation of a new channel) refer to the natural geological processes that result in an increase or decrease in the territory and are relatively uncontroversial as modes of acquisition of territorial sovereignty.[154] For example, where the erosion of land that once comprised the territory of

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contiguity and prescription, Judge Huber's decision did not directly analyse the facts in terms of any one of the traditional modes of acquisition, and most noticeably refrained from using the language of the former modes of acquisition. Rather, what was emphasized was the importance of 'the actual continuous and peaceful display of state functions' evidenced in the Netherlands' administrative acts over the territory: above note 17, 867–71. See also the *Legal Status of Eastern Greenland* (1933) PCIJ (Ser. A/B) No. 53 and the *Minquiers and Ecrehos* case [1953] ICJ Rep 47.

[151] Jennings and Watts, above note 13, 679.

[152] See generally A.L.W. Munkman, 'Adjudication and Adjustment – International Judicial Decision and the Settlement of Territorial and Boundary Disputes' (1972–73) 46 *British Yearbook of International Law* 20.

[153] In the *Eritrea/Yemen* arbitration, the Tribunal found that boundary treaties made between two parties 'represents a legal reality which necessarily impinges upon third States, because they have effect *erga omnes*': 114 ILR 1, 48. Brownlie, above note 2, 129; Shaw above note 56, 495–6.

[154] Jennings and Watts, above note 13, 696; Brownlie, above note 2, 145.

a state upstream results in the extension of a river bank of a state downstream, the territories of both states are correspondingly diminished or enlarged. Artificial formations such as man-made islands, embankments and so on do not enlarge a state's territory. Accordingly, no state may deliberately alter its own territory to the detriment of another state without former agreement.[155]

4.6.5.2 Cession

Cession occurs when an owner state transfers sovereignty over territory to another state. A state may cede any part of its land territory, and by ceding all its territory it will completely merge with the other state. Rivers and the maritime belt may not be ceded on their own, as they are an inalienable appurtenance of the land.[156] In order to effect a cession of territory, it must be intended that the owner state transfers sovereignty, and not merely governmental powers short of sovereignty. Cessions of territory are usually effected by a treaty. Examples can be found in the cessions of Hong Kong and Kowloon by China to the United Kingdom following the Opium Wars, and the United States' purchase of Alaska from Russia in 1867.

4.6.5.3 Occupation

Occupation as a mode of acquisition of territory historically only occurred when a state intentionally acquired sovereignty over territory that was not subject to the sovereignty of another state.[157] In other words, the territory in question at the time must have been uninhabited, or inhabited by persons whose community was not considered to be a state. This was the crux of the *Western Sahara* case, in which it was determined that territory inhabited by a people with a political or social structure is not *terra nullius* and thus cannot be occupied.[158]

For occupation to have successfully founded title to territory, the acquiring state first had to take possession of the territory. This required both physical possession and the requisite intent to acquire sovereignty.[159] Secondly, an administration had to be established over the territory in the name of the acquiring state. If the acquiring state failed to establish some responsible authority which exercised governing functions within

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155 Jennings and Watts, ibid., 696–7.

156 Brownlie, above note 2, 118.

157 Occupation was recognized as an 'original means of peaceably acquiring sovereignty' in *Legal Status of Eastern Greenland*, above note 150, 21, 44 and 63.

158 *Western Sahara* (Advisory Opinion), above note 36.

159 *Legal Status of Eastern Greenland*, above note 150 42–3; Brownlie above note 2, 133–5; Jennings and Watts, above note 13, 689.

a reasonable time after taking possession, then there was no effective occupation as no sovereignty had been exercised.[160] Lastly, there had to be some intent to act as sovereign, an *animus possidendii*.[161] It was also required that the activities of the state be referable to it and not unauthorized natural persons.[162]

Today, it is conceivable that the acquisition of new territory through occupation is nigh impossible given that little to no *terra nullius* land remains on this planet. However, that is not to say that occupation is irrelevant to modern international law. For example, for the purposes of resolving a current territorial dispute, it may be necessary to look back in time to see whether title was, in fact, validly acquired through effective occupation in the first place, for the reason of *nemo dat quod non habet* – none may pass better title than they have.

