ANNEX TO

Amicus Curiae Observations of Prof. Laurie Blank, Dr. Matthijs de Blois, Prof. Geoffrey Corn, Dr. Daphné Richemond-Barak, Prof. Gregory Rose, Prof. Robbie Sabel, Prof. Gil Troy and Mr. Andrew Tucker

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Issues, Negotiations, Results

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CHAPTER FOUR

The International Criminal Court and The Security Council: Articles 13(b) and 16

Lionel Yee

I. Introduction

The relationship between the International Criminal Court and the Security Council of the United Nations and their respective roles are important issues raised during the preparatory stages as well as at the Rome Conference. The purpose of this chapter is to trace these developments, to highlight the various views and positions, and to indicate the final results reached in the Statute.

The Draft Statute prepared by the International Law Commission envisaged in its draft Article 23 three specific roles for the Security Council in the Court's regime[1]: (i) the Court would not be able to deal with complaints of or directly related to acts of aggression unless there had been a prior determination by the Council that the State in question had committed the act of aggression which was the subject matter of the complaint (paragraph 2); (ii) the Council could refer matters to the Court pursuant to chapter VII

[1] See Article 23, Draft Statute for an International Criminal Court prepared by the International Law Commission, Report of the International Law Commission on the Work of its Forty-sixth Session, United Nations General Assembly Official Records, Forty-ninth Session, Supplement No.10, A/49/10 (1994) [hereinafter 1994 ILC Report] at 84-88. This Report contains in chapter II.B.I. the text of the Draft Statute for an International Criminal Court [hereinafter ILC Draft Statute]. The Commission also provided commentary on each Article [hereinafter ILC Commentary].

of the Charter of the United Nations (paragraph 1); and (iii) the Court could not, in the absence of approval by the Council, commence a prosecution if it arose out of a situation which was being dealt with by the Council under Chapter VII of the Charter (paragraph 3).

These three specific roles formed the basis of consideration during the subsequent negotiations in the Ad Hoc and Preparatory Committees and at the Conference. This chapter will discuss the issues involved during these negotiations.

II. Role of the Security Council with Respect to the Crime of Aggression[2]

The suggestion by the International Law Commission that prior to prosecution, the Security Council first determines that the State in question has committed aggression in circumstances involving the crime of aggression was fraught with difficulty in the negotiations that took place in the Preparatory Committee.[3] Views were divided between those supporting a role for the Council in the light of its responsibilities under the United Nations Charter, and those opposing the politicization of the judicial regime if the Council's approval were made a pre-condition for the exercise of jurisdiction.[4] Some pointed out that this could, in practice, also mean that prosecutions for aggression could never be undertaken against the permanent members of the Council because of their power of veto over any non-procedural decisions.[5]

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[2] The negotiating history of the crime of aggression is covered in Chapter Two, Section II, *supra.*

[3] See Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume I (Proceedings of the Preparatory Committee during March-April and August 1996) United Nations General Assembly Official Records, Fifty-first Session, Supplement No. 22, A/51/22 (1996) [hereinafter 1996 PrepCom Report Vol. I], at paras. 70-73 and 137-139.

[4] The views expressed by delegations on these issues are contained in 1996 PrepCom Report, Vol. 1, at 30-34.

[5] See Article 27(3)of the Charter of the United Nations, which provides that decisions of the Security Council on all other matters (i.e., non-procedural matters) "shall be made by an affirmative vote of nine members including the concurring votes of the permanent members". According to the established practice of the Security Council, "concur-

The matter has now been put on hold in view of the fact that the Rome Statute has included the crime of aggression within the jurisdiction of the Court,[6] but has stipulated that the Court will exercise jurisdiction over such a crime only when the Statute has been amended to include a definition of aggression and conditions under which the Court shall exercise jurisdiction.[7] The Council's role with respect to the crime of aggression remains an issue to be resolved and this fact is alluded to by an express requirement that the provision adopted must be "consistent with the relevant provisions of the Charter of the United Nations".[8] This formulation refers, it is understood, to Article 39 of the United Nations Charter pursuant to which the "Security Council shall determine the existence of any . . . act of aggression . . .". The mandatory language of Article 39 of the Charter seems to indicate that a primary role must be given to the Council to determine the existence of aggression on the part of a State as a pre-condition to the institution of criminal proceedings against individuals by the Court.[9]

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ring votes of the permanent members" means affirmative or negative votes. An abstention is no bar to adoption of decisions. See *Repertory of Practice of United Nations Organs,* Vol. II, at 82-83.

[6] Article 5(1)(d), Rome Statute of the International Criminal Court adopted and opened for signature by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, A/CONF.183/9* and Corrections to the Rome Statute of the International Criminal Court, C.N. 577, 1998 Treaties-8 (Annex) [hereinafter Rome Statute].

[7] Article 5(2), Rome Statute. Chapter Two, *supra,* provides a detailed account of the legislative history of Articles 5, 6 and 7 of the Statute.

[8] Article 39 of the Charter of the United Nations provides that the Security Council "shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." Article 24 (1) provides that in order to ensure prompt and effective action by the United Nations, "its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf."

[9] It could be argued that the word "consistency" used in Article 5(2) of the Rome Statute simply means ensuring that the Court does not make a finding which contradicts a determination, if any, made by the Council on the existence or non-existence of an act of aggression by a State. See Lionel Yee Woon Chin, "Not just a War Crime Court: the Penal Regime Established by the Rome Statute of the International Criminal Court", (1998) 10 *Singapore Academy of Law Journal* 321, Vol. 2, 331 (1998).

III. Referral of Situations to the Court by the Security Council

The first role envisaged by the International Law Commission for the Security Council is connected with the so-called trigger mechanisms of the Court. The trigger mechanisms in the Rome Statute are set out in Article 13, which specifies[10] the entities empowered to initiate proceedings before the Court.

Article 13(b) provides that the Court may exercise its jurisdiction with respect to a crime referred to in Article 5 of the Statute if "a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations". During the preparatory process, delegations supporting the inclusion of the Security Council among those entities having the power to initiate proceedings before the Court pointed to the fact that this would remove the need for the creation of ad hoc tribunals in the future, as had been done in the case of both the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR)[11].

Some delegations were, however, opposed to giving the Council any power to initiate proceedings. The grounds for objection included the argument that this would subject the functioning of the Court to the decisions of a political body and therefore undermine the Court's indepen-

[10] See Article 13, Rome Statute.

[11] Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991, established by the Security Council acting under Chapter VII of the United Nations Charter, May 25, 1993, Security Council Resolution 827(1993), United Nations Security Council Official Records, Forty-eighth Session, 3217th meeting, S/RES/827 (1993), reprinted in 32 International Legal Materials (hereinafter I.L.M.) 1203 (1993). Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States, between 1 January 1994 and 31 December 1994, established by the Security Council acting under Chapter VII of the United Nations Charter, 8 November 1994, Security Council Resolution 955 (1994), United Nations Security Council Official Records, Forty-ninth Session, 3453rd meeting, S/RES/955 (1994), reprinted in 33 I.L.M. 1598 (1994).

dence and credibility. Some felt that such a provision was inequitable in that this specific "trigger" would only be used against States *other* than the permanent members of the Council since the latter could use their power of veto to prevent referrals which impinged on their interests.[12] Objections were also raised on the basis that the Council had no legal competence under the Charter to refer matters for criminal prosecution by an international tribunal. Such objections must, however, now be considered in the light of the 1995 decision of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in the *Tadić* case[13] which upheld the validity of the creation by the Security Council of the Tribunal pursuant to its powers under Chapter VII of the Charter (under Article 41 in particular).

At the Rome Conference, a clear majority of delegations supported the power of the Security Council to initiate proceedings of the Court. Article 13(b) of the Statute thereby acknowledges the enforcement powers of the Council acting under Chapter VII of the Charter of the United Nations, to refer a situation to the Prosecutor in which one or more of crimes falling with jurisdiction of the Court appears to have been committed. These enforcement powers of the Security Council bind all Members of the United Nations.

Among those delegations supporting referrals by the Security Council, there was a division as to whether the Council should refer "matters", "cases" or "situations". Many felt that the Council should only be empowered to refer a general matter or situation rather than a specific case to the Court in order to preserve the Court's independence in the exercise of its jurisdiction. On this point, the bringing of individual prosecutions would instead be a matter within the discretion of the Court based on investigations which it had carried out pursuant to the referral.[14] On the other hand,

[12] The assumption of these delegations was presumably that because of the veto powers, the permanent members of the Security Council are unlikely to agree to refer to the Court a situation involving themselves. This view was expressed by some delegations throughout the negotiating stages. See, for instance, 1995 PrepCom Report, at 27; 1996 PrepCom Report, Vol. 1, at 30-33.

[13] The Prosecutor v. Duško Tadić, Opinion and Judgment, No. IT-94-1-T (Feb. 13, 1995), amended, No. IT-1-T (Sept. 1, 1995), amended, No. IT-94-1-T (Dec. 14,1995), Opinion and Judgement, No. IT-94-1-T (May 7, 1997), reported in 35 I.L.M. 32 (1996), at paras. 28-48, and 36 I.L.M. 908 (1997) 908 et seq.

[14] The debate on the power of the Council to refer matters to the Court is contained in Report of the Ad Hoc Committee on the Establishment of an International Criminal

States which favored the use of the term "case" argued that a referral by the Council should be put on par with referrals by other States, as was the case in the Draft Statute prepared by the International Law Commission.[15]

By the end of the preparatory negotiations, the possibility of referring "cases" had been rejected and the text which was submitted to the Diplomatic Conference contained only two options: the narrower concept of a "matter" and the wider one of a "situation".[16] As between these two terms, those who preferred "matter" did so on the basis of the need for some degree of specificity in the referral before the Court could assert jurisdiction, while those who preferred "situation" argued that the referral of a "matter" by the Council was still too specific for the independent functioning of the Court.

There were also differences of view as to whether a referral by the Council should be subject to a less demanding jurisdictional threshold than that for referrals from other entities. The PrepCom Draft Statute envisaged that, unlike the other cases, a referral by the Council would clothe the Court with jurisdiction irrespective of whether some or all of the relevant States were party to the Statute or had accepted the jurisdiction of the Court with respect to the crime.[17] Supporters of the lower threshold pointed out that this was consistent with the mandatory jurisdictional regime for the two existing ad hoc International Criminal Tribunals. It was observed, on the other hand, that this could run counter to the principle of complementarity whereby national States retained primary responsibility to deal with crimes within the jurisdiction of the Court.

There were also suggestions that the power of referral should be widened both in terms of: (i) enabling the Council to refer matters pur-

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Court, United Nations General Assembly Official Records, Fiftieth Session, Supplement No. 22, A/50/22 [hereinafter 1995 Ad Hoc Committee Report] at paras. 120-121, and 1996 PrepCom Report, Vol. I, at 132-136 (1996).

[15] See Article 25(1) and (2), ILC Draft Statute. It should however be noted that the Rome Statute uses the word "situation" in referral to the Court, whether by the Security Council or by a State Party. See Articles 13 and 14(1), Rome Statute.

[16] Article 10(1), Draft Statute for the International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court. Addendum, Part One. A/CONF. 183/2/Add. 1 (4 April 1998) at 2-167 [hereinafter PrepCom Draft Statute].

[17] See Article 23(1), ILC Draft Statute which provided for an opt-in regime for acceptance by states parties of the Court's jurisdiction over all crimes other than genocide. For these crimes, the Court's exercise of jurisdiction would be conditioned upon its jurisdiction being accepted by the custodial state and the territorial state. See also Article 21(1), PrepCom Draft Statute.

suant to Chapter VI of the Charter as well, that is, when there is, as yet, no threat to or breach of the peace or an act of aggression[18]; and (ii) giving the General Assembly as well as the Council the same *locus standi* to initiate proceedings. This latter proposal was however dropped by the end of the preparatory process,[19] since there was no legal advantage to this approach. A General Assembly resolution would entail no more enforcement powers than a referral by a State.

Supplementing the draft provisions on referrals by the Council were also some textual proposals requiring that such referral be accompanied by all supporting documents available to the Council.[20]

Article 13(b), the product of the Rome Conference negotiations, allows the Council the power to refer a "situation" instead of a "matter" to the Court. The power is pursuant only to Chapter VII (and not Chapter VI) of the Charter of the United Nations. No additional formal requirements are imposed, although it is possible that these might be addressed by the Rules of Procedure and Evidence.[21]

IV. Deferral of Proceedings by the Security Council

The third role of the Council — to stop ongoing or impending proceedings before the Court — had its origins in Article 23, paragraph 3 of the ILC Draft Statute. The draft text prohibited the commencement of a prosecution if it arose from a "situation" which was being dealt with by the Council "as a threat to or breach of the peace or an act of aggression" under Chapter VII of the Charter, unless the Council permitted otherwise.

This issue proved to be one of the most controversial in the negotiations.[22] Supporters of the text pointed to the need to prevent the risk of interference by the Court in the Council's discharge of its primary

[18] See Article 10(3), PrepCom Draft Statute.

[19] It did not appear as an option in the PrepCom Draft Statute submitted to the Conference.

[20] See Article 10(2), PrepCom Draft Statute.

[21] Article 51 of the Rome Statute provides, *inter alia*, that the Rules of Procedure and Evidence shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties.

[22] The divergent positions on the key issues involved are contained in 1995 Ad Hoc Committee Report, at paras. 124-125 (1995) and 1996 PrepCom Report vol. 1, at paras. 140-144.

responsibility for the maintenance of international peace and security. This primary role had been accepted by all Member States under Articles 24(1) and 103 of the Charter. In addition, there were proposals to widen this prohibition to cover not only Chapter VII matters but all situations being dealt with by the Council.

However, a large number of delegations opposed Article 23(3) of the ILC draft on various grounds, including the interference in the independent functioning of the Court by the Council, which was regarded as a political organ. More importantly, the Court could, in effect, be deprived of jurisdiction by the mere placement of a situation on the agenda of the Council, where it could remain under consideration for a potentially indefinite period of time.

Some delegations were prepared to accept a role for the Council, especially where it was in fact concurrently taking action in respect of a situation being dealt with by the Court, but they felt that the formulation was too wide. There were also proposals that the Court should be able to act in the event that no action was taken by the Council within a reasonable time.[23]

The search for the compromise formulation coalesced around what eventually became known as the "Singapore compromise".[24] Under the ILC text, no prosecution may be commenced, unless the Security Council otherwise decides. This means that any permanent member of the Security Council can unilaterally use its veto power under Article 27 of the UN Charter to reject a proposal for commencing Court's proceedings and thus block the proceedings. The Singapore compromise proposed the opposite effect: proceedings of the Court may proceed, unless the Security Council takes a formal decision to stop the process. Since the adoption of a Security Council decision requires a minimum of nine affirmative votes in the Council, the Court's proceedings may only be stopped by a concerted effort of the Council members. Theoretically, not even all five permanent members joined together can block a Court's proceedings, so long as there are nine positive votes from the other ten Council members. Thus, pursuant to the Singapore formula, the "negative veto" given to the Council by the ILC text would be replaced by a "positive" arrangement where the Court could

[23] See PrepCom Draft Statute, Article 10(7), Option 2, para.3.

[24] It derived from a proposal by Singapore in the August 1996 session of the Preparatory Committee, see A/AC.249/WP.51.

exercise its jurisdiction unless it was directed not to do so by the Council. This formulation provided for a narrower role for the Council in general although its scope was broadened in two specific respects. Unlike the ILC draft, the suspension or prohibition would apply not only to the commencement of a prosecution, but to the commencement or *continuance* of an *investigation* or prosecution.

Proposals were made to further refine this arrangement. For example, a Canadian proposal added a time limit so that the Council's direction would have the effect of suspending or preventing proceedings before the Court for twelve months. The Council would therefore have to take another formal decision to renew the suspension or prohibition for further periods of 12 months each.[25]

No breakthroughs on this issue were reached by the end of the preparatory negotiations. The different views expressed were simply consolidated and presented as options to be considered by the Diplomatic Conference and these could be broadly classified into three groups: (i) those in favor of the approach taken in the ILC Draft Statute;[26] (ii) those in favor of a compromise pursuant to which the Council would have to take the initiative to prevent or stop proceedings;[27] and (iii) those which opposed giving the Council any role at all.[28]

At the Diplomatic Conference in Rome, further proposals were made in relation to the second approach where the onus lay upon the Council, and these centered around empowering the Court to take interim measures, e.g. to preserve evidence, during the period of suspension.[29] The proposed provisions for interim measures did not, however, find their way into the text of Article 16 of the Rome Statute. Article 16 as adopted is based upon the second approach.[30] Investigations or prosecutions can only be stopped or prevented if the Council adopts a resolution under Chapter VII

[25] See PrepCom Draft Statute, Article 10(7), option 2, para. 2.

[26] *Ibid.*, Article 10(7), option 1.

[27] *Ibid.*, Article 10(7), option 1.

[28] This group's view is indicated by a footnote attached to Article 10(7) of the PrepCom Draft Statute. See footnote 31 at 35, A/CONF.183/2/Add.1 (1998).

[29] See the proposals by Spain and Belgium contained in A/CONF.183/C.1/20 and Corr.1 and A/CONF.183/C.1/L.7.

[30] For measures that may be taken by the Pre-Trial Chamber, including measures to preserve evidence, see Article 56 of the Rome Statute, which is dealt with in Chapter Eight, Section II, *infra*.

of the Charter of the United Nations making a request to that effect. The suspension or prevention of such proceedings will also be limited to a renewable 12-month period.[31]

[31] The reference to the 12-month time limit might raise the possibility of a conflict if, for instance, a Council resolution requests an indefinite duration or a duration in excess of 12 months. In those circumstances, the primacy of UN Charter obligations would appear to require States Parties to give effect to decisions of the Security Council pursuant to Article 25 of the Charter over conflicting rights and obligations under the Statute. Article 103 of the Charter of the United Nations provides that, in the event of a conflict between the obligations of the Members of the Organization under the Charter and their obligations under any other international agreement, their obligations under the Charter prevail. While the Court, as a non-party to the Charter, would not be bound to refrain from proceeding after the expiry of the 12-month period, States Parties to the Statute might, depending on the terms of the Security Council resolution, be prevented by the provisions of the Charter from either triggering proceedings before the Court or rendering cooperation to the Court under the Statute.

THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT:

A COMMENTARY

VOLUME I

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Chapter 17.2

Referral and Deferral by the Security Council

Luigi Condorelli and Santiago Villalpando

I. Introduction

The creation of the ICC was inspired by the conviction that the prosecution of major international crimes constitutes a means to the maintenance of international peace and security. The ICC was thus conceived as a judicial organism closely related to the UN[1] and, in particular, to the UN organ having the mission of adopting the necessary measures to confront situations of threats to the peace, breaches of the peace, or acts of aggression, namely, the Security Council. As a consequence, the coordination between the judicial activity of the Court and the Security Council's primary responsibility under Article 24 of the UN Charter constituted a crucial issue in the *travaux préparatoires*. The Rome Statute acknowledges the fundamental role of the Security Council in the field by allowing it to intervene in the proceedings before the Court in two essential matters.

A first 'positive' intervention of the Security Council in the exercise of the ICC's jurisdiction is constituted by its power to refer to the Prosecutor situations in

[1] See Art. 2 of the Statute and Ch. 4.3, above.

which international crimes appear to have been committed (Article 13(b)). Through this provision, the Statute renders homage to the Security Council's decisive contribution in the *renaissance* of penal international law and situates the ICC on a continuum with the *ad hoc* international criminal tribunals for the former Yugoslavia and Rwanda which the Security Council established as part of this rebirth. By allowing the Security Council to 'trigger' the proceedings before the Court, the Statute puts at the Security Council's disposal a judicial instrument for the prosecution of international crimes, accessible in any and all future situations without the need to create new tribunals. The ICC is thus conceived of as a sort of '*ad hoc* permanent' international criminal tribunal.[2]

The Security Council is called to intervene in the exercise of the ICC's jurisdiction in a second, 'negative', way. By virtue of Article 16, this UN organ is entitled to defer investigations or prosecutions before the Court for a limited (though renewable) period of twelve months. This provision thus acknowledges the Security Council's 'primary responsibility for the maintenance of international peace and security',[3] allowing it to coordinate—even in terms of timing—the prosecution of international crimes with the other measures which it undertakes for the fulfilment of its mission.

The Court to be born from the Statute is thus made available to the Security Council acting under Chapter VII of the UN Charter. But it is far from being at its mercy. First, the Statute provides for other 'trigger mechanisms', including the possibility for the Prosecutor of the Court to initiate investigations *proprio motu*. Secondly, the exercise of the Security Council's powers under Articles 13(b) and 16 is submitted to a number of conditions and limitations, both arising from the UN Charter and the Statute, which are under the judicial control of the ICC itself. Thirdly, the rules concerning the functioning of the Court and characterizing it as an independent judiciary body respectful of the principles of due process of law also find full application in case of referral of a situation by the Security Council; moreover, the Security Council cannot in any way modify those rules.

In the following pages, we will deal successively with Article 13(b) (*sub* II) and Article 16 (*sub* III). We will study the source of the Security Council's powers to refer and defer situations, the conditions for the exercise of those powers, and the procedure to be followed before the Court.

In any case, however, it is important to keep in mind that the system set up by the 1998 Statute constitutes a partial, and maybe also a temporary, solution to the relationship between the judicial activity of the ICC and the action of the Security Council under Chapter VII. One of the biggest failures of the Rome Conference

[2] L. Condorelli, 'La Cour pénale internationale: Un pas de géant . . .', 103 *RGDIP* (1999) 17.
[3] Art. 24 of the UN Charter.

was its inability to lay down the conditions under which the Court shall exercise its jurisdiction with respect to the crime of aggression.[4] In examining this intricate issue, future Review Conferences may be tempted to reconsider the whole scheme of the coordination between the Court and the Security Council; perhaps more than any other in the Statute, this systematic arrangement thus remains under an invisible Damocletian sword.

II. Referral by the Security Council

Apart from Article 13(b), the Statute contains no specific provision detailing the mechanism of referral by the Security Council:[5] its regulation shall then be inferred from an interpretation of the Statute read as a whole and from the relevant provisions of the UN Charter.

A. The Source of the Security Council's Power of Referral

From the very beginning of the *travaux préparatoires*, it was understood that this provision would make available to the Security Council the jurisdictional mechanism created by the Statute, but that it would not add to (nor restrict) the Security Council's powers as defined in the UN Charter.[6] Accordingly, the final version of Article 13(b) simply provides for the possibility of referral to the Prosecutor by the Security Council 'acting under Chapter VII of the Charter of the United Nations'.[7]

[4] See Art. 5(2) of the Statute. This question was the subject-matter of Art. 23(2) of the ILC's Draft Statute for an International Criminal Court (*YILC* (1994) Vol. II, Part 2, at 43–44). Several options on this topic were submitted to the Rome Conference in the final Draft Statute proposed by the Preparatory Committee, see Draft Art. 10 in Report of the Preparatory Committee on the Establishment of an International Criminal Court, Addendum, UN Doc. A/CONF.183/2/Add.1 (14 April 1998) at 40–42 (hereinafter Report of the Preparatory Committee (14 April 1998)).

[5] The other two trigger mechanisms are enunciated in Art. 13, but then regulated in detail in other provisions: Art. 14 for the referral of a situation by a State Party, Art. 15 for the initiative *proprio motu* by the Prosecutor.

[6] *YILC* (1994) Vol. II, Part 2, at 44 (commentary to Art. 23 of the Draft Statute for an International Criminal Court). The commentary then specifies that in adopting this provision, 'the Commission is not to be understood as taking any position as to the extent of the powers of the Security Council under Chapter VII of the Charter of the United Nations or otherwise, or as to the situations in which it is proper that these powers should be exercised' (ibid.). See also the discussion summarized in Report of the Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/51/22 (13 September 1996) at paras. 129–131 (hereinafter Report of the Preparatory Committee (13 September 1996)).

[7] The reference to Chapter VII was kept between brackets in Art. 6 of the Draft Statute for the International Criminal Court (see Report of the Preparatory Committee (14 April 1998), *supra* note 4, at 38). The final decision by the Rome Conference implies the rejection of the proposals of those who wanted to extend the Security Council's referral authority to matters under Chapter VI of the UN Charter (see Report of the Preparatory Committee (13 September 1996), *supra* note 6, at para. 134).

The source of the authority for the Security Council to seize the Court is thus to be found in the Charter itself. It can be logically linked with its power to create *ad hoc* international criminal tribunals under Chapter VII.[8] One should apply, *mutatis mutandis*, the reasoning of the ICTY Appeals Chamber on the legality of the establishment of the Tribunal:[9] under Article 39 of the Charter, the Security Council is entitled to 'decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security', and the referral to the ICC would fall squarely within its powers under Article 41 as constituting a measure 'not involving the use of armed force'. This referral *per se* would not diminish the requisite independence of the Court[10] as far as the Security Council uses it as an instrument for the exercise of its own principal function without interfering with the subsequent judicial activity.[11]

B. Conditions for the Referral by the Security Council

The exercise of the power of referral by the Security Council is submitted to specific conditions, both arising from its competence under the UN Charter and from the inherent characteristics of a permanent international criminal court as established by the Statute.

1. General Conditions

Two substantial conditions arise directly from Article 39 of the Charter: (a) the Security Council can take action only if it determines, in the first place, the existence of a threat to the peace, breach of the peace, or act of aggression; and (b) the measures taken must pursue the objective of maintaining or restoring international peace and security. The Security Council exercises a wide discretionary power in determining the existence of such conditions;[12] the words of the ICC Statute seem to give some indications as to its possible decisions in the future. As to the first condition, the Preamble of the Statute proclaims that the crimes within the Court's jurisdiction 'threaten the peace, security and well-being of the world'.[13] This assertive declaration ought to be placed in the logic of the UN

[8] *Contra* this interpretation, see Explanation of Vote by Mr Dilip Lahiri, Head of the Delegation of India, on the Adoption of the Statute of the International Court, Rome Conference, 17 July 1998, in <http://www.un.org/icc/speeches/717ind.htm>, consulted on 9 November 1999.

[9] See ICTY, Ap. Ch., Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995, *Tadić*, IT-94-1-AR72, at paras. 28–39 (hereinafter ICTY, Ap. Ch., 2 October 1995, *Tadić*).

[10] This doubt was advanced by some delegations within the Preparatory Committee (see Report of the Preparatory Committee (13 September 1996), *supra* note 6, at para. 130).

[11] In the same manner as the Security Council can establish a subsidiary judicial organ in the exercise of its functions under the Charter (see ICTY, Ap. Ch., 2 October 1995, *Tadić*, *supra* note 9, at paras. 37–38). On the perplexities raised by Art. 16 of the ICC Statute, insofar as it implies an interference of the Security Council in the Court's judicial activity, see *infra* III.

[12] See ICTY, Ap. Ch., 2 October 1995, *Tadić*, *supra* note 9, at paras. 29, 31, and 39.

[13] Statute, Preamble, para. 3.

Charter's system in the field of maintenance of international peace and security. Certainly, in its determination of whether there exists a 'threat to the peace',[14] the Security Council will be guided by the gravity of the crimes committed, the impunity enjoyed by the crimes' perpetrators and the effectiveness or otherwise of national jurisdictions in the prosecution of these crimes, as suggested by the words and the rationale of the ICC Statute.[15] The consideration of these elements stems from a correct interpretation of the Charter[16] and is already reflected in the practice of the Security Council.[17] However, the Statute ought not to be interpreted as limiting in any way the Security Council's discretionary power to examine each specific situation and to label it under the categories described in Article 39, a power that remains subject to its political evaluation in each particular circumstance.

With regard to the second condition, the Security Council should decide that the referral to the Court is an appropriate measure to restore or maintain international

[14] The determination of whether there exists an 'act of aggression' under Art. 39 and the exact definition of this situation raise different problems not treated here and linked with the difficulties encountered by the Rome Conference in determining the jurisdiction *ratione materiae* of the Court and its exercise (see Art. 5(2) of the ICC Statute).

[15] While genocide, aggression, and crimes against humanity are inherently 'grave', war crimes which should be prosecuted under the Statute are especially those of a systematic or large-scale character (see Art. 8(1); see also Art. 17(1)(d)). From the clear words of the Preamble of the Statute, it seems that the goal of putting an end to the impunity of the perpetrators of such crimes is the main reason for the creation of the ICC (paras. 4, 5, and 9). The Statute also highlights the primary responsibility of national jurisdictions to prosecute such crimes and the complementary character of the ICC (see Preamble, paras. 4, 6, and 10 and Arts. 1 and 17).

[16] *Contra* Flavia Lattanzi, who considers that the Security Council should determine, in the first place (as a precondition for the exercise of its powers under Chapter VII), that there is a factual situation objectively identifiable that constitutes a threat to the peace, a breach of the peace, or an act of aggression, and only then determine whether one or more of the crimes provided for in Art. 5 have been committed. See F. Lattanzi, 'Compétence de la Cour pénale internationale et consentement des états', 103 *RGDIP* (1999) 440–441 (hereinafter 'Compétence de la Cour') and F. Lattanzi, 'The Rome Statute and State Sovereignty: ICC Competence, Jurisdictional Links, Trigger Mechanism', in F. Lattanzi and W. Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court*, Vol. I (1999) 62–63 (hereinafter 'The Rome Statute').

[17] The application of Chapter VII by the Security Council in case of grave international crimes that remain unpunished is patent in SC Res. 808 (1993) (on the desirability of establishing the ICTY): after having expressed 'its grave alarm at continuing reports of widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia', the Security Council determines 'that this situation constitutes a threat to international peace and security', it also declares its determination 'to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them' (see also SC Res. 827 (1993) establishing the International Tribunal); similarly, in SC Res. 955 (1994) (that establishes the ICTR), the Security Council expresses 'its grave concern at the reports indicating that genocide and other systematic, widespread and flagrant violations of international humanitarian law have been committed in Rwanda' and then determines that 'this situation continues to constitute a threat to international peace and security', it also expresses its determination 'to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them'. On the Security Council's practice under this aspect, see also ICTY, Ap. Ch., 2 October 1995, *Tadić*, *supra* note 9, at para. 30; J. A. Frowein, 'Article 39', in B. Simma (ed.), *The Charter of the United Nations: A Commentary* (1995) 610–612.

peace and security. This determination raises the classical question as to whether international justice can constitute a suitable means to achieve international peace. In principle, the answer is absolutely positive, as is demonstrated both by the practice of the Security Council[18] and by the conviction of the States Parties at the Rome Conference.[19] In practice, however, political motivations based on the specific situation at stake could bring the Security Council to decide not to seize the Court, even if it appears that crimes within its jurisdiction have been committed. Once again, the Security Council's discretionary power under Chapter VII remains untouched by the Statute.

According to Article 13(b), the Security Council could only refer '[a] situation in which one or more of such crimes [referred to in Article 5] appears to have been committed'.[20] This provision seems to impose a substantive condition on the Security Council's action, since it could only refer a 'situation' and not single cases. As was rightly pointed out, this limitation rather stems from the powers attributed to the Security Council under Chapter VII of the UN Charter, as it should address entire 'situations' and not be concerned with the destiny of individuals.[21]

Despite the almost unanimous consensus on this point, it could, however, be imagined that, in particular circumstances, the impunity of specific individuals would constitute *per se* a threat to the peace and that, in the exercise of its powers under the UN Charter, the Security Council could refer their case to the Court. In other words, the single case of an individual could sometimes have an impact on an entire situation addressed by the Security Council.[22] For instance, national

[18] See SC Res. 827 (1993) and 955 (1994), respectively, on the establishment of the ICTY and the ICTR.

[19] In the Preamble to the Statute, the States affirm their determination to put an end to impunity for the perpetrators and thus to contribute to the prevention of such grave crimes that threaten the peace, security, and well-being of the world (paras. 3 and 6).

[20] The draft provision proposed by the ILC (Art. 23(1)) mentioned the 'referral of a matter' (*YILC* (1994) Vol. II, Part 2, at 43). Although some delegations considered the word 'situation' too broad (see Report of the Preparatory Committee (13 September 1996), *supra* note 6, at para. 136), this was the expression finally adopted by the Preparatory Committee (in Art. 6 of the Draft Statute for the International Criminal Court, Report of the Preparatory Committee (14 April 1998), *supra* note 4, at 38) and in the Rome Statute.

[21] See, for instance, Lattanzi, 'Compétence de la Cour', *supra* note 16, at 438–439 (see also Lattanzi, 'The Rome Statute', *supra* note 16, at 60–61); S. Zappalà, 'Il procuratore della Corte penale internazionale: luci e ombre', 82 *RDI* (1999) 55–56. The word 'situation' is employed in Art. 40 of the UN Charter. In the commentary to Art. 23 of its Draft Statute of 1994, the ILC 'understood that the Security Council would not normally refer to the court a "case" in the sense of an allegation against individuals. Article 23, paragraph 1, envisages that the Council would refer to the court a "matter", that is to say, a situation to which Chapter VII of the Charter applies' (*YILC* (1994) Vol. II, Part 2, at 44). In the same perspective, within the Preparatory Committee, some delegations 'held the view that the Council, while having the power to refer a situation to the Court, should not be able to refer an individual to the Court' (Report of the Preparatory Committee (13 September 1996), *supra* note 6, at para. 136).

[22] *Contra*: Lattanzi, 'Compétence de la Cour', *supra* note 16, at 439 (see also Lattanzi, 'The Rome Statute', *supra* note 16, at 61); Zappalà, *supra* note 21, at 55–56.

judicial authorities, by deciding not to prosecute a key leader of the State or of an organization suspected of having committed international crimes, or by initiating a patently partial trial against him, might cause grave instability in the State or in the region concerned: the Security Council could decide that only the intervention of the ICC could constitute an appropriate measure to restore or maintain international peace and security.[23] This action by the Security Council would not contravene the provisions of Chapter VII of the Charter. It would not contravene the Statute either, since Article 13(b) does not dismiss (and actually expressly contemplates) the possibility that the Security Council may refer to the ICC a situation in which 'one or more' crimes are committed, even by one single individual. Furthermore, this would not interfere with the independent exercise by the Court of its judicial activity, since the Prosecutor could decide that there is no reasonable basis to proceed under the Statute and his decision could be submitted to review by the Pre-Trial Chamber;[24] conversely, the Prosecutor could decide, with the authorization of the Pre-Trial Chamber, to investigate and prosecute other individuals for other crimes ignored by the Security Council. In addition, the trial would in any case proceed under the guarantees of independence and impartiality provided for by the Statute.

In general, the Security Council enjoys a wide discretion, based on its powers under Chapter VII of the Charter, in determining and delimiting the 'situation' to be referred to the Court. Thus, the Security Council could refer in broad terms to a situation ongoing in a particular geographical zone, or it could identify more specifically the crimes that appear to have been committed and their authors, as it could even refer the case of single individuals (in the situations considered in the previous paragraph). It shall be highlighted once again that this determination, though permitting the triggering of the proceedings before the Court, does not limit in any way the power of the Prosecutor (under the control of the Pre-Trial Chamber) to decide whether to proceed under the Statute on these grounds and its power to initiate an investigation on other related cases not envisaged by the Security Council. Moreover, in case of referral under Article 13(b), the exercise by the Security Council of its powers under Chapter VII is submitted to the control of legality of the jurisdictional organs of the ICC.[25]

From a formal point of view, referral by the Security Council could be expected to be accomplished through a *decision* taken in accordance with Article 41 of the UN

[23] Although unprecedented in practice, the hypothesis is far from being implausible. On many occasions, the prosecution (or lack of prosecution) of important political figures suspected of commission of international crimes has caused a situation that has (or could have) degenerated into a threat to the peace: one could recall the case of Ceauşescu in Romania in 1989, Pol Pot in Cambodia, Milošević in the Federal Republic of Yugoslavia (Serbia-Montenegro), or Pinochet facing the prospect of prosecution in Spain against the will of the government of Chile.

[24] See Art. 53 of the ICC Statute.

[25] See *infra*, in the following section, II.C.1.

Charter. However, nothing prevents the Security Council from simply *recommending* investigations and/or prosecutions by the Court: even under this hypothesis, however, by virtue of Article 13(b), the Security Council should imperatively act under Chapter VII of the Charter. In any case, the Security Council should make clear that it is exercising its powers under Article 13(b) of the ICC Statute; otherwise, the relevant resolution could be interpreted not as a referral but as simply providing the Prosecutor with information for the purposes of *proprio motu* investigations under Article 15(1).

2. Jurisdiction

In principle, the referral by the Security Council allows the Court to proceed within the limits of its jurisdiction as defined by the Statute.[26]

Accordingly, no specific exception is provided for in case of referral by the Security Council as regards jurisdiction *ratione materiae*. From Article 13, it follows unequivocally that the Security Council could refer a situation to the Prosecutor only when one or more crimes provided for in Article 5 appear to have been committed.

Nor is an exception recognized with respect to jurisdiction *ratione personae* (intended in the sense that only natural persons who were above the age of 18 at the time of the commission of a crime can be prosecuted by the Court). These limitations stem from the general principles of criminal law (and in fact they are provided for under Part 3)[27] and there is no reason for them to be ignored in case of referral by the Security Council.

On the contrary, preconditions *ratione loci* and *ratione personae* (intended in the sense of a limitation based on the nationality of the individual) to the exercise of the Court's jurisdiction, as provided for in Article 12(2), do not apply in case of referral by the Security Council. The binding powers of the Security Council upon UN Member States under Chapter VII allow the Court to proceed even if none of the States concerned has ratified the Statute or accepted its jurisdiction.

The issue of the Court's jurisdiction *ratione temporis* presents a number of loopholes that could be relevant in case of referral by the Security Council. Articles 11(1), 22(1), and 24(1), present a seemingly coherent system in which the ICC's jurisdiction is restricted to crimes committed after the entry into force of the Statute. Since these provisions are worded in absolute terms and appear to be

[26] In the words of the heading of Art. 13, the Court exercises its jurisdiction 'in accordance with the provisions of this Statute'. On the possibility for the Security Council to extend the ICC's jurisdiction, see, Ch. 15, above.

[27] See Arts. 25 and 26 of the ICC Statute.

related to the general principles of criminal law,[28] one could conclude that such a limitation is also binding in case of referral by the Security Council. However, this hasty assessment deserves closer analysis.

Articles 22 and 24 belong to Part 3 of the Statute, enunciating 'General Principles of Criminal Law'. These provisions are clearly inspired by the principle of non-retroactivity (also known as *nullum crimen sine lege*).[29] Accordingly, the purpose of these two provisions is not to regulate the temporal jurisdiction of the Court, but simply to prohibit the retrospective application of the criminal law. Under this rationale, both Article 22(1) and Article 24(1), exclude criminal responsibility 'under this Statute for conduct prior to the entry into force of the Statute'.[30] Such a statement appears to be perfectly justified only if it is limited—*as it is* in both provisions—[31] to the Statute itself, thus underlining that its provisions, being criminal law, cannot be applied retrospectively. On the contrary, the exclusion of criminal responsibility for conduct falling under the Court's jurisdiction *ratione materiae* and having taken place prior to the entry into force of the ICC Statute would not make any sense if extended to other international norms that already criminalized such conduct beforehand. Hence, Article 22 rightly points out that its provisions 'shall not affect the characterization of any conduct as criminal under international law independently of this Statute' (para. 3). Indeed, States' practice, the judicial activity of national and international tribunals since World War II and the works of the ILC clearly show that many crimes already come under the aegis of existing rules of general international law (and have for a long time).[32] As a consequence,

[28] In the ILC Draft Statute, the temporal limitation was dealt with in a different manner: under the heading 'principle of legality (*nullum crimen sine lege*)', Art. 39 stated that an accused could not be held guilty unless the act committed constituted 'a crime under international law' (*YILC* (1994) Vol. II, Part 2, at 55). In the debates within the *Ad Hoc* Committee and the Preparatory Committee, it was agreed that the crimes falling under the Court's jurisdiction should be defined in order to satisfy the principle of legality; accordingly, the principle of the non-retroactivity of the Statute provisions was to be included (see Report of the *Ad Hoc* Committee on the Establishment of an International Criminal Court, UN Doc. A/50/22 (1995) at para. 57 (hereinafter Report of the *Ad Hoc* Committee (1995)); Report of the Preparatory Committee (13 September 1996), *supra* note 6, at paras. 52 and 189). In this same perspective, the Draft Statute presented to the Rome Conference contained two 'interrelated' articles on temporal jurisdiction: Art. 8 (in the chapter on jurisdiction of the Court) and Art. 22 (in the chapter on the general principles of criminal law) (Report of the Preparatory Committee (14 April 1998), *supra* note 4, at 38 and 57).

[29] See the headings of those provisions as well as the debates in the *travaux préparatoires* referred to in note 28.

[30] The quotation is taken from Art. 24(1) (emphasis added). Art. 22(1), states that '[a] person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime *within the jurisdiction of the Court*' (emphasis added), thus also providing for criminal responsibility under the Statute; it also refers to the provisions of the Statute regulating the Court's jurisdiction (in Part 2) that will be dealt hereinafter.

[31] Both Arts. 22(1), and 24(1), consider criminal responsibility exclusively 'under the Statute'.

[32] Customary international law also gives sufficient elements to establish the applicable penalties in each case: see the sentencing practice of the Nuremberg and Tokyo Tribunals and, more recently, of the ICTY and the ICTR.

the prosecution of a crime, falling under the Court's jurisdiction *ratione materiae*, committed before the entry into force of the Statute would not contravene the general principle of non-retroactivity, if such conduct can be shown to have been criminalized under a valid norm of international law at the time it took place.[33] Moreover, under the Statute, the ICC is entitled to have recourse, where appropriate, to 'applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict',[34] and could do so in proceedings for crimes falling under its jurisdiction.

Consequently, the power of the Court to prosecute criminal activities conducted prior to the entry into force of the Statute cannot be established nor excluded on the basis of Articles 22 and 24. It requires a careful analysis of the relevant provisions concerning its jurisdiction in Part 2 of the Statute.

One must then turn to Article 11, which establishes the temporal jurisdiction of the Court. Paragraph 1 attributes jurisdiction to the Court 'only with respect to crimes committed after the entry into force of the Statute': apparently such a limitation, being worded in absolute terms, is binding even in case of referral by the Security Council. Yet, this preliminary conclusion does not close the debate on the present issue. Paragraph 2 provides that, once the Statute is in force, the Court is not allowed to exercise its jurisdiction before the entry into force of the Statute for the State concerned, unless such a State has made an *ad hoc* declaration under Article 12(3). By referring to the mechanism provided for under Article 12, this paragraph thus reveals the intrinsic relation between the limitations to the Court's jurisdiction *ratione temporis* and the conventional nature of the Statute. In this perspective, the temporal limitations established in Article 11 *as a whole* could be interpreted as being nothing more than the necessary corollary to the rule forbidding the Court to act without the consent of the States as provided for under Article 12. It is well known that Article 12 excludes the applicability of preconditions to the exercise of jurisdiction in case of referral under Article 13(b).

Under this interpretation, it follows that the Security Council would not be bound by any limitation *ratione temporis* to the ICC's jurisdiction. This would allow the Court to prosecute, under the jurisdictional terms of the Statute, crimes committed before its establishment, in a similar manner as do the *ad hoc* inter-

[33] Furthermore, it should be remarked that the substantive principle of non-retroactivity of criminal law does not hinder the possibility of a person being judged by a tribunal established *after* the commission of its crime, provided that the conduct in question constituted, at the time it took place, a crime. In the international field, this conclusion is supported by the wide acceptance of the *ad hoc* international criminal tribunals created by the Security Council (ICTY and ICTR) that have jurisdiction over crimes committed before their creation.

[34] Art. 21(1)(b).

national criminal tribunals created by the Security Council. The terms of Article 11, read as a whole and in the logic of the overall system of the ICC, would not preclude the Security Council from referring a situation to the Court in which crimes appear to have been committed before the entry into force of the Statute, provided that, in strict accordance with the general principle of non-retroactivity, such conduct was held to be criminal under valid rules of international law at the time of its commission. However, since the relevant provisions can certainly be deemed ambiguous, only practice may eventually provide us with a definitive solution to the issue of the Court's jurisdiction *ratione temporis*.

3. Admissibility

The Statute remains ambiguous as to issues of admissibility in the case of referral by the Security Council. On the one hand, in defining the general principles on admissibility, Article 17 does not distinguish between the different trigger mechanisms; in establishing how to challenge admissibility before the Court, Article 19 contains no limitation in case of referral by the Security Council;[35] furthermore, Article 53 provides for the Prosecutor, in deciding whether to initiate an investigation, to consider the issue of admissibility apparently even in the case of referral under Article 13(b).[36] On the other hand, the procedure described in Article 18, which constitutes an integral part of the system based on admissibility, only applies when jurisdiction is exercised under *lit.* (a) and (c) of Article 13.

Nonetheless, it is clear from the Preamble (paragraph 10) and from Article 1, that the principle of complementarity and the criteria of admissibility are to be considered intrinsic characteristics of the Court. When exercising its powers under the Statute, the Security Council should be bound by the logic of the judicial system of the Court as established in Rome and consequently the principles on admissibility should also apply to referral under Article 13(b).[37] In the future,

[35] Art. 19(3) even specifies that, in the proceedings with respect to admissibility, 'those who have referred the situation under Article 13' (without any limitation) may also submit observations to the Court.

[36] Under Art. 53(2), the Prosecutor shall inform, *inter alia*, 'the Security Council in a case under Article 13, paragraph (b)' of his conclusion that there is not a sufficient basis for a prosecution. Art. 53(3)(a) attributes to the Security Council, in case of referral *ex* Art. 13(b), the power to request a review of the Prosecutor's decision under this article.

[37] See F. Lattanzi, 'The Complementarity Character of the Jurisdiction of the Court with respect to National Jurisdictions', in F. Lattanzi (ed.), *The International Criminal Court: Comments on the Draft Statute* (1998) 10 (hereinafter 'The Complementarity Character') (see also Lattanzi, 'Compétence de la Cour', *supra* note 16, at 441 and Lattanzi, 'The Rome Statute', *supra* note 16, at 63); Zappalà, *supra* note 21, at 57; A. Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections', 10 *EJIL* (1999) 158–159; P. Benvenuti, 'Complementarity of the International Criminal Court to National Criminal Jurisdictions', in F. Lattanzi and W. Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court*, Vol. I (1999) 41–42; P. Gargiulo, 'The Controversial Relationship between the International Criminal Court and the Security Council', in ibid. 82–85. This interpretation is sustained by the fact that neither the Draft Statute

complementarity (and the consequent obligation of the Security Council to abide by it) will probably also be enshrined in the Relationship Agreement to be concluded between the Court and the UN under Article 2 of the Statute.[38]

Still, this trigger mechanism is submitted to a special procedure with regard to admissibility. When a situation has been referred by the Security Council, the Prosecutor does not have the obligation (under Article 18(1)) to notify the States Parties and those States which would normally exercise jurisdiction over the crimes concerned.[39] Consequently—since the whole mechanism provided for in Article 18 is based on this notification—one might conclude that, in case of referral under Article 13(b), there will be no preliminary rulings on admissibility: States could only challenge the admissibility of the case before the Court under Article 19.[40] In any event—it is true—the State that claims to be investigating or prosecuting the case (or to have done so) can obtain the suspension of the investigations by the Prosecutor.[41] However, in case of referral by the Security Council, the claim on admissibility by a single State is necessarily submitted to the decision of a Chamber.[42]

Normally, the Security Council should not be expected to make a direct pronouncement on the question of admissibility in its resolution under Article 13(b). As it stems unequivocally from Articles 17 and 19, issues of admissibility can only be examined with regard to a single case and consequently fall beyond the normal power of the Security Council to refer a whole *situation* to the Court. Issues of admissibility *stricto sensu* will be considered in a subsequent phase—once the

proposed by the ILC in 1994 (see the Preamble and Art. 35 in *YILC* (1994) Vol. II, Part 2, at 26–27 and 52–53) nor the first works by the Preparatory Committee (see Report of the Preparatory Committee (13 September 1996), *supra* note 6, at paras. 153–178) envisaged any exception to the principle of complementarity in the case of referral by the Security Council. For a discussion of the obligation for the Security Council to abide by the Statute and on the possibility for it to go beyond the limits established under the Statute also concerning admissibility, see Ch. 15, above.

[38] Although the UN cannot directly participate in the Statute, the Agreement provided for in Art. 2, in establishing the principles regulating the relationship between the ICC and the UN, should have the effect of binding the Organization to the principles of the Statute: see Ch. 4.3, above.

[39] This peculiarity can be explained by the fact that proceedings under Chapter VII of the UN Charter already satisfy the required publicity on the initiation of investigations by the Court: the States carry the burden to follow the developments of the Court's activity (in this sense, Zappalà, *supra* note 21, at 60).

[40] Benvenuti, *supra* note 37, at 47–48 ; Gargiulo, *supra* note 37, at 84.

[41] When jurisdiction is exercised under Art. 13(a) and (c), the State can request the Prosecutor to defer the case to its national authorities and the Prosecutor has the obligation to do so, unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation (Art. 18(2)); afterwards, the control over the State's action on the case is entrusted to the Prosecutor (Art. 18(3) and (5)). Under Art. 19, a challenge to admissibility made by a State entails the suspension of the investigation by the Prosecutor until the moment the Court makes a determination in accordance with Art. 17 (Art. 19(7)).

[42] This mechanism thus ensures that the initiative by the Security Council will not be frustrated by a single State without the control of a jurisdictional body of the Court.

investigation on a single case is initiated—by the organs of the Court (notably the Prosecutor and the competent Pre-Trial or Trial Chamber). In the preliminary, 'trigger' phase, the Security Council should concern itself with the gravity of the crimes that appear to have been committed, and the inability or unwillingness of single States to investigate or prosecute them, only in a general manner, in order to justify its determination that there exists a threat to the peace or its decision to refer the entire situation to the Court. In this perspective, the Security Council could be expected to take guidance from the principle of complementarity of the ICC and to decide to refer a situation to the Court only where there is a collapse or unavailability of the national judicial system or where the State is willing to grant a generalized impunity to the criminals.[43] In any event, as will be seen later, the last word on admissibility belongs to the Court itself.

As was remarked above, however, the Security Council could exceptionally refer specific cases to the Court: in these hypotheses, it will probably deal more directly with issues of admissibility such as the inability or unwillingness of the State to prosecute the individual. Though, in these cases, the Security Council resolution will certainly be more detailed on the question of admissibility, its evaluation will be submitted to review by the Court under Article 19.

Occasionally, the Security Council may feel it necessary to refer a situation to the Court when it considers that a particular national judicial authority—though available and willing to prosecute—is unable to deal with the crimes committed in their entirety. In situations where crimes cannot be geographically located in one single State (such as those that justified the establishment of the Nuremberg Tribunal) or where there is a controversy between States on the *forum conveniens*,[44] the Security Council may consider the ICC as being the most appropriate jurisdiction to investigate and judge certain crimes. In these situations, the Security Council's decision to refer the situation to the Court could be justified by the determination that the inherent characteristics of the crimes concerned are the cause of the inability of single States to obtain the necessary evidence or otherwise carry out the proceedings impartially and appropriately.[45] Though not literally

[43] Lattanzi, 'The Complementarity Character', *supra* note 37, at 10.

[44] For instance (in the light of the controversy concerning the prosecution of Augusto Pinochet in Spain and his arrest in the United Kingdom in 1998 against the will of the Chilean government), it could be imagined that, in some circumstances, the prosecution of one or more individuals could cause a situation of tension between States amounting, in the view of the Security Council, to a threat to the peace: the exercise of jurisdiction by an international criminal court could prove a suitable means to remove this tension.