4.6.5.4 Prescription

Although there has always been a school of thought that questioned whether acquisitive prescription even constitutes a mode of acquisition,[163] it had generally been accepted that territory could be acquired through prescription as a matter of practice.[164] Acquisitive prescription involved the transfer of territory to an acquiring state through open possession by continuous and undisturbed acts of sovereignty over a prolonged period of time, adverse to the original state.[165] No concrete rules existed that set

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[160] Jennings and Watts, ibid., 688–9.

[161] Brownlie above note 2, 134–5.

[162] Humphrey Waldock (ed.), *Brierly's Law of Nations: An Introduction to the Law of Peace* (Oxford: Clarendon Press, 1963, 6th edn), 163.

[163] For example, in his Separate Opinion delivered in the *Land, Island and Maritime Frontier* case, Judge Torres Bernandez referred to acquisitive prescription as 'a highly controversial concept which, for my part, I have the greatest difficulty in accepting as an established institute of international law': [1992] ICJR 629, 678. A similar position was adopted by Judge Moreno Quintana in his Dissenting Opinion in *Right of Passage over Indian Territory* (*Portugal v India*) (Merits) [1960] ICJ Rep 6, 88. Also see generally A.W. Heffter, *Le Droit international de l'Europe* (Berlin: H.W. Müller; Paris: A. Cottilon 1883, 4th edn, by Geffcken) s. 12.

[164] See generally D.H.N. Johnson, 'Acquisitive Prescription in International Law' (1950) 27 *British Yearbook of International Law* 332; Jennings and Watts, above note 13, 706.

[165] The definition given by Johnson is 'the means by which, under international law, legal recognition is given to the right of a state to exercise sovereignty over land or sea territory in cases where that state has, in fact, exercised its authority in a continuous, uninterrupted and peaceful manner over the area concerned for a sufficient period of time, provided that all other interested and affected states . . . have acquiesced in this exercise of authority': Johnson, ibid., 353.

out a minimum length of time or requisite acts of sovereignty in order to have successfully acquired title by prescription. Such matters were dictated by the individual circumstances of each case.[166] It is important to note that such definitions of acquisitive prescription, as with occupation, which emphasizes the passage of time, are now outdated. What is more important is the establishment of effective control.[167]

The best example of title founded by prescription can be found in the *Island of Palmas* case.[168] In this case, Judge Huber found that even if it were accepted that, as the United States claimed, Spain had title to the island by discovery, such title did not prevail in the face of a 'continuous and peaceful display of sovereignty'.[169] In this case it was required that there exist acts attributable only to sovereignty, and the will to act as sovereign and, furthermore, acquiescence on the part of the original sovereign.

4.6.5.5 Subjugation

Lastly, subjugation was the acquisition of territory by military force, followed by annexation.[170] While this mode of acquisition was traditionally a predominant feature of the acquisition of territory by states and empires, the use of force for the purpose of acquisition has, for some time, been unlawful in international law.[171] Accordingly, the purported annexation of Kuwait by Iraq in 1990 was invalid, as it was acquired by unlawful force.[172] The principle of inter-temporal law subjugation may still be relevant, however, in determining title in the context of the law as it stood at the time of the relevant acts.[173]

Of course, use of force is not unlawful if exercised in self-defence.[174] This

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166 Jennings and Watts, above note 13, 698.

167 See 4.6.6.3 for a discussion of effective occupation and administration.

168 Though it is important to note that the decision was not expressly decided on the basis of prescription or any of the former modes of occupation.

169 *Island of Palmas* case, above note 17, 840.

170 See generally Sharon Korman, *The Right of Conquest: Acquisition of Territory by Force in International Law and Practice* (Oxford: Clarendon Press, 1996); Shaw, above note 56, 500–502.

171 Charter of the United Nations, above note 14, Art. 2(4) stipulates that Member States must refrain from the threat or use of force against the territorial integrity or political independence of any state. See also Article 5(3) of the Consensus Definition of Aggression adopted in 1974 by UN General Assembly, and Article 52 of the Vienna Convention on the Law of Treaties 1969.

172 E. Lauterpacht, C.J. Greenwood, M. Weller and D. Bethlehem (eds) *The Kuwait Crisis – Basic Documents* (Cambridge, UK: Grotius, 1991), 90.

173 See section 4.6.6.2 for a discussion of inter-temporal law.

174 See Charter of the United Nations, above note 14, Art. 51; and Chapter 8.

raised the question of whether territory could have been validly acquired by annexation following the use of force in self-defence – for example, if, in response to an act of aggression, a state acted in self-defence and in doing so found it necessary to occupy part of the territory of an aggressor. The vast weight of authority, however, suggests doubt that such an annexation would ever have been valid in today's context.[175]

4.6.6 Departure from the Traditional Modes of Acquisition – Guiding Principles

As noted above, in modern international law, such neat doctrinal categories are difficult to apply and are rarely done so by tribunals in determining a territorial dispute. They serve, rather, as a broad framework from which arise many complex and sometimes overlapping principles. These guiding principles have their roots in the former modes of acquisition, but are also founded in the underlying concepts that are fundamental to the international order, such as the need for territorial stability in international relations, preventing state rights from arising from illegal acts, ideals of international justice and equity, political reality and the need for certainty, and the growing spheres of influence of human rights and the right to self-determination.[176]

4.6.6.1 Relativity of title

In making a territorial claim, a state must demonstrate two elements: the intention and will to exercise sovereignty, and the manifestation of state activity.[177]

The manifestation of state activity is relative in two ways. First, title is relative to the claims made by other parties. There is no minimum threshold level of state activity. It must simply be shown that one state's claim

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[175] See Shaw, above note 56, 501. See also D. P. O'Connell, *International Law* (1965), 497; Jennings and Watts, above note 13, 702–5, Jennings above note 121, 55–62; cf. Stephen M. Schwebel, 'What Weight to Conquest?' (1970) 64 *American Journal of International Law* 344.

[176] Martin Griffiths, 'Self Determination, International Society and World Order' (2003) 3 *Macquarie Law Journal* 29; W. Michael Reisman, 'Sovereignty and Human Rights in Contemporary International Law' (1990) 84 *American Journal of International Law* 866; Thomas Fleier-Gerster and Michael A. Meyer, 'New Developments in Humanitarian Law: A Challenge to the Concept of Sovereignty' (1985) 34 *International and Comparative Law Quarterly* 267; Rupert Emerson, 'Self-Determination' (1971) 65 *American Journal of International Law* 459.

[177] *Island of Palmas* case, above note 17; *Legal Status of Eastern Greenland*, above note 150.

is stronger than that of another.[178] Secondly, the type of territory is relevant to determining the kind of effective control required. For example, regarding uninhabited and remote territory, 'very little in the way of actual exercise of sovereign rights might be sufficient in the absence of competing claim'.[179]

4.6.6.2 Inter-temporal law and critical dates

Judge Huber, in the *Island of Palmas* case, stated that the principle of inter-temporal law requires that '[a] juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time such a dispute in regard of it arises or falls to be settled'.[180] It is a relatively well-established principle of law, and is tied to concepts of stability and certainty.