[45] It must be noted that this inability is not due to the lack of legal grounds for the exercise of domestic jurisdiction for extra-territorial crimes, since, in contemporary international law, the crimes listed in Art. 5 of the Statute can all be considered to be submitted to universal jurisdiction. The inability of the States to cope with the situation appropriately will rather be due to practical issues, such as the collection of evidence (including documents or statements by witnesses) or the arrest of the accused or condemned person. Furthermore, obstacles arising from the lack of treaties on extradition

provided for in Article 17(3), this determination would respond to the same logic as the ones of collapse or unavailability of national judicial authorities and, in our view, is not to be considered contrary to the general principle of complementarity inspiring the Court. In these cases, in fact, the ICC will act not as a primary jurisdiction, but as a complement to national authorities when they appear inadequate to prosecute certain international crimes. On some occasions, it cannot be excluded that the resolution by the Security Council referring a situation of this kind to the Court may even prohibit, under Chapter VII, the prosecution of the relevant cases by national authorities: UN Member States would then be under the obligation to abide by this prohibition by virtue of Article 25 of the Charter.[46] As a consequence, the national judicial systems could be considered 'unavailable' in legal terms and the States would be 'unable to carry out' the proceedings; accordingly, the Court should determine the admissibility of the relevant cases by virtue of Article 17. Of course, these extremely exceptional cases shall be properly reasoned by the Security Council under Chapter VII: they will require the determination that the inability of single national jurisdictions to cope with the situation causes a threat to international peace and security and that the referral to the Court constitutes the best means to respond to it.[47] In any event, however, the ICC, acting by virtue of Article 19, shall have jurisdiction to verify the legality of the Security Council's action under Chapter VII of the UN Charter.

C. Procedural Issues

1. The Kompetenz-Kompetenz of the Court: Judicial Review of the Action by the Security Council?

Under Article 19 of the Statute, the Court is entitled to examine its own jurisdiction as well as the admissibility of the case brought before it. This power is a necessary component in the exercise of the judicial function: it is a major part of the incidental or inherent jurisdiction of every judicial or arbitral tribunal.[48] As the

or judicial cooperation between the States concerned could easily be overcome by the ICC under the provisions of Part 9 of the Statute.

Our view is that the decision by the Security Council to refer such a situation to the ICC is in accordance with the general principles governing the Court (including the principle of complementarity). As a consequence, the States concerned will be obliged to abide by this decision by virtue of the Statute. Furthermore, as far as UN Member States are concerned, that obligation will also stem from the UN Charter, since the Security Council's resolution will be taken under Chapter VII. Possible problems arising from the States' legal obligations to prosecute the crimes concerned under existing international treaties could easily be overcome with reference to Art. 103 of the Charter: the obligations arising from the UN resolution shall prevail.

[46] Naturally, the existence of such a prohibition (and the consequent obligation of UN Member States to abide by it) shall be assessed on the basis of an interpretation of the terms of the relevant resolution by the Security Council.

[47] On the impossibility for the Security Council to attain this same purpose by going beyond the rules of the Statute in application of Chapter VII of the UN Charter, see Ch. 15, above.

[48] ICTY, Ap. Ch., 2 October 1995, *Tadić*, *supra* note 9, at para. 18.

ICTY Appeals Chamber clearly established, this title of jurisdiction allows the Court to examine the legality of the decisions of other organs as a matter of incidental jurisdiction, in order to ascertain and be able to exercise its primary jurisdiction over the matter before it.[49] On this basis, the ICC is thus entitled to establish whether or not the exercise of its jurisdiction under Article 13 (and notably *lit.* (b)) respected the conditions laid down by the Statute.

In the first place, the Court shall satisfy itself that the case before it is part of a 'situation' referred by the Security Council; otherwise, the Prosecutor should be considered to have acted *proprio motu* with the consequent obligation to submit the decision to proceed with the investigation to a Pre-Trial Chamber. The Court shall also verify that the Security Council has indeed adopted a resolution referring the situation to the Prosecutor and that, in so doing, it has acted under Chapter VII of the UN Charter, as established by Article 13(b) of the Statute.

Moreover, as it also stems from the reasoning of the ICTY Appeals Chamber mentioned above, the Court shall have jurisdiction to verify that the Security Council has acted in conformity with the conditions set up by Chapter VII of the UN Charter.

In particular, the Court shall determine whether the Security Council had the power to invoke Chapter VII and thus whether it has preliminarily determined the existence of a threat to the peace, a breach of the peace, or an act of aggression as provided for in Article 39. In so doing, as appears from the precedent of the ICTY Appeals Chamber, the Court should not limit itself to the formal verification that the Security Council has made such determination. Since the Security Council's decision on the existence of a situation described in Article 39 is not 'a totally unfettered discretion', the Court should also determine that the Security Council has acted within the limits of the Purposes and Principles of the Charter:[50] the Court, for instance, should bear out that the determination of the Security Council in that situation is in accordance with its settled practice and the common understanding of the UN membership in general.[51]

In any case, the Court's judicial review shall only constitute a control of the *legality* of the Security Council's action and it shall not be concerned with the appropriateness and effectiveness of the UN organ's resolution as a measure to maintain or restore international peace and security. When deciding whether to refer to the Prosecutor each specific situation, the Security Council 'enjoys wide discretionary powers' under Article 39, 'as such a choice involves political evaluation of highly complex and dynamic situations'.[52] It is not a matter for the Court to review the

[49] Ibid., at paras. 14–22.
[50] Ibid., at para. 29.
[51] Ibid., at para. 30.
[52] Ibid., at para. 39.

way in which the Security Council exercises such discretionary powers, as long as it remains within the margin of appreciation established by the UN Charter.

If ever the Security Council decided to refer the case of specific individuals, considering that it causes a situation of threat to the peace (as canvassed above), the ICC should also be expected to examine, along the same parameters, the legality of such a resolution under the UN Charter and the Statute.

In addition, as already mentioned, even in the case of referral by the Security Council, the Court will have jurisdiction to determine whether the case before it falls within its primary jurisdiction as established by the Statute and whether it is admissible under Article 17. Normally, this evaluation will not exactly entail a review of the action by the Security Council, since it will rather refer to the case as presented by the Prosecutor than to the initial decision of referral.[53]

2. Other Procedural Matters

The referral of a situation under Article 13(b) also influences the whole proceedings that follow before the Court.

In the first place, the referral by the Security Council is characterized as a sort of 'fast track'.[54] As in the case of referral by a State Party, the decision by the Prosecutor to proceed with an investigation is not submitted to the control of a Pre-Trial Chamber.[55] As opposed to the other two trigger mechanisms, no acceptance by any State (neither *ex ante facto* nor *ex post facto*) is required for the Court to exercise jurisdiction. Moreover, as already pointed out, the Prosecutor need not notify the States of the initiation of the proceedings and no preliminary rulings on admissibility are available.

Previous drafts of the Statute provided for the Security Council to accompany its referral with all supporting material available.[56] Though not explicitly contemplated by the final version of the Statute, this communication would certainly serve the interests of justice in the investigations and the prosecutions by the Court. The Relationship Agreement between the UN and the ICC under Article 2 should deal with this issue, creating obligations for this purpose or at least encouraging the exchange of information between the two entities.[57]

[53] See however the remarks above on admissibility when the Security Council exceptionally refers specific cases to the Court (see *supra* II.B.3).

[54] See M. C. Bassiouni, 'Observations on the Structure of the (Zutphen) Consolidated Text', in M. C. Bassiouni (ed.), *Observations on the ICC Text before the Final Session of the Preparatory Committee*, in 13-*bis Nouvelles Études pénales* (1998) 13 and Zappalà, *supra* note 21, at 60.

[55] Unlike when the Prosecutor acts on its own initiative, in which case he or she must submit a request for authorization of an investigation to the Pre-Trial Chamber, as provided for in Arts. 15 and 53(1).

[56] See, for instance, Art. 10(2) of the Draft Statute for the International Criminal Court, in Report of the Preparatory Committee (14 April 1998), *supra* note 4, at 41.

[57] See Ch. 4.3, above.

The referral by the Security Council entails for the Prosecutor the duty to initiate the investigations, but it does not oblige him or her to prosecute. By virtue of Article 53, the Prosecutor decides independently whether there is sufficient basis for a prosecution, taking particular account of the 'interests of justice'.[58] Whenever he or she decides not to proceed, following a referral under Article 13(b), the Security Council shall be informed,[59] but it can only request a review of that decision by a Pre-Trial Chamber.[60]

By virtue of Article 19(3), when the Court is dealing with a question of jurisdiction or admissibility as regards a case that follows the referral of a situation under Article 13(b), the Security Council is allowed to 'submit observations' on these matters.[61]

The trial itself, if it goes ahead following a Security Council referral, will proceed without any further special features: the Security Council will not intervene, except when States fail to cooperate with the Court in violation of the Statute (for States Parties) or of *ad hoc* arrangements or agreements (for States not parties to the Statute).[62] Though the Statute does not specify the possible measures to be taken in these cases, one could expect the Security Council to act in a similar manner as in the case of non-cooperation with the *ad hoc* international criminal tribunals: it could, in particular, decide to take further measures under Chapter VII of the UN Charter;[63] those measures, of course, will be binding only on UN Member States. The Statute does not provide for further special obligations for the States as regards international cooperation and judicial assistance to the Court. However, as was rightly remarked,[64] the Security Council's initial resolution referring a situation to the Court could be worded in such terms as to attribute extended powers to the ICC when seeking cooperation from UN Member States. In this case, the Security Council would choose to go beyond the system of the Statute: the extraordinary powers of the Court would then be based solely on Chapter VII of the Charter.[65]

The referral by the Security Council should entail special consequences with regard to the financing of the Court. By virtue of Article 115, the UN should be

[58] See Art. 53(2), notably *lit.* (c). In the words of Antonio Cassese, the Statute enshrines the principle of 'prosecutorial discretion' (Cassese, *supra* note 37, at 162).

[59] Art. 53(2) *in fine*. See also Rule 105 of the Rules of Procedure and Evidence.

[60] See Art. 53(3)(a).

[61] See also Rule 59 of the Rules of Procedure and Evidence.

[62] See Art. 53(5) and (7).

[63] Such a decision, of course, would require the fulfilment of the conditions provided for in the UN Charter, and in particular the determination of the existence of a threat to the peace, breach of the peace, or act of aggression and of the opportunity to take such measures to maintain or restore international peace and security.

[64] Zappalà, *supra* note 21, at 61.

[65] Ibid. and Ch. 15, above.

expected to provide special funds in relation to the expenses incurred: the conditions for the granting of such funds should be regulated by the Relationship Agreement provided for in Article 2 of the Statute.[66]

A further issue is whether the Security Council can stop a procedure it has initiated under the Statute once it considers that the grounds of Chapter VII are no longer present or that the continuation of the prosecution by the Court could in itself constitute a threat to the peace. Such a power—that could logically be compared with the power of the Security Council to dissolve an *ad hoc* international criminal tribunal—is not expressly provided for by the Statute. On the contrary, once a situation has been referred under Article 13, the system of the ICC appears to be absolutely independent and nothing or no one (except the Court) is entitled to put an end to the proceedings. Consequently, it can be held that the Security Council is not entitled to stop definitively a proceeding before the Court, even if the case was engaged following its own initiative. The only instrument available for the Security Council is the *deferral* of the investigations and prosecutions provided for under Article 16 of the Statute, but—as it will be examined hereinafter—this power is submitted to restrictive conditions and only entails the suspension of the proceedings for a certain period of time.

III. Deferral by the Security Council

The power of the Security Council to defer an investigation or a prosecution before the Court is only regulated under Article 16.

A. A Turbulent Drafting for a Provision of Compromise

Since the beginning of the preparatory works, concern was expressed about the need to coordinate the judicial function of the Court and the Security Council's fulfilment of its primary responsibility for the maintenance of international peace and security under Article 24 of the UN Charter.[67] In acknowledgement of the priority given to the role of the Security Council by Article 12 of the Charter, the ILC proposed a draft provision forbidding any prosecution to be commenced under the Statute 'arising from a situation which is being dealt with by the Security Council' under Chapter VII, unless the Security Council itself otherwise decides.[68] In the opinion of the ILC, this provision contained in itself a safeguard

[66] See Ch. 4.3, above.

[67] See *YILC* (1994) Vol. II, Part 2, at 43–45; Report of the *Ad Hoc* Committee (1995), *supra* note 28, at para. 124; Report of the Preparatory Committee (13 September 1996), *supra* note 6, at para. 141.

[68] Art. 23(3) in the Draft Statute for an International Criminal Court, in *YILC* (1994) Vol. II, Part 2, at 43–44.

in favour of the Court: first, it gave no mere 'veto' to the Security Council over the commencement of the prosecutions, since it required concrete action on its behalf; secondly, the prosecutions could be initiated as soon as the action under Chapter VII was terminated.[69]

Nevertheless, the provision was strongly criticized, essentially at two different levels. First, some considered that already its rationale was unacceptable: it allowed the judicial function of the Court to be subject to a decision by a political organ.[70] Secondly, the implementation of the principle was often contested: under the provision proposed by the ILC, 'the court could be prevented from performing its functions through the mere placing of an item on the Council's agenda and could then be paralyzed for lengthy periods',[71] even without a formal decision of the UN organ under Chapter VII. Still, the provision was supported by some delegations within the Preparatory Committee, notably by the permanent members of the Security Council.[72]

Several compromise proposals were advanced during the preparatory works: they required, for instance, that action was 'actually being taken' by the Security Council with regard to the situation in order to suspend the prosecution before the Court, or they allowed the Court to start proceedings in case of failure by the Security Council to act within a reasonable time, or they provided for a formal resolution by the Security Council aimed at deferring the case before the Court as effective action was being taken.[73] The draft article finally proposed by the Preparatory Committee contained several brackets and options, including the possibility of deleting the whole provision.[74]

[69] Ibid., at 45.

[70] See ibid.; Report of the *Ad Hoc* Committee (1995), *supra* note 28, at para. 125; Report of the Preparatory Committee (13 September 1996), *supra* note 6, at para. 142. It was also noted that no similar priority was given to the Security Council as regards the judicial function of the ICJ. In the legal literature, see, for instance, M. Bennouna, 'Le Fonctionnement de la Cour criminelle internationale: Difficultés et perspectives', in F. Lattanzi and E. Sciso (eds.), *Dai tribunali penali internazionali ad hoc a una Corte permanente* (1996) 208; U. Leanza, 'Foreword', in F. Lattanzi (ed.), *The International Criminal Court: Comments on the Draft Statute* (1998) pp. xviii–xix; Gargiulo, 'The Relationship between the ICC and the Security Council', in ibid., at 118; G. Arangio-Ruiz, 'Fine prematura del ruolo preminente di studiosi italiani nel progetto di codificazione della responsabilità degli Stati: specie a proposito dei crimini internazionali e dei poteri del Consiglio di sicurezza', 81 *RDI* (1998) 124–125.

[71] Report of the *Ad Hoc* Committee (1995), *supra* note 28, at para. 125. See also: Report of the Preparatory Committee (13 September 1996), *supra* note 6, at para. 142; Politi, 'The Establishment of an International Criminal Court at a Crossroads: Issues and Prospects after the First Session of the Preparatory Committee', in M. C. Bassiouni (ed.), *The International Criminal Court: Observations and Issues before the 1997–98 Preparatory Committee; and Administrative and Financial Implications*, in 13 *Nouvelles Études pénales* (1997) 153.

[72] See K. Hall, 'The First and Second Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court', 91 *AJIL* (1997) 182; H.-P. Kaul, 'Towards a Permanent International Criminal Court: Some Observations of a Negotiator', 18 *HRLJ* (1997) 172.

[73] See Report of the Preparatory Committee (13 September 1996), *supra* note 6, at para. 143.

[74] See Draft Art. 10, in Draft Statute for the International Criminal Court, in Report of the Preparatory Committee (14 April 1998), *supra* note 4, at 40–42.

The solution finally adopted, after long debate, by the Rome Conference substantially follows a proposal by Singapore:[75] Article 16 requires a positive action by the Security Council, through a resolution under Chapter VII of the UN Charter requesting that no investigation or prosecution be commenced for a period of twelve months; this request may be renewed under the same conditions.

In view of the large controversy that preceded its adoption, this provision represents, after all, a balanced compromise: while recognizing the paramount role of the UN in the maintenance and restoration of international peace and security, it avoids the judicial action of the ICC being paralysed without the Security Council formally taking a stand to this purpose.[76] Contrary to the initial proposal by the ILC, it overcomes the evil consequences of the permanent members' power of 'veto' within the Security Council: the suspension of the proceedings before the Court will require the approval of nine of the members of the Council and the lack of a contrary vote by the five permanent members;[77] moreover, the suspension is limited to one-year time periods, unless a new resolution is adopted.[78] The power of deferral by the Security Council will then probably be seldom used and the independence of the judicial activity by the Court will be effectively guaranteed.[79]

B. Source and Conditions of the Security Council's Power of Deferral

Under Article 16, the source of the power by the Security Council to defer proceedings before the ICC clearly stems from Chapter VII of the UN Charter and is to be connected with its responsibility for the maintenance of international peace and security.

The deferral by the Security Council should thus respect the conditions set up by the UN Charter, but also those deriving from the system of the ICC Statute. In this sense, the power of the Security Council should be interpreted restrictively, as

[75] UN Doc. Non-Paper/WG.3/N.16 (8 August 1997). The issue, however, remained open until a very advanced stage of the negotiations at Rome: on 10 July 1998, a Bureau Proposal still considered three different options, including the deletion of the provision (UN Doc. A/CONF.183/C.1/L.59 (10 July 1998)).

[76] However, the criticisms regarding the rationale of the provision (mentioned *supra* note 70) still hold. In Flavia Lattanzi's words the provision could be described as a 'lesser evil' (Lattanzi, 'Compétence de la Cour', *supra* note 16, at 444).

[77] See Lattanzi, 'Compétence de la Cour', *supra* note 16, at 443–444 (see also, Lattanzi, 'The Rome Statute', *supra* note 16, at 65); Zappalà, *supra* note 21, at 65–66; E. La Haye, 'The Jurisdiction of the International Criminal Court: Controversies over the Preconditions for Exercising its Jurisdiction', 46 *NILR* (1999) 13–14 or Gargiulo, *supra* note 37, at 88–89.

[78] See Cassese, *supra* note 37, at 162–163.

[79] Actually, for these same reasons, Alain Pellet strongly criticizes this provision as inapplicable and without effect, since it discredits the judicial function without really imposing the interests of *realpolitik*: in his view, the conditions required for the application of this article will never be fulfilled (A. Pellet, 'Pour la Cour pénale internationale, quand même! Quelques remarques sur sa compétence et sa saisine', 5 *L'Observateur des Nations Unies* (1998) 162).

absolutely exceptional in the relations between political organs and the jurisdictional function.[80]

In the first place, under Article 39 of the UN Charter, the Security Council should, as a preliminary step, determine the existence of a threat to the peace, breach of the peace, or act of aggression. In our view, this situation need not necessarily find its direct cause in the investigations or prosecutions *per se*: the Security Council could refer to a larger factual or political background, related to the proceedings before the Court and placed in one of the categories described in Article 39.[81] On the contrary, the Security Council shall indeed justify its decision of deferral as a means to maintain or restore international peace and security: it should give reasons for its decision by demonstrating that the suspension of the investigations or the prosecutions will contribute to the objective provided for in Chapter VII of the Charter.[82]

In assessing the grounds for requesting a deferral, the Security Council will be led to take into consideration the current activity of the Court, and particularly the cases pending before it. In fact, the evaluation of the existence of a threat to the peace, and of the appropriateness of deferral as a measure under Chapter VII, should not be made in abstract terms but shall be determined by the effect of the continuation of specific proceedings before the Court on the entire situation being dealt with by the Security Council. As a consequence, the Security Council will normally request the suspension of the proceedings in specified cases in order to attain the purposes set up by Chapter VII. Far from contradicting the terms of the Charter, this interpretation appears to be the only which would allow correct application of the conditions set thereupon. It is also confirmed by the words of Article 16, which specifically refer to 'investigations' or 'prosecutions' before the Court, as opposed to a general term such as 'proceedings'.

This is certainly the most questionable aspect of the Security Council's power of deferral, since its request is binding upon the organs of the Court. As opposed to the referral provided for in Article 13(b), which is subject to the assessment by the Prosecutor and the potential review by a Pre-Trial Chamber, the resolution under

[80] In this sense, Zappalà, *supra* note 21, at 66.

[81] For a different opinion see Zappalà, ibid., at 66–67, and Cassese, *supra* note 37, at 163: these authors consider that the Security Council should explicitly decide that continuation of the investigation by the Prosecutor or prosecution may amount to a threat to the peace. Of course, we agree that, in certain circumstances, the proceedings before the Court could constitute *per se* a threat to the peace: Salvatore Zappalà gives the example of a referral by a State motivated by partial political interests (Zappalà, *supra* note 21, at 67).

[82] According to this interpretation, the Security Council could decide that, while the proceedings before the Court *per se* do not constitute a threat to the peace, their suspension would contribute effectively to the maintenance or restoration of peace: it could, for instance, provide for the suspension of the investigations or prosecutions related to a particular situation to facilitate the achievement of a peace agreement.

Article 16 creates an obligation for the Court to suspend (or abstain from commencing) all proceedings. As a consequence, there is patent interference by a UN political organ with the independent exercise of the jurisdictional function and the judicial guarantees for the accused (or the suspect) before the Court. Nonetheless, this power of the Security Council is far from being absolutely arbitrary, since it is subject to the conditions and purposes set out in Chapter VII. In exercising its power of judicial review of the resolution requesting the deferral, the Court will establish the legality or otherwise of the Security Council's action. In so doing, the Court will also be entitled to ascertain that the Security Council has not exceeded its competence according to the Charter.[83]

It could be asked whether the resolution of deferral should be accompanied (or followed) by effective action by the Security Council to maintain or restore international peace and security. Though present in previous drafts and often placed at the core of the rationale of this provision,[84] such a condition is not explicitly required by the final version of Article 16. Its deletion appears to be in accordance with the wide discretion that characterizes the exercise of the Security Council's powers under Chapter VII: accordingly, the Security Council could consider that the deferral *per se* constitutes an appropriate and sufficient means to maintain international peace and security; it could also decide upon the adoption of further measures for this end. The only real condition for the Security Council appears to be the general obligation to give reasons for its decision in keeping with the Purposes and Principles of the UN Charter and the objectives established under Chapter VII.

By virtue of Article 16, the deferral by the Security Council will have limited temporal effects: the stay in the proceedings should not exceed twelve months.[85] This

[83] The Court would not pronounce on the appropriateness of the action by the Security Council, but only on its *legality*: actions *ultra vires* of an organ (or actions which divert the objectives of the powers that are attributed to the organ) constitute an irregularity that can be dealt with in the context of such a judicial review (see the legal concepts of 'excès de pouvoir' or 'détournement de pouvoir', used in French administrative procedure, and similar notions known in other civil law systems). On the criteria to be applied by the Court in exercising this control of legality, see, *mutatis mutandis*, the remarks on the power of judicial review of a referral under Article 13(b): *supra* at II.C.1.

[84] This was certainly the original idea of the draft provision by the ILC which required that the Security Council be dealing with the situation (see *YILC* (1994) Vol. II, Part 2, at 43–45). Some proposals later combined the mechanism of requiring a resolution of deferral under Chapter VII and the express condition that the Security Council should actively deal with the situation: see, for instance, Art. 10(7), option 2 in Draft Statute for the International Criminal Court in Report of the Preparatory Committee (14 April 1998), *supra* note 4, at 42; or a proposal submitted by Spain to the Committee of the Whole (in UN Doc. A/CONF.183/C.1/L.20 (25 June 1998)).

[85] From a literal interpretation of the provision, it could even be affirmed that the Security Council could request a deferral only for that particular period of time (neither more nor less). It is clear however that the Security Council could request a deferral for a shorter period or that it could review a previous decision of deferral thus allowing the reinitiation of the proceedings before the established one-year term.

condition does not arise from the UN Charter and is rather directly imposed by the Statute itself, limiting the interference of the Security Council with the judicial activity of the Court. It does not result in a restriction of the powers of the Security Council under Chapter VII, since the renewal of the deferral is possible every twelve months, but it subjects it to certain conditions. In fact, the Security Council will have to adopt an additional resolution, subject to a new vote and having to be justified by reference to the persistence of a threat to the peace, breach of the peace, or act of aggression and to the fact that the deferral of the activity of the Court constitutes an appropriate means to maintain or restore international peace and security. The mechanism thus encourages a renewed debate within the Security Council and creates accountability on the part of this UN body.[86]

C. Procedure before the Court in Case of Deferral

Probably due to its turbulent drafting history, Article 16 is a totally isolated provision in the procedural system of the ICC Statute: it contains no regulation of the mechanisms to put the deferral into effect and no other article refers to it. Moreover, the Rules of Procedure and Evidence have failed to confront and deal appropriately with this issue.[87] In the absence of any adequate regulation, we will identify hereinafter the general principles that should guide the procedure before the Court in case of deferral.

The request of deferral by the Security Council should be addressed to the Presidency of the ICC, which has the responsibility for the proper administration of the Court.[88] By interpreting *prima facie* the resolution of the Security Council, the Presidency shall identify those cases currently proceeding to which the deferral should apply and communicate the request to the competent Chambers. In any event, the Presidency shall also notify the request to the Prosecutor—as it is pertinent to the future conduct of his or her investigations. If applicable, the interested suspects or accused should also be informed.[89]

Although, under Article 16, the Court appears to have no discretionary power in deciding whether to abide by the request of deferral, the decision by the Security Council is subject to such formal and substantial conditions as to require review by the jurisdictional organs, in the interests of justice and in order to safeguard the independence of the judiciary.[90] Consequently, the decision to suspend current

[86] Cassese, *supra* note 37, at 163.

[87] No rule of the Rules of Procedure and Evidence refers to deferral under Art. 16 of the ICC Statute.

[88] See Zappalà, *supra* note 21, at 68.

[89] This communication, however, should normally be done by the competent Chamber in each particular case.

[90] See Zappalà, *supra* note 21, at 68–69. The author notes, in addition, that the text of Art. 16 refers to the 'Court', as when the Statute intends to refer to the jurisdictional power in general. Some proposals at the Rome Conference expressly provided for the jurisdictional organs of the Court to

proceedings should pertain to: (a) the Pre-Trial Chamber—guarantor of the interests of justice in the investigations phase—if the Prosecutor is examining the case; (b) the Trial Chamber—that shall ensure a fair and expeditious trial as well as full respect of the rights of the accused—[91] once the trial has begun; or (c) the Appeals Chamber, if the case is under appeal. In addition, since the Prosecutor should exercise his or her functions in full respect of the Statute, he or she shall abstain from initiating, or continuing with, investigations on the situation at stake.[92]

In their decision to suspend the proceedings, the jurisdictional organs of the Court should have a power of review of the Security Council's request of deferral. They shall ensure that the request is being made in accordance with the conditions provided for under the UN Charter and the ICC Statute, notably that it is indeed a resolution taken under Chapter VII of the Charter, that it follows a determination of the existence of a situation described under Article 39, that, in so doing, the Security Council has respected the Purposes and Principles of the UN and has not acted *ultra vires*, that there is effectively a duly motivated request of deferral, etc.[93] As in the event of referral under Article 13(b), the power of review of the ICC's jurisdictional organs shall be limited to verifying the legality of the action by the Security Council and should not extend to the political grounds of its decisions. In addition, through an interpretation of the resolution, they should determine whether the specific case is part of the situation considered by the Security Council under Chapter VII. If all the conditions are present, they are bound to uphold the deferral of the case.

Once the request by the Security Council is communicated to the Court, current proceedings (investigations included) shall be suspended pending the decision by the competent Chamber. If subsequent to a request of deferral, the Prosecutor decides to initiate an investigation *proprio motu*, the Pre-Trial Chamber, in the examination provided for under Article 15, should take into due account the existence of the Security Council's request and refuse to authorize the investigation until the termination of the twelve-month period whenever the specific case is related to a situation for which there is a resolution under Article 16. More complex is the situation in case of subsequent referral by a State Party, since the Statute envisages no immediate intervention of the Pre-Trial Chamber: logically, the

decide about the suspension of the proceedings following a request by the Security Council: see, for instance, UN Doc. A/CONF.183/C.1/L.20 (25 June 1998) ('Proposal for Article 10 Submitted by Spain').

[91] ICC Statute, Art. 64(2).

[92] On the contrary, since Art. 16 refers only to 'investigations' and 'prosecutions', nothing prevents the Prosecutor from continuing to gather information that would prove useful in future proceedings, after the period of deferral (see *infra*).

[93] See *supra* III.B and, *mutatis mutandis*, II.C.1.

Prosecutor should seek a ruling regarding the question of deferral by the Chamber as soon as possible.[94]

The Statute does not provide for judicial challenges against the resolution of deferral by the Security Council. The legality of a resolution will normally be dealt with *ex officio* by the competent Chamber in its ruling on the suspension of the proceedings. However, since the request of deferral interferes with the normal exercise of the Court's primary jurisdiction under the Statute, the issue should be considered as jurisdictional *lato sensu*. In accordance, those entities allowed to challenge the jurisdiction of the Court under Article 19 should also be entitled to seize the competent jurisdictional body to obtain a verification of the legality of the Security Council's resolution. In addition, this latter decision by the Chambers should be subject to appeal in accordance with Article 82 of the Statute.

D. Consequences of the Deferral

The main consequence of deferral is expressly provided for by Article 16: '[n]o investigation or prosecution may be commenced or proceeded'. It follows from the broad language used by this provision that the deferral entails the suspension of any judicial proceeding before the Court, from the investigations of the Prosecutor to trials themselves (either in the first instance, in appeal or revision).[95]

The deferral, however, should not mean the complete paralysis of the ICC with regard to the situation: the wording of Article 16 clearly refers, and limits its consequences exclusively, to the investigations and prosecutions before the Court. The Prosecutor should then be entitled to conduct those examinations that precede the actual initiation of the investigations following an authorization by a Pre-Trial Chamber: he or she could, in particular, gather information and take all the appropriate steps to analyse its seriousness.[96] Moreover, the administrative duties of the Court linked with the deferred cases should be completed. It could be asked whether some exceptional judicial activities can still be pursued after the deferral. That should certainly be the case for those measures considered appropriate by the Court for the protection of witnesses and victims, since it would be unacceptable

[94] By virtue of Art. 19(3), the Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility; he or she should then be entitled to seize the Chamber for the purposes of Art. 16.

[95] See Zappalà, *supra* note 21, at 65–66. As this author notes the word 'prosecution' is generally used to designate the activity of the Prosecutor, from the moment of initiation of the trial to the final sentencing.

[96] See Art. 15(2). It is true that it could be difficult to identify in practice the thin line separating this gathering of information from the conduct of investigations. However, the Statute appears to recognize the existence of a preliminary phase in the proceedings that could be conducted by the Prosecutor without the authorization of a Pre-Trial Chamber and that precedes the actual investigations (see Zappalà, *supra* note 21, at 62–63).

for their safety and well-being to be affected by the deferral of the Security Council.[97] On the other hand, Article 56 of the Statute, as presently worded, does not allow the Court to proceed in such cases where the Prosecutor, though not actively investigating a case, finds himself or herself confronted with a unique opportunity to take testimony or a statement from a witness or to examine, collect or test evidence, which may not be available subsequently for the purposes of a trial.[98]

The exercise of the power of deferral by the Security Council causes a number of further problems, related to the preservation of the interests of justice. They should be solved, appropriately in accordance with the judicial system established by the Statute as a whole and in respect of the function attributed to the Security Council under the UN Charter. Hereinafter, we will limit ourselves to some examples of the complications that may arise as a consequence of a deferral and their possible solutions.

In case of deferral of proceedings before the Court, the Prosecutor will find himself or herself in possession of documentation related to a situation being dealt with by the Security Council under Chapter VII. The question then arises whether he or she has the obligation to deliver the information to the Security Council for a better evaluation of the situation, taking into account that it may reveal the identity of witnesses in danger or the contents of sealed documents: confidentiality may then be essential for the continuation of the judicial proceedings after the period of deferral. The problem is not contemplated by the Statute. It should be duly considered in the Relationship Agreement between the Court and the UN under Article 2: the agreement should, in particular, provide for the possible obligation for the Prosecutor to cooperate with the Security Council, but also, conversely, for the Security Council's burden to take the necessary measures to secure confidentiality in the interests of justice[99] and to return the relevant documents at the end of the period of deferral.

A more intricate issue concerns the guarantee of the rights of the accused, since the deferral will entail a delay in the proceedings for a long period (that could even amount to years). Doubts can be expressed as to the compatibility of the Security Council's request of deferral with the right of the accused to 'be tried without undue delay'.[100] Moreover, it could be asked whether the continued detention for

[97] See Art. 68 of the Statute.

[98] This could happen, in particular during the preliminary phase of analysis of the seriousness of the information received (see *supra* note 96).

[99] For instance, the Security Council could be subject to the duty to keep the names of the witnesses in silence in order to guarantee their protection.

[100] See also Art. 14(3)(c) of the International Covenant on Civil and Political Rights, GA Res. 2200A (XXI), 16 December 1966.

the period of deferral of those accused (or suspects) that were kept under custody of the Court pending trial[101] is not to be considered 'arbitrary'.[102]

It follows from the provision entitling the Security Council to request a deferral under Chapter VII that the Statute considers the interests of the maintenance or restoration of international peace and security to be paramount; however, this does not mean in any way that those interests may set aside the guarantees of a fair trial. In their ruling on the suspension of the proceedings, the jurisdictional organs of the Court should verify the legality of the Security Council's resolution also under this aspect, taking into due consideration the rights of the suspect or the accused.[103] Additionally, in accordance with the obligation to periodically review the ruling providing for the detention of a person, the competent Chamber, at the moment of deferral, and during the period of suspension, should re-examine the subsistence of the conditions that justified the detention as provided for under Article 53 of the Statute.[104]

The above-mentioned considerations reinforce the conviction that the Security Council's resolution of deferral must be submitted, in any case, to the verification of its legality by the ICC's jurisdictional organs. The examination of the existence of the conditions provided for under Chapter VII of the UN Charter and the Statute with regard to the request for deferral constitute an appropriate judicial guarantee of the rights of the accused.

This *prima facie* examination of the possible complications that could arise from a deferral by the Security Council demonstrate the urgent necessity of a detailed regulation of the consequences of the application of Article 16. It is unfortunate to see that the Preparatory Commission seems to have overlooked

[101] As it is known, under Art. 58, at any time after the initiation of an investigation, the Pre-Trial Chamber shall issue a warrant of arrest of a person if it is satisfied that there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court and the arrest of the person appears necessary: (i) to ensure the person's appearance at trial; (ii) to ensure that the person does not obstruct or endanger the investigation or the Court proceedings, or (iii) where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.

[102] See Art. 9(1) of International Covenant on Civil and Political Rights, GA Res. 2200A (XXI), 16 December 1966.

[103] The Court should then verify whether or not the purpose of the resolution is to unduly keep a person in custody without a trial. If so, the action by the Security Council would be contrary to the Charter, since it would deviate from the purposes laid down in Chapter VII.

[104] The obligation for the Pre-Trial Chamber to review periodically the mentioned ruling is provided for under Art. 60(3). The intervention of a jurisdictional organ with regard to the continued detention of individuals after a deferral is imperative. In fact, if it were established that the deferral implied *ipso facto*, the release of the accused, the Security Council would be given an unacceptable power to liberate individuals; on the contrary, if no revision by the Chamber was provided for, the Security Council would have the power of maintaining a person in prison without a due trial.

these complications: it has not taken the opportunity to establish a comprehensive regulation of these intricate issues in the Rules of Procedure and Evidence. The Relationship Agreement under Article 2 of the Statute will provide a new occasion to deal with some of these matters in a systematic way. Otherwise, these problems, which touch at the core of the judicial function, will have to be resolved on an *ad hoc* basis, by for instance taking into account the formulation of each resolution of deferral by the Security Council or through formal and informal contacts between the ICC and the Security Council.

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8

FORMS OF GOVERNMENTAL AUTHORITY OVER TERRITORY

1. THE CONCEPT OF TERRITORY

In spatial terms the law knows four types of regime: territorial sovereignty, territory not subject to the sovereignty of any state or states and which possesses a status of its own (e.g. trust territories), *res nullius*, and *res communis*. Territorial sovereignty extends principally over land territory and the territorial sea, its seabed and subsoil. The concept of territory includes islands, islets, rocks, and (in certain circumstances) reefs.[1] Exceptionally an area of territory may be under the sovereignty of several states (a condominium), though in practice these have always been states with other territory subject to their exclusive sovereignty.[2] A *res nullius* consists of an area legally susceptible to acquisition by states but not as yet placed under territorial sovereignty. The *res communis*, consisting of the high seas (which for present purposes include exclusive economic zones) and also outer space, is not capable of being placed under sovereignty. In accordance with customary international law and the dictates of convenience, the airspace above and subsoil beneath state territory, the *res nullius*, and the *res communis* are included in each category.

[1] For the dispute over the large Caribbean reef structure Quitasueño Bank: Pratt (2001) *IBRU Boundary and Security Bulletin* 108. Generally: *Argentina/Chile (Beagle Channel)* (1977) 21 RIAA 53, 189; *Eritrea v Yemen (Territorial Sovereignty)* (1998) 114 ILR 1, 138–9; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, ICJ Reports 2001 p 40, 200, and on the distinction between low- and high-tide elevations: chapter 11.

[2] Generally: Bantz (1998) *12 Florida JIL* 77; *Barberis, in* Kohen (ed), *Liber Amicorum Lucius Caflisch* (2007) 673; Samuels (2008) 29 *Mich JIL* 732. The best-known example is the former condominium of the New Hebrides (now Vanuatu): O'Connell (1968–69) 43 *BY* 71. The legal regime may be used to deal with problems of neighbourhood relating to boundary rivers and the like: *Dutch-Prussian Condominium* (1816) 6 ILR 50; also: Brown, *The Saudi Arabia Kuwait Neutral Zone* (1963). For the Anglo-Egyptian Sudan: Taha (2005) 76 *BY* 337. In certain cases, e.g. land-locked lakes and bays bounded by two or more states, it has been argued that riparian states have a *condominium* by the operation of law. This is doubtful, but it is possible for such a regime to arise by usage. In relation to the Gulf of Fonseca the Chamber held that its waters, other than the three-mile maritime belts, 'are historic waters and subject to a joint sovereignty of the three coastal states': *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, ICJ Reports 1992 p 351, 601. Also *Gulf of Fonseca* (1917) 11 *AJIL* 674. In each case the particular regime will depend on the facts, and it is unsafe to rely on any general theory of community of property.

2. KEY TERMS AND DISTINCTIONS

(A) SOVEREIGNTY AND JURISDICTION

State territory and its appurtenances (airspace and territorial sea), together with the government and population within its boundaries, constitute the physical and social base for the state. The legal competence of states and the rules for their protection depend on and assume the existence of this stable, physically identified (and normally legally delimited) base.

The competence of states in respect of their territory is usually described in terms of sovereignty and jurisdiction, but the terminology is not employed very consistently even in legal sources. At the same time, some uniformity of usage may be noted. The normal complement of state rights, the typical case of legal competence, is described commonly as 'sovereignty': particular rights, or accumulations of rights quantitatively less than the norm are referred to as 'jurisdiction'. In brief, 'sovereignty' is shorthand for legal personality of a certain kind, that of statehood; 'jurisdiction' refers to particular aspects of the substance, especially rights (or claims), liberties, and powers. Of particular significance is the criterion of consent. State A may have considerable forces stationed within the boundaries of state B. State A may also have exclusive use of a certain area of state B, and exclusive jurisdiction over its own forces. If, however, these rights exist with the consent of the host state then state A has no claim to sovereignty over any part of state B.[3] In such case there has been a derogation from the sovereignty of state B, but state A does not gain sovereignty as a consequence. It would be otherwise if state A had been able to claim that exclusive use of an area hitherto part of state B belonged to state A *as sovereign*, as of right and independently of the consent of any state.

(B) SOVEREIGNTY AND OWNERSHIP

The analogy between sovereignty over territory and ownership of real property appears more useful than it really is. For the moment it is sufficient to establish certain distinctions. The legal competence of a state includes considerable liberties in respect of internal organization and the disposal of territory. This general power of government, administration, and disposition is *imperium*, a capacity recognized and delineated by international law. *Imperium* is distinct from *dominium* in the form of public ownership of property within the state;[4] *a fortiori* in the form of private ownership recognized as such by the law.[5]

[3] E.g. British Sovereign Base Areas in Cyprus. Further: Hendry & Dickson, *British Overseas Territories Law* (2011) 339–42.

[4] Or elsewhere: cf the John F Kennedy Memorial Act 1964, s1 which transferred to and vested in the US land at Runnymede, England for an estate in fee simple absolute to be held in perpetuity.

[5] Cf Lauterpacht, 1 *International Law* (1970) 367, 367–70. Generally: Shan et al (eds), *Redefining Sovereignty in International Economic Law* (2008).

(C) SOVEREIGNTY AND ADMINISTRATION

It may happen that the process of government over an area, with the concomitant privileges and duties, falls into the hands of another state. Thus after the defeat of Nazi Germany in the Second World War the four major Allied Powers assumed supreme power in Germany.[6] The German state did not, however, disappear. What occurred is akin to legal representation or agency of necessity. Indeed, the legal basis of the occupation depended on its continued existence. The very considerable derogation of sovereignty involved in the assumption of powers of government by foreign states, without the consent of Germany, did not constitute a transfer of sovereignty. A similar case, long recognized in customary law, is the belligerent occupation of enemy territory in time of war.[7] The important features of 'sovereignty' in such cases are the continued existence of a legal personality and the attribution of territory to that legal person and not to holders of the territory for the time being.[8]

(D) 'SOVEREIGN RIGHTS' BEYOND STATE TERRITORY

A further source of confusion is the fact that sovereignty is not only used as a description of legal personality accompanied by independence but also as a reference to various types of rights, indefeasible except by special grant, in the patrimony of a state, for example the 'sovereign rights' a coastal state has over the resources of the continental shelf,[9] or a prescriptive right of passage between the main territory and

[6] It is assumed that the form which the occupation took was lawful. See Jennings (1946) 23 *BY* 112, and on post-1945 Germany, Crawford, *Creation of States* (2nd edn, 2006) 452–66, 523–6; chapter 5.

[7] *L v N* (1947) 14 ILR 242. The basic rule in the modern law of military occupation that the occupation of territory during war does not confer sovereignty upon the occupying power is borne out, *inter alia*, in Arts 43, 45 of the Hague Regulations 1907 which establish the occupying force as a mere *de facto* administrator: Pictet (ed), *Commentary on Geneva Convention IV of 1949* (1958) 273. Further: Fleck (ed), *The Handbook of International Humanitarian Law* (2nd edn, 2008) 273–84. Cf McCarthy (2005) 10 *JCSL* 43, questioning the right of the Coalition forces to implement structural changes in the government of Iraq during its occupation 2003–04. Another instance is provided by the situation in which the ceding state still administers the ceded territory, by agreement with the state taking cession: *Gudder Singh v The State (India)* (1953) 20 ILR 145. Further examples of delegated powers: *Quaglia v Caiselli* (1952) 19 ILR 144; *Nicolo v Creni* (1952) 19 ILR 145. On belligerent occupation generally: Benvenisti, *The International Law of Occupation* (1993); Dinstein, *The Law of Belligerent Occupation* (2009). On the issue of Northern Cyprus, see e.g. *Loizidou v Turkey* (1996) 108 ILR 443, 462: Cyprus, which does not exercise effective control over Northern Cyprus, 'has remained the sole legitimate Government of Cyprus'; also *Tomko v Republic of Cyprus*, ILDC 834 (CY 2007). Further, the lack of effective control over part of a state's territory does not diminish that state's rights over that territory under international law. E.g. the Republic of Cyprus, whilst not having effective control over the occupied northern part of the island, is still entitled to exercise its sovereign rights over the latter's airspace under the Chicago Convention on Civil Aviation: *KTHY v Secretary of Transport* [2009] EWHC 1918 (Admin) §52; [2010] EWCA Civ 1093, §§38, 68–9; also Franklin (2011) 36 *Air & Space L* 109; Franklin & Porter (2010) 35 *Air & Space L* 63.

[8] On recent international administrations: e.g. Knoll, *The Legal Status of Territories Subject to Administration by International Organisations* (2008); Stahn, *The Law and Practice of International Territorial Administration* (2008); Wilde, *International Territorial Administration* (2008).

[9] E.g. GCCS, 28 April 1958, 499 UNTS 311, Art 2, recognized as customary law in *North Sea Continental Shelf (Federal Republic of Germany/Netherlands; Federal Republic of Germany/Denmark)*, ICJ Reports 1969 p 3, 19, reiterated in UNCLOS, 10 December 1982, 1833 UNTS 3, Art 77.

an enclave. Rights which are 'owned' and in this special sense 'sovereign' involve a broader concept, not reducible to *territorial* sovereignty.

3. TERRITORIAL ADMINISTRATION SEPARATED FROM STATE SOVEREIGNTY

While the concept of territorial sovereignty normally applies in relation to states, there is now considerable experience with international organizations not only administering territory in the capacity of agent but also assuming legal responsibility for territory in respect of which no state has title. Such a situation arose in 1966 when the General Assembly terminated the Mandate of South West Africa. The legal relations of an organization to the territory in such a case can only be classified as *sui generis* because terms and concepts like 'sovereignty' and 'title' are historically associated with the patrimony of states.[10]

(A) TERMINABLE AND REVERSIONARY RIGHTS

Territorial sovereignty may be defeasible in certain circumstances by operation of law, for example by fulfilment of a condition subsequent or the failure of a condition under which sovereignty was transferred where there is an express or implied condition that title should revert to the grantor. The first situation is exemplified by the status of Monaco before 2005; its independence was conditional, in that if there was a vacancy in the Crown of Monaco it would have become a protectorate of France.[11] Until such a condition operates the tenant had an interest equal in all respects to that of sovereignty.[12]

The second type of case was represented, on one view, by the system of mandates created after the First World War. The mandatories, or administering states for the various ex-German territories, were nominated by the five principal Allied and Associated Powers, in whose favour Germany had renounced sovereignty. On this basis, and because they took the decision to place the territories under mandate, it was suggested that 'the Principal Powers retained a residual or reversionary interest in the actual territories concerned except where these have attained self-government or independence'.[13] The precise incidents of such a reversion would depend on the circumstances of each

[10] *International Status of South West Africa*, ICJ Reports 1950 p 128, 150 (Lord McNair). Also Perritt (2003) 8 *UCLA JILFA* 385.

[11] Treaty of Friendship, 17 July 1918, 981 UNTS 364, Art 3.

[12] Now Treaty of 24 October 2002, 48 *AFDI* 792, 48; Crawford (2nd edn, 2006) 328.

[13] *South West Africa (Ethiopia v South Africa; Liberia v South Africa)*, Preliminary Objections, ICJ Reports 1962 p 319, 482 (Judges Spender & Fitzmaurice, diss).

case.[14] But they did not amount to sovereignty; they took the form of a power of disposition, or of intervention or veto in any process of disposition.

(B) RESIDUAL SOVEREIGNTY

Occupation of foreign territory in time of peace may occur on the basis of a treaty with the territorial sovereign. The grantee under the treaty may receive very considerable powers of administration, amounting to a delegation of the exercise of many of the powers of the territorial sovereign to the possessor for a particular period. Thus, in Article 3 of the Treaty of Peace of 8 September 1951, Japan agreed that, pending any action to place the Ryukyu Islands under the trusteeship system of the UN:

> The United States will have the right to exercise all and any powers of administration, legislation and jurisdiction over the territory and inhabitants of these islands, including their territorial waters.[15]

US courts, in holding that inhabitants of the Ryukyus were not nationals of the US and that the islands were a 'foreign country' in connection with the application of various US statutes, referred to the '*de facto* sovereignty' of the US and to the Japanese interest in terms of 'residual sovereignty' or '*de iure* sovereignty'.[16] Restoration of full Japanese sovereignty was the subject of subsequent bilateral agreements.[17]

This type of interest may have practical consequences. In *Lighthouses in Crete and Samos,* the Permanent Court held that in 1913 Crete and Samos were under the sovereignty of Turkey, which therefore had the power to grant or renew concessions with regard to the islands. As regards Crete the Court said:

> Notwithstanding its autonomy, Crete has not ceased to be a part of the Ottoman Empire. Even though the Sultan had been obliged to accept important restrictions on the exercise of his rights of sovereignty in Crete, that sovereignty had not ceased to belong to him, however it might be qualified from a juridical point of view.[18]

(C) INTERNATIONAL LEASES

There are examples of concessions of territory, including full governmental authority, for a period of years (the New Territories of Hong Kong prior to 1997)[19] or even in

[14] *Eritrea v Yemen (Territorial Sovereignty)* (1998) 114 ILR 1, 40, 115, where the Tribunal held that Yemen had not shown that the doctrine of reversion exists in international law.

[15] 136 UNTS 45.

[16] E.g. *Burna v US,* 240 F.2d 720 (1957). Also: Oda & Owada (eds), *The Practice of Japan in International Law 1961–1970* (1982) 76–96.

[17] (1968) 7 ILM 554; Rousseau (1970) 74 *RGDIP* 682, 717; Rousseau (1970) 64 *AJIL* 647.

[18] *Lighthouses in Crete and Samos* (1937) PCIJ Ser A/B No 71, 126–30. Also: 1 Lauterpacht (1970) 367, 372–3.

[19] Treaty between China and Great Britain, 29 August 1842, 30 BFSP 389. On the expiry of the lease: UKMIL (1985) 56 *BY* 363, 483–5; UKMIL (1986) 57 *BY* 487, 513–14, 529–34. Further: Malanczuk, 'Hong Kong' (2010) *MPEPIL.*

perpetuity (Guantanamo Bay). In such cases the term 'lease' may be applied, but it is no more than a superficial guide to the interest concerned: each case depends on its particular facts and especially on the precise terms of the grant. Certainly there is a presumption that the grantor retains residual sovereignty. Certain types of 'lease' were however, virtual cessions of territory.[20] The return of full control over several leased territories (Hong Kong in 1997, Macao in 1999, the Panama Canal Zone in 2000)[21] may indicate a trend towards confirming the lessor's sovereignty.

The best-known extant international lease is that between Cuba and the US with respect to Guantanamo Bay.[22] The initial lease was concluded in 1903,[23] shortly after Cuba was declared independent. A second lease was concluded in 1934.[24] The revolutionary government in place since 1959 has consistently claimed both to be illegal.[25] Although rarely articulated in legal terms, the basis for the Cuban claim is that the leases are voidable due to their inequitable character and the change in circumstances since the end of the Cold War.[26] Material in this context is Article III of the 1903 Lease, which provides that:

> While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the above described areas of land and water, on the other hand the Republic of Cuba consents that during the period of occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas with a right to acquire... for the public purposes of the United States any land over or other property therein by purchase or by exercise of eminent domain with full compensation to the owners thereof.

[20] *Secretary of State for India v Sardar Rustam Khan* (1941) 10 ILR 98. Also: *Union of India v Sukumar Sengupta* (1990) 92 ILR 554, for discussion on the difference between a lease and servitude.

[21] Panama-US Convention of 18 November 1903, *USTS* No 431. In *In re Cia de Transportes de Gelabert* (1939) 9 ILR 118, the Panama Supreme Court held that Panama retained 'its jurisdictional rights of sovereignty' in the airspace of the Canal Zone. Cf *Stafford Allen & Sons, Ltd v Pacific Steam Navigation Co* [1956] 2 All ER 716. The Panama Canal Treaty and the Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal, 7 September 1977, 1161 UNTS 177, 1280 UNTS 3, superseded the 1903 Convention: Arcari, 'Panama Canal' (2009) *MPEPIL*.

[22] Lazar (1968) 62 *AJIL* 730; Lazar (1969) 63 *AJIL* 116; Johns (2005) 16 *EJIL* 613; Strauss (2006–07) 10 *NYCLR* 479. Another example is the British Indian Ocean Territory (BIOT). In 1966, the UK made the BIOT available to the US for a period of at least 50 years; it subsequently agreed to the establishment of a military base on Diego Garcia Island and to allow the US to occupy the other islands of the Archipelago if they should wish to do so. Cf *Bancoult v Foreign Secretary* [2008] UKHL 61. On the alleged violations of the indigenous people's rights in BIOT: *Bancoult v McNamara*, 445 F.3d 427 (DC Cir, 2006); 549 US 1166 (2007); and the cases pending before the ECtHR, *Chagos Islanders v UK*, Application 35622/04, and an UNCLOS Annex VII Tribunal (*Mauritius v UK*): see ITLOS/Press 164, 25 March 2011.

[23] Agreement between Cuba and the United States for the Lease of Lands for Coaling and Naval Stations, 16 and 23 February 1903, 192 CTS 429.

[24] Treaty Concerning the Relations between the United States of America and the Republic of Cuba, 29 May 1934, 150 LNTS 97.

[25] Further: de Zayas, 'Guantánamo Naval Base' (2009) *MPEPIL*.

[26] Ronen, 'Territory, Lease' (2008) *MPEPIL*. Further: *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, ICJ Reports 1997 p 7, 64–5.

The apparently perpetual character of the rights assigned by this clause has given rise to much commentary, a key issue being whether US constitutional rights protections extend to Guantanamo Bay.[27]

The difficulties concerning the nature of the grantor's interest in this type of case, new examples of which are unlikely to arise, are not present in the amenity-providing 'lease' of a railway station or a military, naval, or air base.[28] Here the rights conferred by a treaty, executive agreement or other intergovernmental agreement are of a more limited kind: consequently the grantor has a right to revoke the 'contractual licence' (according to its terms) and, after a reasonable time has elapsed, proportionate steps (even, in the last resort, force) may be employed to evict the trespasser.

(D) DEMILITARIZED AND NEUTRALIZED TERRITORY

Restrictions on use of territory, accepted by treaty, do not affect territorial sovereignty as a title, even when the restriction concerns matters of national security and preparation for defence.[29] The same applies where demilitarized zones have been imposed by the Security Council[30] or even (in the context of provisional measures) by the International Court.[31]

(E) VASSALAGE, SUZERAINTY, AND PROTECTION

As noted, a condominium involves a sovereignty jointly exercised by two (or more) states on a basis of equality. Historically, other types of shared sovereignty have occurred in which the dominant partner, state A, has acquired a significant role in the government of state B, and particularly in the taking of executive decisions relating to the conduct of foreign affairs. The legal aspects of the relationship will vary with the circumstances of each case, and not too much can be deduced from the terminology of the relevant instruments.[32] It may be that the protected community or 'state' is a

[27] Particularly in relation to the US use of its naval facility at Guantanamo to house detainees captured as part of the so-called 'war on terror': e.g. Steyn (2004) 53 *ICLQ* 1 (describing the facility as a 'legal black hole'); *Abbasi v Foreign Secretary* [2002] EWCA Civ 1598 (Eng) §64. Also: de Zayas (2003–04) 37 *UBCLR* 277; Neuman (2004) 50 *Loyola LR* 1; Johns (2005) 16 *EJIL* 613. Key US decisions are *Rasul v Bush*, 542 US 466 (2004); *Hamdan v Rumsfeld*, 548 US 557 (2006); *Boumediene v Bush*, 553 US 723 (2008); *Al Maqaleh v Gates*, 605 F.3d 84 (DC Cir, 2010). Also: *Khadr v Canada (No 1)* (2008) 143 ILR 212; *Khadr v Canada (No 2)* (2009) 143 ILR 225.

[28] Another example of a modern lease agreement is the US Manas Airbase in Kyrgyzstan, renewed in 2010: US–Kyrgyzstan Status of Forces Agreement, 4 December 2001.

[29] *A-G of Israel v El-Turani* (1951) 18 ILR 164.

[30] E.g. SC Res 687 (1991) re-confirming the territorial sovereignty of both Iraq and Kuwait while imposing a demilitarized zone in the border region between the states; SC Res 1973 (2011) re-confirming the territorial sovereignty of Libya while imposing a no-fly zone.

[31] *Request for Interpretation of the Judgment of 15 June 1962 in the case concerning the Temple of Preah Vihear (Cambodia v Thailand)*, Order of 18 July 2011, §§39–42, 61.

[32] Verzijl, 2 *International Law in Historical Perspective* (1969) 339–454; Rousseau, 2 *Droit International Public* (1974) 276–300. On the unique co-seigneury of Andorra before the adoption of its constitution in 1993

part of state A and, as a colonial protectorate, has no international legal personality, although for purposes of internal law it may have a special status.[33] The question of the status of colonial protectorates is complex and can only be approached on a case by case basis.[34] The protected state may retain a measure of externally effective legal personality, although the exercise of its legal capacities be delegated to state A. In this latter case treaties by state A will not necessarily apply to state B. However, for certain purposes, including the law of neutrality and war, state B may be regarded as an agent of state A. Thus if state A declares war the protected state may be treated as belligerent also, although much will depend on the precise nature of the relations between states A and B.[35] These questions, though they can still be important for the determination of the legal status of territory, pertain closely to the question of the independence of states, considered in chapter 5.

4. RESTRICTIONS ON DISPOSITION OF TERRITORY

(A) TREATY PROVISIONS

States may by treaty agree not to alienate certain parcels of territory in any circumstances, or they may agree not to transfer to a particular state or states.[36] Moreover, a state may agree not to unite with another state: by the State Treaty of 1955, Austria is obliged not to enter into political or economic union with Germany.[37] Previously, in Article 88 of the Treaty of St Germain of 1919, the obligation was expressed differently: the independence of Austria was 'inalienable otherwise than with the consent of the Council of the League of Nations'.[38] An obligation not to acquire territory may also be undertaken. In case of a breach of a treaty obligation not to alienate, or acquire, territory, the grantee may regard the treaty as *res inter alios acta*, and it is doubtful if the existence of a claim by a third state for breach of a treaty can result in the nullity of the transfer.

see *Cruzel v Massip* (1960) 39 ILR 412; *Re Boedecker & Ronski* (1965) 44 ILR 176; Crawford (1977) 55 *RDISDP* 258. Now: Duursma, *Fragmentation and the International Relations of Micro-States* (1996) 316–73.

[33] *Ex parte Mwenya* [1960] 1 QB 241 (sovereignty of the British Crown over the protectorate of Northern Rhodesia indistinguishable in legal effect from that of a British colony; *habeas corpus* thus available). *Mwenya* was cited by the US Supreme Court in *Rasul v Bush*, 542 US 466, 482 (2004).

[34] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)*, ICJ Reports 2002 p 303, 402–7 (kings and chiefs of Old Calabar).

[35] Cf *Nationality Decrees Issued in Tunis and Morocco* (1923) PCIJ Ser B No 4, 27.

[36] Rousseau, 3 *Droit International Public* (1977) 197–8; Verzijl (1969) 477–8.

[37] 15 May 1955, 217 UNTS 223, Art 4.

[38] (1920) 14 *AJIL Supp* 30. See *Customs Regime between Germany and Austria* (1931) PCIJ Ser A/B No 41.

(B) THE PRINCIPLE OF APPURTENANCE

The territory of a state by legal implication includes a territorial sea and the airspace above its land territory and territorial sea.[39] Thus if state A merges with state B, state B's territory will include the territorial sea and the airspace formerly of state A.[40] This simple idea is sometimes described as the principle of appurtenance,[41] and high authority supports the view that as a corollary the territorial sea cannot be alienated without the coast itself (no doubt similarly in the case of airspace).[42] But the logical and legal basis for the corollary is not compelling. Another form of appurtenance appears in the dissenting opinion of Judge McNair in the *Anglo-Norwegian Fisheries* case. In his words: '[i]nternational law imposes upon a maritime State certain obligations and confers upon it certain rights arising out of the sovereignty which it exercises over its maritime territory. The possession of this territory is not optional, not dependent upon the will of the State, but compulsory'.[43] Attractive though this view may seem at first sight, it raises many difficulties. How many of the various territorial extensions are possessed by compulsion of law? The desire to invest the coastal state with responsibility for the maintenance of order and navigational facilities is not a sufficient basis for McNair's rule; indeed, this kind of logic would equally support a doctrine of closed seas. States are permitted to abandon territory, leaving it *res nullius*, whereas the presumptive consequence of disclaiming the territorial sea is simply to extend a *res communis*, the high seas.

5. CONCLUSIONS

(A) THE CONCEPT OF TITLE[44]

The content of sovereignty has been examined from various points of view. By and large the term denotes the legal competence which a state enjoys in respect of its territory.

[39] E.g. when Great Britain acquired sovereignty over Australia's Northern Territory in 1824 it also acquired sovereignty over the territorial sea 'by operation of international law': *Yarmirr v Northern Territory* (2001) 125 ILR 320, 350. Cf Art 1 of the Convention on International Civil Aviation, 7 December 1944, 15 UNTS 295, reflecting customary law: '[t]he contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory'; *KTHY v Secretary of Transport* [2009] EWHC 1918 (Admin), §41; [2010] EWCA Civ 1093, §26.

[40] Claims to territory and treaties of transfer usually refer to territory as specified, or islands, without referring to territorial waters: e.g. the Italian Peace Treaty, 10 February 1947, 49 UNTS 3, Arts 11, 14; Treaty between US and Cuba relating to the Isle of Pines, 2 March 1904, 127 LNTS 143: Wright (1925) 19 *AJIL* 340.

[41] *Grisbadarna (Norway v Sweden)* (1909) 11 RIAA 147, 155. Cf *Procurator General v D* (1948) 15 ILR 70 (status of the maritime belt determined by that of the adjoining land); on the power of the mandatory to legislate for the territorial waters of the mandated territory, *Naim Molvan v A-G for Palestine* [1948] AC 351.

[42] 1 Oppenheim 479–84; also Towey (1983) 32 *ICLQ* 1013.

[43] *Fisheries (UK v Norway)*, ICJ Reports 1951 p 116, 160 (Judge McNair, diss). Also: Fitzmaurice (1954) 31 *BY* 371, 372–3; Fitzmaurice (1957) 92 Hague *Recueil* 1, 129, 137–8.

[44] The following works are helpful, since the problems in the sphere of international law are basically the same: Honoré, in Guest (ed), *Oxford Essays in Jurisprudence* (1961) 107, 134–41; Buckland & McNair,

This competence is a consequence of title and by no means conterminous with it. Thus an important aspect of state competence, the power of disposition, may be limited by treaty, but the restriction, provided it is not total, leaves title unaffected. However, the materials of international law employ the term sovereignty to describe both the concept of title and the legal competence which flows from it. In the former sense the term 'sovereignty' explains (a) why the competence exists and what its fullest possible extent may be; and (b) whether claims may be enforced in respect of interference with the territorial aspects of that competence against a particular state.

The second aspect mentioned is the essence of title: the validity of claims to territorial sovereignty against other states. The equivalent concept in French, *titre*, has been defined as follows: *'[t]erme qui, pris dans le sens de titre juridique, désigne tout fait, acte ou situation qui est la cause et le fondement d'un droit'*.[45] In principle the concept of ownership, opposable to all other states and unititular,[46] does exist. Thus the first and undisputed occupation of land which is *res nullius* may give rise to title which is equivalent to the *dominium* of Roman law. However, in practice the concept of title employed to solve disputes approximates to the notion of the better right to possess familiar in the common law.[47] The operation of the doctrines of acquiescence and recognition makes this type of approach inevitable, but in any case tribunals will favour an approach which reckons with the limitations inherent in a procedure dominated by the presentation of evidence by two claimants, the result of which is not automatically opposable to third states.[48]

(B) TITLE, DELIMITATION, DEMARCATION

In a broad sense many questions of title arise in the context of 'boundary disputes', but as a matter of principle the determination of the location in detail of the boundary line is distinct from the issue of title. Considerable dispositions of territory may take place in which the grantee enjoys the benefit of a title derived from the grant although no determination of the precise boundary line is made.[49] On the other hand precise determination of the boundary may be made a suspensive condition in a treaty of

Roman Law and Common Law (2nd edn, 1965) 71–88 (excursus by Lawson). Also: Castellino & Allen, *Title to Territory in International Law* (2003).

[45] Basdevant, *Dictionnaire de la terminologie du droit international* (1960) *sv.* Cf Salmon (ed), *Dictionnaire de droit international public* (2001) 1084.

[46] Honoré, in Guest (1961) 137, for a definition of a unititular system: '[u]nder it, if the title to a thing is in A, no title to it can be acquired (independently) by B, except by a process which divests A. There is only one "root of title" for each thing, and the present title can ultimately be traced back to that root.'

[47] Jennings, *Acquisition of Territory in International Law* (1963) 5–6. The common law is 'multititular': Honoré, in Guest (1961) 139; so is international law: *Legal Status of Eastern Greenland* (1933) PCIJ Ser A/B No 53, 46; *Island of Palmas (Netherlands v US)* (1928) 2 RIAA 829, 840.

[48] Statute of the International Court of Justice, 26 June 1945, 33 UNTS 993, Art 59.

[49] On the effect of treaties of cession or renunciation relating to territories the boundaries of which are undetermined: *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne* (1925) PCIJ Ser B No 12, 21.

cession. The process of determination is carried out in accordance with a special body of rules. For example according to the *thalweg principle* in the case of a navigable river, the middle of the principal channel of navigation is accepted as the boundary. In the case of non-navigable watercourses the boundary is constituted by the median line between the two banks.[50]

The practical aspects of boundaries must be emphasized. Agreement as to the precise details of a boundary is often followed by the separate procedure of demarcation, that is, the marking, literally, of the boundary on the ground by means of posts, stone pillars, and the like. A boundary may be legally definitive and yet remain undemarcated. Boundaries which are *de facto*, either because of the absence of demarcation or because of the presence of an unsettled territorial dispute, may nevertheless be accepted as the legal limit of sovereignty for some purposes, for example those of civil or criminal jurisdiction, nationality law, and the prohibition of unpermitted intrusion with or without the use of arms.

(c) *NEMO DAT QUOD NON HABET*[51]

This maxim, together with some exceptions, is a familiar feature of English law, but the principle is undoubtedly part of international law also. In *Island of Palmas*, Arbitrator Huber stated:

> The title alleged by the United States of America as constituting the immediate foundation of its claim is that of cession, brought about by the Treaty of Paris, which cession transferred all rights of sovereignty which Spain may have possessed in the region. ... It is evident that Spain could not transfer more rights than she herself possessed.[52]

The effect of the principle is much reduced by the operation of acquiescence and recognition.

Certain connected principles require consideration. First, in principle the adjudication by a tribunal of a piece of territory as between states A and B is not opposable to state C. The tribunal, insofar as adjudication of itself gives title, only has jurisdiction to decide as between the parties before it.[53] The fact that state C claims a particular parcel of territory does not deprive the tribunal of power to adjudicate and does not prevent states A and B from defining their rights in relation to the parcel mutually.[54] In

[50] *Kasikili/Sedudu Island (Botswana v Namibia)*, ICJ Reports 1999 p 1045, 1061–2; *Frontier Dispute (Benin v Niger)*, ICJ Reports 2005 p 90, 149–50. Also: *Guyana/Suriname Arbitration* (2007) 139 ILR 566, §§137, 194, 226, 301. Generally: Cukwurah, *The Settlement of Boundary Disputes in International Law* (1967); 3 Rousseau (1977) 231–72; Brownlie, *African Boundaries* (1979); Shaw, *Title to Territory in Africa* (1986) 221–63; Biger (1989) 25 *MES* 249; McCaffrey, *The Law of International Watercourses* (2nd edn, 2007) 70–2; Islam, *The Law of Non-Navigational Uses of International Watercourses* (2010).

[51] *Cameroon v Nigeria*, ICJ Reports 2002 p 303, 400–7. Also McNair, *Treaties* (1961) 656, 665.

[52] *Island of Palmas (Netherlands v US)* (1928) 2 RIAA 829, 842.

[53] *Guiana Boundary (Brazil v UK)* (1904) 11 RIAA 11, 22.

[54] Boundary Agreement between China and Pakistan, 2 March 1963, (1963) 57 *AJIL* 713, which is expressed as fixing 'the alignment of the boundary between China's Sinkiang and the contiguous areas the

certain cases, the principle operates through particular rules governing special problems. Thus an aggressor, having seized territory by force may purport to transfer the territory to a third state. The validity of the cession will depend on the effect of specific rules relating to the use of force by states. Again, a state may transfer territory which it lacks the capacity to transfer. In this type of situation much turns on the extent to which defects of title may be cured by acquiescence, and recognition.

Under certain conditions it is possible that the law accepts the existence of encumbrances passing with territory ceded. McNair refers to 'treaties creating purely local obligations' and gives as examples territory over which the ceding state has granted to another state a right of transit[55] or a right of navigation on a river,[56] or a right of fishery in territorial or internal waters.[57] This is also the approach of the 1978 Vienna Convention on the Succession of States in Respect of Treaties, Article 12 of which provides that a succession of states shall not affect obligations or rights 'relating to the use of territory' which are 'established by a treaty for the benefit of any territory of a foreign state and considered as attaching to the territories in question'.[58]

defence of which is under the actual control of Pakistan'. Thus India's rights in respect of Kashmir are not foreclosed (Art 6 of the Agreement).

[55] 'A right of transit by one country across the territory of another can only arise as a matter of specific agreement': *Iron Rhine (Belgium v Netherlands)* (2005) 27 RIAA 35, 64.

[56] E.g. the rights of Costa Rica over the San Juan River: *Navigational and Related Rights (Nicaragua v Costa Rica)*, ICJ Reports 2009 p 213.

[57] McNair (1961) 656. Others speak of 'international servitudes', a term McNair rejects since it 'would make the category depend upon the recognition by international law of the institution known as a servitude, which is highly controversial'. See however *Eritrea v Yemen (Territorial Sovereignty)* where the Tribunal noted that the traditional open fishing regime in the southern Red Sea together with the common use of the islands in the area by populations of both coasts was capable of creating historic rights accruing to the two states in dispute in the form of 'a "*servitude internationale*" falling short of territorial sovereignty': (1998) 114 ILR 1, 40–1. Evidently the Tribunal could not quite stomach the idea of a servitude in English. In the region this well-meaning dictum has been a further source of conflict. On the question of servitudes see also *Right of Passage over Indian Territory (Portugal v India)*, ICJ Reports 1960 p 6; *Aaland Islands* (1920) *LNOJ Sp Supp* No 3, 18; *SS Wimbledon* (1920) PCIJ Ser A No 1, 24. Traditionally, such rights were to be interpreted restrictively as limitations to sovereignty. However, such a restrictive interpretation has been rejected in more recent cases: e.g. *Iron Rhine* (2005) 27 RIAA 35, 64–7; *Navigational Rights*, ICJ Reports 2009 p 213, 237–8.

[58] 23 August 1978, 1946 UNTS 3. Art 12 does not however say when rights and duties are so considered.

9

ACQUISITION AND TRANSFER OF TERRITORIAL SOVEREIGNTY[1]

1. INTRODUCTION

Disputes concerning title to land territory, including islands, and over the precise determination of boundaries are regularly the subject of international proceedings. Recourse to arbitration may be part of an overall peace settlement.[2] But many such conflicts are dormant and it is only when a dispute flares up that it receives publicity. While the occupation of territory not belonging to any state (*terra nullius*) is no longer a live issue, issues concerning such occupation in the past may still arise. Legally relevant events may have occurred centuries ago.[3] The pressures of national sentiment, the exploitation of areas once thought barren or inaccessible, the strategic significance of areas previously neglected, and the pressure of population on resources suggest that territorial disputes will continue to be significant.

[1] Jennings, *The Acquisition of Territory in International Law* (1963); Fitzmaurice (1955–56) 32 *BY* 20; de Visscher, *Les Effectivités du droit international public* (1967) 101; Blum, *Historic Titles in International Law* (1965); Bardonnet (1976) 153 Hague *Recueil* 9; Kaikobad (1983) 54 *BY* 119; Shaw, *Title to Territory in Africa* (1986); Thirlway (1995) 66 *BY* 10; Kohen, *Possession contestée et souveraineté territoriale* (1997); Sharma, *Territorial Acquisition, Disputes and International Law* (1997); Ratner (2006) 100 *AJIL* 808; Prescott & Triggs, *International Frontiers and Boundaries* (2008); Shaw, *The International Law of Territory* (2012). For acquisition of maritime territory and zones see chapter 11; for maritime delimitation, chapter 12.

[2] E.g. *Eritrea-Ethiopia Boundary Delimitation* (2002) 130 ILR 1; Simma & Khan, in Ando, McWhinney & Wolfrum (eds), 2 *Liber Amicorum Judge Shigeru Oda* (2002) 1179; Shaw (2007) 56 *ICLQ* 755; Kohen, in Kohen (ed), *Liber Amicorum Lucius Caflisch* (2007) 767. Also, for Sudan: *Government of Sudan v Sudan People's Liberation Movement/Army (Abyei Arbitration)* (2009) 144 ILR 348; Daly & Schofield, 'Abyei Arbitration' (2010) *MPEPIL*; Bockenforde (2010) 23 *LJIL* 555.

[3] In *Minquiers and Ecrehos (France/UK)*, ICJ Reports 1953 p 47, the parties and, to a lesser extent, the Court considered it necessary to investigate legal transactions of the medieval period.

2. DETERMINING TITLE

(A) THE CENTRALITY OF TITLE[4]

If the basic unit of the international legal system is the state, the space which the state occupies in the world is its territory, traditionally thought of as realty, with the state (a person) its proprietor. Thus there were sales and bequests of state territory, leaseholds and reversions, with little or no regard for the wishes of the inhabitants. Indeed international law developed a notion of entitlement to territory well before the state itself developed as a normative concept. Thereafter title arose not simply by physical occupation (i.e. actual administration, often referred to as *effectivités*) but through acquisition in accordance with law—although until 1928, the law included the rule that coerced treaties were valid.[5] Yet there were areas of uncertainty, with territory (often islands, islets, or rocks but sometimes whole provinces) contested between states.[6] In such cases it was largely a historical question which of the claimant states had the better claim.

The basic principle in the modern law is that stated by the Chamber in *Frontier Dispute (Burkina Faso/Mali)*:

> Where the act corresponds exactly to law, where effective administration is additional to the *uti possidetis iuris*, the only role of *effectivité* is to confirm the exercise of the right derived from a legal title. Where the act does not correspond to the law, where the territory which is the subject of the dispute is effectively administered by a State other than the one possessing the legal title, preference should be given to the holder of the title. In the event that the *effectivité* does not co-exist with any legal title, it must invariably be taken into consideration. Finally, there are cases where the legal title is not capable of showing exactly the territorial expanse to which it relates. The *effectivité* can then play an essential role in showing how the title is interpreted in practice.[7]

Thus title prevails over possession, but if title is equivocal, possession under claim of right matters.

Title to territory, like ownership of land, is normally 'objective', but there is no system of registration, no international Torrens title.[8] Unquestioned title is a contingency

[4] Fitzmaurice (1955–56) 32 *BY* 20, 64–6; Schwarzenberger (1957) 51 *AJIL* 308, 320–2; Castellino & Allen, *Title to Territory in International Law* (2003); Kohen (2004) 108 *RGDIP* 562; Shaw (ed), *Title to Territory* (2005); Ratner (2006) 100 *AJIL* 808. See also chapter 8. For linguistic confusion over the term: O'Keefe (2011) 13 *Int Comm LR* 147, 153–4.

[5] Thus the objection to British acquisition of the Boer Republics was merely that it was premature, not that it was intrinsically unlawful: *West Rand Central Gold Mining Co v R* [1905] 2 KB 391. For the development of rules relating to the use of force see chapter 33.

[6] On Gibraltar see Waibel, 'Gibraltar' (2009) *MPEPIL*.

[7] ICJ Reports 1986 p 554, 586–7. The term *uti possidetis (iuris)* refers to the presumption that the boundaries of a new state or entity follow those that existed under the previous (usually colonial) regime. Further: Lalonde, *Determining Boundaries in a Conflicted World* (2002); Castellino & Allen (2003) ch 1.

[8] That is, a system of municipal title registration whereby inclusion on the register confers on the holder indefeasible title: see *Black's Law Dictionary* (9th edn, 2010) 1625. The civil law equivalent is a cadastre.

arising from history, general recognition, and the absence of any other claimant. Title may be relative in several quite different contexts.

(1) The principle *nemo dat quod non habet* (no donor can give a greater interest than he or she already has) places a restrictive effect on titles dependent on bilateral agreement: see chapter 8.

(2) A judicial decision on issues of title cannot foreclose the rights of third parties.

(3) In a situation where physical holding is not conclusive of the question of right, recognition becomes important, and this may be forthcoming from some states and not others.

(4) The *compromis* on the basis of which a dispute is submitted to a court or tribunal may assume that title is to go to one of the two claimants. In *Minquiers and Ecrehos* the Court interpreted the *compromis* as excluding a finding that the islets were *res nullius* or subject to a *condominium*.[9] In such a case, in the absence of any other claimant, the result seems to be a title valid against all, but the parties have not had to come up to any minimum requirements of effective control.

(5) In any event, in instances such as *Island of Palmas* and *Minquiers and Ecrehos*,[10] the Court assesses the relative intensity of the competing acts of state authority to determine which party has the better right.

(6) In appropriate circumstances the Court will lean in favour of title in one claimant even though there are grounds for a finding that the territory was at the relevant time *terra nullius*. Thus in *Eastern Greenland*[11] Danish activity in the disputed area had hardly been intensive, but the Court refused to consider the area *terra nullius*.[12]

(7) In some cases the sheer ambiguity of the facts may lead the Court to rely on matters which are less than fundamental,[13] or to seek evidence of acquiescence by one party. In this context it is academic to use the classification 'inchoate'. A title, though resting on very preliminary acts, is sufficient as against those without a better title.[14] In coming to a decision on the question of right, it may be necessary to measure 'titles' against each other.[15]

[9] ICJ Reports 1953 p 47, 52. See also the special agreement in *Island of Palmas* (1928) 2 RIAA 831, 869.

[10] Also: *Temple of Preah Vihear (Cambodia v Thailand)*, ICJ Reports 1962 p 6, 72 (Judge Moreno Quintana).

[11] *Legal Status of Eastern Greenland* (1933) PCIJ Ser A/B No 53. Further: Alfredsson, '*Eastern Greenland* Case' (2007) *MPEPIL*.

[12] Cf Lauterpacht, *Development* (1958) 241. Also: *Clipperton Island* (1931) 2 RIAA 1105.

[13] *Sovereignty over Certain Frontier Land (Belgium/Netherlands)*, ICJ Reports 1959 p 209, 231 (Judge Lauterpacht), 232 (Judge Spiropoulos), 249–51 (Judge Armand-Ugon), where title resting on an ambiguous treaty conflicted with various acts of administration.

[14] Cf French rights as against Mexico in *Clipperton*; Danish rights as against Norway in *Eastern Greenland*. See Beckett (1934) 50 Hague *Recueil* 189, 230, 254–5.

[15] *Island of Palmas* (1928) 2 RIAA 831, 870.

(B) THE INTERTEMPORAL LAW[16]

In many instances the rights of parties to a dispute derive from a legally significant act done, or treaty concluded, long ago. As Fitzmaurice says, it is 'an established principle of international law that in such cases the situation in question must be appraised, and the treaty interpreted, in the light of the rules of international law as they existed *at the time*, and not as they exist today'.[17] In *Island of Palmas,* Judge Huber stated the principle and continued: 'The effect of discovery by Spain is ... to be determined by the rules of international law in force in the first half of the 16th century—or (to take the earliest date) in the first quarter of it ...'.[18] The rule has also been applied in the interpretation of treaties concerning territory.[19] It is justified by reference to the need for predictability and stability in the international system of title.[20]

In *Island of Palmas,* Judge Huber had to consider whether Spanish sovereignty over the island subsisted at the critical date in 1898. In doing so he gave a new dimension to the rule:

> As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case (the so-called intertemporal law), a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law.[21]

This extension of the doctrine has been criticized on the grounds that to require title to be actively maintained at every moment of time would threaten many titles and lead to instability.[22] This emphasizes the need for care in applying the rule.[23] In any case the intertemporal principle does not operate in a vacuum: its impact will be reduced

[16] Jennings (1963) 28; Fitzmaurice (1953) 30 *BY* 1, 5; Elias (1980) 74 *AJIL* 285; Thirlway (1995) 66 *BY* 128; Higgins, in Makarczyk (ed), *International Law at the Threshold of the 21st Century* (1996) 173; Kotzur, 'Intertemporal Law' (2008) *MPEPIL*.

[17] Fitzmaurice (1953) 30 *BY* 1, 5 (emphasis added). See also Fitzmaurice (1975) 56 *Ann de l'Inst* 536, Art 1 ('Unless otherwise indicated, the temporal sphere of application of any norm of public international law shall be determined in accordance with the general principle of law by which any fact, action or situation must be assessed in light of the rules that are contemporaneous with it').

[18] *Island of Palmas* (1928) 2 RIAA 831, 845. Further: Jessup (1928) 22 *AJIL* 735; also *Banks of Grisbadarna* (1909) 11 RIAA 155, 159.

[19] *Rights of Nationals of the United States of America in Morocco (France v US)*, ICJ Reports 1952 p 176, 189; *Right of Passage over Indian Territory (Portugal v India)*, ICJ Reports 1960 p 6, 37; also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports 1971 p 16, 31; *Aegean Sea Continental Shelf (Greece v Turkey)*, ICJ Reports 1978 p 3, 32.

[20] E.g. *Eritrea and Yemen* (1998) 114 ILR 1, 46, 115; *Eritrea-Ethiopia Boundary* (2002) 130 ILR 1, 34; *Land and Maritime Boundary between Cameroon and Nigeria*, ICJ Reports 2002 p 303, 404–7.

[21] *Island of Palmas* (1928) 2 RIAA 831, 845.

[22] Lauterpacht, *Function of Law* (1933, repr 2011) 283–5. See Jessup (1928) 22 *AJIL* 735, 739; Jennings (1963) 28; Jennings (1967) 121 Hague *Recueil* 422.

[23] This form of the doctrine was applied sensibly in *Minquiers and Ecrehos*, ICJ Reports 1953 p 47, 56; see also *Western Sahara*, ICJ Reports 1975 p 12, 38; ibid, 168 (Judge de Castro).

by the effect of recognition, acquiescence, and the rule that abandonment is not to be presumed. Thus in *Pedra Branca*, the historic title of the Sultanate of Johore to the disputed features survived into the modern period, despite little or nothing by way of the exercise of governmental authority over them.[24]

(c) THE CRITICAL DATE[25]

In any dispute a certain date will assume prominence in the process of evaluating the facts. The choice of such a date is within the province of the tribunal and will depend on the logic of the law applicable to the facts as well as on the practical necessity of confining the dossier to the more relevant facts and thus to acts prior to the existence of a dispute. In the latter context the tribunal is simply excluding evidence consisting of self-serving acts of parties after the dispute arose. But evidence of acts and statements occurring after the critical date may be admissible if not self-serving, as in the case of admissions against interest. There are several types of critical date, and it is difficult and probably misleading to formulate general definitions:[26] the facts of the case are dominant (including the terms of the special agreement empowering the tribunal to hear the case) and there may be no necessity for a tribunal to choose any date whatsoever.

In some cases there will be several dates of significance. *Eastern Greenland* arose from a Norwegian proclamation of 10 July 1931 announcing occupation of the area. The Court held that 'as the critical date is July 10th, 1931 ... it is sufficient [for Denmark] to establish a valid title in the period immediately preceding the occupation.'[27] In *Island of Palmas* the US claimed as successor to Spain under a treaty of 10 December 1898, and everything turned on the nature of Spanish rights at that time. The Court did not specifically choose a critical date in *Minquiers and Ecrehos*.[28] In *Argentine-Chile Frontier* the tribunal 'considered the notion of the critical date to be of little value in the present litigation and ... examined all the evidence submitted to it, irrespective of the date of the acts to which such evidence relates'.[29]

[24] *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, ICJ Reports 2008 p 12.

[25] Fitzmaurice (1955–56) 32 *BY* 20; Blum (1965) 208; Thirlway (1995) 66 *BY* 31. See also the Chamber in *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, ICJ Reports 1992 p 351, 401. For the problems arising in the context of treaties of cession and the rights of successor states see *Lighthouses (France and Greece)* (1956) 23 ILR 659, 668.

[26] See Jennings (1963) 31; Jennings (1967) 121 Hague *Recueil* 423.

[27] *Eastern Greenland* (1933) PCIJ Ser A/B No 53, 45.

[28] ICJ Reports 1953 p 47. France relied on the date of the Convention between France and Great Britain for Defining the Limits of Exclusive Fishing Rights, 2 August 1839, 89 CTS 221; the UK on the date of the *compromis* (29 December 1950). See Johnson (1954) 3 *ICLQ* 189, 207–11. Critical dates did not feature in *Temple*, ICJ Reports 1962 p 6. However, the Court treated two dates as material: 1904, the date of a frontier treaty between France and Thailand, and 1954, when Thailand sent military or police forces to occupy the area. See also *Rann of Kutch* (1968) 50 ILR 2, 470.

[29] (1966) 38 ILR 10, 79–80. Also: *Eritrea and Yemen* (1998) 114 ILR 1, 32; *Sovereignty over Pulau Ligitan and Pulau Sipidan (Indonesia/Malaysia)*, ICJ Reports 2002 p 625, 682; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea*, ICJ Reports 2007 p 659, 697–701.

(D) *TERRA NULLIUS*[30]

Terra nullius is land not under the sovereignty or authority of any state; *occupatio* was the mode by which such territory could be acquired.[31] In the modern context, it has fallen into disuse. This is because there remains on the surface of the earth no truly 'vacant' territory,[32] but also because the term gradually assumed imperialist overtones when it was used to justify colonization of large areas of inhabited lands through a theory of European supremacy. That theory underlay the Congress of Berlin of 1885 but now 'stands condemned'.[33] In *Western Sahara*, the Court had to decide whether the Western Sahara was *terra nullius* at the time of Spanish colonization (in the 1890s). It held it was not, because the people of the territory were socially and politically organized under chiefs with a capacity to represent them. In fact the territory was acquired by treaty, not occupation.[34]

3. THE 'MODES' OF ACQUISITION

(A) BASIC PRINCIPLES

Standard textbooks, particularly those in English, classify the modes of acquisition in a stereotyped way reflecting those of Roman law.[35] According to this analysis there are five modes of acquisition—occupation, accretion, cession, conquest, and prescription. But the concept of modes of acquisition is unsound in principle: such labels only make the task of analysis more difficult.[36] The inadequacies of the orthodox approach are more apparent when the relevant questions have been examined, but a few things may be usefully said here.

First, it is common to classify the five orthodox modes of acquisition as 'original' or 'derivative'. Occupation and accretion are usually described as 'original', cession as 'derivative'. There are differences of opinion in regard to conquest and prescription, and again the classification has no practical value.[37] In one sense all titles are original, since much depends on the acts of the grantee in the case of a cession. In any event the

[30] Generally: Andrews (1978) 94 *LQR* 408.

[31] E.g. *Eastern Greenland* (1933) PCIJ Ser A/B No 53, 44–51; *Western Sahara*, ICJ Reports 1975 p 12, 38–40, 85–6 (Vice-President Ammoun).

[32] Aside from some very small rocks and a small sector of Antarctica (over which in any case no sovereignty may be claimed by virtue of the Antarctic Treaty, 1 December 1959, 402 UNTS 71, Art IV). Also: Shaw, in Shaw (2005) 3, 24; Ratner (2006) 100 *AJIL* 808, 811.

[33] *Western Sahara*, ICJ Reports 1975 p 12, 86.

[34] Ibid, 39–40. For the classification of Australia as *terra nullius*: *Mabo v Queensland (No 2)* (1992) 112 ILR 457, 491–2. Generally on the 18th–19th century practice: Crawford, *Creation of States* (2nd edn, 2006) 263–74.

[35] Castellino & Allen (2003) ch 2.

[36] For criticism: Johnson (1955) 13 *CLJ* 215; Jennings (1963) 6–7.

[37] Thus an 'original' mode does not necessarily give a title free of encumbrances: *Right of Passage*, ICJ Reports 1960 p 6.

dual classification oversimplifies the situation, and the modes described as 'derivative' are so in rather different ways. Moreover the usual analyses do not explain how title is acquired when a new state comes into existence.[38] Events leading to independence of the new state are mostly within the domestic jurisdiction of another state, yet they are legally relevant to territorial disputes involving the new state. In this type of case there is no 'root of title' *as such*: title is a by-product of the events leading to the creation of a state as a new source of territorial sovereignty.[39]

Secondly, in determining title, a tribunal will concern itself with proof of the exercise of sovereignty via conduct *à titre de souverain* before the critical date or dates, and will not apply the orthodox analysis to describe its process of decision. The issue of territorial sovereignty is often complex and involves the application of various legal principles to the facts, including (as concerns the modern period) principles deriving from the prohibition on the acquisition of territory by force and the invalidity of coerced treaties. The result often cannot be ascribed to any single 'mode of acquisition'. Orthodox analysis does not allow for the interaction of acquiescence and recognition with the other rules. Furthermore, a category like 'cession' or 'prescription' may bring quite distinct situations into unhappy fellowship.[40] Lastly, the importance of showing a better right in contentious cases, that is, of relative title, is obscured if too much credit is given to the five 'modes'. Thus the following headings represent categories of convenience.

(B) ORIGINAL AND HISTORIC TITLE

It may happen that a current dispute involves not only reliance upon the exercise of state authority but the invocation of an ancient, original or historic title. The concept informs the principle of 'immemorial possession' and reliance upon evidence of general repute or opinion as to matters of historical fact. Particularly in Asia, traditional boundaries play a significant role.[41] International tribunals have recognized the concept of ancient or original title,[42] but require appropriate evidence in support.

(C) EFFECTIVE OCCUPATION[43]

The concept of effective occupation in international law represents the type of legal relation which in private law would be described as possession. In *Eastern Greenland*

[38] Jennings (1963) 7–11. Also: 1 Hyde 390; 1 Hackworth 444–5.

[39] Crawford (2nd edn, 2006) 664–5; see further chapter 5.

[40] The term 'annexation' is neither a term of art nor a root of title, but describes an official state act signifying an extension of sovereignty. Whether it is legally effective is another matter. See McNair, 1 *Opinions* 285, 289; 1 Hackworth 446–9.

[41] Kaikobad (1983) 54 *BY* 119, 130–4.

[42] *Minquiers and Ecrehos*, ICJ Reports 1953 p 47, 53–7, 74–9 (Judge Basdevant); *Rann of Kutch* (1968) 50 ILR 2, 474; *Western Sahara*, ICJ Reports 1975 p 12, 42–3; *El Salvador/Honduras*, ICJ Reports 1992 p 351, 564–5; *Eritrea and Yemen* (1998) 114 ILR 1, 37–45.

[43] Waldock (1948) 25 *BY* 311; von der Heydte (1935) 29 *AJIL* 448; Fitzmaurice (1955–56) 32 *BY* 20, 49–71; Shaw, in Shaw (2005) xi.

the Permanent Court said 'a claim to sovereignty based not upon some particular act or title such as a treaty of cession but merely upon continued display of authority, involves two elements each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority'.[44] This statement has not lost its force, and was (in part) reiterated in *Eritrea/Yemen*: '[t]he modern international law of the acquisition (or attribution) of territory generally requires that there be: an intentional display of power and authority over the territory, by the exercise of jurisdiction or State functions, on a continuous and peaceful basis'.[45]

In the absence of a formal basis of title in a treaty or judgment, and in a system without registration of title, possession plays a significant role. It must be borne in mind that 'legal possession' involves a search for an interest worth protection by the law. Legal policy may lead a court to regard as sufficient a tenuous connection with the territory in certain conditions. Moreover, what is important is *state activity* and especially acts of administration: use by local peoples generally lacks this element and is only tangentially relevant.[46] 'Occupation' here derives from *occupatio* in Roman law and does not necessarily signify occupation in the sense of actual settlement and a physical holding.

As in private law, the concept of effective occupation is complex, and many difficulties arise in applying it to the facts. Precisely what acts will be sufficient to found sovereignty is a matter of fact and degree,[47] and may depend on the character of the territory: for example, the bar with respect to remote and sparsely settled areas will be set lower than in the context of more heavily populated territory.

Effective and long-established occupation is key to a claim of acquisitive prescription, although courts and tribunals have rarely applied that doctrine as such.[48] In practice it may not be easy to distinguish effective occupation and prescription, and neither *Island of Palmas* nor *Eastern Greenland* employs the categories. Beckett classified the former as a case of prescription, the latter as resting on occupation.[49] But in both cases the issue was simply which of two competing sovereignties had the better right. Prescription classically involves usurpation, yet these cases involved, for all practical purposes, contemporaneous, competing acts of state sovereignty. In

[44] (1933) PCIJ Ser A/B No 53, 45–6, 63; *Western Sahara*, ICJ Reports 1975 p 6, 12, 42–3. These criteria were applied in *Caribbean Sea*, ICJ Reports 2007 p 659, 711–21.

[45] (1998) 114 ILR 1, 69.

[46] *Kasikili/Sedudu Island (Botswana/Namibia)*, ICJ Reports 1999 p 1045, 1105–6.

[47] E.g. *Eastern Greenland* (1933) PCIJ Ser A/B No 53, 45–6; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, ICJ Reports 2001 p 40, 100 (and see Kohen (2002) 106 *RGDIP* 295); *Pulau Ligitan/Sipadan*, ICJ Reports 2002 p 625, 682; *Pulau Batu Puteh*, ICJ Reports 2008 p 12, 34–7.

[48] E.g. *Pulau Batu Puteh*, ICJ Reports 2008 p 12.

[49] Beckett (1934) 50 Hague *Recueil* 218, 220. *Eastern Greenland* (1933) PCIJ Ser A/B No 53 is commonly thought to have been decided on the basis that the area concerned was *terra nullius* at the critical date, but this is a misreading: de Visscher (1967) 105. The Belize Supreme Court held that Britain gained sovereignty over Belize 'by a combination of the various treaties with Spain and later with Guatemala, first acquired interests in British Honduras and by effective occupation and administration together with the passage of time': *Cal v Attorney General* (2007) 46 ILM 1022, 1038.

Minquiers and Ecrehos, the Court stated the issue as one of possession,[50] which in the context was equated with sovereignty.[51] Its task was 'to appraise the relative strength of the opposing claims to sovereignty over the Ecrehos'.[52]

(i) Discovery[53]

This category, much employed, is equally unsatisfactory for the purpose of legal analysis. It links the concept of 'discovery' to that of *terra nullius*, and is discredited for the same reasons. At one time it was thought that in the fifteenth and sixteenth centuries discovery conferred a complete title.[54] But it seems that it gave no more than an inchoate title: an effective act of appropriation seems to have been necessary.[55] The modern view, certainly, is that it gave no more than an inchoate title, an option, as against other states, to proceed to effective occupation within a reasonable time.[56] In *Island of Palmas* the US argued that, as successor to Spain, its title derived from Spanish discovery in the sixteenth century. Huber responded that, even if discovery without more gave title at that time, the continued existence of the right must be determined according to the law prevailing in 1898, the critical date. In his opinion the modern law is that 'an inchoate title of discovery must be completed within a reasonable period by the effective occupation of the region claimed to be discovered'.[57] British[58] and Norwegian[59] practice supports this view. The US view now is that mere discovery gives no title, inchoate or otherwise, and this has much to commend it.[60] The notion of discovery only makes sense if it is placed firmly in the context of effective occupation, and it is best to avoid the category altogether. Further, the notion of inchoate title is misleading. Title is never 'inchoate', though it may be weak if it rests on slight evidence of state activity.

[50] *Minquiers and Ecrehos*, ICJ Reports 1953 p 47, 55–7.

[51] Ibid, 58–9.

[52] Ibid, 67. Cf *Eastern Greenland* (1933) PCIJ Ser A/B No 53, 22, 46.

[53] See 1 Hyde 312–30; Lindley (1926) ch 8; von der Heydte (1935) 29 *AJIL* 448; Goebel, *The Struggle for the Falkland Islands* (1927) 47–119; Waldock (1948) 25 *BY* 311, 322–5; McDougal, Lasswell, Vlasic & Smith (1963) 111 *U Penn LR* 521, 543–4, 558–60, 598–611; McDougal, Lasswell & Vlasic, *Law and Public Order in Space* (1963) 829–44; Kohen & Hébié, 'Territory, Discovery' (2011) *MPEPIL*.

[54] Hall, *International Law* (1880) 126.

[55] In the 16th century Roman law relating to acquisition by finding was applied, and this emphasized actual taking. Contemporary state practice usually demanded a first taking followed by public and continuous possession evidenced by state activity. See the instructions of Charles V of Spain to his ambassador of 18 December 1523 respecting the Spanish claim to the Moluccas: Goebel (1927) 96–7; 1 Hyde 324. Keller, Lissitzyn & Mann argue that whereas mere discovery could not give a valid title, symbolic acts of taking of possession could do so: *Creation of Rights of Sovereignty through Symbolic Acts, 1400–1800* (1938) 148–9.

[56] Hall (1880) 127; McNair, 1 *Opinions* 285.

[57] See also *Clipperton Island* (1931) 2 RIAA 1105, in which Mexico relied unsuccessfully on alleged discovery by Spain.

[58] McNair, 1 *Opinions* 285, 287, 320; 1 Hackworth 455.

[59] 1 Hackworth 400, 453, 469, 459 (French view on Adélie Land); Orent & Reinsch (1941) 35 *AJIL* 443; cf 1 Hyde 325 (Portuguese view in 1782).

[60] 1 Hackworth 398–400, 457, 460.

(ii) Symbolic annexation[61]

Symbolic annexation[62] may be defined as a declaration or other act of sovereignty or an act of private persons, duly authorized, or subsequently ratified by a state, intended to provide unequivocal evidence of the acquisition of sovereignty over a parcel of territory or an island. The subject must be seen as a part of the general question of effective occupation. There is no magic in the formal declaration of sovereignty by a government, whether or not this is preceded, accompanied or followed by a formal ceremony in the vicinity. In the case of uninhabited, inhospitable and remote regions little is required in the nature of state activity and a first, decisive act of sovereignty may suffice to create a valid title. But in principle the state activity must satisfy the normal requirements of 'effective occupation'. 'Symbolic annexation' does not give title except in special circumstances (as in *Clipperton Island*). However, it is a part of the evidence of state activity. It has been stated that 'a prior State act of formal annexation cannot after a long interval prevail against an actual and continuous display of sovereignty by another State'.[63] But if the initial act was effective to vest title then a latecomer can only succeed, if at all, on the basis of prescription or acquiescence. To require too much in respect of the maintenance of rights may encourage threats to the peace. In the case of remote islands, it is unhelpful to require a determinate minimum of 'effectiveness', once title is actually established.[64]

In *Clipperton Island* a French lieutenant, duly authorized, proclaimed French sovereignty in 1858: this was notified to the government of Hawaii by the French consulate. In 1897, after inactivity in the intervening years, a French vessel called at the island and found three Americans collecting guano for an American company. The US denied any intention of claiming sovereignty. In the same year the island received its first visit from a Mexican gunboat and a diplomatic controversy began. The Mexican case rested on Spanish discovery, but the arbitrator held that even if a historic right existed it was not supported by any manifestation of Mexican sovereignty. The award continues:

> if a territory, by virtue of the fact that it was completely uninhabited, is, from the first moment when the occupying State makes its appearance there, at the absolute and undisputed disposition of that State, from that moment the taking of possession must be considered as accomplished, and the occupation is thereby completed.[65]

[61] McDougal, Lasswell, Vlasic & Smith (1963) 111 *U Penn LR* 521, 543–4, 558–60, 598–611; McDougal, Lasswell, Vlasic & Smith, *Law and Public Order in Space* (1963) 829–44; 1 Hackworth 398–9; Waldock (1948) 25 *BY* 311, 323–5; McNair, 1 *Opinions* 314ff; Marston (1986) 57 *BY* 337.

[62] The term 'annexation' is neither a term of art nor a root of title. The term commonly describes an official state act signifying an extension of sovereignty. Whether it is legally effective is another matter. See McNair, 1 *Opinions* 285, 289; 1 Hackworth 446–9.

[63] See Waldock (1950) 36 *GST* 325. Cf Fitzmaurice (1955–6) 32 *BY* 20, 65.

[64] On the establishment of British sovereignty over Rockall in 1955: Verzijl, 3 *International Law in Historical Perspective* (1968) 351.

[65] (1931) 2 RIAA 1105, 1110.

The annexation, though symbolic in form, had legal effect.

(iii) Effective and continuous display of state authority

As was noted by Huber in *Island of Palmas* 'the actual continuous and peaceful display of state functions is in the case of dispute the sound and natural criterion of territorial sovereignty'.[66] This is in contrast to older works on international law, stressing a nineteenth-century view of occupation in terms of settlement and close physical possession.[67] Rather the question has become one of administrative character, under which those acts which are reflective of the intention to govern, and not merely to possess in some nominal fashion, are constitutive of title.[68]

Thus, in *Island of Palmas* the Dutch claim to the contested territory was preferred on the basis of evidence 'which tends to show that there were unchallenged acts of peaceful display of Netherlands sovereignty from 1700 to 1906 and which... may be regarded as sufficiently proving the existence of Netherlands sovereignty'.[69] In *Eastern Greenland* the Danish claim, based not on any physical presence in the contested territory but on (a) the long-term presence of colonies in other parts of Greenland, (b) the wording of legislation and treaties so as to render them applicable to Eastern Greenland, and (c) seeking to have the resulting title recognized internationally, was held to be superior to the Norwegian claim, based on the wintering of various expeditions in the territory and the construction of a wireless station there. The Permanent Court held that Denmark, at least in the 10 years prior to Norwegian involvement, had 'displayed and exercised her sovereign rights to an extent sufficient to constitute valid title to sovereignty'.[70]

The emphasis on the display of state activity, and the interpretation of the facts in the light of a legal policy which favours stability and allows for the special characteristics of uninhabited and remote territories, suggest a change in the law.[71] The modern law concentrates on title, on evidence of sovereignty, and the notion of occupation has been refined accordingly.[72] Thus in *Minquiers and Ecrehos* in relation to the Ecrehos group the Court was concerned with acts involving the exercise of jurisdiction, local administration, such as the holding of inquests,[73] and a British Treasury Warrant of 1875 constituting Jersey a Port of the Channel Islands.[74]

[66] E.g. *Island of Palmas* (1928) 2 RIAA 831, 839.

[67] See Hall, *International Law* (8th edn, 1924) 125. Also: McNair, 1 *Opinions* 291, 315–16; 1 Hyde 342.