However, in many cases there will be a so-called critical date: the period when 'the material facts of a dispute are said to have occurred . . . [and] after which the actions of the parties to a dispute can no longer affect the issue'.[181] For example, if the territorial dispute centres upon an alleged cession by treaty, the date of the treaty may be the critical date for that is the moment at which the rights of the states have crystallized. Critical dates are particularly important in the context of *uti possidetis* whereby a new state will inherit the boundaries of its predecessor.[182] In such a situation the moment of independence is normally the critical date, though this does not preclude the possibility that some situation or act had crystallized state rights earlier. Of course, some cases may have multiple dates of importance, and in some cases there may be no critical date at all.[183] The importance of the concept of a critical date depends on the circumstances, and it is open to a tribunal to relegate little weight to it, as was done in the *Argentine-Chile Frontier* case[184] and *Frontier Dispute* case.[185]

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178 *Minquiers and Ecrehos* case, above note 150; Clipperton Island Arbitration (1930) 26 *American Journal of International Law* 390, 394; *Legal Status of Eastern Greenland*, above note 150, 45–6.

179 *Legal Status of Eastern Greenland*, above note 150.

180 *Island of Palmas* case, above note 17, 845.

181 L.F.E. Goldie, 'The Critical Date' (1963) 12 *International and Comparative Law Quarterly* 1251, 1251.

182 *Case Concerning the Frontier Dispute* (*Burkina Faso/Mali*), above note 119. The *uti possidetis* principle is discussed below at section 4.9.2.

183 Shaw, above note 121, xxii.

184 *Argentine–Chile Frontier* case (*Argentina v Chile*) (1969) 38 ILR 20.

185 *Frontier Dispute* (*Burkina Faso and Republic of Mali*), above note 119.

4.6.6.3 Continued and effective occupation and administration

A vital element common to all modes of acquisition, aside from cession and accretion, is the effective occupation and administration of territory. As put by Judge Huber in the *Island of Palmas* case, 'the actual continuous and peaceful display of State functions is in case of dispute the sound and natural criterion of territorial sovereignty'.[186] The principle owes its importance in the area of acquisition of territory to the nature of the international system and the need for stability. In a system of law horizontally structured with no overarching authority with the power of compulsory jurisdiction, greater emphasis must be given to concrete manifestations of possession of territory, rather than upon abstract rights of possession, in order to substantiate claims.[187]

The law in this area was developed by three pivotal cases. In the *Island of Palmas* case,[188] Judge Huber's determination in favour of the Netherlands was decided on the basis of that state's peaceful and continuous displays of state authority over the island. The subsequent *Clipperton Island* arbitration[189] and the *Eastern Greenland* case[190] similarly used the criterion of continued and effective occupation and administration as a central criterion of territorial sovereignty.

4.6.6.4 Changing values in the international community and the principle of stability

International law has always been caught between competing needs to move with changing political realities and social norms, and to uphold a sense of stability and certainty in international relations. This is even more apparent in the area of territorial sovereignty as territorial delineations are one of the most important anchors for stability in human communities. The strong emphasis on possession in occupation and prescription may be seen as a result of the need to recognize the realities of territorial situations and maintain border stability. And yet, as the international community gives increasing weight to concepts such as self-determination and human rights, accordingly international law is re-imagining the rela-

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186 *Island of Palmas* case, above note 17, 840.

187 As put by Judge Huber, 'International law, the structure of which is not based on any super-state organization, cannot be presumed to reduce a right such as territorial sovereignty, with which almost all international relations are bound up, to the category of an abstract right, without concrete manifestations': *Island of Palmas* case, above note 17, 839.

188 Ibid.

189 (1931) 2 RIAA 1105.

190 *Legal Status of Eastern Greenland*, above note 150.

tionship between people and their territory. For example, in *Cameroon v Nigeria* the ICJ noted that the territorial rights of the state consisted not only of its territorial integrity, but of considerations with regard to the killing of people and the serious risk of further harm to others, indicating a strong link between the interests of individuals and the territorial rights of the state.[191]

4.7 SCOPE OF TERRITORIAL SOVEREIGNTY

It is to state the obvious to say that sovereignty cannot be exercised over an area that does not comprise the territory of the state, and for that reason it is worth briefly looking at what constitutes a state's territory.