[68] Cf *Eritrea-Ethiopia Boundary* (2002) 130 ILR 1, 42.

[69] *Island of Palmas* (1928) 2 RIAA 829, 870–1.

[70] (1933) PCIJ Ser A/B No 53, 63.

[71] See Shaw, in Shaw (2005) xi, xxiii–xxiv.

[72] See von der Heydte (1935) 29 *AJIL* 448, 462ff; 3 Rousseau, 169.

[73] ICJ Reports 1953 p 47, 65–6. On acts relating to the Minquiers see ibid, 67–70.

[74] *Minquiers and Ecrehos*, ICJ Reports 1953 p 47. Further: *Frontier Dispute (Belgium/Netherlands)*, ICJ Reports 1959 p 209, 228–9, 231–2, 248–50, 251, 255; *Temple*, ICJ Reports 1962 p 6, 12, 29–30, 59–60, 72, 91–6; *Pulau Ligitan/Sipidan*, ICJ Reports 2002 p 625, 678–86.

By contrast acts by private persons purporting to appropriate territory may be ratified by the state and may then constitute evidence of its effective occupation.[75] Otherwise they will have no legal effect.[76]

(iv) The intention to act as sovereign

The requirement of an intention to act as sovereign, otherwise referred to as *animus occupandi*[77] or *animus possidendi*,[78] is generally stressed. However, the notion may create more problems than it solves: Ross described the subjective requirement of the 'will to act as sovereign' as 'an empty phantom'.[79] In truth the subjective criterion is unrealistic in seeking a coherent intention from activity involving numerous individuals often over a considerable period of time. Furthermore, the criterion begs the question in many cases where there are competing acts of sovereignty.[80]

In certain contexts, however, the *animus occupandi* (or something like it) *has* a function. First, the activity must be *à titre de souverain* in the sense that the agency must be that of the state and not of unauthorized persons. Secondly, it has a negative role: if the activity is by the consent of another state recognized as the rightful sovereign then no amount of state activity is capable of maturing into sovereignty. Thirdly, the state activity taken as a whole may be explicable only on the basis that sovereignty is assumed.[81] Thus in *Minquiers and Ecrehos* the fact that both parties had conducted official hydrographic surveys of the area was not necessarily referable to an assertion of sovereignty by either. But certain forms of activity, whilst not necessarily connected with territorial sovereignty, have probative value, for example, the exercise of criminal jurisdiction.

(D) CESSION[82]

A right to territory may be conferred by treaty, provided the transferee takes in accordance with the treaty.[83] An actual transfer is not required.[84] The date on which title

[75] McNair, 1 *Opinions* 295, 314, 316–19, 323–5. Also: Orent & Reinsch (1941) 35 *AJIL* 443, 450–4; Shaw, in Shaw (2005) xi, xxiii.

[76] E.g. *Qatar v Bahrain*, ICJ Reports 2001 p 40, 99–100 (digging of artesian wells not reflective of sovereignty); *Pulau Ligitan/Sipadan*, ICJ Reports 2002 p 625, 683 (illegal fishing not evidence of sovereign conduct). See also the Court's treatment of the persistent presence of indigenous peoples in the contested territory in *Kasikili/Sedudu Island*, ICJ Reports 1999 p 1045.

[77] Cf Fitzmaurice (1955–56) 32 *BY* 20, 55–8; *Clipperton Island* (1931) 2 RIAA 1105, 1110.

[78] See *Eastern Greenland* (1933) PCIJ Ser A/B No 53, 83 (Judge Anzilotti, diss). See also *Frontier Dispute (Belgium/Netherlands)*, ICJ Reports 1959 p 209, 255 (Judge Moreno Quintana, diss).

[79] Ross, *International Law* (1947) 147.

[80] Cf *Eastern Greenland* (1933) PCIJ Ser A/B No 53, 45–6.

[81] Fitzmaurice (1955–56) 32 *BY* 20, 56–8.

[82] The term 'cession' is used to cover a variety of transactions: cf *Différends Sociétés Dufay et Gigandet* (1962) 16 RIAA 197, 208–12. Also: *Christian v R* [2006] UKPC 47, §11. See generally Dörr, 'Cession' (2006) *MPEPIL*. On the possibility of cession by the people of a territory (Malta) see *Sammut v Strickland* [1938] AC 678.

[83] *San Lorenzo Title & Improvement Co v City Mortgage Co* (1932) 6 ILR 113, 116; *Franco-Ethiopian Railway Co* (1957) 24 ILR 602, 616, 623; *Christian v R* [2006] UKPC 47, §11. Cf *Certain German Interests in Polish Upper Silesia* (1926) PCIJ Ser A No 7, 30; *Lighthouses in Crete and Samos* (1937) PCIJ Ser A/B No 71, 103.

[84] Some cases of transfer may be better classified as renunciation: *Sorkis v Amed* (1950) 17 ILR 103, although the term cession is sometimes used: *German Reparations* (1924) 1 RIAA 429, 443; *Banin v Laviani*

changes will normally be the date on which the treaty comes into force:[85] an unratified treaty does not confer sovereignty.[86] Naturally the transferee cannot receive any greater rights than those possessed by the transferor: *nemo dat quod non habet.*[87]

Apart from cession and transfer in accordance with a treaty, title may exist on the basis of a treaty alone, the treaty marking a reciprocal recognition of sovereignty in solemn form.[88] In the case of a disputed frontier the boundary treaty which closes the dispute will *create* title, previously unsettled, whereas a treaty of cession merely transfers an extant (though definitive) title.[89] In the case where a territorial regime is established by a treaty, this settlement achieves a permanence which the treaty itself does not necessarily enjoy: the continued existence of that regime is not dependent upon the continuing life of the treaty under which the regime is agreed.[90]

(i) Agreements concluded with indigenous rulers[91]

Treaties between indigenous peoples and the state were a feature of the period of colonization but are of limited relevance, externally, following the partition of the world into independent equal states. The early position was defined primarily in the era of Western European colonial expansion, notably in the so-called 'Scramble for Africa',[92] under which an immense number of treaties were concluded with various African polities.[93] Such arrangements with indigenous rulers were not normally considered as cessions, but gave a form of derivative title distinguishing the act of acquisition from that of mere occupation. This was characterized by Huber in *Island of Palmas* as follows:

> In substance, it is not an agreement between equals; it is rather a form of internal organisation of a colonial territory, on the basis of autonomy of the natives ... And thus suzerainty

and Ellena (1949) 16 ILR 160; *Différends Sociétés Dufay et Gigandet* (1962) 16 RIAA 197, 208–12. In the Treaty on the Final Settlement with Respect to Germany, 12 September 1990, 1696 UNTS 115, Germany confirmed its border with Poland and other territorial changes.

[85] *Date of Entry into Force of Versailles Treaty* (1961) 32 ILR 339; *N Masthan Sahib v Chief Commissioner* (1976) 49 ILR 484; and see Treaty of Cession relating to the Kuria Muria Islands, 15 November 1967, 617 UNTS 319.

[86] *Territorial Dispute (Libya/Chad)*, ICJ Reports 1994 p 6, 25. Further: VCLT, 22 May 1969, 1155 UNTS 331, Art 14.

[87] E.g. *Island of Palmas* (1928) 2 RIAA 829, 842.

[88] Consequently disputes as to title may involve the interpretation of a treaty and nothing more: e.g. *Beagle Channel* (1977) 52 ILR 93.

[89] See McNair, *Law of Treaties* (1961) 656–7; McNair, 1 *Opinions* 287; *Frontier Dispute (Belgium/Netherlands)*, ICJ Reports 1959 p 209, 226, 231, 256; *Temple*, ICJ Reports 1962 p 6, 16, 52, 67, 73–4, 102–3.

[90] *Territorial and Maritime Dispute (Nicaragua v Colombia)*, Preliminary Objections, ICJ Reports 2007 p 832, 861; *Libya/Chad*, ICJ Reports 1994 p 6, 37.

[91] Generally: Crawford (2nd edn, 2006) ch 6; Alfredsson, 'Indigenous Peoples, Treaties with' (2007) *MPEPIL*. See also UN Declaration on the Rights of Indigenous Peoples, GA Res 61/295, 13 September 2007, Art 37.

[92] Generally: Pakenham, *The Scramble for Africa* (1991); Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005).

[93] The Court estimated that during the later 19th century, some 350 treaties were concluded between Great Britain and the local chieftains of the Niger Delta: *Cameroon v Nigeria*, ICJ Reports 2002 p 303, 404. Also: Castellino & Allen (2003) ch 4.

over the native States becomes the basis of territorial sovereignty as towards other members of the community of nations.[94]

Subsequent decisions of the International Court have qualified Huber's dictum to a degree. In *Western Sahara* the Court stated that in the period beginning in 1884, 'agreements with local rulers, whether or not considered as an actual "cession" of the territory, were regarded as derivative roots of title, and not original titles obtained by occupation of *terra nullius*'.[95]

In *Cameroon v Nigeria*, the Court was called upon to determine the legal effect of an 1884 treaty between the UK and the 'Kings and Chiefs of Old Calabar', an area in the Niger Delta, and its consequent effect on the UK's capacity to deal later with the territory.[96] Nigeria considered the 1884 treaty to have created an international protectorate, which did not therefore result in the transfer of title to the UK; rather it remained vested in Old Calabar as a sovereign entity. The Court disagreed, noting that: (a) at the time, the UK did not regard Old Calabar as a state, a position consistent with its activity in the rest of the region; (b) the region did not possess a central federal authority sufficient to create a protectorate; (c) British activity in the region was reflective of an intention to administer, rather than merely protect; and (d) Nigeria was unable to identify with any degree of precision the source and character of Old Calabar's international personality, either in 1884 or thereafter.[97] The Court concluded that 'under the law at the time, Great Britain was in a position in 1913 to determine its boundaries with Germany in respect of Nigeria, including in the southern section'.[98]

(ii) Renunciation or relinquishment

It is possible for states to renounce title over territory in circumstances in which the subject-matter does not thereby become *terra nullius*. This distinguishes renunciation from abandonment. Furthermore, there is no element of reciprocity, and no commitment to transfer, as in the case of a treaty of cession. Renunciation may be recognition that another state now has title[99] or an agreement to confer a power of disposition to be exercised by another state or a group of states.[100]

[94] *Island of Palmas* (1928) 2 RIAA 829, 858.

[95] *Western Sahara*, ICJ Reports 1975 p 12, 39; 123–4 (Judge Dillard). But cf *Cameroon v Nigeria*, ICJ Reports 2002 p 303, 405, referring in passing to 'treaties for cession of land'.

[96] 10 September 1884, 163 CTS 182.

[97] *Cameroon v Nigeria*, ICJ Reports 2002 p 303, 404–7.

[98] Ibid, 407.

[99] E.g. Treaty of St Germain-en-Laye, 10 September 1919, 226 CTS 8, Arts 36, 43, 46–7, 53–4, 59; South Africa-Namibia, Treaty with Respect to Walvis Bay and the Offshore Islands, 28 February 1994, 33 ILM 1256, Art 2. Also: *German Reparations* (1924) 1 RIAA 429, 442.

[100] Treaty of St Germain-en-Laye, Arts 89–91; *Lighthouses (France and Greece)* (1956) 23 ILR 659, 663–6. On Italian renunciation of all right and title to territories in Africa see the Treaty of Peace, 10 February 1947, 49 UNTS 3, Art 23; *Banin v Laviani and Ellena* (1949) 16 ILR 73; *Sorkis v Amed* (1950) 17 ILR 101; *Farrugia v Nuova Comp Gen Autolinee* (1951) 18 ILR 77; *Cernograz and Zudich v INPS* (1978) 77 ILR 627; *Différends Sociétés Dufay et Gigandet* (1962) 16 RIAA 197, 208–12. Also: Treaty of Peace with Japan, 8 September 1951,

A series of unilateral acts may constitute evidence of an implicit relinquishment of rights.[101] Renunciation is to be distinguished from reversion, that is, recognition by an aggressor that territory seized is rightfully under the sovereignty of the victim. Here, there is no title to renounce.[102]

(E) ADJUDICATION

While the subject is generally neglected, some jurists accept adjudication by a judicial organ as a mode of acquisition.[103] The question then, as with a treaty of cession, is whether the award is self-executing, or merely gives an executory right.[104] At least in certain cases the award is dispositive as between the parties: (a) when the character of the territory is such that no physical act is necessary to its effective appropriation (this is true of maritime delimitations); (b) where the two disputants are both exercising acts of administration in respect of the territory concerned and the award merely declares which of the two 'possessors' is a lawful holder; (c) where the loser is to continue in possession with delegated powers of administration and jurisdiction; (d) when the successful claimant is already in possession; and (e) (perhaps) where the award relates only to the detailed fixing of a frontier line.[105]

4. DISPLACEMENT OF TITLE

(A) THE CONCEPT OF 'PRESCRIPTION'[106]

(i) The place of prescription in the law

At its core, prescription refers to the removal of defects in a putative title arising from usurpation of another's sovereignty by the acquiescence of the former sovereign. The standard apology for the principle rests on considerations of good faith and the need

136 UNTS 45, Art 2. For the former German eastern territories: Treaty on the Final Settlement with Respect to Germany, 12 September 1990, 1696 UNTS 115, Art 1.

[101] *Rann of Kutch* (1968) 17 RIAA 1, 531–53, 567–70.

[102] *Franco-Ethiopian Railway Co* (1957) 24 ILR 602, 605.

[103] 3 Rousseau 186; 1 Guggenheim 442; Shaw, in Shaw (2005) xi, xvii. Also: *Minquiers and Ecrehos*, ICJ Reports 1953 p 47, 56; *Brazil-British Guiana Boundary* (1904) 11 RIAA 22; further Kaikobad, *Interpretation and Revision of International Boundary Decisions* (2007) 3–14.

[104] At any rate, before execution of the award the successful claimant cannot simply seize the territory: UN Charter, Art 94(2); Mosler & Oellers-Frahm, in Simma (ed), 2 *The Charter of the United Nations* (2nd edn, 2002) 1174.

[105] 3 Rousseau 186.

[106] Generally: 2 Whiteman 1062–84; Fitzmaurice (1953) 30 *BY* 1, 27–43; Fitzmaurice (1955–56) 32 *BY* 20, 31–7; Jennings (1963) 20–3; Blum (1965) 6–37; Thirlway (1995) 66 *BY* 1, 12–14; Lesaffer (2005) 16 *EJIL* 25; O'Keefe (2011) 13 *Int Comm LR* 147; Wouters & Verhoeven, 'Prescription' (2008) *MPEPIL*.

to preserve international order and stability. It is inelegant to describe it as a mode of acquisition: the real source of title is recognition of or acquiescence in the consequences of unchallenged possession and control.

Prescription is distinct from the outright abandonment or relinquishment of territory. Abandonment refers to a situation where a state is held to have surrendered its title, converting the territory to *res nullius*, before another state establishes its own title by way of lawful allocation or effective occupation. In the case of abandonment, there is no usurpation of sovereignty since there are no contemporaneous competing claims.[107] Relinquishment is the giving up of a claim to territory in face of what is thereby acknowledged to be a better claim, or at least a subsisting one.[108]

In particular cases the difference between prescription and effective occupation is not easy to establish. In *Island of Palmas* and cases like it, there is simply contemporaneously competing state activity: in deciding on title the tribunal will apply the criterion of effective control associated with 'effective occupation'.[109] To speak of prescription is unhelpful,[110] and significantly Huber avoided the term, apart from a passing reference to 'so-called prescription', by which he meant merely 'continuous and peaceful display of State sovereignty'.

(ii) The role of private law analogies

In addressing problems of prescription, writers have drawn on analogies from the private law of both civil and common law traditions.[111] From the civilian tradition has been drawn the concept of abandonment or *derelictio*, under which the title-holder makes a conscious decision to relinquish its rights with respect to the contested territory, which may result in its becoming *res nullius* prior to the assertion of the other state's claim. From the common law comes the doctrine of estoppel, under which a representation made by one state that is relied on by another to its detriment may preclude the former state from acting in a contrary fashion. Another, now declining, source of analogy has been the civil law doctrine of acquisitive prescription and the common law 'equivalent' of adverse possession.[112]

[107] In particular cases the distinction may wear thin: O'Keefe (2011) 13 *Int Comm LR* 147, 179–80.

[108] See Judges Simma and Abraham (diss) in *Pulau Batu Puteh*, ICJ Reports 2008 p 12, 121: 'In fact, it is not of great importance that … the Court should use this or that legal category or characterization, as those categories, it must be acknowledged, are often not hermetically separated from one another.'

[109] *Island of Palmas* (1928) 2 RIAA 829, 840; *Frontier Dispute (Burkina Faso/Mali)*, ICJ Reports 1986 p 554, 587; *El Salvador/Honduras*, ICJ Reports 1992 p 351, 398, 429; *Kasikili/Sedudu Island*, ICJ Reports 1999 p 1045, 1094–5. Also: the dictum in *Argentine-Chile Frontier* (1966) 16 RIAA 109, 173, emphasizing the relevance of effective administration.

[110] Examples of references to *Island of Palmas* as an instance of prescription: Beckett (1934) 50 Hague *Recueil* 220, 230; Johnson (1950) 27 *BY* 342, 348. Other cases misleadingly classified in this way include the *Brazil-British Guiana Boundary* (1904) 11 RIAA 21; *Grisbadarna* (1909) 11 RIAA 155; *Guatemala-Honduras Boundary* (1933) 2 RIAA 1322.

[111] Lauterpacht, *Private Law Sources and Analogies of International Law* (1927) 91; Lesaffer (2005) 16 *EJIL* 25; Kohen (1997) 10–48.

[112] O'Keefe (2011) 13 *Int Comm LR* 147, 176–88.

Apart from the imperfect nature of these 'sources', there is the distinct issue of the effect of the presumption of legality. Analogies with municipal law reveal the difficulty with any general doctrine of prescription. Although it is sometimes said that the International Court would accept acquisitive prescription as a general principle of law,[113] what is the content of the general principle? Instead of providing guidance, analogies to acquisitive prescription, adverse possession or similar concepts tend to spark confusion and lead to inconsistent terminology.[114]

(B) THE REQUIREMENTS OF PRESCRIPTION

(i) Conduct on the part of the usurping party

To establish such a case for the usurpation of title, certain prerequisites need to be clearly established.[115]

(1) Possession must be exercised *à titre de souverain*. There must be a display of state authority and the absence of recognition of sovereignty in another state, for example under conditions of a protectorate leaving the protected state with a separate personality. Without adverse possession there can be no prescription.

(2) The possession must be public, peaceful, and uninterrupted. As Johnson has remarked: 'Publicity is essential because acquiescence is essential'.[116] By contrast in a situation of competing state activity, as in *Island of Palmas*, publicity will not play an important role because acquiescence may not be relevant except in minor respects.

(3) Finally, possession must persist. In the case of recent possession it is difficult to adduce evidence of tacit acquiescence. A few writers have prescribed fixed periods of years.[117] Such suggestions are due to a yearning after municipal models and to the influence of the view that 'acquiescence' may be 'implied' in certain conditions. The better view is that the length of time required is a matter of fact depending on the particular case.[118]

[113] Johnson (1950) 27 *BY* 343.

[114] See Schwarzenberger (1957) 51 *AJIL* 308, 324 ('it appears that the practice of international courts and tribunals fits easily into a pattern which dispenses completely with analogies from private law. It then emerges that titles to territory are governed primarily by the rules underlying the principles of sovereignty, recognition, consent and good faith').

[115] E.g. *Kasikili/Sedudu Island*, ICJ Reports 1999 p 1045, 1103–4; *Pulau Batu Puteh*, ICJ Reports 2008 p 12, 122 (Judges Simma and Abraham, diss).

[116] (1950) 27 *BY* 347.

[117] Field, *Outlines of an International Code* (1872) §52 (50 years). The 50-year period specified in Art IV(a) of the arbitration treaty relative to the British Guiana–Venezuela boundary represents an ad hoc rule of thumb: 2 February 1897, 89 BFSP 57; *British Guiana-Venezuela Boundary* (1899) 28 RIAA 331, 333–7. In *Frontier Dispute (Belgium/Netherlands)*, an important factual aspect was that Belgium had not challenged the Netherlands' exercise of effective administration over the territory in question for at least 50 years: ICJ Reports 1959 p 209, 231 (Judge Lauterpacht).

[118] Johnson (1950) 27 *BY* 347, 354; 1 Hyde 388–9.

Where the necessary *effectivités* on the part of the usurping party have been established, the competing conduct of the title-holder must be assessed to determine whether title has been relinquished.

(ii) The importance of acquiescence[119]

In *Island of Palmas*, Huber observed that the continuous and peaceful display of *effectivités* by a state 'may prevail even over a prior, definitive title put forward by another State'.[120] In the face of competing activity and claims by another, a state may by conduct or admission acquiesce in the extension of its competitor's sovereignty.

At its simplest, this may take the form of an express declaration by one state that it considers another to hold title to the territory, combined with evidence of conduct *à titre de souverain* by that other. This was a key feature in *Eastern Greenland*: Norway had, through a declaration by its Foreign Minister, Nils Ihlen, accepted Danish title to the disputed territory.[121] In *Pulau Batu Puteh* the Court gave great weight to a response given in 1953 by the Acting Secretary of State of Johor that 'the Johor government [did] not claim ownership of Pedra Branca':

> Johor's reply shows that as of 1953 Johor understood that it did not have sovereignty over Pedra Branca/Pulau Batu Puteh. In light of Johor's reply, the authorities in Singapore had no reason to doubt that the United Kingdom had sovereignty over the island.[122]

Even without an express declaration of relinquishment, the absence of state activity, combined with an absence of protest that might otherwise be expected in response to the *effectivités* of the opposing party, may be decisive.[123] In the jurisprudence of the International Court, this has become known as acquiescence, a concept which is equivalent to tacit recognition manifested by unilateral conduct which the other party may properly interpret as consent. Although the term originally emerged in the context of maritime delimitation,[124] it has been adopted by the Court in the context of territorial disputes as well. In *Pulau Batu Puteh*, it was said that:

> Under certain circumstances, sovereignty over territory might pass as a result of the failure of a state which has sovereignty to respond to conduct *à titre de souverain* of the other

[119] 1 Hyde 392–4; McNair, 1 *Opinions* 299–305; Moore, 1 *Digest* 300; Beckett (1934) 50 Hague *Recueil* 189, 252–5; 1 Hackworth 442–3; Fitzmaurice (1955–56) 32 *BY* 20, 67; Jennings (1963) 36–40; Kaikobad (1983) 54 *BY* 119; Marston (1986) 57 *BY* 337; Marques Antunes & Bradley, *Estoppel, Acquiescence and Recognition in Territorial and Boundary Dispute Settlement* (2000); O'Keefe (2011) 13 *Int Comm LR* 147, 147; Kohen, 'Abandonment' (2008) *MPEPIL*.

[120] *Island of Palmas* (1928) 2 RIAA 828, 838–9, 846.

[121] *Eastern Greenland* (1933) PCIL Ser A/B No 53, 73. The better view is that the facts disclosed an agreement rather than a unilateral act, the *quid pro quo* being Danish recognition of Norwegian sovereignty over Svalbard (Spitzbergen). On unilateral acts generally see chapter 18.

[122] ICJ Reports 2008 p 12, 81. Although there is a distinction between sovereignty and 'ownership', the Court took them here to be synonymous: ibid, 80.

[123] Thus mere protest will be sufficient to prevent the conclusion that title has been abandoned: e.g. *Chamizal* (1911) 11 RIAA 309.

[124] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/US)*, ICJ Reports 1984 p 246, 305.

State... Such manifestations of the display of sovereignty may call for a response if they are not opposable to the State in question. The absence of a reaction may well amount to acquiescence... That is to say, silence may also speak, but only if the conduct of the other State calls for a response.[125]

But because of the need to maintain stability and to avoid temptations to 'squatting', abandonment is not to be presumed.[126] As the Chamber said in *Burkina Faso/Mali*, where there is a conflict between title and *effectivités*, preference will be given to the former.[127] Accordingly, very little evidence of *effectivités* will be required to prove maintenance of title, particularly in regard to remote and uninhabited areas. In *Clipperton Island* it was stated: 'There is no reason to suppose that France has subsequently lost her right by *derelictio*, since she never had the *animus* of abandoning the island, and the fact that she has not exercised her authority there in a positive manner does not imply the forfeiture of an acquisition already definitively protected'.[128] In *Eastern Greenland* Norway had argued that Greenland became *terra nullius* after the disappearance of the early settlements. The Court, rejecting the argument, observed:

> It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries.[129]

Similarly, in *Cameroon v Nigeria* the Court found that Cameroon had not abandoned its title to the Bakassi region, despite having engaged in only occasional acts of administration in the area due to a lack of resources.[130]

Thus it would seem that nothing short of the total (or near-total) absence of conduct *à titre de souverain* in an area by the title-holder will be sufficient to signal movement away from the status quo. An illustration is *Pulau Batu Puteh* where the Court held that 'any passing of sovereignty over territory on the basis of the conduct of the Parties... must be manifested clearly and without any doubt by that conduct and the relevant facts... especially so if what may be involved, in the case of one of the parties, is in effect the abandonment of sovereignty over part of its territory'.[131] This was only

[125] *Pulau Batu Puteh*, ICJ Reports 2008 p 12, 50–1.

[126] Tribunals for many years avoided pronouncing on whether *derelictio* was even possible, preferring instead to find the claim was not made out on the facts: e.g. *Chamizal* (1911) 11 RIAA 309, 328 (displacement of extant title 'very controversial'); *Frontier Dispute (Belgium/Netherlands)*, ICJ Reports 1959 p 207, 227–31; *Kasikili/Sedudu Island*, ICJ Reports 1999 p 1045, 1105. See also O'Keefe (2011) 13 *Int Comm LR* 147, 158–62.

[127] ICJ Reports 1986 p 554, 586–7. See also *Island of Palmas* (1928) 2 RIAA 829, 867; *Argentine-Chile Frontier* (1966) 16 RIAA 109, 173; *Eritrea and Yemen* (1998) 114 ILR 1, 51.

[128] (1931) 2 RIAA 1105, 1110–11.

[129] *Eastern Greenland* (1933) PCIJ Ser A/B No 53, 46. The Court then went on to say that 'As regards voluntary abandonment, there is nothing to show any definite renunciation on the part of the Kings of Norway or Denmark' (ibid, 47).

[130] It did, however, collect taxation from the area: *Cameroon v Nigeria*, ICJ Reports 2002 p 303, 415–16.

[131] ICJ Reports 2008 p 12, 50–1.

established with reference to Pulau Batu Puteh (Pedra Branca) itself and then only because of the declaration of the Acting State Secretary.

(iii) Estoppel[132]

Recognition, acquiescence, admissions constituting a part of the evidence of sovereignty,[133] and estoppel form an interrelated subject-matter; everything depends on the precise alchemy of the opposing parties' *effectivités*, combined with the presence of some form of representation by a party that it does not consider itself as sovereign. In *Temple* the Court held that by its conduct Thailand had recognized the frontier line contended for by Cambodia in the area of the temple, as marked on the map drawn up by French members of a Mixed Delimitation Commission. In particular the Court placed reliance on a visit of a 'quasi-official character' by a member of the Siamese royal family to the disputed territory where he was 'officially received' by the local French plenipotentiary 'with the French flag flying'.[134] The Court remarked:

> Looking at the incident as a whole, it appears to have amounted to a tacit recognition by Siam of the sovereignty of Cambodia (under French Protectorate) over Preah Vihear, through a failure to react in any way, on an occasion that called for a reaction in order to affirm or preserve title in the face of an obvious rival claim. What seems clear is that either Siam did not in fact believe that she had any title—and this would be wholly consistent with her attitude all along... —or else she decided not to assert it, which again means she accepted the French claim, or accepted the frontier of Preah Vihear as it was drawn on the map.[135]

In many situations acquiescence and express admissions are but part of the evidence of sovereignty. Estoppel differs in that, if the conditions for an estoppel are satisfied, it suffices to settle the issue. Resting on good faith and the principle of consistency in state relations, estoppel may involve holding a government to a declaration which in fact does not correspond to its real intention, if the declaration is unequivocal and the state to which it is made has relied on it to its detriment. Such a principle must be used with caution, more particularly in dealing with territorial issues.[136] Thus the Court held that the declaration of the Acting State Secretary that Johor did not possess sovereignty over Pedra Branca did not give rise to an estoppel. The Court said:

[132] See Bowett (1957) 33 *BY* 176; MacGibbon (1958) 7 *ICLQ* 468, 5069; Martin, *L'Estoppel en droit international public* (1979); Thirlway (1989) 60 *BY* 29; Sinclair, in Lowe & Fitzmaurice, *Fifty Years of the International Court of Justice* (1996) 104. Generally see chapter 18.

[133] See Fitzmaurice (1955–56) 32 *BY* 20, 60–2; Bowett (1957) 33 *BY* 176, 196–7.

[134] *Temple*, ICJ Reports 1962 p 6, 30.

[135] Ibid, 30–1.

[136] See Bowett (1957) 33 *BY* 176, 197–201, 202; and *Temple*, ICJ Reports 1962 p 6, 142–6 (Judge Spender, diss). In his view, on the facts, the elements of estoppel were not present in any case. For criticism: Chan (2004) 3 *Chin JIL* 555; Buss (2010) 9 *Chin JIL* 111. The dispute has returned to the Court, under the guise of a request for interpretation under Art 60 of the Statute: *Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the* Temple of Preah Vihear (Cambodia v Thailand) *(Cambodia v Thailand)* (2011, pending).

[A] party relying on an estoppel must show, among other things, that it has taken distinct acts in reliance on the other party's statement... The Court observes that Singapore did not point to any such acts. To the contrary, it acknowledges in its Reply that, after receiving the letter, it had no reason to change its behaviour; the actions after 1953 to which it refers were a continuation and development of the actions it had taken over the previous century.[137]

By contrast, in cases such as *Temple*, where much of the evidence is equivocal, acquiescence over a long period may be treated as decisive: here it is not itself a root of title but an aid in the interpretation of the facts and legal instruments.[138] To be decisive acquiescence must rest on very cogent evidence. Express recognition in a treaty of the existence of title in the other party (as opposed to recognition by third states) is of course conclusive.[139]

(C) 'NEGATIVE PRESCRIPTION'

Some writers seem to suggest that prescriptive title arises even without acquiescence, simply by lapse of time and possession not disturbed by measures of forcible self-help.[140] A similar result is reached by formulations which presume acquiescence under certain conditions. Such views are not supported by the jurisprudence,[141] which sets an exacting evidentiary standard for the displacement of confirmed title, a standard which requires at least some evidence (tacit or express) of acquiescence. They commonly antedate the period when forcible self-help and conquest were prohibited. It is probably the case now that prescription cannot create rights out of situations brought about by illegal acts.[142] Finally, it must be remembered that in *Island of Palmas*, *Minquiers and Ecrehos* and other like cases, the possession upheld by the tribunal is adverse only in a special sense; there is no deliberate usurpation with a sequel of adverse holding, but a more or less contemporaneous competition.

(D) HISTORICAL CONSOLIDATION OF TITLE: AN EPITAPH

Historical consolidation as a concept refers to an acquisition of title on the basis of its use without challenge over a significant period of time. Its origin is generally seen to lie in *Anglo-Norwegian Fisheries*; there, the Court, having established that Norway had delimited the territorial sea by a system of straight baselines since 1869, had to

[137] *Pulau Batu Puteh*, ICJ Reports 2008 p 12, 81.

[138] Jennings (1963) 51.

[139] See McNair, *Treaties* (1961) 487, referring to *Eastern Greenland* (1933) PCIJ Ser A/B No 53, 68–9. McNair takes a less strict view of estoppel than Bowett (1957) 33 *BY* 197, 202.

[140] See Moore, 1 *Digest* 293–5 (ambiguous and diverse dicta of publicists collected); 1 Hyde 386, 387 (stressing the element of acquiescence); 1 Guggenheim 442.

[141] *Cameroon v Nigeria*, ICJ Reports 2002 p 303, 346; *Pulau Batu Puteh*, ICJ Reports 2008 p 12, 120 (Judges Simma and Abraham, diss).

[142] Lauterpacht (1950) 27 *BY* 367, 397–8.

decide whether, as against other states, it had title to waters so delimited. The Court said:

> [I]t is indeed this system itself [of straight baselines] which would reap the benefit of general toleration, the basis of an historical consolidation which would make it enforceable as against all States... The general toleration of foreign States with regard to the Norwegian practice is an unchallenged fact. The notoriety of the facts, the general toleration of the international community, Great Britain's position in the North Sea, her own interest in the question, and her prolonged abstention would in any case warrant Norway's enforcement of her system against the United Kingdom.[143]

The attitude of other states was taken as evidence of the legality of the system, but there were certain special features. The extension of sovereignty claimed was over a *res communis* and therefore the toleration of foreign states in general was of significance. Moreover, the Court appeared to regard British silence as an independent basis of legality as against the UK.

De Visscher took the decision as an example of the 'fundamental interest of the stability of territorial situations from the point of view of order and peace', which 'explains the place that consolidation by historic titles holds in international law':

> This consolidation, which may have practical importance for territories not yet finally organized under a State regime as well as for certain stretches of sea-like bays, is not subject to the conditions specifically required in other modes of acquiring territory. Proven long use, which is its foundation, merely represents a complex of interests and relations which in themselves have the effect of attaching a territory or an expanse of sea to a given State.[144]

Thus, 'consolidation' differs from prescription and occupation in de Visscher's doctrine. It is, moreover, certain that the elements which he calls 'consolidation' are influential; the essence of the matter is peaceful holding and acquiescence or toleration by other states.[145] But the concept of historical consolidation is not much more than a compendium of pre-existing modes of acquisition. Certainly, as late as 1998 a distinguished arbitral tribunal referred to the concept of consolidation of title with approval.[146] Nonetheless, the accepted view is that consolidation does not exist as a concept independent of the established rules governing effective occupation and prescription. In *Cameroon v Nigeria*, the Court stated that 'the theory of historical consolidation is highly controversial and cannot replace the established modes of acquisition of title under international law'.[147]

[143] ICJ Reports 1951 p 116, 130, 138–9.
[144] De Visscher, *Theory and Reality in Public International Law* (4th edn, 1970) 226.
[145] Schwarzenberger (1957) 51 *AJIL* 308, 316–24.
[146] *Eritrea and Yemen (Territorial Sovereignty)* (1998) 114 ILR 1, 117.
[147] *Cameroon v Nigeria*, ICJ Reports 2002 p 303, 352.

5. EXTENT OF SOVEREIGNTY: TERRITORIAL DISPUTES[148]

We are here concerned with certain logical and equitable principles which are not roots of title but are important in determining the actual extent of sovereignty derived from some source of title such as a treaty of cession or effective occupation.

(A) THE PRINCIPLE OF CONTIGUITY

Considerations of contiguity and geographical unity come to the fore when the disputed territory is uninhabited, barren or uncharted. In relation to islands contiguity is a relevant concept.[149] Thus, in *Land, Maritime and Frontier Dispute*, the Chamber held that the island of Meanguerita was a dependency of the larger island of Meanguera, due to its small size, its proximity, and the fact that the claimants to the dispute treated the two as a single unit.[150] But this is a presumption only: in *Pulau Batu Puteh* one of three disputed features was held to belong to Singapore, a second (and by inference a third) to Malaysia.[151]

The principles are simply a part of judicial reasoning, but have significance in other respects. State activity as evidence of sovereignty need not press uniformly on every part of territory. Associated with this is the presumption of peripheral possession based on state activity, for example, on the coast of a barren territory.[152] Lastly, in giving effect to principles of geographical unity in *Eastern Greenland*,[153] and thus concluding that somewhat localized Danish activity gave title over the whole of Greenland, the Permanent Court was not swayed by the significance of unity isolated from the context of effective occupation. Writing of the decision, Lauterpacht remarked on 'those principles of finality, stability and effectiveness of international relations which have characterized the work of the Court'.[154] Contiguity may be in itself an earnest of effectiveness.

In conclusion the 'principle of contiguity' is little more than a technique in the application of the normal principles of effective occupation.[155] In the case of islands in

[148] 1 Hyde 331–6; von der Heydte (1935) 29 *AJIL* 448, 463–71; Waldock (1948) 25 *BY* 311, 339ff; Lauterpacht (1950) 27 *BY* 376, 423–31; Fitzmaurice (1955–56) 32 *BY* 20, 72–5; Kelsen, *Wehberg Festschrift* (1956) 200–11; McNair, 1 *Opinions* 287–8, 292; 3 Rousseau, 193–203; Sharma (1997); Ratner (2006) 100 *AJIL* 808; Prescott & Triggs (2008).

[149] See further Sharma (1997) 51–61.

[150] ICJ Reports 1992 p 351, 570.

[151] ICJ Reports 2008 p 12, 95–6 (Pedra Branca (Pulau Batu Puteh)), 99 (Middle Rocks), 100–1 (South Ledge).

[152] *Brazil-British Guiana Boundary* (1904) 11 RIAA 21. See also *Island of Palmas* (1928) 2 RIAA 855; *Minquiers and Ecrehos*, ICJ Reports 1953 p 47, 99; Jennings (1963) 74–6.

[153] (1933) PCIJ Ser A/B No 53, 45–52; also *Western Sahara*, ICJ Reports 1975 p 12, 42–3.

[154] Lauterpacht, *Development* (1958) 241.

[155] For a different opinion: 1 Guggenheim, 440–1. Also: 2 Whiteman 1104–8.

particular the notion of contiguity may be unhelpful. Huber in *Island of Palmas* said that 'the alleged principle itself is by its very nature so uncertain and contested that even governments of the same State have on different occasions maintained contradictory opinions as to its soundness ...'.[156]

(B) THE *UTI POSSIDETIS* PRINCIPLE

Put simply, the concept of *uti possidetis* provides that states emerging from the dissolution of a larger entity inherit as their borders those administrative boundaries which were in place at the time of independence. In *Burkina Faso/Mali*, the Chamber in applying the principle to Africa said as follows:[157]

> The essence of the principle lies in its primary aim of securing respect for territorial boundaries at the moment when independence is achieved. Such territorial boundaries might be no more than delimitations between different administrative divisions or colonies all subject to the same sovereign. In that case, the application of the principle of *uti possidetis* resulted in administrative boundaries being transformed into international frontiers in the full sense of the term.

Though like many concepts in this chapter it has its origins in Roman law,[158] the modern application of the doctrine began in Latin America in the nineteenth century, whereby the elites who had declared independence from Spain adopted the administrative divisions imposed by the Spanish as the borders of the new states that emerged in the region.[159] Thus by their practice the successor states agreed to apply, as between themselves, and later in their disputes with Brazil, a principle for the settlement of frontier disputes in an area in which *terra nullius* (territory belonging to no state) by stipulation did not exist: the independent republics regarded their titles as co-extensive with that of the former Spanish empire. The principle involves implied agreement to base territorial settlement on a rule of presumed possession by the previous Spanish administrative unit in 1821, in Central America, or in 1810, in South America. Its use has persisted throughout the twentieth century, and in a slightly different form it has

[156] *Island of Palmas* (1928) 2 RIAA 854. Other disputes involving arguments based on contiguity: *Bulama Island* (1870), Moore, 2 *Int Arb* 1909; *Lobos Islands* (1852), Moore, 1 *Digest* 265–6, 575; *Navassa Island* (1872), Moore, 1 *Digest* 266–7; *Aves Island* (1865), Moore, 5 *Int Arb* 5037 (Spanish report). Further: 1 Hyde 343–6; McNair, 1 *Opinions* 315.

[157] *Burkina Faso/Mali*, ICJ Reports 1986 p 554, 566; see also *El Salvador/Honduras*, ICJ Reports 1992 p 351, 386–8 ('*uti possidetis juris* is essentially a retrospective principle, investing as international boundaries administrative limits intended originally for another purpose'). Further: Shaw (1993) 42 *ICLQ* 929; Lalonde, *Determining Boundaries in a Conflicted World* (2002); Abi-Saab, in Kohen (2007) 657.

[158] In litigation over contested property, the *praetor* would issue an edict granting provisional title to the party already in possession of the land, unless he had come about it through trickery, violence or in some form revocable by the other party, hence the maxim 'as you possess, so you may possess' (*uti possidetis, ita possidetis*): Ratner (1996) 90 *AJIL* 590, 593; Castellino & Allen (2003) 8–11.

[159] Further: Ratner (1996) 90 *AJIL* 590, 593–5; Shaw (1996) 67 *BY* 75, 98–100; Castellino & Allen (2003) ch 3.

been adopted by governments and tribunals concerned with boundaries in Asia[160] and Africa.[161] The principle was also applied in relation to the appearance of new states on the territory of the former Yugoslavia.[162]

The operation of *uti possidetis* does not always give satisfactory solutions.[163] The administrative boundaries are frequently ill-defined or difficult to prove.[164] Furthermore, the colonial boundaries on which the future of contested regions now rely were often not drawn in the first place with any degree of ethnic sensitivity, leading to the inclusion of opposed groups within the same new state.[165] Finally, the doctrine may impede the recognition of new states due to the unwillingness of states to acknowledge a desire for independence contrary to *uti possedetis*. In a worst case scenario, this may result in an otherwise successful polity being shackled to a 'failed state'.[166]

No doubt the principle is not peremptory and the states concerned are free to adopt other principles as the basis of a settlement.[167] But the general principle that pre-independence boundaries of former administrative divisions subject to the same sovereign remain in being is in accordance with good policy. Three arguments are generally posited as justifying this conclusion:[168] (a) the doctrine renders the division of a state susceptible to only one outcome, preventing armed conflict over territory; (b) a division based on administrative boundaries is as valid as any other approach in principle, and far simpler in execution; and (c) *uti possidetis* has achieved the status of a general principle or default rule of international law.[169]

[160] See *Temple*, ICJ Reports 1962 p 6; *Rann of Kutch* (1968) 50 ILR 2. Cf *Eritrea and Yemen (Territorial Sovereignty)* (1998) 114 ILR 1, 32–4.

[161] OAU Resolution on Border Disputes, AHG/Res 16(I), 21 July 1964; Touval (1967) 21 *Int Org* 102; *Burkina Faso/Mali*, ICJ Reports 1986 p 554, 565–8, 586–7; *Guinea-Guinea (Bissau) Maritime Delimitation* (1985) 77 ILR 636, 657; *Guinea (Bissau)-Senegal Delimitation* (1989) 83 ILR 1, 22; 56–85 (Bedjaoui, diss). Also: *Libya/Chad*, ICJ Reports 1994 p 6, 83–92 (Judge ad hoc Ajibola).

[162] Badinter Commission, *Opinion No 2* (1992) 92 ILR 167; *Opinion No 3* (1992) 92 ILR 170; Craven (1995) 66 *BY* 333, 385–90.

[163] Ratner identifies two central complaints: (1) its inherent simplicity gives rise to the temptation on the part of ethnic separatists to further divide territory along existing boundaries; (2) application of the principle to modern state collapses may lead to significant populations both unsatisfied with their status in the new state and uncertain of their political participation there; see Ratner (1996) 90 *AJIL* 590.

[164] See *Guatemala-Honduras Boundary* (1933) 2 RIAA 1322. For comment: Fisher (1933) 27 *AJIL* 403. Cf Waldock (1948) 25 *BY* 325. Also: *El Salvador/Honduras*, ICJ Reports 1992 p 351, 386–95; *Frontier Dispute (Benin/Niger)*, ICJ Reports 2005 p 90, 108–10, 133–49; *Caribbean Sea*, ICJ Reports 2007 p 659, 727–9.

[165] Further: Luker (2008) 158–61.

[166] On Somaliland: see Poore (2009) 45 *Stanford JIL* 117; Crawford (2nd edn, 2006) 412–18.

[167] *Opinion No 2* (1992) 92 ILR 167, 168.

[168] Ratner (1996) 90 *AJIL* 590, 591.

[169] Further: *Burkina Faso/Mali*, ICJ Reports 1986 p 554, 565: 'Nevertheless [*uti possidetis*] is not a special rule which pertains solely to one specific system of international law. It is a general principle, which is logically connected with the phenomenon of obtaining independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new states being endangered by fratricidal struggles.' Also: Badinter Commission, *Opinion No 3* (1992) 92 ILR 170, 171–2. Some scholars have come to attribute to it the status of customary international law: Ratner (2006) 100 *AJIL* 808, 811.

(C) ACCRETION[170]

Accretion concerns the process of increase of territory through new geological formations. In the simple case, deposits on a sea coast may result in an extension of sovereignty. A more dramatic example is provided with the emergence of an island within the territorial sea of Iwo Jima due to volcanic activity in 1986; this was subject to immediate recognition by the UK government as part of the territory of Japan.[171] In such a case, '[n]o formal acts of appropriation are required'.[172]

(D) HYDRAULIC BOUNDARIES

(i) Boundary rivers[173]

The principle of delimitation apparently established in the law is that of the *thalweg*, presumed to mean the middle of the main navigable channel. However, the term may have another meaning in particular instruments and treaties, viz., the line of deepest soundings. The two definitions will often coincide. But conditions prevailing, even within the same river system, are very variable and the learning in the books tends to be unhelpful in practice. Expertise is called for, particularly in relation to the determination of the main channel among several arms of a river.[174]

Unlike purely terrestrial borders, boundary rivers may change their course. This is not a true case of accretion. Thus, in relation to the southern boundary of New Mexico, the solution of disputes between the US and Mexico depended on principles of acquiescence and the interpretation of agreements as to the outcome of natural changes.[175] In this type of case, even in the absence of applicable agreements, sudden, forcible, and significant changes in river courses (avulsion) will not be considered to have changed the frontier line:[176] in other words, the boundary will be fixed along the route of the former river bed, following not the river but the land underneath. Accretion, the gradual and imperceptible addition of sediments, can give rise to an extension of the sovereignty of the co-riparian to areas already under

[170] See 1 Hackworth 409–21; 1 Hyde 355; *Island of Palmas* (1928) 2 RIAA 829, 839; Kanska & Manko (2002–3) 26 *Pol YIL* 135.

[171] UKMIL (1986) 57 *BY* 487, 563.

[172] 1 Hyde 355–6.

[173] See E Lauterpacht (1960) 9 *ICLQ* 208; Bouchez (1963) 12 *ICLQ* 789; McEwen, *International Boundaries of East Africa* (1971) 76–96; Kaikobad, *The Shatt-al-arab Boundary Question* (1988); Bardonnet (1976) 153 Hague *Recueil* 9, 83–95; Schroeter (1992) 38 *AFDI* 948. Also: the dispute related to the boundary river San Juan between Nicaragua and Costa Rica, *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua)*, Order of 8 March 2011.

[174] See *Argentine-Chile Frontier* (1966) 38 ILR 10, 93; *Kasikili/Sedudu Island*, ICJ Reports 1999 p 1045, 1060–74; *Eritrea-Ethiopia Boundary* (2002) 130 ILR 1, 116; *Benin/Niger*, ICJ Reports 2005 p 90, 149–50.

[175] See *Chamizal* (1911) 11 RIAA 309, 316; *San Lorenzo* (1932) 6 ILR 113. Also: Chamizal Convention, 28 August 1963, 505 UNTS 185.

[176] *Nebraska v Iowa*, 143 US 359 (1892); *Kansas v Missouri*, 322 US 213 (1943); *Georgia v South Carolina*, 497 US 376 (1991); *El Salvador/Honduras*, ICJ Reports 1992 p 351, 546; cf *Chamizal* (1911) 11 RIAA 309.

effective occupation[177] on the basis of principles of contiguity and certainty. The gradual nature of the process leads to a presumption of occupation by the riparian state and one of acquiescence by other states; thus the boundary will be held to move with the river.[178]

(ii) Boundary lakes

As to boundary lakes the principle of the median line applies, but as usual express agreement or acquiescence may produce other modes of division.

(E) THE POLAR REGIONS: THE SECTOR PRINCIPLE[179]

Particularly in the case of the Arctic, the question of rights over frozen sea or 'ice territory' arises,[180] but otherwise normal principles apply to territory situated in polar regions. In the making of claims to ice deserts and remote groups of islands, it is hardly surprising that governments should seek to establish the limits of territorial sovereignty by means of straight lines, and similar systems of delimitation may be found in other regions, for example in North America. In the polar regions use has been made of lines of longitude converging at the Poles to produce a sector of sovereignty. While the 'sector principle' does not give title, it may represent a reasonable application of the principles of effective occupation as they are now understood, and as applied in *Eastern Greenland*.[181] It remains a rough method of delimitation, and has not become a separate rule of law.

Confusion of claims has arisen primarily from the indecisive nature of state activity in the polar regions. However, three reservations may be made: the 'sector principle' has the defects of any doctrine based upon contiguity; its application is a little absurd insofar as there is claim to a narrow sliver of sovereignty stretching to the Pole; and, lastly, it cannot apply so as to include areas of the high seas.

[177] See *Island of Palmas* (1928) 2 RIAA 839.

[178] *El Salvador/Honduras*, ICJ Reports 1992 p 351, 546. Also: *Arkansas v Tennessee*, 246 US 158 (1918); *Louisiana v Mississippi*, 282 US 458 (1940); *Georgia v South Carolina*, 497 US 376 (1991).

[179] On the Antarctic: 1 Hackworth 399–400, 449–76; Waldock (1948) 25 *BY* 311; Auburn (1970) 19 *ICLQ* 229; Watts, *International Law and the Antarctic Treaty System* (1992); Kaye, in Oude Elferink & Rothwell (eds), *The Law of the Sea and Polar Maritime Delimitation and Jurisdiction* (2001) 157. On the Arctic: Lakhtine (1930) 24 *AJIL* 703; 1 Hyde 349–50; Head (1963) 9 *McGill LJ* 200. Further: Smedal, *Acquisition of Sovereignty over Polar Areas* (1931); 2 Whiteman 1051–61; 3 Rousseau, 203–30; Scovazzi, in Oude Elferink & Rothwell (2001) 69; Churchill, ibid, 105; Timchencko, ibid, 269; Scott, (2009) 20 *Ybk IEL* 3. Generally: Rothwell, *The Polar Regions and the Development of International Law* (1996).

[180] Some writers take the view that permanently frozen ice shelves are susceptible to effective occupation. See Waldock (1948) 25 *BY* 311, 317–18; Fitzmaurice (1957) 92 Hague *Recueil* 1, 155. The USSR was particularly fond of such claims: for state practice see Lakhtine (1930) 24 *AJIL* 703; 1 Hackworth 449–52; 2 Whiteman 1266–7. On the status of ice in international law, see further Joyner (1991) 31 *NRJ* 213; Joyner (2001) 23. In the Antarctic context, see the New Zealand claim over the Ross Dependency, part of which includes a claim over the Ross ice shelf: Rothwell (1996) 55, Fig 3. Also: Richardson (1957) 33 *NZLJ* 38; Auburn, *The Ross Dependency* (1972).

[181] See Wall (1947) 1 *ILQ* 54.

In the Arctic,[182] Denmark, Finland, Norway, and the US have refrained from sector claims linked to territories peripheral to the polar seas. On the other hand Canada[183] and the Russian Federation[184] have made use of the sector principle. It is probable that it is recognition by treaty or otherwise which creates title in the Arctic rather than the sector principle as such.[185]

Sector claims in Antarctica have been made by the UK,[186] New Zealand, Australia, France, Norway, Argentina, and Chile.[187] The state practice calls for brief comment. First, some claims are made which do not depend on contiguity but on discovery. Secondly, claimants are not confined to peripheral neighbours as in the Arctic. And thirdly, recognition[188] is obviously important in establishing title in an otherwise fluid situation created by overlapping claims, many of which in law may amount to little more than ambit claims or declarations of interest. Overlaying all such claims, however, is the Antarctic Treaty[189] which in Article IV(2) prevents any additional claims to the continent being made and signals non-recognition by third states of claims already made.