A state's territory first and foremost comprises its land, which includes its subsoil. It also includes its national (internal) waters and, if it is a coastal state, its territorial sea. Further, a state may possess limited rights to areas of water beyond the territorial sea. The United Nations Convention on the Law of the Sea (UNCLOS)[192] delineates the state's contiguous zone, exclusive economic zone and continental shelf, and what rights attach to each. A state's territory also includes its territorial airspace, which comprises the airspace above its territorial land, national waters and territorial sea, extending upwards towards outer space.[193] However, there is currently no international agreement on the point at which the legal regime of airspace ends and outer space begins. Any airspace not within a state's territorial limits is, like the high seas, a *res communis*.

Interestingly, the latter half of the twentieth century saw the emergence of special treaty regimes to protect the 'common heritage of mankind', a recognition that particular territorial areas should remain open to all humanity as a *res communis*, and should not be subject to the territorial claims of individual states. This principle was first articulated in the Outer Space Treaty, which recognizes 'the common interest of all mankind in the progress of the exploration and use of outer space for peaceful purposes'.[194] As a result, outer space and celestial bodies cannot be subject

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[191] *Cameroon v Nigeria* (Provisional Measures) [1996] ICJ Rep 13, [39], [42].

[192] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 14 November 1994) 450 UNTS 11.

[193] See generally Blewett Lee, 'Sovereignty of the Air' (1913) 7 *American Journal of International Law* 470.

[194] The Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (opened for signature 27 January 1966, entered into force 10 October 1967).

to any territorial sovereignty claims. In contrast, the Antarctic Treaty and subsequent agreements effectively 'froze' the territorial claims of states at the time it entered into force, such that sovereignty claims were not recognized, renounced or prejudiced.[195] With the issue of sovereignty suspended, Antarctica has become a scientific preserve with established freedom of scientific research.[196]

4.8 FUTURE DIRECTIONS IN TERRITORIAL SOVEREIGNTY

As the law governing territorial sovereignty, its acquisition and scope continue to evolve slowly in reflection of changing international community values, scholars have speculated on a move away from the dominant statist order. Notably, Allot proposes an international order in which sovereignty over territory no longer exists.[197] Similarly, Gottmann notes that the dominance of the territorially based view of the twentieth century appears to be simply one more stage in the evolution of international law, and the 'sovereign state, based on exclusive territorial jurisdiction, may have been the evolution's purpose from the sixteenth to the mid-twentieth century. By 1970 sovereignty has been by-passed, and a new fluidity has infiltrated the recently shaped map of multiple national states.'[198]

Recent developments in the areas of self-determination and human rights, the rise of non-territorial actors and the revival of natural law philosophy have prompted some conjecture on the possible demise of the territorially defined statist order.[199] This speculation

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Similarly, the Moon was declared to be 'the common heritage of mankind' in the Agreement Governing Activities of States on the Moon and Other Celestial Bodies (opened for signature 18 December 1979, entered into force 11 July 1984), Art. 1.

[195] Final Act of the Agreement between the Government of Australia and the Governments of Argentina, Chile, the French Republic, Japan, New Zealand, Norway, the Union of South Africa, the Union of the Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland and the United States of America concerning the Peaceful Uses of Antarctica ('Antarctic Treaty') (adopted 1 December 1959, entered into force 1961) [1961] ATS 12, Art. 4

[196] Ibid., Art. 2.

[197] Phillip Allott, *Eunomia: New Order for a New World* (Oxford: Oxford University Press, 1990).

[198] Gottmann, above note 138, 26–7.

[199] See generally John A. Agnew, *Globalization and Sovereignty* (Lanham, MD: Rowman and Littlefield, 2009); Christopher Rudolph, 'Sovereignty and Territorial Borders in a Global Age' (2005) 7 *International Studies Review* 1; Hans

has particular resonance in the context of the Charter of the United Nations which entrenches concepts of self-determination, the rights of individuals, and international social, economic and cultural cooperation.[200] Nonetheless, this trend against sovereignty – what Koskenniemi refers to as a 'reduction to purpose'[201] – can easily be overstated and there is little evidence to suggest that the importance of sovereignty, bound up as it is in the concept of controlled territory, has meaningfully diminished. To be sure, it has gone through change and been affected by the modernization of international law, but it remains the physical framework around which international law and relations are understood and practised.