6. TERRITORIAL SOVEREIGNTY AND PEREMPTORY NORMS

The complex question of the effect of breaches of peremptory norms on the validity of interstate transactions is considered in chapter 27. The concern here is the effect of certain rules on the power of alienation.

(A) TRANSFER BY AN AGGRESSOR

The modern law forbids conquest and regards a treaty of cession imposed by force as a nullity, a logical extension of the prohibition on the use of force contained in Article 2(4) of the UN Charter.[190] Even if—and this is open to considerable doubt—the

[182] Head (1963) 9 *McGill LJ* 200; Rothwell (1996) 4–6, 166–73; also 288–91 (on the 'Arctic lake' theory). See also Scovazzi (2001) 69.

[183] No precise declaration was made, but see 1 Hackworth 463; 2 Whiteman 1267. For the Canadian declaration that the sector principle does not apply to the Arctic: (1970) 9 ILM 607, 613.

[184] Decree of 15 April 1926; 1 Hackworth 461.

[185] 1 Hackworth 463–8; 2 Whiteman 1268. Also: Rothwell (1996) 59–63.

[186] The first sector claim in the area was by Letters Patent in 1917 defining the Falkland Islands Dependencies. Further: Rothwell (1996) 54.

[187] For the various claims: ibid, 51–8.

[188] Thus the Norwegian proclamation of 1939 was accompanied by a minute of the Ministry of Foreign Affairs which recognized the British, New Zealand, Australian, and French claims: ibid, 57–8. Norway does not accept the sector principle as such.

[189] 1 December 1959, 402 UNTS 72.

[190] Also: Arts 3 and 4 of the Helsinki Final Act, 1 August 1975, 14 ILM 1292.

vice in title can be cured by recognition by third states, it is clear that the loser is not precluded from challenging any title based upon a transfer from the aggressor. It is the force of a powerful prohibition, the stamp of illegality, which operates here rather than the principle *nemo dat quod non habet*. In the event, the Charter era has been attended by far less acquisition of territory by force than periods before it.[191] This is reflected in the terms of SC Resolution 242 (1967), which highlighted the inadmissibility of the acquisition of territory by force, and more emphatically, the Friendly Relations Declaration of 1970, which stipulates that:

> the territory of a state shall not be the object of acquisition by another state resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal.[192]

Exceptions could perhaps occur when there is a disposition of territory by the principal powers or some other international procedure valid as against states generally. So far in the modern period such dispositions have not resulted in an aggressor keeping territory seized.

(B) THE PRINCIPLE OF SELF-DETERMINATION AND TERRITORIAL TRANSFERS

Is there a rule of law inhibiting the transfer of territory if certain minimum conditions of local consent are not fulfilled? Dispositions by the principal powers, transfers under procedures prescribed by international organizations, and bilateral cessions in the period since 1919 have been expressed to be in accordance with the principle of self-determination. The machinery of the plebiscite is sometimes applied,[193] or affected individuals may be given an option of nationality and/or repatriation.[194]

Some opinions support the view that transfers must satisfy the principle. However, there is insufficient practice to warrant the view that a transfer is invalid simply because there is no sufficient provision for expression of opinion by the inhabitants.[195] At present most claims are made in terms which do not include a condition as to due consultation of the population concerned. Those jurists who insist on the principle refer to exceptions, in particular the existence of a collective decision of states representing

[191] Zacher (2001) 55 *Int Org* 215, 223–4; Ratner (2006) 100 *AJIL* 808, 811.

[192] GA Res 2625(XXV), 24 October 1970. See also SC Res 662 (1990) §1, declaring that the Iraqi annexation of Kuwait 'under any form and whatever pretext has no legal validity and is considered null and void'. Further: VCLT, Art 52 (treaty procured through use or threat of force is void *ab initio*).

[193] 1 Hyde 364–5, 372; 2 Whiteman 1168–72. This most recently occurred in the cases of East Timor and South Sudan.

[194] E.g. India–Bangladesh, Agreement Concerning the Demarcation of the Land Boundary between India and Bangladesh and Related Matters, 16 May 1974, available at www.hcidhaka.org/agreement_india_bd.php, Art 3 as enacted by the Protocol of 6 September 2011, www.mea.gov.in/mystart.php?id=500418206.

[195] Ratner (2006) 100 *AJIL* 808, 811.

the international community to impose measures on an aggressor,[196] and the principle of respect for pre-independence administrative divisions following attainment of independence by former colonies (*uti possidetis*).[197] In any event the application of the principle may be difficult in practice. In relation to the British–Argentine dispute over the Malvinas/Falklands the relevant UN resolutions call for transfer by virtue of a principle of decolonization while the UK regards transfer without local consent as a breach of the principle of self-determination.[198]

[196] Cf the debate over the Oder-Neisse frontier established by the Potsdam Declaration (1945) 39 *AJIL Supp* 245; Brownlie, *Use of Force* (1963) 409.

[197] See *Burkina Faso/Mali*, ICJ Reports 1986 p 554, 566–7; ibid, 652–3 (Judge ad hoc Luchaire).

[198] See UKMIL (1985) 56 *BY* 402–6, 473–4. Also: Reisman (1983) 93 *Yale LJ* 287; Crawford (2nd edn, 2006) 637–47. On Kosovo: e.g. Corten, in Cot (ed), *Liber Amicorum Jean-Pierre Cot, le procès international* . (2009) 30.

10

STATUS OF TERRITORY: FURTHER PROBLEMS

1. INTERNATIONAL PROCEDURES OF TERRITORIAL DISPOSITION[1]

A basic assumption of the international system is that sovereignty—plenary power over territory—inheres individually in each state which has the better claim to title over that territory, and that it is not shared. But this is an assumption; from a legal point of view it may even be a presumption: it is not a rule, still less a peremptory norm. There is nothing to prevent a state from freely abandoning its sovereignty in favour of merger in another state, and what can be done in whole can be done in part. Groups of states, or an international organization, can come to exercise dispositive authority over a given territory: questions may then arise as to the modalities of the exercise of such powers and their relation to the self-determination of the people of the territory concerned. Some of these situations are grouped for consideration here.

(A) AGREEMENT BETWEEN THE STATES CONCERNED

A cession of territory may depend on the political decision of the states concerned in a dispute. Such a cession may be the result of a political claim, on grounds of history or security, a legal claim, or a combination of these. The conditions under which transfer occurs may be influenced by the recommendations of political organs of international organizations and, latterly, by the principle of self-determination (see chapters 5, 29). On numerous occasions, plebiscites have been organized under the auspices of the United Nations, with the results treated as indicative or binding.[2]

[1] See esp Jennings, *Acquisition of Territory* (1963) 69–87; Crawford, *Creation of States* (2nd edn, 2006) 501–647.

[2] Wambaugh, *Plebiscites since the World War* (1933); Beigbeder, *International Monitoring of Plebiscites, Referenda and National Elections* (1994).

(B) JOINT DECISION OF THE PRINCIPAL POWERS

Likewise on a number of occasions a group of leading powers, perhaps in association with a number of other states, have assumed a power of disposition, although the legal bases of such a power were sometimes problematic.[3] It is possible that, as in the case of the creation of a new constitution by rebellion, the political and legal bases are inseparable: certainly the legal consequences of this power of disposition are commonly accepted. The mandates system rested in substantial part at least on such a power of disposition, and the International Court accepted its consequences in its successive advisory opinions on the status of South West Africa.[4]

Disposition of territory alone is not enough for a transfer of sovereignty, however. In the *Eritrea/Yemen* arbitration, the Tribunal considered the status of certain Red Sea islands in light of Article 16 of the Treaty of Lausanne, by which the Ottoman Empire renounced sovereignty over the islands. It held that no doctrine of reversion of historical title applied, so that sovereignty over the islands in question had remained indeterminate after Turkey divested itself of the territory.[5] What was required for acquisition of the territory was 'an intentional display of power and authority over the territory, by the exercise of jurisdiction and state functions, on a continuous and peaceful basis'.[6]

(C) ACTION BY UNITED NATIONS ORGANS

It is doubtful if the UN has a capacity to convey title, in part because it cannot assume the role of territorial sovereign: in spite of the principle of implied powers, the UN is not a state and the General Assembly only has a power of recommendation. On this basis it can be argued that GA Resolution 181(II) of 29 November 1947, approving a partition plan for Palestine, was if not *ultra vires* at any rate not binding on member states.[7]

However this may be, the fact is that states may agree to delegate a power of disposition to a political organ of the UN, at least where the previous sovereign has relinquished title; but there is no transfer of sovereignty and no disposition of a title inhering in the Organization. In such cases the Organization acts primarily as a referee. The General Assembly played this type of role in relation to the creation of the new states of Libya and Somalia and in the case of territory relinquished by Italy under the Peace Treaty of 1947.[8]

[3] Cf *International Status of South West Africa*, ICJ Reports 1950 p 128, 146–63 (Lord McNair).

[4] *Status of South West Africa*, ICJ Reports 1950 p 128; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports 1971 p 16; *Western Sahara*, ICJ Reports 1975 p 12.

[5] *Eritrea and Yemen (Territorial Sovereignty)* (1998) 114 ILR 1, 40.

[6] Ibid, 69.

[7] Kelsen, *The Law of the United Nations* (1950) 195–7; Crawford (2nd edn, 2006) 424–36.

[8] See GA Res 289A(IV), 21 November 1949; GA Res 387(V), 17 November 1950; GA Res 1418(XIV), 5 December 1959. Further: GA Res 515(VI), 1 February 1952, on the transfer of Eritrea to Ethiopia.

On similar principles, the General Assembly probably retained a power to terminate trusteeship status for cause.[9] But the termination of mandates was a matter of more difficulty, partly because the power of disposition arguably inhered in the principal Allied Powers participating in the Treaty of Versailles.[10] It may be that, in the historic cases of mandate and trusteeship, and also of the few remaining territories to which Chapter XI of the Charter applies, the UN does not 'confer sovereignty', but rather decides on or approves the manner in which the principle of self-determination is to be implemented. Certainly resolutions of the General Assembly play an important element in the consolidation of title over territory. This is especially the case with the resolutions based on Resolution 1514(XV), the Declaration on the Granting of Independence to Colonial Countries and Peoples.[11]

However that may be, the General Assembly assumed the power to terminate the Mandate for South West Africa in Resolution 2145(XXI) of 27 October 1966.[12] Subsequently the General Assembly established the Council for South West Africa, appointed a UN Commissioner to administer the territory, and renamed the territory 'Namibia'. South Africa failed to respond to these developments and the Security Council adopted resolutions in 1969 and 1970 'recognizing' the decision of the General Assembly to terminate the Mandate and calling upon all states to take measures to implement the finding that South Africa's continued presence in Namibia was illegal. By a further resolution the International Court was asked to give an advisory opinion on the question, 'What are the legal consequences for States of the continued presence of South Africa in Namibia notwithstanding Security Council Resolution 276 (1970)?' As a preliminary to giving its views on the substance of the question, the Court considered the validity of GA Resolution 2145(XXI) in terms of the Charter.[13] The Court held that the power of the League of Nations, and therefore of the United Nations, to revoke the Mandate for reasons recognized by general international law (termination on the ground of material breach of a treaty) was to be implied.[14] The role adopted by the General Assembly, assisted by the Security Council, was to take such action as was necessary to ensure the application of the provisions of Resolution 1514(XV) to the people of Namibia. In formal terms at least, this did not involve a power of disposition as such, but the application of the provisions of the Charter, as interpreted by the practice of the organs, relating to the principle of self-

[9] This may be inferred from Arts 76 and 85 of the Charter: Jennings (1963) 81. No express provision appears, but (except with strategic trusteeships) it was the GA that approved the trusteeship agreement in each case. Further: Marston (1969)18 *ICLQ* 1; Crawford (2nd edn, 2006) 581–6.

[10] Also: *Status of South West Africa*, ICJ Reports 1950 p 128, 150 (Judge McNair), 168 (Judge Read), 180–1 (Judge Alvarez, diss); Crawford (2nd edn, 2006) 574–81.

[11] 14 December 1960. Further: Jennings (1963) 82–7.

[12] For contemporary comment: Dugard (1968) 62 *AJIL* 78; Marston (1969) 18 *ICLQ* 1, 28ff; Rousseau (1967) 71 *RGDIP* 382.

[13] *Namibia*, ICJ Reports 1971 p 16, 45–50.

[14] Ibid, 47–9. Also: Dugard (1968) 62 *AJIL* 78, 84–8.

determination.[15] Namibia eventually achieved independence in 1990 after elections supervised by the UN Transition Assistance Group.[16]

The role of the General Assembly in the decolonization of Western Sahara has involved a complex of issues concerning the principle of self-determination and the legal interests of Morocco (and at one time Mauritania).[17] The situation remains unresolved.[18]

In the aftermath of the Iraqi invasion and occupation of Kuwait the Security Council adopted Resolution 687 (1991). The resolution specified the measures to be taken under Chapter VII of the Charter. In particular, the Security Council demanded respect for the agreed territorial delimitation,[19] and decided 'to guarantee the inviolability of the ... international boundary and to take as appropriate all necessary measures to that end in accordance with the Charter of the United Nations'. In the event, following the eviction of Iraq by a broad-based coalition acting under a Security Council mandate, a Demarcation Commission was created: it submitted a Final Report on the demarcation of the international boundary between Iraq and Kuwait on 20 May 1993.[20] In Resolution 833 (1993) the Security Council adopted the decisions of the Commission as 'final'. The exercise was, at least in form, the demarcation of an already agreed alignment and no 'reallocation' was intended. However, when the Final Report is examined it follows almost inexorably that elements of delimitation *were* involved, especially in relation to the maritime delimitation.[21] The outcome was controversial but it is important to remember that the Security Council expressly disclaimed an intention to use the demarcation process for the purpose of 'reallocating territory between Kuwait and Iraq'. Iraq subsequently recognized the boundary so determined.[22]

In the context of maintaining international peace and security UN organs have also been prepared to assume administrative functions in relation, for example, to the City

[15] For criticism of the opinion on the basis that neither the GA nor the SC has the power to abrogate or alter territorial rights, see Judge Fitzmaurice (diss), ICJ Reports 1971 p 16, 280–3, 294–5. But in the Friendly Relations Declaration, the GA stated that achieving *any* political status freely determined by plebiscite is tantamount to achieving self-determination: Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, Annex to GA Res 2625(XXV), 24 October 1970.

[16] GA Res S-18, 23 April 1990, following SC Res 652 (1990).

[17] *Western Sahara*, ICJ Reports 1975 p 12, 69–77 (Judge Gros), 105–15 (Judge Petrén), 116–26 (Judge Dillard), 127–72 (Judge de Castro).

[18] Franck (1976) 70 *AJIL* 694; Shaw (1978) 49 *BY* 118; Crawford (2nd edn, 2006) 637–47; S/2007/210.

[19] Iraq-Kuwait, Agreed Minutes Between the State of Kuwait and the Republic of Iraq Regarding the Restoration of Friendly Relations, Recognition and Related Matters, Baghdad, 4 October 1963, 485 UNTS 321. The Agreed Minutes did not delimit maritime areas.

[20] S/25811, 21 May 1993.

[21] Mendelson & Hulton (1993) 64 *BY* 135.

[22] S/1994/1173, 14 October 1994. Also: SC Res 949 (1994).

of Jerusalem,[23] the Free City of Trieste,[24] East Timor,[25] and Kosovo.[26] The existence of such administrative powers rests legitimately on the principle of necessary implication and is not incompatible with the view that the UN cannot have territorial sovereignty.

2. SOVEREIGNTY DISPLACED OR IN ABEYANCE

Although an undivided sovereignty is the normal mode of territorial administration, exceptional situations exist which cannot be forced into the sovereignty strait-jacket. Thus sovereignty may be held jointly by two states, as in a condominium,[27] or distributed in time, as with a leasehold or other grant of sovereign rights subject to an ultimate right of reversion.[28] Or it may be in abeyance, as with the mandate and trusteeship systems.[29] A brief analysis of some other possibilities follows.

(A) TERRITORY *SUB IUDICE*

When a territorial dispute is referred to adjudication, there is a real sense in which sovereignty is in abeyance *pendente lite*: at any rate the tribunal cannot acknowledge either state as sovereign pending its decision, although the decision once given will be declaratory in form. The analogy here is perhaps with the right of possession which the *sequester* or stakeholder had in Roman law.[30] The existing regime rests on acts in the law which in principle could not create sovereignty in the existing holder but which do not render the region *terra nullius*. For practical purposes the present possessor may be regarded as exercising normal powers of jurisdiction and administration, subject only to external limitations arising from the legal instruments determining the status of the region. Thus the relevant agreement may contain provisions for demilitarization.

Furthermore, there must be an implied obligation not to act in such a way as to render fulfilment of the ultimate objective of the arrangement impossible. Thus if the

[23] See Trusteeship Council, Statute for the City of Jerusalem, T/592, 4 April 1950; Stahn (2001) 5 *MPUNYB* 105, 126–7, 134; Chesterman, *You, The People: The United Nations, Transitional Administration, and State-Building* (2004) 52–4.

[24] See Permanent Statute for the Free Territory of Trieste, Annex VI to the Treaty of Peace with Italy, 10 February 1947, 49 UNTS 3; Stahn (2001) 5 *MPUNYB* 105, 125–6, 135–6, 180; 3 Whiteman 68–109; Chesterman (2004) 50–2.

[25] On the UN Transitional Administration in East Timor (1999–2002) see Crawford (2nd edn, 2006) 560–2; Chesterman (2004) 60–4, 135–43.

[26] Ruffert (2001) 50 *ICLQ* 613; Stahn (2001) 5 *MPUNYB* 105; Wilde (2001) 95 *AJIL* 583; Chesterman (2004) 79–83. Further: chapter 4.

[27] Lauterpacht (1956) 5 *ICLQ* 405, 409–414; Seyersted (1961) 37 *BY* 351, 452–3; O'Connell (1968–69) 43 *BY* 71 (New Hebrides). Cf Kelsen (1950) 195–7, 684–7.

[28] The best-known case is *Guantanamo Bay* under the Cuba–US Treaty of 23 February 1903, 193 CTS 314.

[29] Crawford (2nd edn, 2006), 613–15.

[30] Holmes, *The Common Law* (1881) 209.

stated objective is to provide for an expression of opinion by certain minority groups it would be *ultra vires* to deport or to harass and blackmail the groups concerned.[31] In this respect, the absence of a textually-prescribed enforcement mechanism is not enough to offset the obligation not to impede fulfilment of the end goal, though the presence of such a mechanism will add yet another arrow to the bow. The status of the inhabitants in terms of nationality and citizenship will depend on the circumstances of the particular case.[32] If one accepts the obligations inherent in the doctrine of the ultimate objective then the conferment and deprivation of nationality would not be a matter of domestic jurisdiction for the administering state.

(B) TERRITORY TITLE TO WHICH IS UNDETERMINED

It may happen that a piece of territory not a *res nullius* has no determinate sovereign. This is not simply a case where two states have conflicting claims to territory. In principle such cases can be assessed according to law, with judgment in the form of a declaration. By contrast there are cases where title is in effect suspended pending some future event.

Existing cases spring chiefly from the renunciation of sovereignty by the former holder and the existence of an interregnum with disposition postponed until a certain condition is fulfilled, or where the states having a power of disposition for whatever reason do not exercise the power or fail to exercise it validly. For example, in the 1951 Peace Treaty Japan renounced all rights to Taiwan.[33] But the better view is that Taiwan was not the subject of any act of disposition; it was not transferred to any state. The former view of the British government was that: 'Formosa and the Pescadores are... territory the *de iure* sovereignty over which is uncertain or undetermined'.[34] Since 1972 the British government has acknowledged the position of the Chinese government that Taiwan is a province of China.[35]

(C) *TERRA NULLIUS*[36]

For practical purposes the cases of *terra nullius* and territory *sub iudice* or title to which is undetermined may, to a certain extent, be assimilated. In both cases activity is limited by principles similar to those protecting a reversioner's interest in municipal law. However, in the case of the *terra nullius* the state which is in the course of

[31] Genocide Convention, 9 December 1948, 78 UNTS 277.

[32] Cf *Eritrea/Ethiopia Claims Commission, Partial Award: Loss of Property in Ethiopia owned by Non-Residents (Eritrea's Claim No 24)*, 19 December 2005, §§8–11.

[33] Treaty of Peace with Japan, 8 September 1951, 136 UNTS 45, Art 2(b).

[34] Written answer by the Secretary of State, 4 February 1955, in (1956) 5 *ICLQ* 405, 413; also: (1959) 8 *ICLQ* 146, 166.

[35] See the official statements in (1986) 57 *BY* 509, 512; (1991) 62 *BY* 568; (1995) 66 *BY* 618, 620–1. On the legal status of Taiwan cf Crawford (2nd edn, 2006) 206–21.

[36] *Island of Palmas* (1928) 2 RIAA 829; Fitzmaurice (1957) 92 Hague *Recueil* 129, 140–4. Cf McNair, 1 *Opinions* 314–25; *Jacobsen v Norwegian Government* (1933) 7 ILR 109. Also: chapter 9.

consolidating title[37] is in principle entitled to carry out acts of sovereignty. The important difference is that whereas a *terra nullius* is open to acquisition by any state, the territory *sub iudice* is not susceptible to occupation, since the express conditions for its attribution may have been laid down already. In any case, there already is a possessor whose interim possession may have received some form of recognition.

A *terra nullius* is subject to certain rules of law which depend on two assumptions, first, that such zones are for the time being free for the use and exploitation of all and, second, that persons are not deprived of the protection of the law merely because of the absence of state sovereignty—the law of the sea gives the relevant analogy for this. States may exercise jurisdiction in respect of their individuals and companies carrying on activities in a *terra nullius*, as well as in respect of stateless persons. There is also universal jurisdiction in certain cases: Article 101 of the UN Convention on the Law of the Sea defines piracy to include acts directed 'against a ship, aircraft, persons or property in a place outside the jurisdiction of any State'.[38] Acts in the nature of aggression or breaches of the peace, war crimes, or crimes against peace and humanity, will equally be so in *terra nullius*.[39] Unjustified interference from agencies of another state with lawful activity will create international responsibility in the ordinary way. As far as succession of obligations to the new state goes, it is doubtful whether private interests established prior to the reduction into sovereignty of a *terra nullius* must be respected by the new sovereign.[40]

Several issues remain unsettled. It is not clear that a *terra nullius* has a territorial sea: the logic, such as it is, of the doctrine of appurtenance[41] does not apply here, and it would be reasonable to regard the adjacent waters as high seas.[42]

(D) *RES COMMUNIS*

The high seas are commonly described as *res communis omnium*,[43] and occasionally as *res extra commercium*.[44] The use of these terms is innocent enough, providing not too

[37] Since states do not always advertise an *animus possidendi* this is probably to be presumed, except where representations from other states provoke a disclaimer. See Escorihuela (2003) 14 *EJIL* 703, 717 (presenting one view of *animus possidendi* as an 'empty phantom'); *Legal Status of Eastern Greenland* (1933) PCIJ Ser A/B No 53.

[38] UNCLOS, 10 December 1982, 1833 UNTS 3. Also: UNCLOS, Arts 100, 105; ILC *Ybk* 1956/II, 282–3 (Arts 38–9 and 43 and commentary thereon). On piracy: chapter 13.

[39] Fitzmaurice (1957) 92 Hague *Recueil* 129, 142.

[40] Cf *Mabo v Queensland (No 2)* 112 ILR 457.

[41] E.g. *Cohen v Whitcomb* (1919) 142 Minn 20, 23 (Minn SC) defining *appurtenance* as '[t]hat which belongs to something else. Something annexed to another thing more worthy.'

[42] GCTS, 29 April 1958, 516 UNTS 215, Art 10 and UNCLOS Art 2 speak of the extension of the sovereignty of a state, not of the extent of a territory.

[43] Fitzmaurice (1957) 92 Hague *Recueil* 129, 142, 143, 150–1, 156–7, 160–2. In Roman law the concept did not acquire a very definite content and was confused at times with *res publicae*. On the high seas: chapter 13.

[44] Lindley, *The Acquisition and Government of Backward Territory in International Law* (1926) 23 uses the term *territorium nullius*.

much is read into them. They represent only a few basic guideposts and do not provide a viable regime of themselves. The *res communis* may not be subjected to the sovereignty of any state, general acquiescence apart, and states are bound to refrain from any acts which might adversely affect the use of the high seas by other states or their nationals. It is now generally accepted that outer space and celestial bodies have the same general character. Legal regimes that are similar in type may be applied by treaty to other resources, for example an oilfield underlying parts of two or more states.[45]

(E) TERRITORIAL ENTITIES (OTHER THAN STATES) ENJOYING LEGAL PERSONALITY

In *Western Sahara* the International Court considered the legal status of the 'Mauritanian entity' at the time of colonization by Spain in the years 1884 onwards. It was accepted that the entity was not a state. However, in coming to this conclusion the Court accepted as a principle that in certain conditions a legal entity, other than a state, 'enjoying some form of sovereignty', could exist distinct from the several emirates and tribes which composed it.[46] These conditions were not described with any precision by the Court but were related to the existence of 'common institutions or organs' and of an entity which was in 'such a position that it possesses, in regard to its Members, rights which it is entitled to ask them to respect'.[47]

(F) ANTARCTICA[48]

Escaping all classifications—but illustrating well the possibilities and weaknesses of international arrangements for the government of territory—is Antarctica. Virtually the whole continent is claimed by one of the seven claimant states (there is a small unclaimed sector which is the last surviving *terra nullius* on earth). But these claims are not recognized by any other participant in Antarctic activity, and the legal positions of both claimants and non-claimants are protected by a continental 'without prejudice' clause, Article IV of the Antarctic Treaty.[49] It is on this fragile basis of claims and their non-recognition that the entire edifice of Antarctic scientific and (increasingly) touristic activity is based, as well as the regulatory framework of the Antarctic Treaty System.

[45] UK-Netherlands, Agreement relating to the Exploitation of Single Geological Structures extending across the Dividing Line on the Continental Shelf under the North Sea, 6 October 1965, 595 UNTS 106.

[46] ICJ Reports 1975 p 12, 57–65, 67–8.

[47] Ibid, 63, referring to *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ Reports 1949 p 174, 178. On legal personality: chapter 4.

[48] See Bush, *Antarctica and International Law* (1988); Rothwell, *The Polar Regions and the Development of International Law* (1996); Stokke & Vidas, *Governing the Antarctic* (1996); Crawford, in French, Saul & White (eds), *International Law and Dispute Settlement* (2010) 271.

[49] Antarctic Treaty, 1 December 1959, 402 UNTS 71, Art IV.

The Creation of the State of Palestine: Too Much Too Soon?

James Crawford *

I. Introduction

It seems to be difficult for international lawyers to write in an impartial and balanced way about the Palestine issue. Most of the literature, some of it by respected figures, is violently partisan. It is true that this only reflects much of the political and personal debate about Palestine. Still, such a level of partisanship in legal discourse is disturbing. Perhaps the sceptics are right in claiming that "impartiality" is a facade and a pretence, in which case Boyle at least has the merit of honesty and lack of hypocrisy in his pleading. But the problem is that, if they are right, we should not merely give up the pretence but the game itself. And the obstinate fact remains that the actors, most of the time, continue to use the language of law in making and assessing claims. (International law scholars are not like critics in an empty theatre). That the language of law is used implies that these claims *can* be assessed, on the basis of values which extend beyond allegiance to a particular party, country, bloc or religion.

It may be conceded that Boyle's evident and – if his work is to be read as stating a legal claim rather than as a disguised oath of allegiance – regrettable partisanship has illustrious antecedents, on both sides of the dispute. Even so, an unusually high proportion of what Boyle has to say is directed at issues of strategy and is concerned to advocate a certain position within the overall spectrum of the Palestinian cause. However, those views are supported by legal arguments of various kinds, which call for separate examination. To the extent that it involves propositions of international law, Boyle's thesis, as outlined in "The Creation of the State of Palestine"[1] and stated in more detail elsewhere,[2] involves three basic propositions:

(1) Having regard to the classical "four elements constituent of a state", Palestine, under the provisional government of the Palestine Liberation Organization, is already a state in international law: "all four characteristics have been satisfied by the newly proclaimed independent state of Palestine."

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1 Boyle, 'The Creation of the State of Palestine', *EJIL* (1990) 301.

2 See Boyle, 'Create the State of Palestine!' (1988) 7 *Scandinavian Journal of Development Alternatives* 25.

(2) The General Assembly, whether as the successor of the League of Nations with respect to the mandate system or by virtue of the authority to recognize the new state, and in its Resolution 43/177 has "essentially" done so, such recognition "being constitutive, definitive, and universally determinative." (Boyle has however already stated that the Palestine National Council's Declaration of Independence was "definitive, determinative and irreversible").

(3) To add yet a third level of determinacy (to make assurance trebly sure), he adds that other states, and in particular Israel and the United States, are bound to accept the new state, either because the international status of the Palestinian people had already been "provisionally recognized" in Article 22 of the League of Nations Covenant, a position preserved by Article 80 of the Charter, or (in the case of Israel) because its acceptance of the Partition Resolution was a "condition for its admission" to the United Nations.

Other questions which he discusses include the present legal status of Jerusalem, and the partly related issue of the modalities for terminating the Israeli occupation of the occupied territories. Boyle's "solution" for the Jerusalem problem would involve a demilitarized "*corpus separatum*", under United Nations auspices, with neither side relinquishing its claim to sovereignty over the Old City. His suggestion for an orderly termination of Israeli occupation seems to be involve the imposition of a trusteeship with the United Nations itself, apparently, as administering authority. Both suggestions raise complex legal issues: for example, are the occupied territories "now held under mandate" within the meaning of Article 77(1)(a) of the United Nations Charter, and if not, which state or states are currently "responsible for their administration"? But they raise even more formidable difficulties at the levels of policy, practicality and finance, and there seems no need to discuss them in detail here. But it is necessary to say at least something about the other three arguments.

II. The Status of Palestine under the Traditional Criteria for Statehood

It is a curious feature of modern discussions of territorial status that the "traditional definition" of a state, as expressed in the four criteria referred to in the Montevideo Convention on the Rights and Duties of States of 1933,[3] continues to exercise so strong a hold. It is even more curious when the Montevideo definition, which looks to the ostensibly separate elements of territory, permanent population, government and the capacity to enter into relations with other states, is then minutely examined – in some cases one would say tortured – in order to be able to argue that a particular entity fits within those criteria.

Even applying the Montevideo Convention, in a relatively superficial way, in accordance with its terms, it is difficult to see how Palestine could constitute a state. Its whole territory is occupied by Israel, which functions as a government in the territory. The Palestine Liberation Organization has never functioned as a government in respect of the occupied territories. But the Montevideo Convention treats statehood essentially as an existing state of affairs, as a matter of fact as much as a matter of law.[4] And as a matter of fact, notwithstanding that allegiance, neither the PLO nor the Palestine National Council

3 165 *LNTS* 19.

4 See J. Crawford, *The Creation of States in International Law* (1979) 36-48 for an examination and critique of the Montevideo formula.

has been in a position to exercise the whole range of governmental powers within the territory concerned. That they may have a right to do so – or, more accurately, that the Palestinian people may have a right to choose a representative authority to govern themselves – is beside the point, from the perspective of the Montevideo formula. That formula is concerned with the existence of secure governing authority rather than with any right to exercise that authority in future. It should be recalled that the Montevideo Convention was drafted at a time when the principle of self-determination was not generally recognized in international law, and when the implications of the nascent rule prohibiting the use of force between states in this context had not been worked out. It may be that the idea of statehood, imperfectly expressed in the Montevideo Convention, has been modified by these developments. But it is curious that the debate about the statehood of entities such as Palestine is still conducted in terms of that Convention. Boyle's essay is a good example of this.

Rather than examining separately the four apparently discrete criteria listed in the Montevideo formula, it is preferable to focus on the notion of state independence as a prerequisite for statehood. Essentially that notion embodies two elements – the existence of an organized community on a particular territory, exclusively or substantially exercising self-governing power, and secondly, the absence of the exercise of another state, and of the right of another state to exercise, self-governing powers over the whole of that territory.[5]

From this perspective, the often stated proposition that the absence of clearly delimited boundaries is not a prerequisite to statehood is axiomatic. Boundaries are the consequence of territory. But territory, in the context of statehood, is not "something owned." It is the basis in space for the organized community which is the state. No doubt the PLO directly and indirectly exercises considerable influence within the occupied territories, and commands the allegiance of a significant part of the population of those territories. But this falls far short of what is required in terms of the first element, the existence of an organized self-governing community. Moreover, that Israel's governmental power and authority over those territories does not amount, for the most part, to a claim of sovereignty, that it would be unlawful if it did amount to a consensus that the Palestinian people are entitled to form a state – none of this could affect the point that they do not currently do so, if the generally-accepted principle of state independence is applied. In this respect Boyle fails to face up either to the law or the facts.

Of course there are other conceptions of statehood under which different results might be reached. The first and most obvious alternative – though Boyle does not rely upon it – is the constitutive theory of statehood. According to this view an entity is a state if, and only if, it is recognized as such by other states. But the difficulty is that the constitutive theory inevitably leads to extreme subjectivity in the notion of the state. There is no rule that majority recognition is binding on third states in international law. At present Palestine has been recognized as a state by over 100 states, but it does not yet command anything like the level of quasi-unanimous support as such which would be required to establish a particular rule of international law to the effect that Palestine is a state. In the absence of such a "particular" rule, the constitutive theory leads inevitably to the proposition that another state is not bound to treat an entity as a state if it has not recognized it. Since the crucial actors here are the United States and Israel, which vehemently do not recognize Palestine as a state, the theory leads nowhere. In any event, there are compelling reasons for rejecting the constitutive theory, and most modern authorities do so.[6]

5 *Id.*, 48-71.

6 *Id.*, 15-24, with references to other authorities.

The second alternative would be to seek to take advantage of developments in international law since 1945 which have arguably modified the conception of statehood from that implied by the Montevideo formula. There has been a certain departure from the notion of a state as an effective territorial community independent of other states. Instead, notions of entitlement or disentitlement to be regarded as a state have been influential, at least in some situations. Thus entities which would have otherwise qualified as a state may not do so because their creation is in some significant sense illegitimate (Rhodesia, the Bantustans, the Turkish Federated States of Cyprus). Palestine involves the converse problem, that of an entity which is not sufficiently effective to be regarded as independent in fact, but which is thought entitled to be a state.

It should be stressed that we are not dealing with the situation of the extinction of states which were once, incontestably, established as such. The situation here involves the establishment of a new state on territory over which other states have claims of one kind or another. On this issue the practice is limited, though it is not non-existent. In the case of a number of former Portuguese territories in Africa (Guinea-Bissau being the best example[7]) the view was taken that the National Liberation Organization's extensive *de facto* control over large parts of the territory in question, and the apparent inevitability of its success, combined with the principle of self-determination, meant that the entity became a state in circumstances in which the recognition of its statehood would otherwise have been premature. Although the arguments in favour of premature statehood were often not set out or were poorly articulated, the importance of the principle of self-determination in such cases seems to have been that it disentitled the former sovereign to rely on its authority over the territory. On the other hand it is significant that in each of these cases the liberation organization did have a significant degree of control in the territory, such that its victory could reasonably be said to be imminent. Moreover the issue presented was one of a simple yes/no kind – independence for the territory in question or the continuation of colonial rule. There was no question of any subsisting claim by the colonial power, or indeed by any other state, to significant parts of the territory in question.

The situation in Namibia provides an instructive contrast. There, notwithstanding the undoubted entitlement of the people of Namibia to self-determination, as declared by the International Court in the *Namibia* case,[8] and despite the fact that the relevant liberation organization, SWAPO, did have a high degree of allegiance, and a fluctuating degree of control, in Namibia, there was no attempt to treat Namibia as being already legally a state. Instead action was taken to bring about its independence, and in the meantime to seek to protect the rights of the people of Namibia through other means (e.g. the Resolution of the United Nations Committee for Namibia on Permanent Sovereignty over its Natural Resources). In this situation the modalities of achieving independence were of great importance, and were undoubtedly an important factor in leading states to maintain the distinction between the rights of the people of Namibia and their present status. Much the same thing could be said of the Western Sahara, especially having regard to the presence of a relatively powerful neighbouring state with claims over the territory.

Thus although a majority of states have taken the view that the next logical step beyond the Guinea Bissau situation should be taken in the case of Palestine, a significant minority of states opposes that step. There is certainly not the level of support in state practice, nor in the other sources of international law, to support that additional development.

7 *Id.*, 260-1.

8 ICJ Rep (1971) 16.

practice, nor in the other sources of international law, to support that additional development.

This is not to say that the territory now designated as the territory of Palestine lacks a special legal status, or that appropriate representatives of the people of that territory do not share that status for various international purposes. But the continuing reservations held about the status of Palestine are reflected, both in the practice of international organizations and in the actions of individual states. For example, on 12 May 1989 the 42nd World Health Assembly deferred consideration of the application of Palestine for admission as a member of the World Health Organization. The preamble of the relevant resolution (A42/VR/10) states, in part:

> Recognizing in this context that the legal and other issues related to the application of Palestine for membership of the World Health Organization require further detailed study...

Similarly the Executive Board of UNESCO deferred consideration of a Palestinian application for membership of UNESCO, while adopting measures to ensure that Palestine had the fullest possible opportunity (short of membership) of participation in the work of UNESCO.[9]

Another expression of doubt as to the status of Palestine is contained in the Note of Information which Switzerland, as the depository of the 1949 Geneva Conventions on the Laws of War and the 1977 Protocols, addressed to States Parties. In that Note Switzerland reported that it had declined to accept a "communication" from the permanent observer of Palestine to the United Nations office in Geneva, acceding to the Conventions and Protocols, on the grounds that

> Due to the uncertainty within the international community as to the existence or the non-existence of a State of Palestine and as long as the issue has not been settled in an appropriate framework, the Swiss Government, in its capacity as depository ... is not in a position to decide whether this communication can be considered as an instrument of accession in the sense of the relevant provisions of the Conventions and their additional Protocols... The unilateral declaration of application of the four Geneva Conventions and of the additional Protocol I made on 7 June 1982 by the Palestine Liberation Organization remains valid.[10]

Against this general background some brief comments should be made about two other arguments used by Boyle to support the case for the statehood of Palestine.

III. The Authority of the General Assembly to Recognize Palestinian Statehood

Boyle takes a very extensive view of the General Assembly's authority to recognize Palestinian statehood, specifically by its Resolution 43/177. These seem to be three main bases for this authority. The first involves the "provisional recognition" given to

9 See UNESCO 132 EX/31, 29 September 1989, and the associated *Consultation* by Professor Alain Pelet, 7 September 1989.

10 Embassy of Switzerland, Note of Information sent to States Parties to the Convention and Protocol, 13 September 1989.

the sovereignty of the nations subject to "A" class mandates pursuant to Article 22 of the League of Nations Covenant. That provisional recognition would be a right of peoples saved or reserved by Article 80 of the United Nations Charter. But the fact is that, with the exception of Iraq, the "provisional recognition" given by Article 22 did not amount to much.[11] In practice the "A" class mandates were subject to the normal mandatory regime, and it was not argued that the status of the territories concerned was that of independent states. In this context the distinction between "state" and "nation", rejected by Boyle, is crucial: certain "peoples" or "nations" were recognized by Article 22 as having rights of a relatively immediate kind, but these did not as yet amount to statehood.

The second element supporting General Assembly Authority, according to Boyle, arises from his assertion that the General Assembly was the successor to the League of Nations with respect to the mandate system. But there was no direct succession between the League of Nations and the United Nations in this or in other respects, and this lack of succession was wholly deliberate. Instead, the International Court in 1950[12] and again in 1971[13] supported the exercise by the United Nations of authority with respect to mandates on the basis of arguments which did not depend on a rule of succession. Moreover, although the General Assembly acquired power through these means to revoke the mandate for South West Africa, that power was not of a general discretionary or governing kind, but was more in the nature of a declaratory power exercised on behalf of the international community in a situation where no state had sovereignty over the territory concerned. The binding character of that decision, and in particular the legal consequences for states as set out in the *Namibia Opinion*, were in a substantial part due to the operation of Security Council resolutions pursuant to Article 25 of the Charter. No doubt there are important implications for the status of Palestine in these arguments. But they stop far short of the proposition that the General Assembly can recognize Palestine as a state, and not merely for such "internal" purposes of the United Nations as observer status, with an effect which is "constitutive, definitive, and universally determinative." What the position would be if Palestine was actually admitted to United Nations membership is, of course, another question.

IV. The Position of Dissenting or Opposing States

Finally I should briefly note Boyle's arguments to the effect that both the United States and Israel are bound to accept the status of Palestine as a new state, notwithstanding their consistent opposition. So far as the United States is concerned, the principal ground for the argument is based upon the "provisional recognition" by Article 22 of the League of Nations Covenant of the status of the nations under "A" class mandates, a position preserved in Article 80 of the Charter. This argument has already been dealt with. It is only necessary to add, to the extent that it may be relevant, that the United States was not a party to the Covenant. It could be argued that Article 80 cannot have the effect of preserving treaty rights as against states which were not parties to the relevant treaties. Perhaps the better view, however, is that Article 80 is a mere savings clause of an essentially declaratory and limited kind.

So far as Israel is concerned, Boyle's argument is principally based upon the proposition that Israel's acceptance of the Partition Resolution (General Assembly Resolution

11 Crawford, *supra* note 337-40.

12 *Status of South West Africa Opinion*, ICJ Rep (1950) 128.

13 *Namibia Opinion*, ICJ Rep 1071, p. 16.

181(II) of 29 November 1947) was "a condition for its admission" to the United Nations. The essential point here is that, although the relevant Jewish organization did accept the Partition Resolution when it was first adopted, the Resolution was not accepted by the Arab states involved. Instead war broke out, leading to a cease-fire on quite different boundaries. Israel was not admitted to the United Nations on the basis of a division of territory which in any way reflected the partition resolution. Moreover the Charter makes no provision for "conditional admission."

V. Conclusion

It has to be said that the case for Palestinian statehood presented by Boyle is weak and unconvincing. Indeed it is weaker and more unconvincing than it need have been, having regard to some of the post-1945 developments, and in particular to the case of Guinea Bissau. But if that case is to be justified on the premise "*nasciturus pro jam natus habetur*",[14] the fact remains that a real State of Palestine is by no means yet assured. For a Palestinian State to be properly described as "*nasciturus*", what is needed is statesmanship on all sides, and respect for the rights of the peoples and states of the region. The manipulation of legal categories is unlikely to advance matters.

14 See Crawford, *supra* note 391-2.

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will constitute legal persons, although they may act with some degree of influence upon the international plane. International personality is participation plus some form of community acceptance. The latter element will be dependent upon many different factors, including the type of personality under question. It may be manifested in many forms and may in certain cases be inferred from practice. It will also reflect a need. Particular branches of international law here are playing a crucial role. Human rights law, the law relating to armed conflicts and international economic law are especially important in generating and reflecting increased participation and personality in international law.

States

Despite the increasing range of actors and participants in the international legal system, states remain by far the most important legal persons and despite the rise of globalisation and all that this entails, states retain their attraction as the primary focus for the social activity of humankind and thus for international law.

Lauterpacht observed that: 'the orthodox positivist doctrine has been explicit in the affirmation that only states are subjects of international law'.[6] However, it is less clear that in practice this position was maintained. The Holy See (particularly from 1871 to 1929), insurgents and belligerents, international organisations, chartered companies and various territorial entities such as the League of Cities were all at one time or another treated as possessing the capacity to become international persons.[7]

Creation of statehood[8]

The relationship in this area between factual and legal criteria is a crucial shifting one. Whether the birth of a new state is primarily a question of

[6] Lauterpacht, *International Law*, p. 489.

[7] See Verzijl, *International Law*, pp. 17–43, and Lauterpacht, *International Law*, pp. 494–500. See also the *Western Sahara* case, ICJ Reports, 1975, pp. 12, 39; 59 ILR, pp. 30, 56, and *Survey of International Law in Relation to the Work of Codification of the International Law Commission*, Memorandum of the Secretary-General, 1949, A/CN.4/1/Rev.1, p. 24.

[8] See in particular Crawford, *Creation of States*, chapter 2; R. Higgins, *The Development of International Law through the Political Organs of the United Nations*, Oxford, 1963, pp. 11–57; K. Marek, *Identity and Continuity of States in Public International Law*, 2nd edn, Leiden, 1968; M. Whiteman, *Digest of International Law*, Washington, 1963, vol. I, pp. 221–33, 283–476, and Nguyen Quoc Dinh, P. Daillier and A. Pellet, *Droit International Public*, 7th edn, Paris, 2002, p. 407. See also Société Française pour le Droit International, *L'État Souverain*, Paris, 1994; L. Henkin, *International Law: Politics and Values*, Dordrecht, 1995, chapter 1; R. H. Jackson, *Quasi-States: Sovereignty, International Relations and the*

fact or law and how the interaction between the criteria of effectiveness and other relevant legal principles may be reconciled are questions of considerable complexity and significance. Since *terrae nullius* are no longer apparent,[9] the creation of new states in the future, once the decolonisation process is at an end, can only be accomplished as a result of the diminution or disappearance of existing states, and the need for careful regulation thus arises. Recent events such as the break-up of the Soviet Union, the Socialist Federal Republic of Yugoslavia and Czechoslovakia underline this. In addition, the decolonisation movement has stimulated a re-examination of the traditional criteria. Article 1 of the Montevideo Convention on Rights and Duties of States, 1933[10] lays down the most widely accepted formulation of the criteria of statehood in international law. It notes that the state as an international person should possess the following qualifications: '(a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states'.

The Arbitration Commission of the European Conference on Yugoslavia[11] in Opinion No. 1 declared that 'the state is commonly defined as a community which consists of a territory and a population subject to an organised political authority' and that 'such a state is characterised by sovereignty'. It was also noted that the form of internal political organisation and constitutional provisions constituted 'mere facts', although it was necessary to take them into account in order to determine the government's sway over the population and the territory.[12]

Such provisions are neither exhaustive nor immutable. As will be seen below, other factors may be relevant, including self-determination and recognition, while the relative weight given to such criteria in particular

Third World, Cambridge, 1990, and A. James, *Sovereign Statehood: The Basis of International Society*, London, 1986.

[9] See, as regards Antarctica, O'Connell, *International Law*, p. 451. See also below, chapter 10, p. 535.

[10] 165 LNTS 19. International law does not require the structure of a state to follow any particular pattern: *Western Sahara* case, ICJ Reports, 1975, pp. 12, 43–4; 59 ILR, pp. 30, 60–1.

[11] Established pursuant to the Declaration of 27 August 1991 of the European Community: see Bull. EC, 7/8 (1991). See generally, M. Craven, 'The EC Arbitration Commission on Yugoslavia', 65 BYIL, 1994, p. 333, and below, p. 210.

[12] 92 ILR, pp. 162, 165. Note that *Oppenheim's International Law*, p. 120, provides that 'a state proper is in existence when a people is settled in a territory under its own sovereign government'.

situations may very well vary. What is clear, however, is that the relevant framework revolves essentially around territorial effectiveness.

The existence of a permanent population[13] is naturally required and there is no specification of a minimum number of inhabitants, as examples such as Nauru and Tuvalu[14] demonstrate. However, one of the issues raised by the Falkland Islands conflict does relate to the question of an acceptable minimum with regard to self-determination issues,[15] and it may be that the matter needs further clarification as there exists a number of small islands awaiting decolonisation.[16]

The need for a defined territory focuses upon the requirement for a particular territorial base upon which to operate. However, there is no necessity in international law for defined and settled boundaries. A state may be recognised as a legal person even though it is involved in a dispute with its neighbours as to the precise demarcation of its frontiers, so long as there is a consistent band of territory which is undeniably controlled by the government of the alleged state. For this reason at least, therefore, the 'State of Palestine' declared in November 1988 at a conference in Algiers cannot be regarded as a valid state. The Palestinian organisations did not control any part of the territory they claim.[17]

Albania prior to the First World War was recognised by many countries even though its borders were in dispute.[18] More recently, Israel has been accepted by the majority of nations as well as the United Nations as a valid state despite the fact that its frontiers have not been finally settled

[13] A nomadic population might not thus count for the purposes of territorial sovereignty, although the International Court in the *Western Sahara* case, ICJ Reports, 1975, pp. 12, 63–5; 59 ILR, pp. 30, 80–2, held that nomadic peoples did have certain rights with regard to the land they traversed.

[14] Populations of some 12,000 and 10,000 respectively: see *Whitaker's Almanack*, London, 2003, pp. 1010 and 1089.

[15] See below, p. 251.

[16] But see, as regards artificial islands, *United States* v. *Ray* 51 ILR, p. 225; *Chierici and Rosa* v. *Ministry of the Merchant Navy and Harbour Office of Rimini* 71 ILR, p. 283, and *Re Duchy of Sealand* 80 ILR, p. 683.

[17] See *Keesing's Record of World Events*, p. 36438 (1989). See also General Assembly resolution 43/77; R. Lapidoth and K. Calvo-Goller, 'Les Éléments Constitutifs de l'État et la Déclaration du Conseil National Palestinien du 15 Novembre 1988', AFDI, 1992, p. 777; J. Crawford, 'The Creation of the State of Palestine: Too Much Too Soon?', 1 EJIL, 1990, p. 307, and Crawford, 'Israel (1948–1949) and Palestine (1998–1999): Two Studies in the Creation of States' in *The Reality of International Law* (eds. G. Goodwin-Gill and S. Talmon), Oxford, 1999, p. 95. See below, p. 246, with regard to the evolution of Palestinian autonomy in the light of the Israel–Palestine Liberation Organisation (PLO) Declaration on Principles.

[18] See e.g. the *North Sea Continental Shelf* cases, ICJ Reports, 1969, pp. 3, 32.

and despite its involvement in hostilities with its Arab neighbours over its existence and territorial delineation.[19] What matters is the presence of a stable community within a certain area, even though its frontiers may be uncertain. Indeed, it is possible for the territory of the state to be split into distinct parts, for example Pakistan prior to the Bangladesh secession of 1971 or present-day Azerbaijan.

For a political society to function reasonably effectively it needs some form of government or central control. However, this is not a pre-condition for recognition as an independent country.[20] It should be regarded more as an indication of some sort of coherent political structure and society, than the necessity for a sophisticated apparatus of executive and legislative organs.[21] A relevant factor here might be the extent to which the area not under the control of the government is claimed by another state as a matter of international law as distinct from *de facto* control. The general requirement might be seen to relate to the nineteenth-century concern with 'civilisation' as an essential of independent statehood and ignores the modern tendency to regard sovereignty for non-independent peoples as the paramount consideration, irrespective of administrative conditions.[22]

As an example of the former tendency one may note the *Aaland Islands* case of 1920. The report of the International Committee of Jurists appointed to investigate the status of the islands remarked, with regard to the establishment of the Finnish Republic in the disordered days following the Russian revolution, that it was extremely difficult to name the date that Finland became a sovereign state. It was noted that:

[19] Brownlie, *Principles*, p. 71. In fact most of the new states emerging after the First World War were recognised *de facto* or *de jure* before their frontiers were determined by treaty: H. Lauterpacht, *Recognition in International Law*, Cambridge, 1948, p. 30. See *Deutsche Continental Gas-Gesellschaft* v. *Polish State* (1929), 5 AD, pp. 11, 15; the *Mosul Boundary* case, PCIJ, Series B, No. 12, p. 21; the *North Sea Continental Shelf* cases, ICJ Reports, 1969, pp. 3, 32; 41 ILR, pp. 29, 62, and the *Libya/Chad* case, ICJ Reports, 1994, pp. 6, 22 and 26; 100 ILR, pp. 5, 21 and 25. See also Jessup speaking on behalf of the US regarding Israel's admission to the UN, SCOR, 3rd year, 383rd meeting, p. 41. The Minister of State of the Foreign and Commonwealth Office in a statement on 5 February 1991, UKMIL, 62 BYIL, 1991, p. 557, noted that the UK 'recognises many states whose borders are not fully agreed with their neighbours'. See as to the doctrine of *uti possidetis*, the presumption that on independence entitites will retain existing boundaries, below, chapter 10, p. 525.