4.9 PEOPLES AND SELF-DETERMINATION

The development of statehood, particularly in the second half of the twentieth century, is profoundly tied to the principle of self-determination, which has seen numerous colonized territories restored to statehood and self-control. It is hardly possible to talk now about the development of states and their role and status in the international legal regime without considering the concept of peoples and self-determination.

Self-determination has been defined as 'the right of cohesive national groups ("peoples") to choose for themselves a form of political organization and their relation to other groups'.[202] The United Nations General Assembly (UNGA) has stated that the right to self-determination gives 'peoples' the right to 'freely determine their political status and freely pursue their economic, social and cultural development'.[203]

While it is a right recognized as being a principle of customary law,[204] and accepted as being a right with *erga omnes* status,[205] the precise content of the rule and the circumstances in which it is to be applied are elusive. For example, there is a popular assumption that the exer-

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J. Morgenthau, 'The Problem of Sovereignty Reconsidered' (1948) 48 *Columbia Law Review* 341.

[200] Shaw, above note 121, 11.

[201] See Martti Koskenniemi, 'What Use for Sovereignty Today?' (2011) 1 *Asian Journal of International Law* 61, 68.

[202] Brownlie, above note 2, 580.

[203] Declaration on the Granting of Independence to Colonial Countries and People, GA Res. 1514(XV) UN GAOR, 15th sess., 947th plen. mtg, UN Doc. A/RES/1514 (1960) ('Declaration on the Granting of Independence').

[204] *Western Sahara* (Advisory Opinion) above note 36, 32.

[205] *East Timor* (*Portugal v Australia*) (Judgment) [1995] ICJ Rep 90, 102.

cise of the right to self-determination will always result in the right of a people to achieve independence. However, while the realization of self-determination may involve independence, it may also involve free association with an independent state or integration with an independent state.[206] Additionally, while for a long time it has been, both theoretically and in practice, confined to colonial situations, the break-up of Yugoslavia has indicated that the principle may be extended to other, non-colonial circumstances.

4.9.1 Development of the Principle of Self-determination

4.9.1.1 Self-determination up to the Second World War

The idea of self-determination is new. Some attribute the first recognition of its legal relevance to the American Declaration of Independence of 1776.[207] Others refer to the Bolshevik Revolution and Soviet treaties concluded in the period 1920 to 1921,[208] or even the French Revolution.[209] During the First World War, the notion of self-determination was actively pushed by President Wilson and implicitly included in his speech known as 'Wilson's Fourteen Points'.[210] However, he did not succeed in having the principle included in the League of Nations Covenant, and it was clearly not yet accepted as a legal principle.[211] Indeed, in the *Aaland Islands* case (heard before the first session of the League of Nations), both the report of the International Commission of Jurists[212] and the report of the Committee of

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[206] Principles which Should Guide Members in Determining whether or not an Obligation Exists to Transmit the Information Called for under Article 73e of the Charter, GA Res. 1541(XV) UN GAOR, 15th sess., 948th plen. mtg, Supp. No. 16, 29, UN Doc. A/RES/1541(1961), Principle VI ('Principles which should Guide Members'). *Erga omnes* refers to the procedural scope of application of the relevant rule (whether a right or obligation) being towards all (see Shaw, above note 56, 133–4).

[207] See, e.g., Karl Doehring, 'Self-Determination', in Bruno Simma (ed.), (2002, 2nd edn) Vol. 1, 50; Daniel Thürer and Thomas Burri, 'Self-determination', in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Heidelberg: Max-Planck-Institut, 2010), [1], online edition available at http://www.mpepil.com .

[208] See, e.g., Crawford, above note 10, 108; Brownlie, above note 2, 580; Cassese, above note 39, 60 [3.7.1].