[20] See e.g. the Congo case, Higgins, *Development*, pp. 162–4, and C. Hoskyns, *The Congo Since Independence*, Oxford, 1965. See also Higgins, *Problems and Process*, p. 40, and Nguyen Quoc Dinh *et al.*, *Droit International Public*, pp. 415 ff.

[21] See the *Western Sahara* case, ICJ Reports, 1975, pp. 12, 43–4; 59 ILR, pp. 30, 60–1.

[22] See below, p. 251, on the right to self-determination.

> [t]his certainly did not take place until a stable political organisation had been created, and until the public authorities had become strong enough to assert themselves throughout the territories of the state without the assistance of the foreign troops.[23]

Recent practice with regard to the new states of Croatia and Bosnia and Herzegovina emerging out of the former Yugoslavia suggests the modification of the criterion of effective exercise of control by a government throughout its territory. Both Croatia and Bosnia and Herzegovina were recognised as independent states by European Community member states[24] and admitted to membership of the United Nations (which is limited to 'states' by article 4 of the UN Charter[25])[26] at a time when both states were faced with a situation where non-governmental forces controlled substantial areas of the territories in question in civil war conditions. More recently, Kosovo declared independence on 17 February 2008 with certain Serb-inhabited areas apparently not under the control of the central government.[27] In such situations, lack of effective central control might be balanced by significant international recognition, culminating in membership of the UN. Nevertheless, a foundation of effective control is required for statehood. Conversely, however, a comprehensive breakdown in order and the loss of control by the central authorities in an independent state will not obviate statehood. Whatever the consequences in terms of possible humanitarian involvement, whether by the UN or otherwise depending upon the circumstances, the collapse of governance within a state (sometimes referred to as a 'failed state') has no necessary effect upon the status of that state as a state. Indeed the very

[23] LNOJ Sp. Supp. No. 4 (1920), pp. 8–9. But cf. the view of the Commission of Rapporteurs in this case, LN Council Doc. B7 21/68/106 (1921), p. 22.

[24] On 15 January 1992 and 6 April 1992 respectively: see *Keesing's Record of World Events*, 1992, pp. 38703, 38704 and 38833. But see the Yugoslav Arbitration Commission's Opinion No. 5 of 11 January 1992 noting that Croatia had not met the requirements laid down in the Draft Convention on Yugoslavia of 4 November 1991 and in the Declaration on Yugoslavia and Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union of 16 December 1991: see 92 ILR, p. 178. Opinion No. 4 expressed reservations concerning the independence of Bosnia and Herzegovina pending the holding of a referendum. A referendum showing a majority for independence, however, was held prior to recognition by the EC member states and admission by the UN, *ibid.*, p. 173. See also below, p. 209.

[25] See e.g. V. Gowland-Debbas, 'Collective Responses to the Unilateral Declarations of Independence of Southern Rhodesia and Palestine', 61 BYIL, 1990, p. 135.

[26] On 22 May 1992. See M. Weller, 'The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia', 86 AJIL, 1992, p. 569.

[27] See further below, p. 204.

designation of 'failed state' is controversial and, in terms of international law, misleading.[28]

The capacity to enter into relations with other states is an aspect of the existence of the entity in question as well as an indication of the importance attached to recognition by other countries. It is a capacity not limited to sovereign nations, since international organisations, non-independent states and other bodies can enter into legal relations with other entities under the rules of international law. But it is essential for a sovereign state to be able to create such legal relations with other units as it sees fit. Where this is not present, the entity cannot be an independent state. The concern here is not with political pressure by one country over another, but rather the lack of competence to enter into legal relations. The difference is the presence or absence of legal capacity, not the degree of influence that may affect decisions.

The essence of such capacity is independence. This is crucial to statehood and amounts to a conclusion of law in the light of particular circumstances. It is a formal statement that the state is subject to no other sovereignty and is unaffected either by factual dependence upon other states or by submission to the rules of international law.[29] It is arguable that a degree of actual as well as formal independence may also be necessary. This question was raised in relation to the grant of independence by South Africa to its Bantustans. In the case of the Transkei, for example, a considerable proportion, perhaps 90 per cent, of its budget at one time was contributed by South Africa, while Bophuthatswana was split into a series of areas divided by South African territory.[30] Both the Organisation of African Unity and the United Nations declared such 'independence' invalid and called upon all states not to recognise the new entities. These entities were, apart from South Africa, totally unrecognised.[31]

[28] See e.g. Crawford, *Creation of States*, pp. 719–22; S. Ratner, 'The Cambodia Settlement Agreements', 87 AJIL, 1993, p. 1, and T. M. Franck, 'The Democratic Entitlement', 29 *University of Richmond Law Review*, 1994, p. 1.

[29] See *Austro-German Customs Union* case, (1931) PCIJ, Series A/B, No. 41, pp. 41 (Court's Opinion) and 57–8 (Separate Opinion of Judge Anzilotti); 6 AD, pp. 26, 28. See also Marek, *Identity*, pp. 166–80; Crawford, *Creation of States*, pp. 62 ff., and Rousseau, *Droit International Public*, vol. II, pp. 53, 93.

[30] This was cited as one of the reasons for UK non-recognition, by the Minister of State, FCO: see UKMIL, 57 BYIL, 1986, pp. 507–8.

[31] The 1993 South African Constitution provided for the repeal of all laws concerning apartheid, including the four Status Acts which purported to create the 'independent states' of the four Bantustans, thus effectively reincorporating these areas into South Africa: see J. Dugard, *International Law – A South African Perspective*, Kenwyn, 1994, p. 346.

However, many states are as dependent upon aid from other states, and economic success would not have altered the attitude of the international community. Since South Africa as a sovereign state was able to alienate parts of its own territory under international law, these entities would appear in the light of the formal criteria of statehood to have been formally independent. However, it is suggested that the answer as to their status lay elsewhere than in an elucidation of this category of the criteria of statehood. It lay rather in understanding that actions taken in order to pursue an illegal policy, such as apartheid, cannot be sustained.[32]

An example of the complexities that may attend such a process is provided by the unilateral declaration of independence by Lithuania, one of the Baltic states unlawfully annexed by the Soviet Union in 1940, on 11 March 1990.[33] The 1940 annexation was never recognised *de jure* by the Western states and thus the control exercised by the USSR was accepted only upon a *de facto* basis. The 1990 declaration of independence was politically very sensitive, coming at a time of increasing disintegration within the Soviet Union, but went unrecognised by any state. In view of the continuing constitutional crisis within the USSR and the possibility of a new confederal association freely accepted by the fifteen Soviet republics, it was at that time premature to talk of Lithuania as an independent state, not least because the Soviet authorities maintained substantial control within that territory.[34] The independence of Lithuania and the other Baltic States was recognised during 1991 by a wide variety of states, including crucially the Soviet Union.[35]

It is possible, however, for a state to be accepted as independent even though, exceptionally, certain functions of government are placed in the hands of an outside body. In the case of Bosnia and Herzegovina, for example, the Dayton Peace Agreement of 1995 provided for a High

[32] See M. N. Shaw, *Title to Territory in Africa: International Legal Issues*, Oxford, 1986, pp. 161–2. See also OAU Resolution CM.Res.493 (XXVII), General Assembly resolution 31/61A and Security Council statements on 21 September 1979 and 15 December 1981. Note that the Minister of State at the Foreign and Commonwealth Office declared that 'the very existence of Bophuthatswana is a consequence of apartheid and I think that that is the principal reason why recognition has not been forthcoming', 126, HC Deb., cols. 760–1, 3 February 1988.

[33] See *Keesing's Record of World Events*, p. 37299 (1990).

[34] See e.g. the view of the UK government, 166 HC Deb., col. 697, Written Answers, 5 February 1990.

[35] See e.g. R. Müllerson, *International Law, Rights and Politics*, London, 1994, pp. 119 ff.

Representative to be appointed as the 'final authority in theatre' with regard to the implementation of the agreement,[36] and the High Representative has, for example, removed a number of persons from public office. None of this has been understood by the international community to affect Bosnia's status as an independent state, but the arrangement did arise as an attempt to reach and implement a peace agreement in the context of a bitter civil war with third-party intervention. More controversially, after a period of international administration,[37] Kosovo declared its independence on 17 February 2008, noting specifically that it accepted the obligations for Kosovo under the Comprehensive Proposal for the Kosovo Status Settlement (the Ahtisaari Plan).[38] This Plan called for 'independence with international supervision' and the obligations for Kosovo included human rights and decentralisation guarantees together with an international presence to supervise implementation of the Settlement. The provisions of the Settlement were to take precedence over all other legal provisions in Kosovo. The international presence was to take the form of an International Civilian Representative (ICR), who would also be the European Union Special Representative, to be appointed by the International Steering Group.[39] The ICR would be the final authority in Kosovo regarding interpretation of the civilian aspects of the Settlement and, in particular, would have the ability to annul decisions or laws adopted by the Kosovo authorities and sanction and remove public officials whose actions were determined to be inconsistent with the Settlement terms.[40] In addition, an international military presence, led by NATO, would ensure a safe environment throughout Kosovo.[41]

[36] See Annex 10 of the Dayton Peace Agreement. See also R. Caplan, 'International Authority and State Building: The Case of Bosnia and Herzegovina', 10 *Global Governance*, 2004, p. 53, and International Crisis Group, *Bosnia: Reshaping the International Machinery*, November 2001. The High Representative is nominated by the Steering Board of the Peace Implementation Council, a group of fifty-five countries and international organisations that sponsor and direct the peace implementation process, and this nomination is then endorsed by the Security Council. See further below, p. 231.

[37] See, as to the international administration of Kosovo, below, p. 232 and, as to recognition, below, chapter 9, p. 452.

[38] See www.assembly-kosova.org/? krye=news&newsid=1635&lang=en.

[39] To consist of France, Germany, Italy, Russia, the UK, the US, the EU, the European Commission and NATO.

[40] See S/2007/168 and S/2007/168/Add.1. Annex IX of the latter document details the role of the ICR.

[41] See Annex XI. An EU Rule of Law Mission (EULEX) was established on 16 February 2008 to support the Kosovan authorities.

9

Recognition

International society is not an unchanging entity, but is subject to the ebb and flow of political life.[1] New states are created and old units fall away. New governments come into being within states in a manner contrary to declared constitutions whether or not accompanied by force. Insurgencies occur and belligerent administrations are established in areas of territory hitherto controlled by the legitimate government. Each of these events creates new facts and the question that recognition is concerned with revolves around the extent to which legal effects should flow from such occurrences. Each state will have to decide whether or not to recognise the particular eventuality and the kind of legal entity it should be accepted as.

Recognition involves consequences both on the international plane and within municipal law. If an entity is recognised as a state in, for example, the United Kingdom, it will entail the consideration of rights and duties that would not otherwise be relevant. There are privileges permitted to

[1] See generally e.g. J. Crawford, *The Creation of States in International Law*, 2nd edn, Oxford, 2006; *Oppenheim's International Law* (eds. R. Y. Jennings and A. D. Watts), 9th edn, London, 1992; H. Lauterpacht, *Recognition in International Law*, Cambridge, 1947; T. C. Chen, *The International Law of Recognition*, London, 1951; J. Charpentier, *La Reconnaissance Internationale et l'Évolution du Droit des Gens*, Paris, 1956; T. L. Galloway, *Recognising Foreign Governments*, Washington, 1978; J. Verhoeven, *La Reconnaissance Internationale dans la Pratique Contemporaine*, Paris, 1975 and Verhoeven, 'La Reconnaissance Internationale, Déclin ou Renouveau?', AFDI, 1993, p. 7; J. Dugard, *Recognition and the United Nations*, Cambridge, 1987; H. Blix, 'Contemporary Aspects of Recognition', 130 HR, 1970-II, p. 587; J. Salmon, 'Reconnaissance d'État', 25 *Revue Belge de Droit International*, 1992, p. 226; S. Talmon, *Recognition in International Law: A Bibliography*, The Hague, 2000; T. D. Grant, *The Recognition of States: Law and Practice in Debate and Evolution*, London, 1999, and *Third US Restatement on Foreign Relations Law*, Washington, 1987, vol. I, pp. 77 ff. See also Nguyen Quoc Dinh, P. Daillier and A. Pellet, *Droit International Public*, 7th edn, Paris, 2002, pp. 556 ff.; P. M. Dupuy, *Droit International Public*, 8th edn, Paris, 2006, p. 95, and L. Henkin, R. C. Pugh, O. Schachter and H. Smit, *International Law*: *Cases and Materials*, 3rd edn, St Paul, 1993, pp. 244 ff.

a foreign state before the municipal courts that would not be allowed to other institutions or persons.

It is stating the obvious to point to the very strong political influences that bear upon this topic.[2] In more cases than not the decision whether or not to recognise will depend more upon political considerations than exclusively legal factors. Recognition is not merely applying the relevant legal consequences to a factual situation, for sometimes a state will not want such consequences to follow, either internationally or domestically.

To give one example, the United States refused for many years to recognise either the People's Republic of China or North Korea, not because it did not accept the obvious fact that these authorities exercised effective control over their respective territories, but rather because it did not wish the legal effects of recognition to come into operation.[3] It is purely a political judgment, although it has been clothed in legal terminology. In addition, there are a variety of options open as to what an entity may be recognised as. Such an entity may, for example, be recognised as a full sovereign state, or as the effective authority within a specific area or as a subordinate authority to another state.[4] Recognition is a statement by an international legal person as to the status in international law of another real or alleged international legal person or of the validity of a particular factual situation. Once recognition has occurred, the new situation is deemed opposable to the recognising state, that is the pertinent legal consequences will flow. As such, recognition constitutes participation in the international legal process generally while also being important within the context of bilateral relations and, of course, domestically.

Recognition of states

There are basically two theories as to the nature of recognition. The constitutive theory maintains that it is the act of recognition by other states that creates a new state and endows it with legal personality and not the process by which it actually obtained independence. Thus, new states are

[2] See e.g. H. A. Smith, *Great Britain and the Law of Nations*, London, 1932, vol. I, pp. 77–80.

[3] See e.g. M. Kaplan and N. Katzenbach, *The Political Foundations of International Law*, New York, 1961, p. 109.

[4] See e.g. *Carl Zeiss Stiftung* v. *Rayner and Keeler* [1967] AC 853; 43 ILR, p. 23, where the Court took the view that the German Democratic Republic was a subordinate agency of the USSR, and the recognition of the Ciskei as a subordinate body of South Africa, *Gur Corporation* v. *Trust Bank of Africa Ltd* [1986] 3 All ER 449; 75 ILR, p. 675.

established in the international community as fully fledged subjects of international law by virtue of the will and consent of already existing states.[5] The disadvantage of this approach is that an unrecognised 'state' may not be subject to the obligations imposed by international law and may accordingly be free from such restraints as, for instance, the prohibition on aggression. A further complication would arise if a 'state' were recognised by some but not other states. Could one talk then of, for example, partial personality?

The second theory, the declaratory theory, adopts the opposite approach and is a little more in accord with practical realities.[6] It maintains that recognition is merely an acceptance by states of an already existing situation. A new state will acquire capacity in international law not by virtue of the consent of others but by virtue of a particular factual situation. It will be legally constituted by its own efforts and circumstances and will not have to await the procedure of recognition by other states. This doctrine owes a lot to traditional positivist thought on the supremacy of the state and the concomitant weakness or non-existence of any central guidance in the international community.

For the constitutive theorist, the heart of the matter is that fundamentally an unrecognised 'state' can have no rights or obligations in international law. The opposite stance is adopted by the declaratory approach that emphasises the factual situation and minimises the power of states to confer legal personality.

Actual practice leads to a middle position between these two perceptions. The act of recognition by one state of another indicates that the former regards the latter as having conformed with the basic requirements of international law as to the creation of a state. Of course, recognition is highly political and is given in a number of cases for purely political reasons. This point of view was emphasised by the American representative on the Security Council during discussions on the Middle East in May 1948. He said that it would be:

[5] See e.g. Crawford, *Creation of States*, pp. 19 ff. and J. Salmon, *La Reconnaissance d'État*, Paris, 1971. See also R. Rich and D. Turk, 'Symposium: Recent Developments in the Practice of State Recognition', 4 EJIL, 1993, p. 36.

[6] See e.g. J. L. Brierly, *The Law of Nations*, 6th edn, Oxford, 1963, p. 138; I. Brownlie, *Principles of Public International Law*, 6th edn, Oxford, 2003, p. 87; D. P. O'Connell, *International Law*, 2nd edn, London, 1970, vol. I, pp. 128 ff.; S. Talmon, 'The Constitutive Versus the Declaratory Theory of Recognition: Tertium Non Datur?', 75 BYIL, 2004, p. 101, and Crawford, *Creation of States*, pp. 22 ff. See also the *Tinoco* arbitration, 1 RIAA, p. 369; 2 AD, p. 34 and *Wulfsohn* v. *Russian Republic* 138 NE 24; 2 AD, p. 39.

> highly improper for one to admit that any country on earth can question the sovereignty of the United States of America in the exercise of the high political act of recognition of the *de facto* status of a state.

Indeed, he added that there was no authority that could determine the legality or validity of that act of the United States.[7] This American view that recognition is to be used as a kind of mark of approval was in evidence with regard to the attitude adopted towards Communist China for a generation.[8]

The United Kingdom, on the other hand, has often tended to extend recognition once it is satisfied that the authorities of the state in question have complied with the minimum requirements of international law, and have effective control which seems likely to continue over the country.[9] Recognition is constitutive in a political sense, for it marks the new entity out as a state within the international community and is evidence of acceptance of its new political status by the society of nations. This does not imply that the act of recognition is legally constitutive, because rights and duties do not arise as a result of the recognition.

Practice over the last century or so is not unambiguous but does point to the declaratory approach as the better of the two theories. States which for particular reasons have refused to recognise other states, such as in the Arab world and Israel and the USA and certain communist nations,[10] rarely contend that the other party is devoid of powers and obligations before international law and exists in a legal vacuum. The stance is rather that rights and duties are binding upon them, and that recognition has not been accorded for primarily political reasons. If the constitutive theory were accepted it would mean, for example, in the context of the former Arab non-recognition of Israel, that the latter was not bound by international law rules of non-aggression and non-intervention. This has not been adopted in any of the stances of non-recognition of 'states'.[11]

[7] See M. Whiteman, *Digest of International Law*, Washington, 1968, vol. II, p. 10.

[8] See generally D. Young, 'American Dealings with Peking', 45 *Foreign Affairs*, 1966, p. 77, and Whiteman, *Digest*, vol. II, pp. 551 ff. See also A/CN.4/2, p. 53.

[9] See Lauterpacht, *Recognition*, p. 6.

[10] See 39 *Bulletin of the US Department of State*, 1958, p. 385.

[11] See e.g. the *Pueblo* incident, 62 AJIL, 1968, p. 756 and *Keesing's Contemporary Archives*, p. 23129; Whiteman, *Digest*, vol. II, pp. 604 ff. and 651; 'Contemporary Practice of the UK in International Law', 6 ICLQ, 1957, p. 507, and *British Practice in International Law* (ed. E. Lauterpacht), London, 1963, vol. II, p. 90. See also N. Mugerwa, 'Subjects of International Law' in *Manual of International Law* (ed. M. Sørensen), London, 1968, pp. 247, 269.

Of course, if an entity, while meeting the conditions of international law as to statehood, went totally unrecognised, this would undoubtedly hamper the exercise of its rights and duties, especially in view of the absence of diplomatic relations, but it would not seem in law to amount to a decisive argument against statehood itself.[12] For example, the Charter of the Organisation of American States adopted at Bogotá in 1948 notes in its survey of the fundamental rights and duties of states that:

> the political existence of the state is independent of recognition by other states. Even before being recognised the state has the right to defend its integrity and independence.[13]

And the Institut de Droit International emphasised in its resolution on recognition of new states and governments in 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.[14]

In the period following the end of the First World War, the courts of the new states of Eastern and Central Europe regarded their states as coming into being upon the actual declaration of independence and not simply as a result of the Peace Treaties. The tribunal in one case pointed out that the recognition of Poland in the Treaty of Versailles was only declaratory of the state which existed 'par lui-même'.[15] In addition, the Arbitration Commission established by the International Conference on Yugoslavia in 1991 stated in its Opinion No. 1 that 'the existence or disappearance of the state is a question of fact' and that 'the effects of recognition by other states are purely declaratory'.[16]

On the other hand, the constitutive theory is not totally devoid of all support in state practice. In some cases, the creation of a new state, or the establishment of a new government by unconstitutional means, or the occupation of a territory that is legally claimed will proceed uneventfully and be clearly accomplished for all to see and with little significant opposition.

[12] See above, chapter 5.

[13] Article 9. This became article 12 of the Charter as amended in 1967. See also the Montevideo Convention on Rights and Duties of States, 1933, article 3.

[14] 39 *Annuaire de L'Institut de Droit International*, 1936, p. 300. See also *Third US Restatement*, pp. 77–8.

[15] *Deutsche Continental Gas-Gesellschaft* v. *Polish State* 5 AD, p. 11.

[16] 92 ILR, pp. 162, 165. See also the decision of the European Court of Human Rights in *Loizidou* v. *Turkey (Preliminary Objections)*, Series A, No. 310, 1995, at p. 14; 103 ILR, p. 621, and *Chuan Pu Andrew Wang and Others* v. *Office of the Federal Prosecutor*, Swiss Supreme Court, First Public Law Chamber, decision of 3 May 2004, No. 1A.3/2004; partly published as BGE 130 II 217, para. 5.3.

However, in many instances, the new entity or government will be insecure and it is in this context that recognition plays a vital role. In any event, and particularly where the facts are unclear and open to different interpretations, recognition by a state will amount to a declaration by that state of how it understands the situation, and such an evaluation will be binding upon it. It will not be able to deny later the factual position it has recognised, unless, of course, circumstances radically alter in the meantime. In this sense, recognition can be constitutive. Indeed, the Yugoslav Arbitration Commission noted in Opinion No. 8 that 'while recognition of a state by other states has only declarative value, such recognition, along with membership of international organisations, bears witness to these states' conviction that the political entity so recognised is a reality and confers on it certain rights and obligations under international law'.[17] By way of contrast, the fact of non-recognition of a 'new state' by a vast majority of existing states will constitute tangible evidence for the view that such an entity has not established its conformity with the required criteria of statehood.[18]

Another factor which leans towards the constitutive interpretation of recognition is the practice in many states whereby an unrecognised state or government cannot claim the rights available to a recognised state or government before the municipal courts. This means that the act of recognition itself entails a distinct legal effect and that after recognition a state or government would have enforceable rights within the domestic jurisdiction that it would not have had prior to the recognition.[19]

This theoretical controversy is of value in that it reveals the functions of recognition and emphasises the impact of states upon the development of international law. It points to the essential character of international law, poised as it is between the state and the international community. The declaratory theory veers towards the former and the constitutive doctrine towards the latter.

There have been a number of attempts to adapt the constitutive theory.[20] Lauterpacht maintained, for example, that once the conditions prescribed by international law for statehood have been complied with, there is a duty

[17] 92 ILR, pp. 199, 201.

[18] See *Democratic Republic of East Timor* v. *State of the Netherlands* 87 ILR, pp. 73, 74.

[19] See below, p. 471.

[20] Note the reference to the 'relativism inherent in the constitutive theory of recognition' with regard to the situation where some states recognised the Federal Republic of Yugoslavia as the continuator of the Federal Republic of Yugoslavia and others did not: see the *Genocide Convention (Bosnia* v. *Serbia)* case, ICJ Reports, 2007, Dissenting Opinion of Judge Al-Khasawneh, para. 8.

on the part of existing states to grant recognition. This is because, in the absence of a central authority in international law to assess and accord legal personality, it is the states that have to perform this function on behalf, as it were, of the international community and international law.[21]

This operation is both declaratory, in that it is based upon certain definite facts (i.e. the entity fulfils the requirements of statehood) and constitutive in that it is the acceptance by the recognising state of the particular community as an entity possessing all the rights and obligations that are inherent in statehood. Before the act of recognition, the community that is hoping to be admitted as a state will only have such rights and duties as have been expressly permitted to it, if any.

The Lauterpacht doctrine is an ingenious bid to reconcile the legal elements in a coherent theory. It accepts the realities of new creations of states and governments by practical (and occasionally illegal) means, and attempts to assimilate this to the supremacy of international law as Lauterpacht saw it. However, in so doing it ignores the political aspects and functions of recognition, that is, its use as a method of demonstrating or withholding support from a particular government or new community. The reality is that in many cases recognition is applied to demonstrate political approval or disapproval. Indeed, if there is a duty to grant recognition, would the entity involved have a right to demand this where a particular state (or states) is proving recalcitrant? If this were so, one would appear to be faced with the possibility of a non-state with as yet no rights or duties enforcing rights against non-recognising states.

Nevertheless, state practice reveals that Lauterpacht's theory has not been adopted.[22] The fact is that few states accept that they are obliged in every instance to accord recognition. In most cases they will grant recognition, but that does not mean that they have to, as history with regard to some Communist nations and with respect to Israel illustrates. This position was supported in Opinion No. 10 of the Yugoslav Arbitration Commission in July 1992, which emphasised that recognition was 'a discretionary act that other states may perform when they choose and in a manner of their own choosing, subject only to compliance with the imperatives of general international law'.[23]

The approach of the United States was emphasised in 1976. The Department of State noted that:

[21] *Recognition*, pp. 24, 55, 76–7.

[22] See e.g. H. Waldock, 'General Course on Public International Law', 106 HR, 1962, p. 154. See also Mugerwa, 'Subjects', pp. 266–90.

[23] 92 ILR, pp. 206, 208.

> [i]n the view of the United States, international law does not require a state to recognise another entity as a state; it is a matter for the judgment of each state whether an entity merits recognition as a state. In reaching this judgment, the United States has traditionally looked to the establishment of certain facts. These facts include effective control over a clearly defined territory and population; an organised governmental administration of that territory and a capacity to act effectively to conduct foreign relations and to fulfil international obligations. The United States has also taken into account whether the entity in question has attracted the recognition of the international community of states.[24]

The view of the UK government was expressed as follows:

> The normal criteria which the government apply for recognition as a state are that it should have, and seem likely to continue to have, a clearly defined territory with a population, a government who are able of themselves to exercise effective control of that territory, and independence in their external relations. Other factors, including some United Nations resolutions, may also be relevant.[25]

Recent practice suggests that 'other factors' may, in the light of the particular circumstances, include human rights and other matters. The European Community adopted a Declaration on 16 December 1991 entitled 'Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union' in which a common position on the process of recognition of the new states was adopted. It was noted in particular that recognition required:

- respect for the provisions of the Charter of the United Nations and the commitments subscribed to in the Final Act of Helsinki and in the Charter of Paris,[26] especially with regard to the rule of law, democracy and human rights;
- guarantees for the rights of ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the CSCE;[27]
- respect for the inviolability of all frontiers which can only be changed by peaceful means and by common agreement;

[24] DUSPIL, 1976, pp. 19–20.

[25] 102 HC Deb., col. 977, Written Answer, 23 October 1986. See also 169 HC Deb., cols. 449–50, Written Answer, 19 March 1990. As to French practice, see e.g. Journal Officiel, Débats Parl., AN, 1988, p. 2324.

[26] See above, chapter 7, p. 372. [27] See above, chapter 7, p. 376.

- acceptance of all relevant commitments with regard to disarmament and nuclear non-proliferation as well as to security and regional stability;
- commitment to settle by agreement, including where appropriate by recourse to arbitration, all questions concerning state succession and regional disputes.[28]

On the same day that the Guidelines were adopted, the European Community also adopted a Declaration on Yugoslavia,[29] in which the Community and its member states agreed to recognise the Yugoslav republics fulfilling certain conditions. These were that such republics wished to be recognised as independent; that the commitments in the Guidelines were accepted; that provisions laid down in a draft convention under consideration by the Conference on Yugoslavia were accepted, particularly those dealing with human rights and the rights of national or ethnic groups; and that support would be given to the efforts of the Secretary-General of the UN and the Security Council and the Conference on Yugoslavia. The Community and its member states also required that the particular Yugoslav republic seeking recognition would commit itself prior to recognition to adopting constitutional and political guarantees ensuring that it had no territorial claims towards a neighbouring Community state. The United States took a rather less robust position, but still noted the relevance of commitments and assurances given by the new states of Eastern Europe and the former USSR with regard to nuclear safety, democracy and free markets within the process of both recognition and the establishment of diplomatic relations.[30]

Following a period of UN administration authorised by Security Council resolution 1244 (1999),[31] the Yugoslav (later Serbian) province of Kosovo declared independence on 17 February 2008. This was preceded by

[28] UKMIL, 62 BYIL, 1991, pp. 559–60. On 31 December 1991, the European Community issued a statement noting that Armenia, Azerbaijan, Belarus, Kazakhstan, Moldova, Turkmenistan, Ukraine and Uzbekistan had given assurances that the requirements in the Guidelines would be fulfilled. Accordingly, the member states of the Community declared that they were willing to proceed with the recognition of these states, *ibid.*, p. 561. On 15 January 1992, a statement was issued noting that Kyrghyzstan and Tadzhikistan had accepted the requirements in the Guidelines and that they too would be recognised, UKMIL, 63 BYIL, 1992, p. 637.

[29] UKMIL, 62 BYIL, 1991, pp. 560–1.

[30] See the announcement by President Bush on 25 December 1991, 2(4 & 5) *Foreign Policy Bulletin*, 1992, p. 12, as cited in Henkin *et al.*, *International Law*, pp. 252–3. See also, as to the importance of democratic considerations, S. D. Murphy, 'Democratic Legitimacy and the Recognition of States and Governments', 48 ICLQ, 1999, p. 545.

[31] See above, chapter 5, p. 204.

the Comprehensive Proposal for the Kosovo Status Settlement formulated by Martti Ahtisaari which had in March 2007 called for independence for Kosovo with international supervision.[32] This was rejected by Serbia. The international community was divided as to the question of recognition of Kosovo's independence. It was recognised swiftly by the US, the UK, Germany and the majority of EU states, Japan and others. Russia and Serbia, on the other hand, made it clear that they opposed recognition, as did Spain and Greece. Accordingly, in the current circumstances, while many countries recognise Kosovo, many do not and entry into the UN is not possible until, for example, Russia is prepared to lift its opposition in view of its veto power.[33] For those states that have recognised Kosovo, the latter will be entitled to all the privileges and responsibilities of statehood in the international community and within the legal systems of the recognising states. However, for those that have not, the state and diplomatic agents of Kosovo will not be entitled to, for example, diplomatic and state immunities, while the international status of Kosovo will be controversial and disputed. While recognition may cure difficulties in complying with the criteria of statehood, a situation where the international community is divided upon recognition will, especially in the absence of UN membership, ensure the continuation of uncertainty.

There are many different ways in which recognition can occur and it may apply in more than one kind of situation. It is not a single, constant idea but a category comprising a number of factors. There are indeed different entities which may be recognised, ranging from new states, to new governments, belligerent rights possessed by a particular group and territorial changes. Not only are there various objects of the process of recognition, but recognition may itself be *de facto* or *de jure* and it may arise in a variety of manners.

Recognition is an active process and should be distinguished from cognition, or the mere possession of knowledge, for example, that the entity involved complies with the basic international legal stipulations as to statehood. Recognition implies both cognition of the necessary facts and an intention that, so far as the acting state is concerned, it is willing that the legal consequences attendant upon recognition should operate.

[32] See S/2007/168 and S/2007/168/Add.1.

[33] One month after the declaration of independence, twenty-eight states had recognised the independence of Kosovo, including sixteen of the twenty-seven EU member states and six of the UN Security Council's fifteen members: see 'Kosovo's First Month', International Crisis Group Europe Briefing No. 47, 18 March 2008, p. 3.

For example, the rules as to diplomatic and sovereign immunities should apply as far as the envoys of the entity to be recognised are concerned. It is not enough for the recognising state simply to be aware of the facts, it must desire the coming into effect of the legal and political results of recognition. This is inevitable by virtue of the discretionary nature of the act of recognition, and is illustrated in practice by the lapse in time that often takes place between the events establishing a new state or government and the actual recognition by other states. Once given, courts have generally regarded recognition as retroactive so that the statehood of the entity recognised is accepted as of the date of statehood (which is a question of fact), not from the date of recognition.[34]

Recognition of governments[35]

The recognition of a new government is quite different from the recognition of a new state. As far as statehood is concerned, the factual situation will be examined in terms of the accepted criteria.[36] Different considerations apply where it is the government which changes. Recognition will only really be relevant where the change in government is unconstitutional. In addition, recognition of governments as a category tends to minimise the fact that the precise capacity or status of the entity so recognised may be characterised in different ways. Recognition may be of a *de facto*[37] government or administration or of a government or administration in effective control of only part of the territory of the state in question. Recognition constitutes acceptance of a particular situation

[34] See e.g. Chen, *Recognition*, pp. 172 ff. See also the views of the Yugoslav Arbitration Commission as to the date of succession of the former Yugoslav republics, Opinion No. 11, 96 ILR, p. 719. Note that retroactivity of recognition is regarded by Oppenheim as a rule of convenience rather than of principle: see *Oppenheim's International Law*, p. 161.

[35] See e.g. I. Brownlie, 'Recognition in Theory and Practice', 53 BYIL, 1982, p. 197; C. Warbrick, 'The New British Policy on Recognition of Governments', 30 ICLQ, 1981, p. 568; M. J. Peterson, 'Recognition of Governments Should Not Be Abolished', 77 AJIL, 1983, p. 31, and Peterson, *Recognition of Governments: Legal Doctrine and State Practice*, London, 1997; N. Ando, 'The Recognition of Governments Reconsidered', 28 *Japanese Annual of International Law*, 1985, p. 29; C. Symmons, 'United Kingdom Abolition of the Doctrine of Recognition: A Rose by Another Name', *Public Law*, 1981, p. 248; S. Talmon, 'Recognition of Governments: An Analysis of the New British Policy and Practice', 63 BYIL, 1992, p. 231, and Talmon, *Recognition of Governments in International Law*, Oxford, 1998; B. R. Roth, *Governmental Illegitimacy in International Law*, Oxford, 1999; *Oppenheim's International Law*, p. 150; Nguyen Quoc Dinh *et al.*, *Droit International Public*, p. 415, and Galloway, *Recognising Foreign Governments*.

[36] See above, chapter 5, p. 197.

[37] See further below, p. 459.

Case No. 18 Contd. preventing the Governing Commission from putting the two ordinances into operation.

[Report : *R.G.St.*, vol. 63, p. 395.]

Territories under Joint or International Government—The Rhineland High Commission—Binding Force of Decrees of the Rhineland Commission within Treaty Authorisation.

See Case No. 48 (*Rhineland Occupation* (*Devisen Legislation*) *Case*).

Territories under International Government—Free City of Danzig—Status of—Membership of the International Labour Organisation—Poland and Danzig.

See Case No. 253 (*Free City of Danzig and International Labour Organisation*).

Territories under International Administration—Free City of Danzig—How far Bound by Rules of International Law as to State Succession.

See Case No. 41 (*Danzig Pension Case*).

D.—RECOGNITION

[See also above : *Recognition of Acts of Foreign States and Governments* ; and Part IV, JURISDICTION : Territorial.]

i. Of States.

Recognition of States—Nature of—Conditions of—Elements of.

See Case No. 5 (*Deutsche Continental Gas-Gesellschaft v. Polish State*).

ii. Of Governments.

Case No. 19 **Recognition—Of Governments—Effect of Non-Recognition on Admissibility of Evidence of a Certificate Signed by Official of Non-Recognised Government.**

MATTER OF WERENJCHIK *v.* ULEN CONTRACTING CORPORATION.

United States, New York Appellate Division ; New York Court of Appeals. 27 *March*, 1930 ; 18 *November*, 1930.

(Hinman, Davis, Whitmyer, Hill, Hasbrouck, JJ. ; Cardozo, C. J., and Kellogg, Pound, Crane, Lehman, O'Brien, Hubbs, JJ.)

THE FACTS.—This was a workmen's compensation claim in

it could not be considered from the maritime point of view as a wreck.

[Report : *Har[illegible]e Rechts- und Gerichtszeitschrift*, 1930, Part B, No. [illegible]]

NOTE.—This de[illegible]lthough bearing on a question of interpretation of a mu[illegible]cipal statute, has been digested because of the novel character and the possible international interest of the question with which it deals. See Spaight, *Air Power and War Rights* (2nd ed., 1933), p. 430, for a discussion of the question "When does a seaplane cease to be an aeroplane and become a boat" in connection with the entry, by belligerent aircraft, of neutral jurisdiction by sea.

B.—PARTS OF STATE TERRITORY

I.—Boundaries

i. Land Boundaries.

Boundaries—Frontier Districts—Absence of Final Marking of Boundary—Question of Jurisdiction.

See Case No. 66 (*In re Brown*).

Boundaries—Absence of Fixed Boundaries—Effect on Jurisdiction—Question of Recognition.

See Case No. 5 (*Deutsche Continental Gas-Gesellschaft* v. *Polish State*).

II.—Rivers

iii. International Rivers.

(*a*) THE PRINCIPLE OF FREEDOM OF NAVIGATION ON INTERNATIONAL RIVERS.

International Rivers—Freedom of Navigation—International Commissions—Tributaries of International Rivers—The River Oder—Article 331 of the Treaty of Versailles.

Case No. 53

PERMANENT COURT OF INTERNATIONAL JUSTICE

JUDGMENT No. 16

THE TERRITORIAL JURISDICTION OF THE INTERNATIONAL COMMISSION OF THE RIVER ODER.

10 *September*, 1929.[1]

THE FACTS.—See Cases Nos. 221 and 240.

After having rejected the interpretation of Article 331 of the Treaty of Versailles by reference to a purely logical interpretation, or an interpretation based on the principle of restrictive

[1] For the composition of the Court see p. 339.

PART II
STATES AS INTERNATIONAL PERSONS

A.—IN GENERAL

I.—Beginning of State Existence.

[For *Recognition*, see below, D.]

Establishment of New States—Territory of New States—Recognition—Whether Constitutive or Declaratory—Recognition *de jure* and *de facto*—Implied Recognition and Recognition by Conclusion of a Treaty—Absence of Recognition by Parent State—Importance of Fixed Boundaries for the Existence of States—The Treaty of Versailles and the Establishment of Poland—Absence of Formal Cession on the Part of Russia. **Case No. 5**

DEUTSCHE CONTINENTAL GAS-GESELLSCHAFT v. POLISH STATE.

Germano-Polish Mixed Arbitral Tribunal. 1 *August*, 1929. (Lachenal, Bruns, Namitkiewicz.)

THE FACTS.—Article 92, paragraph 4, of the Treaty of Versailles provided as follows: " In all the German territory transferred in accordance with the present Treaty and recognised as forming definitively part of Poland, the property, rights, and interests of German nationals shall not be liquidated under Article 297 by the Polish Government except in accordance with the following provisions: . . ." The relevant parts of Article 297 read as follows: " The question of private property, rights and interests in an enemy country shall be settled according to the principles laid down in this Section and to the provisions of the Annex hereto. . . . (*b*) Subject to any contrary stipulations which may be provided for in the present Treaty, the Allied and Associated Powers reserve the right to retain and liquidate all property, rights and interests belonging at the date of the coming into force of the present Treaty to German nationals . . . within their territories, colonies, possessions and protectorates, including territories ceded to them by the present Treaty . . ."

On 14 December, 1923, the Polish Committee of Liquidation, established in pursuance of Polish legislation, ordered the liquidation of property owned by the plaintiff Company in Warsaw (in former Russian territory acquired by Poland).

Case No. 5 ***Contd.***

The object of the proceedings was to obtain the redress provided for in Article 305 of the Treaty of Versailles[1] on the ground that the liquidation was inconsistent with the provisions of Articles 297 (*b*) and 92, paragraph 4. The plaintiff contended that it was the intention of the Treaty to restrict Poland's right of liquidation to the territories ceded by Germany; that by the terms of Article 297 (*b*) the right of the Allied and Associated Powers to liquidate was limited to German property "within their territories, colonies, possessions and protectorates, including territories ceded to them by the present Treaty"; and that on 10 January, 1920 (the date of the coming into force of the Treaty of Versailles) Poland possessed no other territory than that which, in virtue of the Treaty itself, she received from Germany. It was contended that at the time when the applicant's property was liquidated the territory in which it was situated belonged in law to Russia, who had not then ceded it to Poland; even if it were assumed that there was a cession, the frontiers of the territory thus ceded were not yet delimited. The Polish State could not be considered as possessing *de jure* the territory designated as Congress Poland (which had been before the World War under Russian rule) as long as the boundaries of this territory had not been fixed.

Held: that the liquidation of the property owned by the plaintiff Company was not inconsistent with Articles 92, paragraph 4, and 297 (*b*) of the Treaty of Versailles. The plaintiff was not entitled to the redress provided for in Article 305. It was impossible to admit that in drafting Article 297 of the Treaty of Versailles the High Contracting Parties were under the impression that neither Congress Poland nor, in particular, Warsaw, its capital, formed part of the Polish territory, and that Article 297 was not applicable to Congress Poland.[2]

[1] Article 305 provided as follows: "Whenever a competent court has given or gives a decision in a case covered by Sections III, IV, V or VII, and such decision is inconsistent with the provisions of such Sections, the party who is prejudiced by the decision shall be entitled to obtain redress which shall be fixed by the Mixed Arbitral Tribunal. . . ."

[2] The Tribunal pointed out that Article 92, paragraph 4, did not stand by itself. The right of liquidation laid down in that article was a right "under Article 297." It was Article 297 rather than Article 92, paragraph 4, which laid down the right of liquidation. In the view of the Tribunal, the reference to Article 297 in Article 92, paragraph 4, showed clearly that Poland's right of liquidation was founded in Article 297. Had the intention of the Contracting Parties been to exclude Poland from the application of Article 297, they would not have referred to it in that Part of the Treaty in which, as alleged by the applicant, they desired to define Poland's right of liquidation.

(*a*) *Recognition and Establishment of New States.* The Treaty of Versailles was a treaty of peace between Germany and other signatory Powers, of which Poland was one. As regards the terms " enemy country " and " enemy property", it was certain that the signatory Powers of the Treaty of Versailles included Poland amongst the Powers who were enemies of Germany. There was no doubt that at that time Poland existed as a State exercising sovereignty over the Russian and Austrian parts of Poland. This being so, it was unnecessary " to dwell upon the subtle distinction between recognition *de jure* and recognition *de facto*. According to the opinion rightly admitted by the great majority of writers on international law, the recognition of a State is not constitutive but merely declaratory. The State exists by itself (*par lui même*) and the recognition is nothing else than a declaration of this existence, recognised by the States from which it emanates." In the course of the first months of 1919, the new Polish State was recognised by a number of Powers. From 15 December, 1918, Poland was admitted to the negotiations of the Peace Conference. The full powers of its delegation were admitted without reservation by the delegation which negotiated on behalf of Germany. Finally, the Treaty of Peace was signed on 28 June, 1919, by Germany and Poland. " It seemed indisputable that the signing of a treaty of this kind, without any reservations whatsoever, implied full recognition of the State with whom the treaty was signed. The express recognition laid down in Article 87 was no more than a confirmation of that recognition which resulted impliedly from the above facts. Accordingly, the existence of the Polish State was officially recognised before 10 January, 1920, *inter alia*, by Germany." Similarly, the Principal Allied and Associated Powers signed with Poland, on the date of the Peace Treaty, the so-called Minorities Treaty, a treaty which by its importance emphatically implied the official and complete recognition of the State with whom it was concluded. It was true that a State does not exist unless it fulfils the conditions of possessing a territory, a people inhabiting that territory, and a public power which is exercised over the people and the territory. These conditions were recognised as indispensable. It was impossible to admit that the Powers who in 1919 recognised the existence of the Polish State and signed important treaties with her, thought that this Polish State had no territory on the ground that the territories described in Article 87 and the following could not become

Case No. 5 *Contd.*

Polish until the date of the coming into force of the Treaty. The recognition of Poland was not an act aiming at the future; it resulted from the signing of the Treaty itself and from the preceding negotiations. It followed that it was highly improbable that at the time when the signatory Powers, including Poland, enacted the terms of Article 297 they thought that Poland had no territory and that, consequently, Article 297 did not concern her.

(*b*) *Absence of Recognition by Parent State.* The above conclusion could not be discarded on account of the fact that Russia had not at that time, by means of an international treaty, formally and legally renounced the Polish territories which had previously belonged to her. An affirmative answer must be given to the question whether under international law the Powers could validly recognise a new State before the State to which the territory previously belonged had itself recognised the new State. This was so " at least from the moment when the new State has consolidated itself sufficiently so that third Powers can find in it evidence of the three elements of statehood mentioned above. It suffices to recall that in 1831 the Great Powers recognised the Belgian State, whereas it was not recognised by the Netherlands until 1839, and it was only at the latter date that the Netherlands legally ceded the territory forming the Belgian State. . . . "[1]

" In these circumstances the Powers signatories of the Treaty of Versailles surely could recognise the entire Polish State without incurring the reproach of committing as against Russia an act disapproved by international law; it may be admitted with assurance that no mental reservation whatsoever has, according to their common intention, vitiated or affected in any degree the recognition given by them."

(*c*) *Importance of Fixed Boundaries for the Existence of States.* With reference to the submission that the Polish State could not have been regarded as possessing *de jure* the territory designated as " Congress Poland " as long as the boundaries were not definitively fixed, the Tribunal said: " Whatever may be the importance of the delimitation of boundaries, one cannot go so far as to maintain that as long

[1] The Tribunal expressed here the view that as regards Poland there could be even less doubt seeing that, since 1918, the power representing the Russian State had declared in two official and successive utterances that Russia proclaimed the right of self-determination for all peoples, that it endorsed the independence of Poland, and that it recognised as belonging to Poland all the territory the population of which was, in its majority, composed of Poles. In fact the Polish State was recognised by Russia in the Treaty of Brest-Litowsk.

as this delimitation has not been legally effected the State in question cannot be considered as having any territory whatever. The practice of international law and historical precedents point to the contrary. In order to say that a State exists and can be recognised as such . . . it is enough that this territory has a sufficient consistency, even though its boundaries have not yet been accurately delimited, and that the State actually exercises independent public authority over that territory. There are numerous examples of cases in which States have existed without their statehood being called into doubt . . . at a time when the frontier between them was not accurately traced." It was unnecessary to recall the international arbitrations which defined the boundary between the Republic of Argentina and Chile and, even more recently, between Colombia and Venezuela. One could not draw from these arbitrations the inference that prior to these delimitations the States in question had no territory.[1]

The fact that on 10 January, 1920, the eastern boundary of Poland was not yet exactly traced could have a certain relevance if the measure of which the applicant complained had been taken in a territory which could be described as the doubtful zone of Polish territory. However, the measure in question was taken in Warsaw, in other words in a territory the national Polish character of which could not be doubted by anyone since the end of 1918. It was there that the new State was born ; there was the seat of its governmental and public power.[2]

[Reports : *Recueil*, IX (1929–1930), p. 336 ; *Z. für a. ö. R. und V.*, vol. II, Part 2 (1931) p. 14.]

Establishment of New States—Establishment of Territorial Sovereignty by Establishment of Civil Administration—Czechoslovak Territory.

The view expressed in the resolution of 14 April, 1919, No. 352 (Boh. VI, 1919) and in the subsequent decisions (see

[1] The Tribunal reverted here to the Belgian precedent and stated that it was indisputable that, in law, the boundary on the side of the Netherlands was not juridically fixed until the Treaty of 1839. It said that if the Treaty of 1839 which laid down that " the Belgian territory shall consist of central Brabant, Liége, Nemur, etc. . . . " were taken literally this would mean that it was only since that Treaty that Belgium actually possessed those territories. This, the Tribunal said, was not the view of the Powers signatories of the Treaty of 1831. They never thought of regarding Belgium as a State which until 1839 had no territory.

[2] Bruns, the German Arbitrator, delivered a Dissenting Opinion (*Z. für a. ö. R. und V.*, vol. II, Part 2 (1931), p. 25) in which he discussed, *inter alia*, the legal nature of recognition.

The Creation of States in International Law

SECOND EDITION

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(iv) Recognition

As was argued in Chapter 1, recognition is not a condition for statehood in international law. 'An entity not recognized as a State but meeting the requirements for recognition has the rights of a State under international law in relation to a non-recognizing State.'[264] Rights under international law are not contingent upon the acceptance of the right-holder by individual others. An entity is not a State because it is recognized; it is recognized because it is a State.

On the other hand it is true that, in some cases at least, an entity that for some reason may not qualify as a State under the criteria discussed in this chapter may nonetheless be recognized as such. Such recognition may be constitutive of legal obligation for the recognizing or acquiescing State; it may also tend to consolidate a general legal status at that time precarious or in the process of being constituted. Recognition in cases such as Bosnia-Herzegovina, where effective control was lacking, or of the European 'micro-States', where questions arose as to both formal and actual independence, has led writers to emphasize these aspects.[265] Recognition, while in principle declaratory, may thus be of great importance in particular cases.[266] At least where the recognizing government is not acting in a merely opportunistic way, recognition is important evidence of legal status.

(v) Legal order

Since the modern State is the territorial basis for a legal order,[267] it might be thought that the existence of a 'legal order', or at least its basic rules, is a useful criterion for the existence of the State.

> As a political organization, the state is a legal order. But not every legal order is a state . . . The state is a relatively centralized legal order . . . The legal order of primitive society and the general international law order are entirely decentralized coercive

of established governments, with whom we have regular treaties, acknowledging and confirming to them the relations of legal states . . . Although their notions of justice, to be observed between nations, differ from those that we entertain, we do not, on that account, venture to call into question their public acts. As to *the mode* of confiscation . . . we must presume it was done regularly *in their way*, and according to the established custom of that part of the world.' [emphasis original] For the question of 'failed States' see below, Chapter 17.

[264] *Restatement 2nd*, s 107. Comment a states that 'basic principles of fairness and the need for an orderly system of international relations require that the rights which international law accords to states not be dependent on recognition.'

[265] See, e.g., Duursma, *Fragmentation and the International Relations of Micro States*, 115; Hillgruber (1998) 9 *EJIL* 491. On Bosnia and Herzegovina see the comment by Rich (1993) 4 *EJIL* 36, 49.

[266] See, e.g., the discussion in Chapter 5 on Taiwan; Chapter 7 on Monaco; Chapter 12 on Austria after 1938; Chapter 9 on seceding States generally; and Chapters 10, 17 on the non-extinction of 'Germany' after 1945.

[267] D'Entréves, *The Notion of the State*, 96.