[209] Ibid.

[210] President Wilson's Message to Congress, 8 January 1918 (Record Group 46, Records of the United States Senate, National Archives).

[211] Shaw, above note 56, 269; Thürer and Burri, above note 207.

[212] Report of Commission of Jurists (Larnaude, Huberm Struycken), LNOJ Sp. Supp. No. 3 (October 1920).

Rapporteurs[213] explicitly accepted that the principle of self-determination was a political concept but not a legal rule of international law.

The facts of that case concerned the question of whether at the time Finland did possess the relevant qualities of statehood and whether the Islanders might have a right to claim self-determination. As Crawford notes, it is important to qualify the findings of the reports by the League of Nations by considering the specific circumstances in which they were made. He points out that, under current international law, the principle of self-determination would not apply to cases such as the Aaland Islands as it is not applicable to separate minorities within a state.[214] In addition, both reports specifically accepted the possibility that where territories are misgoverned to the point that they are effectively separated from the ruling state, the principle may apply.[215] The report of the Rapporteurs also pointed out that the population of the islands did not consist of a 'people', as opposed to the population of Finland, who formed a distinct 'people'. Even if Finland had not been separate from the Russian Empire before 1917 (as the report found it had), its secession would have been acceptable.[216] Therefore, while the reports expressly held that self-determination was not at the time a rule of international law, they did presage its post-Second World War development as a principle of international law. Interestingly, the report of the Rapporteurs (which was adopted) found that, although Finnish sovereignty over the Islands was established, some minority guarantees were recommended,[217] further demonstrating the political relevance of self-determination at the time.[218]

The principle of self-determination was next invoked during the Second World War,[219] and declared as a right belonging to all people as one of the eight points in the Atlantic Charter – an agreement made in 1941 between British Prime Minister Winston Churchill and United States President Franklin D. Roosevelt. The Atlantic Charter was influential on the United Nations Conference on International Organizations which was held in San Francisco between 25 April and 26 June 1945 ('San Francisco Conference'). This was a convention of 50 delegates which finalized the

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213 Report of the Committee of Rapporteurs (Beyens, Calonder, Elkens), 16 April 1921: LN Council Doct. B7/2I/68/106 [VII].

214 Crawford, above note 10, 111.

215 Ibid.

216 Ibid.

217 Resolution of 24 June 1921, LNOJ Sp. Supp. No. 5, 24; Convention relating to the Status of the Aaland Islands, 20 October 1921, 9 LNTS 212.

218 Crawford, above note 10, 111.

219 Shaw, above note 56, 270; Thürer and Burri, above note 207.

creation of the UN Charter, and influenced the incorporation of the principle of self-determination into the Charter.[220]

4.9.1.2 The UN Charter and Resolutions

The UN Charter uses the term 'self-determination' twice – in Articles 1(2) and 55. Article 1(2) refers to the need to respect the principle of self-determination '[t]o develop friendly relations among states'.[221] Article 55 states the conditions that the UN will promote in order to achieve 'the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples'.[222] In addition, Chapters XI (dealing with non-self-governing territories) and XII (dealing with trusteeship systems) implicitly refer to the principle. Chapter XI concerns the process of decolonization, and encourages all Member States 'which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government'[223] to promote the interests of the inhabitants to achieve self-government.[224] Chapter XII created the International Trusteeship system, by which Trust Territories were placed under supervision by individual agreements with the states administering them.[225]

Again, the objective of the system was to promote self-government and independence of the territories, amongst other things.[226] There were three categories of territory which could be placed under the system:

(a) territories held under mandate at the time;
(b) territories which may be detached from enemy states as a result of the Second World War; and
(c) territories voluntarily placed under the system by states responsible for their administration.[227]

Self-determination can mean two things: first, 'the sovereign equality of existing States, and in particular the right of the people of a State to