15

Territorial Administration by Non-territorial Sovereigns

MALCOLM N SHAW QC*

I. INTRODUCTION

THE CONCEPT OF sovereignty plays a critical role in the structure of international law, composed as it is primarily of states possessing comprehensive international legal personality and equality in formal juridical terms.[1] If statehood (and territorial sovereignty as its operating principle) is the primary and most important model of an entity existing within the framework of international law and the one possessed of the most extensive collection of rights and duties consequent upon international legal personality, it is clearly not the only one, and indeed to focus exclusively upon that model would be to misunderstand the international system. The question addressed in this chapter is the extent to which that model is inadequate in the light of modern experience and the need to refocus our conception of the relationship between the international community, the state and territory. Indeed, it is one of the arguments of this chapter that this relationship has become more distant than in the past.

Sovereignty in international law, or external sovereignty, refers to 'legal authority which is not in law dependent on any other earthly authority'.[2] Judge Huber in the *Island of Palmas* case put it as follows:

> Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.[3]

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[1] See, eg, I Brownlie, *Principles of Public International Law* (6th edn, Oxford University Press, 2003) 287.

[2] R Jennings and A Watts (eds), *Oppenheim's International Law* (9th edn, London, Longmans, 1992) 122.

[3] *Island of Palmas Case* (1928) 2 RIAA 829, 838 (1928).

That means that each state as a matter of definition possesses a spatial dimension within which no other state may act and with regard to which the state exercises a range of competences as recognised in international law.

A fundamental element of sovereignty consists of the relationship of the state to its territory, whether the title to territory itself or the competence to acquire one way or another additional territory. The concept of territorial sovereignty is concerned with the nature of the authority exercised by the state over its territory. Territory forms the spatial framework for the existence and exercise of sovereign rights. Territorial sovereignty is, therefore, centred upon the rights and powers coincident upon territory in the geographical sense. As such it has provided the basis for modern international law. Territorial sovereignty must exist before one can talk of a state.

Maine wrote that

> if sovereignty had not been associated with the proprietorship of a limited portion of the earth, had not, in other words, become territorial, three parts of the Grotian theory would have been incapable of application.[4]

Judge Huber regarded the principle of the exclusive competence of the state in regard to its own territory as the point of departure in settling most questions that concern international relations,[5] while Jennings referred to the 'mission and purpose of traditional international law' as being the delimitation of the exercise of sovereign power on a territorial basis.[6] Brierly emphasised that sovereignty referred not to a relation of persons to persons, nor to the independence of the state itself, but to the characteristics of rights over territory and was a convenient way of contrasting 'the fullest rights over territory known to the law' with certain minor territorial rights, eg, leases and servitudes.[7] In other words, the notion of territorial sovereignty is the basis of international law and comprises a key element of its substance and it focuses upon the notion of rights and duties, being the pinnacle of a structure of such attributes.

Territorial sovereignty has a positive aspect, ie, the exclusive competence of the state within its territory, and a negative aspect, ie, the obligation to protect the rights of other states, and characterises a particular kind of link between state and land recognised by international law. The collection of competences associated with the concept of territorial sovereignty may be seen as derived ultimately from the norms of

[4] H Maine, *Ancient Law* (1861) 66.
[5] *Island of Palmas*, above n 3, 838.
[6] RY Jennings, *The Acquisition of Territory in International Law* (Manchester University Press, 1963) 2.
[7] JL Brierly, *The Law of Nations* (6th edn, Oxford University Press, 1963) 162.

the international legal order itself. But this should not be understood as detracting from the important social and psychological role played by the state in the life of a community. Sovereignty in international law reflects the need for security and stability, but it also constitutes, in Alvarez's words, 'an institution, an international social function of a psychological character'.[8] Territorial sovereignty is the answer provided by international law as regards the needs for security, stability and identity felt by a particular population within a certain area

Holsti has summed up the meaning of sovereignty in the following way:

> Sovereignty is a foundational institution of international relations because it is the critical component of the *birth, maintenance,* and *death* of states. . . . Sovereignty helps create states; it helps maintain their integrity when under threat from within or without; and it helps guarantee their continuation and prevents their death. . . . Sovereignty defines the limits of a legal realm. Jurisdiction exists only within a specified territory and extends no further. . . . The external aspect of sovereignty is that the state has constitutional independence. It is not legally subject to any external authority.[9]

However, sovereignty in international law is not absolute in the way that sovereignty internally could be. Sovereignty, and territorial sovereignty, derives from international law and is thus subject to it and to the way in which it evolves. It is limited by the need to accept the sovereignty of other states and by the obligations imposed on states from time to time by the rules of international law, and it has long been accepted that such norms need not be consensual in order to be binding.[10] Indeed, the Draft Declaration on Rights and Duties of States proclaimed in 1949 that 'the States of the world form a community governed by international law'.[11] Further, recent approaches to sovereignty have treated the concept in a variable or relative context, rather than focusing on any attributes that are deemed absolute.[12]

Holsti has written that:

> Sovereignty is a distinct legal or juridical status. A state is either sovereign or it is not. It cannot be partly sovereign or have 'eroded' sovereignty no matter

[8] *Corfu Channel* case, [1949] ICJ Rep 4, 43.

[9] KJ Holsti, *Taming the Sovereigns* (Cambridge University Press, 2004) 113 (emphasis in original).

[10] See, eg, *Oppenheim's International Law*, above n 2, 29

[11] UNGA Res 375 (IV) (6 December 1949). Para 1 of the Preamble.

[12] See, eg, H Spruyt, *The Sovereign State and Its Competitors* (Princeton University Press, 1994); J Bartelson, *A Genealogy of Sovereignty* (Cambridge University Press, 1995); TL Ilgen (ed), *Reconfigured Sovereignty* (Aldershot, Ashgate, 2003); N Walker (ed), *Sovereignty in Transition* (Oxford, Hart Publishing, 2003); and J Bartelson, 'The Concept of Sovereignty Revisited' (2006) 17 *European Journal of International Law* 463.

> how weak or ineffective it may be. . . . It is an absolute category and not a variable. Interpretations of the term, as well as sovereignty practices, change with time, but its foundational principles have remained essentially intact. . . . This is not to deny all sorts of anomalies, of which there are quite a few, but not enough to constitute a pattern or regular practice.[13]

However, the range of what Holsti terms anomalies is increasing and the absolute nature of sovereignty is decreasing in the light of the needs of the international community, such that traditional descriptions of sovereignty in bold absolute terms require rethinking. Lapidoth has pointed out that the concept of sovereignty 'is one of the most controversial notions in constitutional law and international law, as well as in political science and international relations'. It has been linked to the idea of absolute political authority and has been used or abused to justify totalitarianism and expansionist regimes and to glorify the state.[14] On the other hand, there is an inherent flexibility in the notion of sovereignty in the context of functional competence that may enable the circle to be squared.[15]

The challenges to the absolutist approach to sovereignty are many and varied.[16] On the one hand the rise of other international legal persons as characterised by international law has clearly impacted upon the exclusivity of states within the international system. International organisations, both global and regional, play an increasing role in the conduct of international relations. They can enter into agreements with states, create rights and duties for other legal persons, establish and enforce binding norms of international law and are increasingly important in the multiplying mechanisms for dispute resolution.[17] Across a range of areas, states have surrendered elements of their sovereign power to such organisations in the belief that this may prove a more effective method of achieving aims no longer adequately attainable by themselves alone. Non-governmental organisations and multinational enterprises flourish and function now on the international scene in a manner inconceivable in earlier decades and with increasing effect. Individuals are now the repositories of rights and duties directly under international law and may enforce their international rights through international mechanisms[18] and

[13] Holsti, above n 9, 114.

[14] R Lapidoth, *Autonomy* (Washington, US Institute of Peace Press, 1997) 41.

[15] See *ibid*, ch 6 and generally.

[16] See, eg, A-M Slaughter, 'Sovereignty and Power in a Networked World Order' (2004) 40 *Stanford Journal of International Law* 283.

[17] See, eg, MN Shaw, *International Law* (5th edn, Cambridge University Press 2003) ch 23.

[18] See, eg, the Optional Protocol to the International Covenant on Political and Civil Rights (adopted 16 December 1966); International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) Art 14.

be prosecuted through international courts.[19] Certain groups may benefit from the application of international law norms[20] and may even have the right to independence in certain circumstances.[21] On the other hand, in the face of challenges of an international nature and increasing awareness of global interdependence, states through processes of co-operation with other states and entities have constrained their own exercise of sovereignty in areas such as human rights and humanitarian law, the environment and international trade, and thereby permitted other states to impact upon matters heretofore recognised as subject to exclusive domestic jurisdiction.

Sovereignty, therefore, is not the iconic talisman of the classic period of international law. While in most cases critical issues do not arise as to how to deal with asymmetries between sovereignty and actual control and administration, in some situations such problems may arise and these require careful consideration of the circumstances and thus the allocation of rights and responsibilities in each particular case. In other words, in order to deal with many of the most critical situations in international relations, an exclusive focus upon sovereignty is simply not sufficient, and indeed as the concept of sovereignty is undoubtedly evolving, the range and manner of methodologies of actual control and administration of territory has perhaps been insufficiently examined.

II. ADMINISTRATIVE CONTROL BY THIRD PARTIES

A. General

Consideration of a number of situations in which effective control is exercised by other than the territorial sovereign will be undertaken briefly in order to demonstrate the increasing range of examples in which the absolute territorial sovereignty model has been superseded, at least for a time, in the light of the perceived inadequacy of that mechanism and in order to illustrate some of the problems that may ensue. First, however, some of the reasons that have impelled such approaches should be noted. Such a disjunction between control and sovereignty may arise as a consequence of the inability of the international community, or the major powers, to agree upon or recognise the allocation of sovereignty or

[19] See the Statute of the Yugoslav Tribunal (adopted 25 May 1993 by UNSC Res 827); the Statute of the Rwanda Tribunal (adopted 8 November 1994 by UNSC Res 955); Statute of the International Criminal Court (adopted 17 July 1998) 2187 UNTS 90.

[20] See, eg, A Cassese, *Self-Determination of Peoples* (Cambridge University Press, 1998), and G Simpson, 'The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age' (1996) 32 *Stanford Journal of International Law* 255; and see for indigenous peoples, P Thornberry, *Indigenous Peoples* (Manchester University Press, 2002).

[21] In the case of colonial territories, see, eg, Cassese, above n 20.

because that is the solution agreed upon for reasons deriving from idealism or power balance considerations either on a permanent or a temporary basis, or because the existing political system in a territorial unit has collapsed and the existing and recognised sovereign power is unable to maintain order or prevent egregious violations of human rights.[22]

Further, the actual mechanisms of such administration may vary from military to civilian control and the mix of applicable law may be different from one situation to another. Military officials tend to feel more at home with the minimalist approach of traditional occupation law with its stress on military necessity, while international organisation officials focus more upon international norms relating to human rights and development.[23] Similarly, accountability issues may be dealt with in various ways, whether exclusively within the territory concerned or involving military or civilian elements within the occupying or administering power or involving the responsibility and authority of organs of international organisations, such as the Security Council or the Secretary General.

It should be noted in passing that states may agree to restrict the range of rights they possess by virtue of territorial sovereignty. The UK and France, for example, have agreed to permit each other's frontier control officers to work in specified parts of one another's territory, thus allowing for the application and enforcement of the laws of one state in the territory of the other,[24] while Annex I(b) and (c) of the 1994 Israel–Jordan Peace Treaty recognises the areas of Naharayim/Baqura and Zofar/Al-Ghamr as under Jordanian sovereignty but subject to a special regime permitting extensive Israeli jurisdiction.

Classical international law has long accepted the existence of entities of more limited personality, including states. Several states, for example, were rendered subject to special operating conditions. Switzerland (1815), Belgium (1831)[25] and Austria (1955), for example, were recognised as guaranteed and neutral states by virtue of international agreements.[26] Again, certain states entered into protectorate agreements or arrangements whereby one state took over certain sovereign powers from another, usually the conduct of foreign affairs and national defence.[27]

[22] See, eg, R Wilde, 'From Danzig to East Timor and Beyond: The Role of International Territorial Administration' (2001) 95 *American Journal of International Law* 583, discussing the categories of 'sovereignty' and 'governance' problems.

[23] See S Ratner, 'Foreign Occupation and International Territorial Administration: The Challenges of Convergence' (2005) 16 *European Journal of International Law* 695, 702–3.

[24] See the Protocol Concerning Frontier Controls and Policing, Co-operation in Criminal Justice, Public Safety and Mutual Assistance Relating to the Channel Fixed Link, 1991 and the Protocol of 29 May 2000 and the Channel Tunnel (International Arrangements) Order 1993.

[25] This ceased after the First World War.

[26] See, eg, *Oppenheim's International Law*, above n 2, 319ff.

[27] *Ibid*, 266ff. See, eg, Tunisia under French protection and Morocco partly under French and partly under Spanish protection, see MF Lindley, *The Acquisition and Government of Backward*

However, not all protectorate arrangements fell into the same pattern. The 'colonial protectorate' as applied in Africa in the nineteenth century was essentially little more than a colonising device.[28] These examples, however, operated by recognising de jure the sovereignty in question, while de facto restricting some of the consequences thereof.

B. Control of Territory by Another State

(1) In a Situation of Unallocated Sovereignty

After the end of the First World War and the collapse of the German, Austro-Hungarian, Russian and Ottoman empires, a system for dealing with the colonies of the defeated powers that did not involve annexation was developed. These territories, no longer under the sovereignty of the former powers, were to be governed according to the principle that 'the well-being and the development of such peoples form a sacred trust of civilisation' which would be implemented by entrusting the tutelage of the peoples of such territories to 'advanced nations'. These arrangements were to be exercised by these 'advanced nations' as mandatories on behalf of the League of Nations to which they reported and were accountable.[29] The mandatory power exercised a full range of administrative and legislative control over the territory, but not the expanse of competences and authorities consequent upon ownership. While it was clear that sovereignty over the territory did not pass to the mandatory power,[30] it was less clear where sovereignty did reside. Various possibilities were canvassed, ranging from the Council of the League to the

Territories in International Law (Longman, Green, 1926), and Persian Gulf States under British protection, see HM Al-Baharna, *The Arabian Gulf States: Their Legal and Political Status and Their International Problems* (2nd edn, Beirut: Librairie du Liban, 1978), and the Malay States, see AP Rubin, *International Personality of the Malay Peninsula* (Kuala Lumpur: Penerbit Universiti Malaya, 1974).

[28] See *Land and Maritime Boundary (Cameroon v Nigeria)*, [2002] ICJ Rep paras 205 and 207. See also MN Shaw, 'The Acquisition of Territory in Nineteenth Century Africa: Some Thoughts' in PM Dupuy et al (eds), *Festschrift for Christian Tomuschat* (Kehl, NP Engel Verlag, 2006) 1029.

[29] Covenant of the League of Nations (adopted 28 April 1919) Art 22. See also the *International Status of South West Africa* [1950] ICJ Rep 128, 132; the *Namibia* case [1971] ICJ Rep 16, 28–9 and *Cameroon v Nigeria* [2002] ICJ Rep para 212. See also J Crawford, *The Creation of States in International Law* (2nd edn, Oxford University Press, 2006) ch 13; HD Hall, *Mandates, Dependencies and Trusteeship* (London, Stevens, 1948) and *Oppenheim's International Law*, above n 2, 295ff.

[30] Note that an assertion by South Africa of sovereignty over its mandated territory of South West Africa in a boundary agreement with Portugal of 22 June 1926 was withdrawn after objections from the League of Nations' Permanent Mandates Commission, see Crawford, above n 29, 568. Judge McNair in his separate opinion in the *Status of South West Africa* case noted that sovereignty over a mandated territory was 'in abeyance' to be revived if and when the inhabitants of the territory obtained recognition as an independent State, [1950] ICJ Rep 150.

principal allied powers and from the League to the inhabitants of the territory.[31] What was accepted was that such territories possessed 'an international status'.[32]

The mandate system was transformed into the United Nations trusteeship system after the conclusion of the Second World War and the demise of the League, together with territories taken from the defeated states as a result of that conflict.[33] Although there was no obligation upon mandatory powers to transfer mandated territories into trust territories, all but South Africa in respect of South West Africa did so. In the latter case, the International Court held that the mandate arrangements simply continued. Indeed, what is also of importance in this context is that the Court held that the League's supervisory competence with regard to mandated territories was inherited by the United Nations with regard to trust territories.[34]

With regard to trust territories, the obligation to safeguard and advance the interests of the inhabitants was deemed paramount, while one of the objectives of the system was to promote the progressive development of the territories 'towards self-government or independence' in the light of the 'freely expressed wishes of the people concerned'.[35] Indeed, the International Court made it clear that the principle of self-determination was applicable to mandate and trust territories,[36]

Mandatory and trusteeship powers possessed wide-ranging competence in the legislative and administrative field, subject to the requirement to the supervision of the League of Nations and then the UN General Assembly,[37] but this did not include the capacity to modify the international status of the territory concerned. This capacity rested with the power acting with the consent of the international organisation.[38] While the trust power could administer the territory concerned together with a neighbouring territory, it could not alter unilaterally international boundaries nor otherwise dispose of the territory.

[31] Crawford, above n 29, fn 6. See also Q Wright, 'Sovereignty of the Mandates' (1923) 17 *American Journal of International Law* 691 and id, *Mandates under the League of Nations* (Chicago University Press, 1930).

[32] *International Status of South West Africa* [1950] ICJ Rep 132. Duncan Hall noted that 'twenty years of inconclusive speculation among international lawyers as to where sovereignty was really lodged did not really help matters', above n 29, 73.

[33] UN Charter, Art 77.

[34] *International Status of South West Africa* [1950] ICJ Rep 137, 140 and 143–4.

[35] UN Charter, Art 76.

[36] See the *Namibia* case [1971] ICJ Rep 6, 31 and the *Western Sahara* case [1975] ICJ Rep 12, 31–3.

[37] Strategic trust territories were subject to a slightly different regime under the supervision of the Security Council, See, eg, M Whiteman, *Digest of International Law* vol I (Washington, Government Printing Office, 1963) 769–839.

[38] *International Status of South West Africa* [1950] ICJ Rep 143–4.

(2) In a Situation Where the Recognised Sovereign Was Deprived by Force of Control

(i) Traditional Occupation The capture by force of the territory of another state and the establishment of control raises immediately in international law the status of belligerent occupation with a range of consequential applicable norms. Such rules were essentially predicated upon the expectation of a relatively short period of occupation of the territory of the defeated enemy, and this coloured the nature of the relevant provisions. The occupying state was entitled to exercise a variety of powers, focused upon the establishment and preservation of order, but such powers were carefully constrained. The fundamental principle, however, was that the capture and control of such territories could not of themselves transfer sovereignty from the defeated to the victorious power.[39] Thus the process of occupation in law involved the regulation of control by the occupying power notwithstanding the continuation of the existing sovereign title with a view to resolving the dispute by a peace agreement with the minimum of disruption to the lives of the occupied population.

Territory is deemed occupied, according to Article 42 of the Hague Regulations attached to the 1907 Hague Convention IV on the Laws and Customs of War on Land and accepted as part of customary international law,[40] 'when it is actually placed under the authority of the hostile army', while 'the occupation extends only to the territory where such authority has been established and can be exercised'. This has recently been underlined by the International Court in *Democratic Republic of Congo v Uganda*, where it was further noted that:

> In order to reach a conclusion as to whether a State, the military forces of which are present on the territory of another State as a result of an intervention, is an 'occupying Power' in the meaning of the term as understood in the *jus in bello*, the Court must examine whether there is sufficient evidence to demonstrate that the said authority was in fact established and exercised by the intervening State in the areas in question.

[39] See, eg, E Benvenisti, *The International Law of Occupation* (Princeton University Press, revised paperback printing 2004) 5–6, and UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford University Press, 2004) 278. Note the special situation of the administration of Germany by the Four Allied Powers in 1945, see Crawford, above n 29, 452–4; ID Hendry and MC Wood, *The Legal Status of Germany* (Cambridge, Grotius Publications, 1987) and ME Bathurst and JL Simpson, *Germany and the North Atlantic Community* (London, Stevens, 1972).

[40] See, eg, Judgment of the International Military Tribunal of Nuremberg, 30 September and 1 October 1946, 65; *Legality of the Threat of Use of Nuclear Weapons* [1996] ICJ Rep 256; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Rep __ para 89 and *Democratic Republic of Congo v Uganda* [2005] ICJ Rep 116, para 219. See also the Eritrea–Ethiopia Claims Commission, Partial Award, Central Front, Ethiopia's Claim 2, The Hague, 28 April 2004 at para 16.

The mere presence of occupying forces was not sufficient; there was a need to substitute their own authority for that of the Congolese Government. Any justification given by Uganda for its occupation would be of no relevance nor would it be relevant whether or not a structured military administration of the territory occupied had been established.[41]

In other words, the test is purely pragmatic with no necessary implication as to title. It matters not to the application of the law that there may be a genuine dispute as to the repository of sovereignty with regard to any particular territory. Accordingly, for example, the Israeli Supreme Court (sitting as the High Court of Justice) has affirmed that Israel holds the areas of Judea and Samaria in belligerent occupation.[42]

The law of belligerent occupation is further contained in the Fourth Geneva Convention on the Protection of Civilian Persons in Time of War 1949. Article 2, paragraph 2, provides that the Convention is to apply

> to all cases of partial or total occupation of the territory of the High Contracting Party, even if the said occupation meets with no armed resistance.

The International Court has taken the position that the Convention 'is applicable in any occupied territory in the event of an armed conflict arising between two or more High Contracting Parties' so that with regard to the Israel/Palestine territories question

> the Convention is applicable in the Palestinian territories which before the conflict lay to the east of the Green Line and which, during that conflict, were occupied by Israel, there being no need for any enquiry into the precise legal status of those territories.[43]

The Eritrea–Ethiopia Claims Commission has pointed out that:

> These protections [provided by international humanitarian law] should not be cast into doubt because the belligerents dispute the status of territory. . . . respecting international protections in such situations does not prejudice the status of the territory.[44]

[41] *Democratic Republic of Congo v Uganda* [2005] ICJ Rep, para 173. See also the *UK Manual of the Law of Armed Conflict*, above n 39, 275.

[42] See HCJ 2056/04 *Beit Sourik Village Council v Government of Israel and Others* (Judgment) 30 June 2004, President A Barak, para 1, and HCJ 7957/04 *Mara'abe v Prime Minister of Israel* (Judgment) 15 September 2005, President A Barak, para 14.

[43] *Legal Consequences of the Construction of a Wall*, above n 40, para 101. It should be noted that Israel has long asserted that it applies the humanitarian parts of the Convention to the occupied territories, See, eg, M Shamgar, 'The Observance of International Law in the Administered Territories' (1977) *Israel Yearbook on Human Rights* 262, and T Meron, 'West Bank and Gaza' (1979) *Israel Yearbook on Human Rights* 108. See also *Mara'abe v The Prime Minister of Israel*, above n 42, President A Barak, para 14.

[44] Partial Award, Central Front, Ethiopia's Claim 2, The Hague, 28 April 2004, para 28.

Further, the Commission emphasised that:

> neither text [the Hague Regulations and the Fourth Geneva Convention] suggests that only territory the title of which is clear and uncontested can be occupied territory.[45]

Article 4 of Protocol I to the Geneva Conventions 1977 reinforces the fundamental approach that:

> The application of the Conventions and of this Protocol, as well as the conclusion of the agreements provided for therein, shall not affect the legal status of the Parties to the conflict. Neither the occupation of a territory nor the application of the Conventions and this Protocol shall affect the legal status of the territory in question.

In the case of an occupied territory under the traditional law, the rights and duties of the occupying power are tightly circumscribed. Article 43 of the Hague Regulations[46] provides that:

> The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore and ensure, as far as possible, public order and safety [l'ordre et la vie publics], while respecting, unless absolutely prevented, the law in force in the country.

Accordingly, the structure of an occupation under international law is predicated upon the regulation of the actual exercise of power and not its legitimacy, the upholding of public order and the maintenance of the local legal system. The focus was upon minimalist interference with the pre-existing framework, while ensuring public order.[47] Military necessity constitutes the key to the regulation of the exercise of power by the occupant as balanced by humanitarian considerations, although the precise contours of that relationship are controversial. In the difficult balance between military necessity and humanitarian concern, the twin poles of traditional occupation law, a key rule is played by the principle of proportionality and this may provide the test by which military necessity may be deemed acceptable in the light of the terms of the law of occupation as a whole.[48]

[45] *Ibid*, para 29.

[46] Described by Benvenisti as 'a sort of miniconstitution for the occupation administration', above n 39, 9. See also M Sassoli, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers' (2005) 16 *European Journal of International Law* 661, 663ff.

[47] See, eg, the occupation of areas of France in the Franco-Prussian war, see DA Graber, *The Development of the Law of Belligerent Occupation 1863–1914* (New York, Columbia University Press, 1949) 268.

[48] See, eg, R Higgins, *Problems and Process* (Oxford University Press, 1994) 219; JG Gardam, 'Proportionality and Force in International Law' (1993) 87 *American Journal of International Law* 391 and the Judgment of President Barak in *Beit Sourik,* above n 42, para 36ff.

Article 23(g) of the Hague Regulations prohibits the destruction or seizure of enemy property, unless imperatively demanded by the necessities of war. Article 46, a key provision, insists that the family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected, while private property cannot be confiscated. Requisitions in kind and services must be restricted to the needs of the army of occupation,[49] while any taxes or other money contributions levied in the occupied territories shall be for the expense of the administration of the territory in question or for the needs of the army. Article 50 of the Hague Regulations states that no general penalty, pecuniary or otherwise, shall be inflicted on the population on accounts of acts of individuals for which they cannot be regarded as jointly and severally responsible. Article 55 emphasises that the occupying power is to 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.

This pattern was replicated and reinforced in the provisions of the Fourth Geneva Convention.[50] Article 27 provides that persons in the hands of the occupying power are entitled in all circumstances to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They are to be humanely treated at all times, although the parties to the conflict may take such measures of control and security in regard to them as may be necessary as a result of the war.[51] Article 47 provides that the benefits of the Convention are not to be taken away by any change introduced by the occupying power, up to and including annexation of the whole or part of the occupied territory, while Article 49 prohibits individual or mass forcible transfers, as well as deportations of protection persons from the occupied territory, although evacuation of an area may be undertaken if the security of the population of imperative military reasons so demand. Further, the occupying power shall not deport or transfer parts of its own civilian population into the territory it occupies. The destruction of private or public property is prohibited, except where rendered absolutely necessary by military operations.[52] Article 54 provides that the

[49] Hague Regulations, Art 52.

[50] The Eritrea–Ethiopia Claims Commission in its Partial Award, Central Front, Ethiopia's Claim 2, The Hague, 28 April 2004, paras 15 and 16, takes the position that the Convention is part of customary international law. See also Partial Award, Central Front, Eritrea's Claims 2, 4, 6, 7, 8 and 22, The Hague, 28 April 2004, paras 21 and 22.

[51] See also Arts 29, 31, 32, 33 and 34.

[52] Art 53.

occupying power may not alter the status of public officials or judges in the occupied territories or in any way apply sanctions to or discriminate against them, although it retains the right to remove public officials from office, eg, for refusing obedience to the occupying power.[53] The penal laws of the occupied territory shall remain in force with the exception that they may be repealed or suspended where they constitute a threat to the security of the occupying power or an obstacle to the application of the Convention itself.[54]

Thus, to summarise, the traditional international law on occupation[55] seeks (i) to prevent any unilateral change in the pre-existing sovereignty position; (ii) to emphasise the temporary nature of the occupation; (iii) to permit the occupying power to restore and maintain public order and public life; (iv) to constrain the activities of the occupier to the minimum necessary consistent with the need to upkeep public order; and (v) to maintain its own stance as interpreted in the light of military necessity and oblige the occupier to treat the population of the area in question with humanity and dignity. However, the application of the relevant principles becomes ever more complex the longer the occupation goes on and the predominant assumption of the temporary control of the territory pending a peace settlement weakens or disappears.[56] Problems will arise in a period of rapid social, economic and political changes taking place both within the territory in question and outside where this is impacting upon the population under occupation, particularly where the legal and political system of the territory is anchored in a different time and cultural framework and is thus unable to deal with the evolving situation. The rules traditionally provided by the law of occupation are predicated upon the temporary and minimally interfering nature of the occupation, not upon any perceived need to bring the social, economic and political system of the territory up to date and reform inappropriate laws, practices or procedures. The Israeli Supreme Court put it this way:

> Life does not stand still, and no administration, whether an occupation administration or another, can fulfil its duties with respect to the population if it refrains from legislating and from adapting the legal situation to the exigencies of modern times.[57]

Roberts has written that the argument that in a prolonged occupation,

[53] See *UK Manual of the Law of Armed Conflict*, above n 39, 283.

[54] Art 64.

[55] See generally Graber, above n 47, and A Roberts, 'What Is a Military Occupation?' (1984) 55 *British Year Book of International Law* 249.

[56] See A Roberts, 'Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967' (1990) 84 *American Journal of International Law* 44, especially 47.

[57] *The Christian Society for the Sacred Places v Minister of Defence*, 26 (1) PD 574, 582 (1971) as cited in Benvenisti, above n 39, 146.

new and sometimes long-term measures have to be taken in response to new problems is 'powerful', while raising the problem of how to assess the changing needs of the population.[58] Coupled with the unfortunate fact that many military occupiers have in the recent past simply refused to accept and apply the rules of belligerent occupation with regard to the territory they control,[59] it is clear that the traditional rules are under some pressure

(ii) Traditional Occupation Plus—The Application of International Human Rights Law The question of the application of treaties generally to occupied territory has long been an issue,[60] with particular resonance for international human rights law. In recent years, the issue has been faced as a consequence of the evolving range of such rights, the increasing penetration of international human rights law into domestic legal system, and the changes in the nature of occupation governance. Human rights has long been seen by the international community as relevant to armed conflicts, ironic as this may seem,[61] and where the parties are subject to a particular human rights regime implemented by a judicial mechanism this becomes clear and evident.[62] The UK Manual of the Law of Armed Conflict, for example, concludes that:

> Where the occupying power is a party to the European Convention on Human Rights the standards of that Convention may, depending on the circumstances, be applicable in the occupied territories.[63]

One particular issue of more general issue before the English courts concerns the relationship between human rights law and Security Council resolutions, and the House of Lords has taken the position that the European Human Rights Convention provisions concerning liberty and security of persons must give way to the provisions of Security Council resolution 1546 permitting the post-occupation multinational

[58] Roberts, above n 56, 94.

[59] See, eg, the Moroccan occupation of Western Sahara since 1974, the Indonesian occupation of East Timor from 1975 to 1999, territories occupied by Eritrea and Ethiopia since the conflict of 1998, the occupation of part of the Democratic Republic of Congo by Uganda and Rwanda, and the occupation of Northern Cyprus by Turkey since 1974.

[60] See, eg, Roberts, above n 56, 70, and T Meron, 'Applicability of Multilateral Conventions to Occupied Territories', (1978) 72 *American Journal of International Law* 542.

[61] See, eg, UNGA Res 2444 (XXIII) (19 December 1968).

[62] See, eg, *Cyprus v Turkey* (Judgement) ECHR 10 May 2001.

[63] *UK Manual of the Law of Armed Conflict*, above n 39, 282. See also as to the application of the European Convention of Human Rights to the British occupation of and subsequent presence in southern Iraq, the decisions of the House of Lords in *Al-Skeini v Secretary of State for Defence* [2007] UKHL 26 and *Al-Jedda v Secretary of State for Defence* [2007] UKHL 58. See also *Coard v United States,* Report No 109/99, 29 September 1999, for the view expressed by the Inter-American Commission on Human Rights that the US was bound by relevant rules of humanitarian law and human rights law in the Grenada intervention.

force in Iraq to intern people for imperative reasons of security as a consequence of the operations of Article 103 of the Charter, whereby Charter obligations prevail over obligations under any other international agreement.[64]

More generally, the International Court has discussed the relationship between international humanitarian law and international human rights law. In its advisory opinion on the Legality of the Threat of Use of Nuclear Weapons, the court emphasised that

> the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency

and in such cases the matter will fall to be determined by the applicable *lex specialis,* ie, international humanitarian law.[65] The court returned to this matter in its advisory opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, where it declared more generally that:

> the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind found in Article 4 of the International Covenant on Civil and Political Rights.[66]

As to the relationship between international humanitarian law and human rights law, the court noted that there were three possible situations. First, some rights might be exclusively matters of humanitarian law, some rights might be exclusively matters of human rights law and some matters may concern both branches of international law.[67] It was essentially a question of interpretation of the particular instrument in question. In particular, the jurisdiction of states, while primarily territorial, may sometimes be exercised outside the national territory and in such a situation the International Covenant and other relevant human rights treaties had to be applied by state parties.[68] In reaching this conclusion, the court clearly relied, albeit implicitly, upon the evolution of the jurisprudence of the European Court of Human Rights (ECHR) with

[64] *Al Jedda v Secretary of State for Defence* [2007] UKHL 58 at para 26ff.
[65] [1966] ICJ Rep 239.
[66] [2004] ICJ Rep, para 106.
[67] *Ibid.*
[68] *Ibid*, paras 109, 112 and 113. This was a matter of interpretation of the Covenant and of the practice of the Human Rights Committee established thereunder, *ibid.* See also *Banković v Belgium*, decision of 12 Dec 2001, with regard to a similar statement concerning the European Convention on Human Rights.

regard to the meaning of 'jurisdiction' contained in Article 1 of the European Convention,[69] as well as the practice of the UN human rights organs and the general principle of state responsibility for the acts of its organs which would obviously include members of its armed forces.[70] The court interestingly referred to the prolonged occupation question, observing in this human rights context, although specifically dealing with the International Covenant on Economic, Social and Cultural Rights, that 'the territories occupied by Israel have for over 37 years been subject to its territorial jurisdiction as the occupying Power' and then noting that

> In the exercise of the powers available to it *on this basis,* Israel is bound by the provisions of the International Covenant on Economic, Social and Cultural Rights.[71]

The court returned to the question of the relationship between international humanitarian law and international human rights law in *Democratic Republic of Congo v Uganda*, and reaffirmed that:

> international human rights instruments are applicable 'in respect of acts done by a State in the exercise of its jurisdiction outside its own territory', particularly in occupied territories.[72]

A series of international human rights instruments was listed as being applicable with regard to the Congo situation, including the International Covenants on Human Rights, the Convention on the Rights of the Child, and the African Charter on Human and Peoples' Rights.[73] It was concluded that Uganda was responsible for various violations of international human rights law and international humanitarian law, including those committed by virtue of failing to comply with its obligations as an occupying power.[74] Reference was also made to the violation of Article 47 of the Hague Regulations and Article 33 of the Fourth Geneva Convention and of the African Charter on Human and Peoples' Rights with regard to the exploitation of the natural resources of Congo.[75]

Accordingly, it is now accepted that the law applicable in occupation

[69] See, eg, *Loizidou v Turkey* (Judgment) ECHR 18 December 1996; *Cyprus v Turkey* (Judgment) 10 May 2001; *Ilaşcu v Moldova and Russia* (Judgment) 8 July 2004 and *Asanidze v Georgia* (Judgment) 8 April 2004.

[70] See, eg, *Difference Relating to Immunity from Legal Process of a Special Rapporteur* [1999] ICJ Rep 87 and *Democratic Republic of Congo v Uganda* [2005] ICJ Rep, paras 213–4. See also the International Law Commission's Articles on State Responsibility, 2001, A/56/10, Art 4; and UNGA Res 56/83 (12 December 2001).

[71] *Legal Consequences of the Construction of a Wall,* above n 40, para 112 (emphasis added).

[72] [2005] ICJ Rep, para 216.

[73] *Ibid*, paras 217–18.

[74] *Ibid*, paras 219–20.

[75] *Ibid*, paras 245–50.

situations includes multilateral human rights instruments to which the occupying power is a party. This means inevitably not only that the organs and agents of the occupying power must act in conformity with the provisions of such instruments, but also that the population is entitled to the benefit of their application, and as such it must follow that laws and practices already in operation in the territory prior to the occupation that do not meet these human rights standards must be modified. Thus, the application of human rights law in these situations impacts upon the powers and duties of the occupier and affects the traditional attempts to balance military necessity and humanity in any occupation.

(iii) Occupation Mutating—Israel, the Palestinian Territories and the Palestinian Authority A fascinating example of the slow mutation of occupation into the envisaged establishment of a new and recognised sovereign is provided by the situation in what is termed the Palestinian Territories, ie, the West Bank of the Jordan River and the Gaza Strip, captured respectively from Jordan and Egypt in 1967.[76]

Under the Declaration on Principles on Interim Self-Government Arrangements signed by Israel and the Palestine Liberation Organisation (PLO) on 13 September 1993 (following an exchange of letters whereby the PLO recognised Israel's right to exist and Israel recognised the PLO as the representative of the Palestinian people), a transitional period of up to five years of Palestinian interim self-government in the West Bank and the Gaza Strip was posited and a transfer of certain powers and responsibilities to the newly created Palestinian institutions provided for. This took place by virtue of the Cairo Agreement of 4 May 1994 on the Gaza Strip and Jericho; an Agreement on Preparatory Transfer of Powers and Responsibilities of 29 August 1994, passing powers to the Palestinian Authority in the areas of education, social welfare, tourism health and taxation; a protocol of 27 August 1995 transferring powers in the areas of labour, trade and industry, gas and gasoline, insurance, postal services, statistics, agriculture and local government; the Interim Agreement of 28 September 1995 incorporating and superseding earlier agreements; an agreement on a Temporary International Presence in Hebron of 9 May 1996; the Hebron Protocol of 17 January 1997; the Wye River Memorandum of 23 October 1998; and the Sharm el-Sheikh Agreement of 4 September 1999.

The withdrawal of Israeli forces and citizens and facilities from the

[76] See, eg, Crawford, above n 29, 442ff; A Shapira and M Tabory (eds), *New Political Entities in Public and Private International Law* (The Hague, Kluwer, 1999); E Benvenisti, 'The Status of the Palestinian Authority' in E Cotran and C Mallat (eds), *Arab-Israeli Accords: Legal Perspectives* (Boston, MA, Kluwer Law, 1996); E Benvenisti, 'The Israeli–Palestinian Declaration of Principles: A Framework for Future Settlement' (1993) 4 *European Journal of International Law* 542; and P Malanczuk, 'Some Basic Aspects of the Agreements Between Israel and the PLO from the Perspective of International Law', (1996) 7 *European Journal of International Law* 485.

Gaza Strip in August and September 2005 (and from four northern West Bank settlements) needs also to be noted. Although Israel continues to control maritime, airspace and most land access to the Gaza Strip, an agreement was signed in November 2005 providing for the reopening of the Rafah border crossing between Gaza and Egypt under joint Palestinian Authority and Egyptian control with monitoring provided by the European Union.

The effect of these agreements was to establish a territorial and personal jurisdictional patchwork of powers and responsibilities pending a final status solution. In particular, the following points should be noted. First, the agreements deal with the gradual shift from full belligerent occupation of the territories by Israel to an agreed 'final status' depending upon the wishes and consent of the parties. Second, the territorial framework for the exercise of powers by the Palestinian authorities was described as 'West Bank and Gaza territory', ie, with the omission of the definite article, thereby leaving open the possibility that some areas may not fall under Palestinian jurisdiction in the interim period.[77] Thus redeployment matters covered in the agreements do not cover areas which are 'issues that will be negotiated in the final status negotiations', such as Jerusalem, settlements, specified military locations, Palestinian refugees, borders, foreign relations and Israelis.[78] Third, an additional exception to redeployment is constituted by 'Israel's overall responsibility for Israelis and borders'.[79] Fourth, Israeli forces are to be redeployed to 'specified military locations' to be determined by Israel.[80] Fifth, powers and responsibilities not transferred to the Palestinian Council were reserved to Israel.[81] Sixth, following the redeployment of Israeli forces, Palestinian jurisdiction covered two areas. Area A comprised the cities of Jenin, Nablus, Tulkarem, Kalkilya, Ramallah, Bethlehem and Jericho, containing some 26 per cent of the Palestinian population in which the Palestinian Council, elected in January 1996, was given full responsibility for internal security and public order as well as full responsibility for civil affairs. The city of Hebron was rendered subject to special arrangements set out in the Interim Agreement and the 1997 Protocol. Area B comprised the Palestinian towns and villages in the West Bank, containing some 70 per cent of the Palestinian population, where the Palestinian Council assumed full civil authority and responsibility for public order, while

[77] See Israeli–Palestinian Interim Agreement on the West Bank and the Gaza Strip (28 September 1995) Art XI.2. To be contrasted with references in the Gaza–Jericho agreement which referred to 'withdrawal from *the* Gaza Strip and Jericho', Arts V and VI of the Declaration of Principles on Interim Self-Government Arrangements (13 September 1993) (hereafter 'Declaration of Principles') (emphasis added).

[78] Interim Agreement, Art XVII.

[79] *Ibid*, Art XIII.2b(8).

[80] *Ibid*, Art XI.2(f).

[81] Declaration of Principles, Art VII (5).

Israel retained overriding security responsibility to safeguard its citizens and combat terrorism. A third area, C, comprised the largely unpopulated areas of the West Bank deemed of strategic value to Israel together with Jewish settlements. In these areas, Israel retained full responsibility for security and public order and civil responsibilities related to the territory, such as planning and archaeology; the Palestinian Council has civil responsibility for all other civil spheres. The first and second phases of the redeployment were completed in March 2000, at which point some 40 per cent of the West Bank, comprising some 98 per cent of the Palestinian population, was under full Palestinian civilian control and full or partial security control.

In this situation, it is necessary to emphasise two points. First, that the Palestinian Authority emerging out these agreements is not identical to the PLO, recognised by the international community and by Israel as the representative of the Palestinian people, but is rather an entity deriving its legitimacy and powers from the agreements.[82] Secondly, the effect of these agreements is not to terminate as such the status of belligerent occupation. Indeed, Article XXXI (7) of the Interim Agreement specifically states that neither side shall initiate or take any step that will change the status of the West Bank and Gaza pending the outcome of negotiations, while Article XXXI (8) provides that the status of these areas will be preserved during the interim period. Thus both Israeli annexation and a unilateral declaration of Palestinian independence are precluded.[83]

In principle, therefore, Israel remains the occupying power and retains its international powers and responsibilities. Those powers and responsibilities transferred to the Palestinian Authority may be seen as an exercise in delegation and the creation of an autonomous zone coupled with certain self-imposed constraints upon Israeli action. However, this does leave a grey area where actions are undertaken by Palestinian forces free from Israeli control and thus to some extent, but only to some extent, free from its jurisdiction. To that extent, and bearing in mind the nature of the agreements between Israel and the PLO, a rather curious occupation regime has emerged with a clear co-occupation element.

(iv) Occupation Plus Plus—The Case of Iraq 2003–4: A New Model Occupation? In the letter from the Permanent Representatives of the UK and the USA to the Security Council on 8 May 2003, following the military operations commenced against Iraq on 20 March 2003, the two states concerned noted that:

[82] See, eg, Crawford, above n 29, 444–5 and OM Dajani, 'Stalled Between Seasons: The International Legal Status of Palestine During the Interim Period' (1997) 26 *Denver Journal of International Law and Policy* 27.

[83] See, eg, J Singer, 'The Oslo Peace Process: A View from Within', in *New Political Entities*, above n 76, 17, 49.

> The States participating in the Coalition will strictly abide by their obligations under international law, including those relating to the essential humanitarian needs of the people of Iraq

and informed the Council of the creation of the Coalition Provisional Authority 'to exercise powers of government temporarily'.[84] On 22 May 2003, the Security Council adopted resolution 1483 (2003), described by Benvenisti as 'a rare and significant event in the history of the troubled law on occupations'.[85] Essentially this resolution both affirmed the position of the UK and US as occupying powers in Iraq under international law and placed a range of other powers and responsibilities upon them over and above the law relating to occupation.[86] This was accepted by the occupying powers. CPA Regulation No 1 (16 May 2003) declared that the Authority was

> vested with all executive, legislative and judicial authority necessary to achieve its objectives, to be exercised under relevant UN Security Council resolutions, including Resolution 1483 (2003), and the laws and usages of war,

while CPA Memorandum No 3 on Criminal Procedures specifically stated that the CPA was acting 'consistent with the Fourth Geneva Convention of 1949 Relative to the Treatment of Civilians in Time of War' and that the provisions therein set out 'give effect to the requirements of international humanitarian law' (section 1(2)). The formal status of occupation ended on 28 June 2004 with the formal handover of authority to the Iraqi Interim Government, as recognised in Security Council resolution 1546.

Resolution 1483 recognised in the preamble

> the specific authorities, responsibilities and obligations under applicable international law of these States [UK and US] as occupying powers under unified command (the 'Authority')

thereby according UN acceptance of the concept of occupation both generally and particularly with regard to the Iraq situation. The resolution also noted that other states 'not occupying powers are working now or in the future may work under the Authority', thus rendering such states subject to the rules and principles contained both in occupation law

[84] S/2003/538.

[85] See E Benvenisti, 'Water Conflicts During the Occupation of Iraq' (2003) 97 *American Journal of International Law* 860 and *ibid*, 'The Security Council and the Law on Occupation: Resolution 1483 on Iraq in Historical Perspective' (2003) 1 *IDF Law Review* 19, 20.

[86] See generally, 'Iraq: Law of Occupation', House of Commons Research Paper 03/51, 2 June 2003; Benvenisti, *ibid*; M Hmoud, 'The Use of Force Against Iraq: Occupation and Security Council resolution 1483' (2004) 36 *Cornell International Law Journal* 435; D Scheffer, 'Beyond Occupation Law' (2003) 97 *American Journal of International Law* 842; GH Fox, 'The Occupation of Iraq' (2005) 36 *Georgia Journal of International Law* 195.

and under the resolution. What is particularly interesting is the extent to which the resolution expands the range of the competence of the occupying powers (and other relevant states) beyond those flowing from the traditional law of occupation.[87]

The following provisions are particularly relevant. Operative paragraph 4

> calls upon the Authority [which includes states not being occupying powers themselves], consistent with the Charter of the United Nations and other relevant international law, to promote the welfare of the Iraqi people through the effective administration of the territory, including . . . the creation of conditions in which the Iraqi people can freely determine their own political future.

Paragraph 22 noted 'the relevance of the establishment of an internationally recognised, representative government of Iraq'. Paragraph 8 calls upon the Secretary General to appoint a Special Representative for Iraq whose independent responsibilities were to include 'in coordination with the Authority', assisting the people of Iraq across a range of activities, including

> working intensively with the Authority, the people of Iraq and others to advance efforts to restore and establish national and local institutions for representative governance . . . promoting the protection of human rights . . . [and] . . . encouraging international efforts to promote legal and judicial reform.[88]

Such provisions clearly go beyond the minimalist competences in such matters in the traditional law of occupation. In addition to requiring the occupying powers in the form of the Authority to effectively administer the territory for the welfare of the population and create the framework for democratic expression, the Authority was also obliged to act, with others, to create national and local representative institutions and an internationally recognised representative government. Further, the Authority, in co-ordination with the Special Representative, was required to promote human rights and legal and judicial reform.[89]

This approach may also be linked with the unique provisions in the resolution for international monitoring. Paragraph 8, as noted, called for the appointment of a Special Representative for Iraq with substantial

[87] Operative para 5 'calls on all concerned to comply fully with their obligations under international law, including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907'.

[88] Para 8(a), (b), (c), (d), (e), (g) and (i). Para 9 provides the support of the Council for the 'formation, by the people of Iraq with the help of the Authority and working with the Special Representative, of an Iraqi interim administration as a traditional administration run by Iraqis, until an internationally recognised, representative government is established by the people of Iraq and assumes the responsibilities of the Authority'.

[89] See for criticism of this, Hmoud, above n 86, 448–9.

co-ordinating responsibilities, reporting to the Council, while an International Advisory and Monitoring Board[90] of the Development Fund for Iraq was established with the duty to approve the appointment of independent public accountants to audit the Development Fund and all export sales of petroleum, petroleum products and natural gas.[91] Further, the Secretary General was asked to continue or commence the exercise, in co-ordination with the Authority, of responsibilities for a six-month period in order to terminate the UN oil-for-food programme and after this period to transfer the administration of any remaining activity under the programme to the Authority.[92] The Secretary General was also requested to transfer as soon as possible to the Development Fund for Iraq $1 billion from funds held pursuant to resolutions 778 (1992) and 986 (1995).[93]

Thus, both in the range of competences exercisable by the occupying powers, particularly in the human rights, welfare and economic fields,[94] and by the establishment of various monitoring mechanisms, resolution 1483 marks a highly significant step in the evolution of the law of occupation, and a consequential shift in the traditional balance between military necessity and humanitarian considerations. In addition, the aims of the occupation and the methodology of seeking to achieve them are markedly different. In traditional occupations, the aim of the occupation was simply to hold on to the territory with minimal cost to the occupier and the occupied pending a peace settlement which almost invariably involved the return of the territory to the dispossessed sovereign. In Iraq, the aim of the occupation was to ensure that the previous regime could not return to power and that the whole political, social, economic and legal system be totally transformed. Therefore, even the approach of the traditional occupation as supplemented by human rights law has been overtaken in this major exercise in societal reordering as internationally mandated.

As Crawford has written, the broad responsibilities laid down in resolution 1483 'would be difficult to satisfy if the general obligations of

[90] The membership of the Board was to include duly qualified representatives of the Secretary General, of the Managing Director of the International Monetary Fund, of the Director General of the Arab Fund for Social and Economic Development and of the President of the World Bank.

[91] Paras 12, 20.

[92] Para 16.

[93] Para 17.

[94] Note, eg, the new laws adopted by the Authority with regard to foreign investments (CPA Order No 39, 19 September 2003), securities markets (CPA Order No 74, 18 April 2004), copyright law (CPA Order No 83, 1 May 2004) and anti-money-laundering legislation (CPA Order No 93, 3 June 2004), as well as those establishing a property claims commission (CPA Regulation No 12, 23 June 2004) and banning former members of the Ba'ath Party from public-sector employment (CPA Order No 1, 16 May 2003).

an occupying power were observed'.[95] The key question, therefore, is on what basis did this new model occupation framework arise? Since there was in the Iraq case clearly no consent by the population to such arrangements, the only answer can be with regard to the Chapter VII powers of the Security Council.

III. CONTROL OF TERRITORY BY AN INTERNATIONAL AUTHORITY

A. As a Mechanism to Pass Sovereignty or Territorial Control to the Recognised Sovereign

In a number of situations and for various reasons spreading over a century, the international community has assumed control of a territory.[96] Such international administration has sometimes been in order to act as a procedural device whereby sovereignty would pass with as little disruption as possible from the recognised sovereign or effective controller of the territory to a recipient recognised by the international community as the correct and appropriate beneficiary. These are cases where there is little or no serious dispute as to the ultimate destination of title to the territory in question, but considerable difficulties in practice with regards to the process of transmission itself.[97]

B. Within States

A number of examples may be noted here of the use of international administration as a methodology to pass control from one entity to the

[95] Crawford, above n 29, 563. See also V Lowe, 'The Iraq Crisis: What Now?' (2003) 52 *International and Comparative Law Quarterly* 859

[96] See, eg, S Chesterman, *You, The People: The United Nations, Territorial Administration and State-building* (Oxford University Press, 2004); R Caplan, *A New Trusteeship? The International Administration of War-torn Territories* (Adephi Paper No 341, Oxford University Press, 2002); M Ydit, *Internationalised Territories* (Leyden, Sythoff, 1961); SR Ratner, 'Foreign Occupation', above n 23; R Wilde, 'From Danzig to East Timor and Beyond', above n 22; *ibid*, 'The Complex Role of the Legal Adviser When International Organisations Administer Territory' (2001) 95 *Proceedings of the American Society of International Law* 251; *ibid*, 'Representing International Territorial Administration: A Critique of Some Approaches' (2004) 15 *European Journal of International Law* 71; *ibid*, 'The United Nations as Government: The Tensions of an Ambivalent Role' (2003) 97 *Proceedings of the American Society of International Law* 212; MJ Matheson, 'United Nations Governance of Postconflict Societies' (2001) 95 *American Journal of International Law* 76.