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220 Thürer and Burri, above note 207.
221 Charter of the United Nations, above note 14, Art. 1(2).
222 Ibid., Art. 55.
223 Ibid., Art. 73.
224 Ibid., Art. 73.
225 Ibid., Art. 75.
226 Ibid., Art. 76.
227 Ibid., Art. 77.

choose its own form of government without external intervention';[228] and, secondly, 'the right of a specific territory (or more correctly its 'people') to choose its own form of government irrespective of the wishes of the rest of the state of which that territory is a part'.[229] Crawford suggests that the explicit references to self-determination in Articles 1(2) and 55 most likely refer to the first of these meanings, while the implicit references in Chapters XI and XII appear to refer to the second meaning.

Several UN General Assembly resolutions have interpreted these sections and developed the status of the principle of self-determination. The 1960 Declaration of Granting Independence to Colonial Countries and Peoples states that all people have a right to self-determination, and that '[i]mmediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom'.[230] Brownlie argues that this declaration is not a 'recommendation' but rather an authoritative interpretation of the Charter.[231]

The 1961 Principles which should Guide Members in Determining whether or not an Obligation Exists to Transmit the Information Called for under Article 73e of the Charter,[232] as its title suggests, details a list of principles which were to guide members in deciding whether certain territories qualified as territories to which Chapter XI of the UN Charter applied. It also explicitly states that a 'Non-Self-Governing Territory can be said to have reached a full measure of self-government' where one of three circumstances (referred to above) exists: (i) independence, (ii) free association with an independent State, or (iii) integration with an independent state.[233] These three circumstances were confirmed as applying in general to self-determination in the 1970 Declaration on Principles of International Law,[234] which pro-

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[228] Crawford, above note 10, 114.

[229] Ibid.

[230] GA Res. 1514(XV) UN GAOR, 15th sess., 947th plen. mtg, UN Doc. A/RES/1514 (1960).

[231] Brownlie, above note 2, 581.

[232] GA Res. 1541(XV) UN GAOR, 15th sess., 948th plen. mtg, Supp. No. 16, 29, UN Doc. A/RES/1541(1961).

[233] Principles which should Guide Members, ibid.

[234] GA Res. 2625(XXV) UN GAOR, 25th sess., 1883rd plen. mtg, UN Doc. A/RES/2625 (1970) ('Declaration on Principles of International Law').

vides the most detailed and authoritative articulation of the principle of self-determination.

The 1970 Declaration restates the right of self-determination and reaffirms the earlier resolutions that '[e]very state has a duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples'.[235] It goes on to state that every state has a duty to 'refrain from forcible action which deprives peoples referred to above in the elaboration of the present principle of the right to self-determination and freedom and independence'.[236] It also makes clear that nothing in the preceding paragraphs should be interpreted as 'authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states'.[237]

The principle of self-determination, as reaffirmed in the 1966 Declaration of Granting Independence[238] was also adopted in the identical Article 1 of the International Covenant on Civil and Political Rights[239] and the International Covenant on Economic, Social and Cultural Rights.[240] Inclusion in both of these covenants further bolstered the fundamental human right nature of the principle of self-determination,[241] particularly once the Covenants came into force in 1976, thereby binding parties that were signatory to them.[242] Indeed, inclusion of the principle of self-determination in the covenants created a new and independent legal basis for that right under international law.[243] Further, these multilateral treaties were created by UN organs and impose binding obligations between all parties, providing important and authoritative interpretations of the Charter.[244]

4.9.2 Decolonization and *Uti Possidetis*

Self-determination has traditionally been confined to the decolonization process. *Uti possidetis juris* expresses the principle that colonial boundaries

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235 Declaration on Principles of International Law, ibid.
236 Ibid.
237 Ibid.
238 Declaration of Granting Independence, above note 230.
239 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976), 999 UNTS 171.
240 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 November 1976) 993 UNTS 3.
241 Thürer and Burri, above note 207.
242 Doehring, above note 207, 53.
243 Ibid., 53.
244 Ibid., 53.