[97] This chapter does not deal with the supervisory responsibility of the League of Nations or the United Nations with regard to mandate and trust territories respectively, nor the failed arrangements with regard to Jerusalem or Trieste, see generally Ydit, above n 96, chs 3 and 4, 231–72 and 273–315.

recognised sovereign within a state where there was no dispute as to the territorial sovereignty of the state in question.

The area of Eastern Slavonia within Croatia was controlled by insurgent Serb forces from the outbreak of the armed conflict over the future of Yugoslavia. An agreement was signed on 12 November 1995 between Croatia and the Serb forces providing for a period of UN administration pending reincorporation into Croatia, and the United Nations Transitional Administration in Eastern Slavonia (UNTAES) came into existence.[98] Security Council resolution 1037 (1996) laid down the mandate of UNTAES as the peaceful reintegration of the area[99] into the Republic of Croatia including demilitarisation, the return of refugees and displaced persons, the reconstruction of the region, and the organisation of free and fair elections. The resolution also stressed the importance of full respect for human rights and fundamental freedoms in the territory.[100] The employment, educational and health sectors were integrated, social and security was essentially achieved, and the political rights of the local Serbs guaranteed by a Croatian letter of intent by autumn 1997; the mandate ended on 15 January 1998.[101]

Mostar was a city divided into Croat and Bosniak (Muslim) sectors, within Bosnia and Herzegovina. In the face of the deep inability to reach any kind of agreement, the two parties signed a Memorandum of Understanding on 6 April 1994 in Geneva empowering the European Union to administer Mostar until a more permanent solution could be reached.[102] A Memorandum of Understanding signed on 5 July 1994 by the states of the European Union, the Western European Union who supplied the police force, the Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and local Mostar administrators laid down the legal framework for the EU administration of Mostar. The EU administration was accorded legislative and executive powers,[103] organised, inter alia, the spending of reconstruction funds, and secured the parties' agreement to an Interim Statute regulating the city's governance on 7

[98] Croatia–local Serbian Community: Basic Agreement on the Region of Eastern Slavonia, Baranja and Western Sirmium, (1996) 35 *International Legal Materials* 184. See also M Bothe, 'The Peace Process in Eastern Slavonia' (December 1996–January 1996) *International Peacekeeping* 6, and JP Klein, 'The United Nations and Administration of Territory: Lessons from the Front Line, The United Nations Transitional Administration in Eastern Slavonia (UNTAES)' (2003) 97 *Proceedings of the American Society of International Law* 205.

[99] Eastern Slavonia, Baranja and Western Sirmium.

[100] See also UNSC Res1043 (31 January 1996), UNSC Res 1079 (15 November 1996), UNSC Res 1120 (14 July 1997) and UNSC Res 1145 (19 December 1997).

[101] See Klein, above n 98, 207–9.

[102] See, eg, International Crisis Group, *Reunifying Mostar: Opportunities for Progress*, April 2000, and *ibid*, *Building Bridges in Mostar*, November 2003.

[103] Note that Art 7(1) of the Memorandum stipulated that the EU administration had to exercise its authority in conformity with the overall principle of subsidiarity, taking due account of the views and wishes of the local parties and population.

February 1996, which has had in practice little success.[104] At the date agreed in the July 1994 Memorandum of Understanding of 22 July 1996, the responsibilities of the EU administration were transferred to a Special Envoy of the European Union in the city of Mostar.[105] From January 1997, these responsibilities passed to the Office of the High Representative in Bosnia and Herzegovina and a regional office was opened in the city. A Statute of the City of Mostar was adopted on 28 January 2004.

The area of Brčko within Bosnia and Herzegovina was disputed between the Serbs and the Bosniaks and the issue remained unresolved at the Dayton peace conference in 1995.[106] Article V of Annex 2 of the Dayton Peace Agreement provided for binding arbitration 'of the disputed portion of the Inter-Entity Boundary Line in the Brčko area'. The tribunal's first award was published on 14 February 1997.[107] Noting that the Republika Srpska had failed to implement its obligations under the Dayton accords to permit the return of refugees and allow free movement in that part of Brčko under its control, the tribunal authorised the establishment for one year of 'interim international supervision of Dayton implementation in the Brčko area'. The Supervisor was given a specific mandate including the phased and orderly return of refugees and displaced persons, enhancement of democratic government and a multi-ethnic administration of the town of Brčko, ensuring freedom of movement, the establishment of normal democratic policing function and the promotion of economic revitalisation. The Supervisor (and Deputy High Representative) was empowered to issue binding orders and regulations in furtherance of his mandate.

This mandate was reaffirmed and strengthened in the Tribunal's supplemental award of 15 March 1998, in which it was ruled, inter alia, that the Supervisor should have the same powers as those conferred on the High Representative of Bosnia and Herzegovina, including the authority to sack any public official who obstructed the implementation of the Dayton agreement, and to strengthen democratic institutions and revive the economy in the Brčko area.[108] A final award was issued on 5 March 1999 (and Annex published on 18 August 1999). This established a special district for the pre-war Brčko *Opstina,* under the exclusive sovereignty of Bosnia and Herzegovina, with the territory belonging to the two

[104] The principles of which had already been agreed at the Dayton conference and included as an Annex to the Dayton Agreement 1995. See International Crisis Group, *Building Bridges,* above n 102, 1 and 3.

[105] See EU Joint Action of 15 July 1996, 96/442/CFSP.

[106] See, eg, International Crisis Group, *Brčko Arbitration,* August 1996; *ibid*, *Brčko: A Comprehensive Solution*, February 1999 and *ibid*, *Bosnia's Brčko: Getting On and Getting Out,* June 2003, 4. See also PC Farrand, 'Lessons from Brčko: Necessary Components for Future Internationally Supervised Territories' (2001) 15 *Emory International Law Review* 529.

[107] See (1997) 36 *International Legal Materials* 396.

[108] Award, 272.

entities (Republika Srpska and the Federation of Bosnia and Herzegovina). The demilitarised district was to be self-governing with a single, unitary, multi-ethnic and democratic government and a unified and multi-ethnic police force and independent judiciary, with extensive powers reserved to the Supervisor, including the right to select voting mechanisms, dissolve existing municipal assemblies, disband and reconstitute municipal governments, appoint initially members of the judiciary and prosecutorial services, appoint the first chief of police, have the final word on the budget, and to transfer publicly owned property to the administration of the district and to privatise it in accordance with Bosnian law.[109] This was described in an International Crisis Group report as creating 'a fully fledged if small scale international trusteeship'.[110] The High Representative of Bosnia issued a Decision on the Establishment of the Brčko District of Bosnia and Herzegovina on 8 March 2000 formally creating the District as a special unit of local self-government under Bosnian sovereignty.[111] A Statute was declared to be in force and an interim government appointed pending elections by orders of the Supervisor on that same date.[112]

C. As Between a Third Party Controlling Administration and a Recognised Sovereign

A second category is where an international authority is introduced as a method of transmitting power between a third-party-controlled administration, often of controversial legitimacy, and an entity recognised internationally as the beneficiary of sovereign title, in circumstances where direct action is not politically feasible. Several examples may be given here.

(1) Leticia

In 1932, Peruvian irregular forces captured the Colombian town and district of Leticia in violation of the treaty between the states of 24 March 1922 that ceded the territory to Colombia.[113] Following the involvement of the League of Nations, the parties concluded an agreement on 25 May 1933 under which the territory was entrusted to a special League of Nations Commission, acting in the name and at the expense of Colombia,

[109] Annex of the Final Award. See also *Bosnia's Brčko,* above n 106, 9–11.

[110] *Bosnia's Brčko,* above n 106, 9. See also (2000) 39 *International Legal Materials* 879.

[111] See www.ohr.int. See also the Report from the Supervisor of Brčko to the Peace Implementation Council of 18 March 2004, available at www.ohr.int.

[112] *Bosnia's Brčko*, above n 106, 13.

[113] See, eg, Ydit, above n 96, 59ff; L Woolsey, 'The Leticia Dispute between Colombia and Peru' (1935) 29 *American Journal of International Law* 94; and Wilde, above n 22, 587.

for a period of one year pending a resolution of the dispute. In the event the parties reached an agreement on 24 May 1934, and the territory was handed over by the Commission to the Colombian authorities. The short period of League administration essentially enabled Colombia to regain control, while maintaining a critical symbolic presence in the territory during this period,[114] and allowed Peru a measure of face-saving as well as providing a point of pressure to encourage Colombia to come to a comprehensive border settlement.

(2) Libya

The Peace Treaty with Italy in 1947 authorised the Allied Powers to determine the future status of the former Italian colony of Libya. The question was passed on to the UN General Assembly, which appointed a UN Commissioner for Libya with the aim of preparing the territory for independence.[115] The territory was administered by the two Administering Powers (UK and France) in co-operation with the UN Commissioner, and the territory became independent on 24 December 1951.[116]

(3) West Irian

West Irian (West New Guinea) was a Dutch colony which remained under Dutch control after the rest of the Dutch East Indies came to independence as Indonesia, and its future was disputed between the two states.[117] Ultimately, it was agreed that the Netherlands would transfer administration of the territory to a UN Temporary Executive Authority (UNTEA) under the jurisdiction of the Secretary General, which would pass control to Indonesia.[118] UNTEA was to have full authority to administer the territory in accordance with the agreement, including the power to legislate and to replace Dutch officials with non-Indonesian ones. The costs of the administration were shared between the two states. Control over the territory was established on 1 October 1962 and transferred to Indonesia after 1 May 1963.

[114] Eg, it provided troops for the Commission and its flag flew alongside that of the League, Ydit, above n 96, 61.

[115] See UNGA Res 289 (21 November 1949). See also Ydit, above n 96, 68–9; Crawford, above n 29, 554–5; and A Pelt, *Libyan Independence and the United Nations: A Case of Planned Decolonisation* (New Haven, Yale University Press, 1970).

[116] Ydit, above n 96, 69.

[117] See, eg, Crawford, above n 29, 555 and DW Bowett, *United Nations Forces* (London, Stevens, 1964) 255–61.

[118] Indonesia–Netherlands Agreement of 15 August 1962. See also UNGA Res 1752 (XVII) (21 September 1962).

(4) Namibia

In October 1966, the General Assembly resolved that since South Africa had failed to fulfil its obligations, its mandate over South West Africa (Namibia) was therefore terminated and the territory was to come under the direct authority of the United Nations.[119] The UN Council for Namibia was established as the legal administering authority over the territory pending independence.[120] Decree No 1 of the Council declared null and void permits or licenses issued by South Africa with regard to the exploitation of natural resources in the territory and forbade such activities.[121] The Council also issued travel documents, but was refused entry into the territory. It remained essentially ineffective. SWAPO (the South West Africa People's Organisation) was recognised in 1973 as the representative of the Namibian people with regard to the 'international territory of Namibia'.[122] In 1978, South Africa accepted the proposals negotiated by the five Western contact powers for Namibian independence involving elections supervised by a UN Transitional Assistance Group and peacekeeping forces.[123] After some difficulties,[124] Namibia obtained its independence and was admitted to the United Nations on 23 April 1990.[125]

(5) East Timor

One of the major examples of UN territorial administration in this context has taken place with regard to East Timor. Portugal evacuated its colony in 1975 amidst domestic upheavals, and Indonesia took control and pur-

[119] See UNGA Res General Assembly resolution 2145 (XXI) (27 October 1966). See also J Dugard, *The South West Africa/Namibia Dispute* (Berkeley, University of California Press, 1973) and S Slonim, *South West Africa and the United Nations* (Baltimore, Johns Hopkins University Press, 1973). See also LL Herman, 'The Legal Status of Namibia and of the United Nations Council for Namibia' (1975) 13 *Canadian Yearbook of International Law* 306.

[120] See UNGA Res 2248 (XXII) (19 May 1967), S-9/2, 1978, 33/182 (C).

[121] 27 September 1974. See also UNGA Res 35/227/I (6 March 1981) and 43/29 (22 November 1988). This decree was described by the UN Commissioner for Namibia as a 'new and strange concept', A/AC.131/81, 18 July 1980.

[122] UNGA Res 3111 (XVIII) (12 December 1973). See also UNSC Res (24 January 1969), UNSC Res 269 (12 August 1969), UNSC Res 276 (30 January 1970) and the *Namibia case (*Advisory opinion) [1971] ICJ Rep 16, approved in UNSC Res 301 (20 October 1971).

[123] (1978) 17 *International Legal Materials* 762–9. See UNSC Res (29 September 1978). See also VP Fortna, 'United Nations Transition Assistance Group in Namibia', in WJ Durch (ed), *The Evolution of UN Peacekeeping* (New York, St Martin's Press, 1994) 353.

[124] See, eg, S/14459, S/14460/Rev 1, S/14461 and S/14462.

[125] Note also the role of the UN with regard to Western Sahara. The UN Mission for a Referendum in Western Sahara (MINURSO) was established in Security Council resolution 690 (1991) to implement a peace plan proposed by the Secretary General (S/21360 and S/22464). MINURSO has been mandated to monitor the ceasefire, oversee the exchange of prisoners and organise a referendum. To date no such referendum has been held. MINORSO's mandate was extended in Security Council resolution 1675 (2006).

ported to annex it shortly thereafter.[126] The Security Council reaffirmed the right of the territory to self-determination and called upon Indonesia to withdraw its forces.[127] Eventually in 1999 Portugal and Indonesia agreed to a popular consultation under UN auspices.[128] This was supported by the Security Council[129] and a UN Mission in East Timor (UNAMET) was established.[130] The referendum rejected Indonesia's proposal of autonomy status, and violence by pro-Indonesian militias ensued.[131] As a result, the Security Council adopted resolution 1264 (1999) condemning the violations of human rights and humanitarian law, and acting under Chapter VII of the Charter, a multinational force (INTERFET) was authorised. This force, under Australian command, began to deploy on 20 September 1999. In resolution 1272 (1999), the Security Council established the UN Transitional Administration in East Timor (UNTAET) with a wide-ranging mandate to administer the territory.[132] By Regulation No 1 adopted on 27 November 1999, all legislative and executive authority with respect to East Timor, including the administration of the judiciary, was vested in UNTAET and exercised by the Transitional Administrator. This Administrator was given the competence further to appoint any person to perform functions in the civil administration in the territory, including the judiciary, or remove such person and to issue regulations and directives.

UNTAET was further to administer all immovable and movable property of the Republic of Indonesia or its organs and agencies in the territory of East Timor. All persons undertaking public duties or holding public office were to observe internationally recognised human rights standards.[133] The applicable law was stated to be the pre-25 October

[126] See, eg, Crawford, above n 29, 560ff; C Stahn, 'The United Nations Transitional Administrations in Kosovo and East Timor: A First Analysis' (2001) 5 *Max Planck Yearbook of United Nations Law* 105; H Strohmeyer, 'Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor' (2001) 95 *American Journal of International Law* 46; M Ruffert, 'The Administration of Kosovo and East Timor by the International Community' (2001) 50 *International and Comparative Law Quarterly* 613; RS Clark, 'East Timor, Indonesia and the International Community' 14 (2000) *Temple International and Comparative Law Journal* 75; J Dunn (ed), *International Law and the Question of East Timor* (Leiden, CIIR, 1995); R Goy, 'L'indépendence du Timor Oriental' (1999) 45 *Annuaire Français de Droit International* 203; and JM Sorel, 'Timor Oriental: Un résumé de l'histoire de droit international' (2000) 104 *Revue Générale de Droit International Public* 37.

[127] See UNSC Res 384 (22 December 197) and 389 (22 April 1976). See also the *East Timor* case [1995] ICJ Rep 90, 96–7.

[128] See S/1999/513.

[129] UNSC Res 1236 (7 May 1999).

[130] UNSC Res 1246 (11 June 1999). See also S/1999/595.

[131] Under the direction, it seems, of the Indonesian military, see UNAMET's analysis, S/1999/976, Annex, para 1.

[132] See also S/1999/24. Note the heavy reliance of UNTAET on the experience of the UN in Kosovo, see Chesterman, above n 96, 63.

[133] In particular, the Universal Declaration on Human Rights (adopted 10 December 1948); the International Covenants on Human Rights (adopted 16 December 1966); the Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965); the

1999[134] local law insofar as it did not conflict with human rights standards, the fulfilment of the mandate of UNTAET under resolution 1272 or any regulation or directive issued by the Transitional Administrator and until replaced by UNTAET Regulations or subsequent legislation of democratically elected institutions of East Timor.[135] UNTAET also set up a National Consultative Council as a mechanism for transition to self-government[136] and signed an agreement with Australia on behalf of the territory to continue the application of the Australian–Indonesian Treaty on the Timor Gap.[137] UNTAET adopted a number of Regulations covering a number of important issues, including the introduction of the dollar as the currency in the territory[138] and the creation of central fiscal authorities.[139]

East Timor became an independent state in 2002 and was admitted as a member of the United Nations on 27 September that year.[140]

B. As a Mechanism to Realise or Sustain a Recognised Settlement

Elements of international administration in one form or another may also be introduced as an important constituent of reaching and maintaining a settlement of a dispute where there are significant and often irreconcilable internal tensions.

The Free City of Danzig was established by the Treaty of Versailles as a compromise in order to ensure Poland's access to the sea, although the population was German. Germany renounced its rights over the territory in favour of the Principal Allied and Associated Powers,[141] who created the Free City as a unit under the protection of the League of Nations and under therefore neither German nor Polish sovereignty.[142] The Free City

Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979); the Convention Against Torture (adopted 10 December 1984) and the International Convention on the Rights of the Child (adopted 20 November 1989) Section 2, Regulation No 1.

[134] The date of adoption of resolution 1272.

[135] UNTAET Regulation 1999/1, s 3. Note the dispute as to whether the local law was Indonesian law or Portuguese law, see S de Bertodano, 'East Timor—Justice Denied' (2004) 2 *Journal of International Criminal Justice* 910; H Strohlmeyer, 'Policing the Peace: Post-Conflict Judicial Reconstruction in East Timor' (2001) 24 *University of South Wales Law Journal* 171, cf *Prosecutor v Armando Dos Santos*, Case No 16/2001 of the East Timor Court of Appeal, 15 July 2003, available at http://jsmp.minihub.org//judgmentspdf/courtofappeal/Ct_ofApp-dos_Santos_English22703.pdf.

[136] Regulation No 2, 1999. See also S/2000/53.

[137] See Crawford, above n 29, 562.

[138] UNTAET Regulation No 2000/7.

[139] UNTAET Regulation No 2000/1.

[140] UNSC Res (23 May 2002) and UNGA Res (20 September 2002).

[141] Art 100. See, eg, Crawford, above n 29, 236–41; Chesterman, above n 96, 20–21 and H Hannum, *Autonomy, Sovereignty and Self-Determination* (Philadelphia, University of Pennsylvania Press, 1990) 375–9.

[142] Art 102.

possessed extensive domestic powers, but its Constitution was guaranteed by the League, which could intervene to implement it.[143] The League also appointed a High Commissioner.[144] The foreign relations of the Free City were undertaken by Poland, by virtue of an international agreement between Danzig and Poland of 9 November 1920.[145] The arrangement collapsed with the outbreak of the Second World War.[146]

In another relevant case, following Vietnamese intervention and an ensuing and vicious civil war, agreements on a comprehensive settlement of the Cambodia conflict were signed on 2 October 1991.[147] The Comprehensive Settlement Agreement created a Supreme National Council as the 'unique legitimate body and source of authority in which, throughout the transitional period, the sovereignty, independence and unity of Cambodia are enshrined'.[148] The Supreme National Council in turn transferred to the United Nations 'all powers necessary to ensure implementation of this Agreement'.[149] The United Nations was invited in particular to set up the UN Transitional Authority in Cambodia (UNTAC) with civilian and military components under the direct responsibility of the UN Secretary General and with the mandate specified in the Agreement.[150] The mandate in question called for the establishment of a neutral political environment conducive to free and fair general elections, with the requirement for such UN control over a wide range of governmental organs, including those dealing with foreign affairs, defence, finance and information, as was necessary to ensure their strict neutrality.[151] There were also provisions concerning the relationship between UNTAC and the Supreme National Council, so that, for example, the former had to follow the advice of the latter if it was acting unanimously (or if Prince

[143] Art 103. See *Treatment of Polish Nationals in the Danzig Territory,* PCIJ Reports, Series A/B, No 44, 21 (1932) and *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City,* PCIJ Reports, Series A/B, No 65, 13 (1935).

[144] However, this did not prevent the Free City from introducing anti-Semitic legislation, following the Nuremberg laws of 1936 in Germany, see Crawford, above n 29, 241, n 211.

[145] See Art 104 of the Versailles Treaty and *Jurisdiction of the Courts of Danzig,* PCIJ Reports, Series B, No 15, 17 (1928). The nature of the arrangement was discussed by the Permanent Court in *Free City of Danzig and the ILO*, PCIJ Reports, Series B, No 18, 13 (1930).

[146] Cf. the position with regard to the Memel Territory in the inter-War period. This was transferred by the Principal Allied and Associated Powers from Germany to Lithuania after the end of the First World War in order to provide that state with a port. However, in view of the fact that the population involved was German, a special regime was established, under Lithuanian sovereignty, with legislative, judicial, administrative and financial autonomy with the limits prescribed by the Statute. See Art 99 of the Versailles Treaty and the Convention Concerning the Territory of Memel 1924 with annexed Statute. See also Crawford, above n 29, 237–8; Lapidoth, above n 14, 77–85 and Hannum, above n 141, 379 –84.

[147] See, eg, SR Ratner, 'The Cambodia Settlement Agreements' (1993) 87 *American Journal of International Law* 1; MW Doyle, *UN Peacekeeping in Cambodia: UNTAC's Civil Mandate* (Boulder, Lynne Rienner, 1995); and Chesterman, above n 96, 74–5.

[148] Art 3. See also to this effect, UNSC Res 668 (20 September 1990).

[149] Art 6.

[150] Art 2.

[151] Art 6.

Sihanouk as the President of the Council provided the advice on its behalf) and if such advice was consistent with the objectives of the Agreement as determined by the head of UNTAC, the Secretary General's Special Representative.[152]

UNTAC was formally established by the Security Council in resolution 745 (1992) for a period not exceeding eighteen months with elections to be held in May 1993.[153] The mandate laid down for UNTAC, unlike that relating to UNTEA in West Irian three decades earlier,[154] was detailed and specific. The provisions concerning civil administration were thorough. The Special Representative was given power, for example, to issue binding directives to a wide range of government agencies and to introduce UN officials with unrestricted access to information and administrative operations, and to remove or reassign existing officials. UNTAC took control of the civil police and other law-enforcement systems and was competent to act against activities deemed inconsistent with a comprehensive political settlement. The mission consisted essentially of seven distinct components: human rights, electoral, military, civil administration, civilian police, repatriation and rehabilitation. Although with only a relatively short duration, UNTAC was the first comprehensive effort by the UN to assume significant elements of control and administration concerning a state.

Bosnia and Herzegovina provides a further example of this usage of international control powers. Recognised as an independent state, the degree of international control over basic governmental functions is nonetheless high. Unlike other situations, however, this international control has been diffuse rather than focused and centralised, involving different agencies. The military component consisted of the NATO-led implementation force, IFOR,[155] and from 20 December 1996 a stabilisation force, SFOR,[156] replaced on 2 December 2004 by the European Union's EUFOR.[157] The civilian components consisted of UN Mission (UNMIBH), based on a UN International Police Task Force and a UN civilian office,

[152] See Annex I of the Agreement, Sec A, para 2 (a), (d) and (e).

[153] Such elections were duly held and certified by the UN Special Representative as free and fair, see Chesterman, above n 96, 74. See also UNSC Res (4 November 1993) noting the conclusion of UNTAC's mission. However, a coup followed in 1997 and flawed elections the following year: *ibid*, 75 and International Crisis Group, *Back from the Brink: Cambodian Democracy Gets a Second Chance* (January 1999).

[154] Which simply gave the head of UNTEA 'full authority under the direction of the Secretary General to administer the territory', Art V of the Agreement on West New Guinea. See, eg, Ratner, above n 147, 15.

[155] UNSC Res 1031 (15 December 1995). IFOR took over from the UN Protection Force (UNPROFOR), established by UNSC Res 743 (21 February 1992) and see also UNSC Res 749 (7 April 1992), 757 (30 May 1992), 758 (8 June 1992), 770 (13 August 1992) and 776 (14 September 1992).

[156] UNSC Res 1088 (12 December 1996).

[157] UNSC Res 1575 (22 November 2004). See also UNSC Res 1551 (9 July 2004) and 1639 (21 November 2005).

and the High Representative. The High Representative, whose mandate terminated on 31 December 2002, to be replaced by an EU Police Mission,[158] was responsible for the 'interpretation of this Agreement on the civilian implementation of the peace settlement',[159] and in particular, played a steadily enlarging role in the areas of the police, judicial system, human rights, co-ordination of humanitarian relief and refugees, landmine clearance, and elections.[160]

The establishment of the post of High Representative arose out of the end of the Bosnian war with the signing of the Dayton Peace Agreement in 1995. Bosnia and Herzegovina was established as a state consisting of two units (or Entities) each with significant autonomy (Republika Srpska and the Federation of Bosnia and Herzegovina). The Dayton Agreement provided for the designation of a High Representative[161] as 'the final authority in theatre'. The High Representative was to monitor the implementation of the peace settlement, promote the full compliance of the parties with the civilian aspects of the peace settlement, co-ordinate the activities of the civilian organisations and agencies in Bosnia and Herzegovina to ensure the effective implementation of the settlement, and facilitate the resolution of difficulties in implementation.[162] The High Representative is nominated by the Steering Board of the Peace Implementation Council,[163] a group of 55 countries and international organisations that sponsor and direct the peace implementation process, and this nomination is then endorsed by the Security Council.

The relatively modest powers of the High Representative under Annex 10 were subsequently enlarged in practice by the Peace Implementation Council in the decisions it took at the Bonn Summit of December 1997. In particular, paragraph XI of the Bonn Conclusions recognised the competence of the High Representative to adopt binding decisions with regard to interim measures when the parties are unable to reach agreement, remaining in force until the Presidency or Council of Ministers has adopted a decision consistent with the Peace Agreement on the issue concerned and

> other measures to ensure implementation of the Peace Agreement throughout Bosnia and Herzegovina and its Entities, as well as the smooth running of the common institutions.

[158] UNSC Res 1423 (12 July 2002). See also the final report of the Secretary General on the mission, S/2002/1314.

[159] Art V, Annex 10.

[160] See, eg, Chesterman, above n 96, 77.

[161] See Annex 10 of the Dayton Peace Agreement. See also R Caplan, 'International Authority and State Building: The Case of Bosnia and Herzegovina' (2004) 10 *Global Governance* 53; International Crisis Group, *Bosnia: Reshaping the International Machinery*, November 2001.

[162] Art II, Annex 10. Note, the High Representative has no authority over IFOR and is unable to interfere in the conduct of military operations, Art II (9).

[163] See www.ohr.int/ohr-info/gen-info/#pic.

Such measures could include, for example, actions against persons found by the High Representative to be in violation of legal commitments made under the terms of the implementation of the Peace Agreement.[164]

In this context, the High Representative has taken a wide-ranging number of decisions, from imposing the Law on Citizenship of Bosnia and Herzegovina in December 1997[165] and imposing the Law on the Flag of Bosnia and Herzegovina in February 1998[166] to enacting the Law on Changes and Amendments to the Election Law in January 2006 to mark the ongoing process of transferring High Representative powers to the domestic authorities in the light of the improving situation.[167] In addition, a number of persons were removed from public office. From March 1998 to mid-2003, over 100 elected officials were so removed, including a former prime minister of the Federation of Bosnia and Herzegovina, a president of Republika Srpska and a member of the Bosnian presidency.[168] More recently, the ban on removals from office has been lifted in a number of cases with regard to specific individuals.[169] Decisions were also adopted limiting removals from public office. For example, on 28 November 2005, a decision was issued lifting the ban except with regard to certain positions of a defence, security or intelligence nature,[170] and on 4 April 2006 a decision was adopted which permitted those banned from public office by a decision of the High Representative to apply for and hold a position in a public enterprise or institution not covered by civil service laws but supported by public funding.[171] In view of the improving situation, the Steering Board of the Peace Implementation Council announced on 24 June 2005 its intention to continue the process of transferring responsibilities to the Bosnian authorities and to replace the High Representative with an EU Special Representative, something that would require a Security Council resolution.[172]

[164] www.ohr.int/pic/default.asp?content_id=5182. This competence has been regularly affirmed by the Security Council, See, eg, UNSC Res 1247 (18 June 1999), 1395 (27 February 2000), 1357 (21 June 2001), 1396 (5 March 2002) and 1491 (11 July 2003).

[165] www.ohr,int/statemattersdec/default.asp?content_id=343.

[166] www.ohr,int/statemattersdec/default.asp?content_id=344.

[167] www.ohr,int/statemattersdec/default.asp?content_id=36465.

[168] See Chesterman, above n 96, 130–1 and the lists by year contained on the High Representative's website: www.ohr.int/decisions/removalssdec.

[169] See, eg, that on Milandan Pesic, www.ohr.int/decisions/removalssdec/default.asp?content_id=36467, 30 January 2006; on Svetozar Radulovic, www.ohr.int/decisions/removalssdec/default.asp?content_id=36515, 30 January 2006 and on Zelijko Jangic, www.ohr.int/decisions/removalssdec/default.asp?content_id=36513, 30 January 2006.

[170] Decision of 28 November 2005, www.ohr.int/decisions/removalssdec/default.asp?content_id=36075.

[171] Decision of 4 April 2006, www.ohr.int/decisions/removalssdec/default.asp?content_id=36919. The decision does not apply to any elected, executive, advisory, security or managerial civil servant position, Art 4.

[172] www.ohr.int/pic/default.asp?content_id=3491. Note that the EU's General Affairs Council appointed the High Representative as the EU's Special Representative in March 2002, See, eg, Council Joint Action 2004/569/CFSP; Council Joint Action 2005/825/CFSP and Council Joint Action 2006/49/CFSP.

C. As a Mechanism to Promote a Settlement Where Sovereignty Is Disputed

(1) The Saar

International administration of territory as a way of a holding operation pending the reaching of a new settlement is not new. Under the Versailles Treaty of 1919, France was authorised to exploit the coalmines in the Saar territory of Germany for a period of 15 years.[173] Germany renounced 'in favour of the League of Nations, in the capacity of trustee, the government of the territory'.[174] The question of ultimate sovereignty over the territory remained unclear, but the better view is that it resided with Germany.[175] The League of Nations administered the territory for the 15-year period through a Governing Commission appointed by the League of Nations Council. After the end of this period, a plebiscite was held in which the population voted to return to German administration. It is interesting to note that both union with France and a continuation of international administration were possible outcomes of the process under the Versailles Treaty.[176]

(2) Kosovo

The Serbian province of Kosovo, with its 90 per cent ethnic Albanian population, had been the site of increasing domestic unrest since the ending of its autonomous status in 1989.[177] Security Council resolution 1160 (1998) called for an 'enhanced status for Kosovo' including 'a substantially greater degree of autonomy'. Talks held at Rambouillet failed[178]

[173] See, eg, Ydit, above n 96, 44–7; Chesterman, above n 96, 18–20; Crawford, above n 29, 233–4 and Wilde, 'From Danzig to East Timor', above n 22, 589.

[174] Versailles Treaty, Art 49.

[175] See Crawford, above n 29, 233 n 172, cf Ydit, above n 96, 44.

[176] Note that the League had the responsibility of settling disputes between the Free City of Danzig (where local powers were split between the city and Poland, while Poland was responsible for its foreign relations) and Poland over the interpretation of their respective powers and of guaranteeing the status of the city by the competence to approve or not of constitutional amendments, see Arts 102–4 of the Versailles Treaty and Crawford, above n 29, 236–41.

[177] See C Tomuschat (ed), *Kosovo and the International Community: A Legal Assessment* (The Hague, Kluwer Lane International, 2002); Crawford, above n 29, 557–60; Chesterman, above n 96, 79–83; Strohmeyer, above n 126; B Knoll, 'From Benchmarking to Final Status? Kosovo and the Problem of an International Administration's Open-Ended Mandate' (2005) 16 *European Journal of International Law* 637; *Kosovo: KFOR and Reconstruction* (1999) House of Commons Research Paper 99/66; A Yannis, 'The UN as Government in Kosovo' (2004) 10 *Global Governance* 67; International Crisis Group, *Kosovo: Towards Final Status*, January 2005; *ibid*, *Kosovo: The Challenge of Transition*, February 2006; A Zimmermann and C Stahn, 'Yugoslav Territory, United Nations Trusteeship or Sovereign State? Reflections on the Current and Future Legal Status of Kosovo' (2001) 70 *Nordic Journal of International Law* 423.

[178] See S/1999/648.

and internal repression led to increasing flows of refugees. NATO operations commenced on 24 March 1999[179] and concluded on 9 June that year with the signing of a military-technical agreement between the NATO-led international security force (termed KFOR) and the Federal Republic of Yugoslavia, as a consequence of which Yugoslav forces withdrew from Kosovo and KFOR was deployed.[180] The following day, Security Council resolution 1244 (1999)[181] was adopted under Chapter VII.

This resolution reaffirmed 'the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia', but deprived this of all but symbolic meaning by authorising Member States and relevant international organisations to establish both an 'international security presence' and an 'international civil presence' in Kosovo with extensive powers. The former was to be endowed with all necessary means to fulfil its responsibilities, which included establishing a secure environment for the return of refugees and displaced persons, the operation of the international civil presence, the establishment of a transitional administration, the delivery of humanitarian aid, and ensuring public safety and order until the international civil presence could take responsibility. The international civil presence was granted responsibilities, including promoting 'the establishment, pending a final settlement, of substantial autonomy and self-government'; performing basic civilian administrative functions; organising the development of provisional institutions for democratic and autonomous self-government, pending a political settlement; and protecting and promoting human rights.[182]

The authority vested in the UN Interim Administration Mission (UNMIK), as this international civil authority was termed, by resolution 1244 became exercisable by the Special Representative of the UN Secretary General, who was made responsible for the four main components as defined with the participation of other international organisa-

[179] Questions as to the legitimacy of the use of force in Kosovo are not addressed in this chapter. See, eg, C Gray, *International Law and the Use of Force* (Oxford University Press, 2000) 31; B Simma, 'NATO, the UN and the Use of Force: Legal Aspects' (1999) 10 *European Journal of International Law* 1; KA Annan, *The Question of Intervention: Statements by the Secretary-General* (New York, United Nations Department of Public Information, 1999); 'NATO's Kosovo Intervention', various writers, (1999) 93 *American Journal of International Law* 824–62; D Kritsiotis, 'The Kosovo Crisis and NATO's Application of Armed Force Against the Federal Republic of Yugoslavia' (2000) 49 *International and Comparative Law Quarterly* 330; P Hilpod, 'Humanitarian Intervention: Is There a Need for a Legal Reappraisal?' (2001) 12 *European Journal of International Law* 437; and 'Kosovo: House of Commons Foreign Affairs Committee 4th Report, June 2000' various memoranda (2000) 49 *International and Comparative Law Quarterly* 876–943.

[180] S/1999/672, annex.

[181] Prefigured in Art 1(2) of the Agreement. KFOR deployment occurred two days after the resolution was adopted.

[182] Paras 10 and 11.

tions, so that while the UN is concerned with civil administration, the OSCE (Organisation for Security and Co-operation in Europe) deals with institution-building matters, the UNHCR (UN High Commissioner for Refugees) with humanitarian matters and the European Union with reconstruction issues. [183]

Annex 1 of the resolution provided for an immediate and verifiable end to violence and repression in Kosovo; the withdrawal of the military, police and paramilitary forces of the Federal Republic of Yugoslavia; establishment of an interim administration to be decided by the Security Council; the safe and free return of all refugees; a political process providing for substantial self-government; the demilitarisation of the Kosovo Liberation Army (KLA); and a comprehensive approach to the economic development of the crisis region. It also called for, crucially, the

> deployment in Kosovo of effective international civil and security presences, endorsed and adopted by the United Nations, capable of guaranteeing the achievement of the common objectives.

Annex 2 reaffirmed these principles, noting in paragraph 3 that there needed to be agreement on the

> deployment in Kosovo under United Nations auspices of effective international civil and security presences, acting as may be decided under Chapter VII of the Charter, capable of guaranteeing the achievement of common objectives.

Paragraph 4 noted that

> The international security presence with substantial North Atlantic Treaty Organisation participation must be deployed under unified command and control and authorised to establish a safe environment for all people in Kosovo and to facilitate the safe return to their homes of all displaced persons and refugees.

The very extensive nature of the competence of UNMIK was early signalled. Section 1.1 of the first Regulation issued by UNMIK in 1999 stated that:

> All legislative and executive authority with respect to Kosovo, including the administration of the judiciary is vested in UNMIK and is exercised by the Special Representative of the Secretary General[184]

[183] See S/1999/779, Report of the UN Secretary General, 12 July 1999. These components became known as the Four Pillars, with Pillar I being police and justice under the direct leadership of the UN; Pillar II being civil administration under the direct leadership of the UN; Pillar III being democratisation and institution building led by the OSCE and Pillar IV being reconstruction and economic development led by the EU.

[184] UNMIK/REG/1991/1, S/1999/987, P 14.

while section 1.2 provided that the Special Representative could appoint any person to perform functions in the civil administration in Kosovo, including the judiciary, or remove such person in accordance with the applicable law.[185] Section 3 of this Regulation provided that the laws applicable in Kosovo prior to 24 March 1999 would continue to apply insofar as they did not conflict with internationally recognised human rights standards, the fulfilment of the mandate given to UNMIK under resolution 1244 or any Regulation issued by UNMIK.[186] Section 4 provided for the issuance of legislation in the form of regulations, while section 6 provided that UNMIK was to administer all property of the Federal Republic of Yugoslavia or Republic of Serbia in Kosovo. Regulation 1999/3 established a customs system for Kosovo,[187] while Regulation 1999/4 introduced the deutschmark as a permitted currency in the territory. It is also worth noting Regulation 2005/16, which regulates the movement into and out of Kosovo.

On 15 May 2001, the Special Representative signed the Constitutional Framework for Provisional Self-Government under which responsibilities were transferred to Provisional Institutions of Self-Government.[188] Article 1.1 of Chapter I of the Constitutional Framework defined Kosovo as 'an entity under interim international administration', while the responsibilities transferred to the Provisional Institutions[189] were to be within the limits of resolution 1244.[190] The powers reserved exclusively to the Special Representative included full authority to ensure that the rights and interests of the communities were fully protected; dissolving the assembly and calling for new elections; final authority with regard to the budget and monetary policy; exercising final authority regarding the

[185] As amended in UNMIK/REG/2000/54.

[186] This was repealed in UNMIK/REG/1999/25. The law in force in Kosovo was stated in UNMIK/REG/1999/24 to be (a) Regulations promulgated by the Special Representative and subsidiary instruments issued thereunder and (b) the law in force in Kosovo on 22 March 1989. This was reaffirmed in UNMIK/REG/2000/59, which noted that if a court or body or person required to implement a provision of the law determines that a subject matter or a situation is not covered by these law, then the law in force in Kosovo after 22 March 1989 shall be applied exceptionally, provided that it is non-discriminatory and complies with international human rights conventions as listed in s 1.3. S 1.3 provided that all persons exercising public functions shall observe internationally recognised human rights standards as reflected in particular in the Universal Declaration, the International Covenants on Human Rights, the European Convention on Human Rights, the Racial Discrimination Convention, the Women's Discrimination Convention, the Torture Convention and the Rights of the Child Convention. S 3 also substituted a sentence of a term of imprisonment for the death sentence applicable under the law in force as at 22 March 1989.

[187] Amended by UNMIK/REG/2005/11.

[188] UNMIK/REG/2001/9. Note that amendments with regard to the executive branch of the Provisional Institutions were adopted in UNMIK/REG/2001/19 and UNMIK/REG/2005/16.

[189] Ch 5.

[190] Preamble, para 6 and ch 2 (a).

appointment, removal from office and disciplining of judges and prosecutors;[191] exercising powers and responsibilities of an international nature in the legal field; exercising authority over law-enforcement institutions; exercising control and authority over the management of the administration and financing of civil security; concluding agreements with states and international organisations in all matters within the scope of resolution 1244; external relations; and customs matter.[192]

Further, Chapter 12 emphasised that the exercise of the responsibilities of the Provisional Institutions under the Constitutional Framework

> shall not affect or diminish the authority of the SRSG [Special Representative] to ensure full implementation of UNSCR 1244 (1999), including overseeing the Provisional Institutions of Self-Government, its officials and agencies, and taking appropriate measures whenever their actions are inconsistent with UNSCR 1244 (1999) of this Constitutional Framework

while Chapter 14.3 provides that the Special Representative on his own initiative may effect amendments to the Constitutional Framework.[193]

The international community is currently discussing the future of Kosovo and there is no doubt that the independence of the territory is one strong possibility. Although, the UN embarked upon a 'standards before status' approach,[194] the Security Council appointed former Finnish President Ahtisaari in November 2005 as a special envoy to start a political process to determine the final status of the territory.[195]

[191] As to which, see also UNMIK/REG/1999/7 and UNMIK/REG/2000/57.

[192] Ch 8.

[193] In addition, ch 6 underlines that the Kosovo police service functions under the authority of the Special Representative and under the supervision of UNMIK Police, while ch 13 notes that nothing in the Constitutional Framework is to affect the authority of KFOR.

[194] See, eg, Security Council Presidential Statement of 30 April 2004, SC/8082. See also B Knoll, 'From Benchmarking to Final Status? Kosovo and the Problem of an International Administration's Open-Ended Mandate' (2005) 16 *European Journal of International Law* 637; BS Brown, 'Human Rights, Sovereignty and the Final Status of Kosovo' (2005) 80 *Chicago Kent law Review* 235; and International Crisis Group Reports of January 2005 and February 2006, above n 177.

[195] SG/A/955, 15 November 2005. See also the Eide Report of 7 October 2005, S/2005/635. This process has started with moves for decentralisation focusing on local finance, the creation of new municipalities and cross-boundary co-operation, see UN press release of 3 May 2006, www.un.org/apps/news/story.asp?NewsID=18337. The Ahtisaari Plan was presented to the UN Security Council on 26 March 2007, S/ 2007/168, but has since become mired in disputes between Western states and Russia and Serbia as to its application, See, eg, *Kosovo: No Good Alternatives to the Ahtisaari Plan*, International Crisis Group Report, 14 May 2007 and *Breaking the Kosovo Stalemate: Europe's Responsibility*, International Crisis Group Report, 21 August 2007. Kosovo declared independence on 17 February 2008.

IV. THEMATIC CONCLUSIONS

A. Why Does the Administration of Territory by Non-Sovereign Situations Arise?

The administration of territory by (third party) non-sovereigns arises essentially because of a breakdown of either international or internal peace and security. The situation constitutes an exception to the norm of administration and control by the territorial sovereign and poses a problem to international law, focused as it is upon the rights and responsibilities of sovereign states. The fundamentals of the legal system cope, in theory, easily with traditional occupations, since these are predicated upon temporary and relatively minimal societal control by the forces of one state of the territory of another pending a peace settlement. Problems have arisen in practice where the occupation is prolonged, and tensions have therefore arisen between the traditional rules and the need to take account of the needs of the local population in an evolving society. Beyond that, the interposition of organised international administration, although not a new phenomenon, has recently assumed a higher profile and this has brought new problems to the fore.

Territory may be administered by an entity, whether state or international organisation or other arrangement, for a number of reasons. First, as a consequence of armed conflict whether legal or illegal. Second, as an attempt to facilitate the transmission of control and/or sovereignty from one international entity to another. Third, as an attempt to resolve difficulties of governance within a state, flowing usually from a civil war or outside intervention or a mix of the two. Such administrations may result, therefore, in the creation of a new or restored independent state, in the integration of the territory into an existing state whether the previous sovereign or a third party, or in a new internal constitutional arrangement. Methodologies and aims may differ, of course, depending on the circumstances. The traditional occupation regime, for example, is focused upon the preservation of order and minimalist control by the occupying power so as to prevent annexation and to protect the local population pending a formal peace treaty, while some international administrations are created with a proactive mission. Globalisation, both in the form of the immediate and dramatic impact of crisis situations upon the international community and in the form of the spread of international law standards, particularly those relating to human rights, has increased pressures for international action to resolve or mitigate or minimise such crises, and the device of international administration now forms part of the mechanisms readily to hand.

B. The Source of Authority

In the case of occupations of territory by (third-party) states, authority will flow from the factual situation itself, ie, from the establishment of actual control resulting from the use of force, whether legal or illegal, and the consequential application of international humanitarian law. It is by its very nature non-consensual and the views of the local population fall outside of this equation, except that in the light of the development of human rights law and the principle of self-determination, it is impossible to ignore the wishes of the local population in terms, at least, of the resolution of the particular dispute.

In the case of administration of territory by an international organisation, authority will flow from the constitutional norms of the organisation in question and from the nature and scope of any relevant international agreements. Often the international organisation in question will be the UN Security Council, which has the power to adopt decisions under Chapter VII of the Charter, which is binding upon all members of the UN. Such resolutions have laid down the basic principles of governance and have been complemented by legislative activity within the territory. As far as the authority of the Security Council itself to undertake such enterprises is concerned, it is now beyond dispute that the Security Council can deal with questions of the administration and even disposition of territory.[196] Although the normal and natural basis for this is Chapter VII action, it is possible for an international administration to be established on the basis of Chapter VI's peaceful settlement provisions.[197]

The fount of authority will vary from situation to situation. In the case of Cambodia, UNTAC derived its power from a UN resolution after the Supreme National Council, established by the Comprehensive Settlement Agreement, had transferred to the UN 'all powers necessary' to implement the agreement, which also contained provisions concerning the relationship between the Supreme National Council and UNTAC. The mandate for UNTAES, UNTAET and UNMIK derived from Security Council resolutions,[198] that for the EU administration of Mostar from an

[196] See, eg, Crawford, above n 29, 563, and Zimmermann and Stahn, above n 177, 438. Whether there is a limit to what the Council can do as a matter of principle in the context of particular threats to or breaches of international peace and security is beyond the scope of this chapter.

[197] See, eg, UNTAC and Cambodia, see above

[198] Note the argument that the Federal Republic of Yugoslavia was not a member of the UN at the relevant time, see Zimmermann and Stahn, above n 177, 438–40. See UNGA Res 47/1 (22 December 1992) and 55/12 (1 November 2000); UNSC Res 757 (30 May 1992) and 777 (19 September 1992) and the UN Legal Opinion of 29 September 1992, A/47/485. However, the FRY did at that time maintain that it was such a member and the doctrine of estoppel would no doubt apply to constrain any subsequent denial with regard specifically to Kosovo. In any event, the FRY gave its consent to the Kosovo arrangements in the Military and Technical Agreement of 9 June 1999.

agreement between the EU and other relevant parties, that for the administration of Brcko from a series of arbitration awards based upon the Dayton Peace Agreement, while that of the High Representative in Bosnia and Herzegovina from the Dayton Peace Agreement as substantively enhanced in practice by the decision of the Peace Implementation Council. The situation in Iraq from 2003 to 2004 marks a confluence of two sources of authority: the traditional law of occupation plus the extended mandate provided by the Security Council. In each case, the range of powers granted to the particular administration will depend primarily upon the terms of the mandate, however sourced and subsequent practice, so that, for example, while UNTAES exercised executive power and little legislative power, both UNMIK and UNTAET exercised significant legislative power, as did the Authority in Iraq between the commencement of military operations and the formal ending of occupation in June 2004.

Where there is more than one source of authority, issues often arise as to priority and conflicting or inconsistent requirements. Insofar as hierarchical questions are raised, it is clear that a Security Council resolution under Chapter VII will be superior to the rules of belligerent occupation where this is relevant. This follows from the Iraq situation between 2003 and 2004 where the proactive requirements of resolution 1483 were clearly intended to operate notwithstanding the law of occupation to the contrary and from the terms of resolution 1244 concerning Kosovo where the range of powers granted to UNMIK far exceeded the limits imposed by traditional occupation law and included the authority to reorganise governmental institutions of all kinds. However, this cannot be taken to mean that in such situations the rules of international humanitarian law were totally superseded. The correct position must rather be that international humanitarian law is applied subject to any particular norms being necessarily replaced by clear provisions to that effect contained in a binding Security Council resolution.

Where there is one source of authority, interpretational problems will tend to arise in the context of the exercise of legislative or executive power. For example, it may be argued that it is far from clear that the authority of the High Representative, as it has evolved, can be firmly grounded upon the Dayton agreement. Perhaps some element of reinterpretation of the agreement has taken place by the relevant parties as a matter of subsequent practice as reflected in the Conclusions of the Bonn Summit of 1997 or consensual activity by the Bosnian government and constituent Entities. Further, in the case of UNMIK, it could be maintained that its legislative competence derived, in the absence of an explicit provision, implicitly by way of a broad understanding of the resolution as expressed in its first Regulation. However one characterises the precise nature of such legislative enactments (usually termed Regulations or

Orders),[199] legal questions do arise as to their interpretation in the context of the mandating instruments and accountability.

The issue of the termination of the authority of the third-party administration is an important one. In the case of occupation, termination occurs upon a peace treaty between the parties concerned or other internationally recognised formal withdrawal of effective control over the territory or where the ousted sovereign is able to regain control,[200] but otherwise the position is rather unclear, appearing to focus upon the exercise of actual control without defining what that means, a point raised with regard to the Gaza Strip. In the case of international administration, the date of termination may be specified, as in the case of UNTAC (Cambodia) where the mission was authorised to operate for a period of up to 18 months, or dependent upon the completion of a particular defined task, as in the cases of Libya, West Irian and East Timor, or rather more open-ended with objectives less clearly specified, as in Bosnia and Kosovo. In the latter situation, it is then up to the mission concerned (and ultimately the Security Council) to determine when its aim has been achieved.

C. Applicable Law

Unlike the situation that exists with regard to the source of authority, the position as to the applicable law as it affects occupation and international administration situations shows elements of convergence. In the case of traditional occupations, the occupying power is to retain the existing framework as far as possible, consistent with the maintenance of public order and the needs of military necessity. However, evolving international law has made international human rights law as well as humanitarian law applicable in addition to the pre-existing local law. How far the introduction of the former impacts upon the presumption upon minimal interference with the local law is unclear, but that it does have an impact is beyond dispute. One further issue concerns the application of the domestic law. Officials, including armed forces personnel, are subject to their own local law to the extent that governmental activities are concerned. Thus in English law, soldiers are subject

[199] See, eg, Ruffert, above n 126, and E De Wet, 'The Direct Administration of Territories by the United Nations and its Member States in the Post Cold War Era: Legal Bases and Implications for National Law' (2004) 8 *Max Planck Yearbook of United Nations Law* 291.

[200] HP Gasser suggests also *debellatio*, but this probably unlikely, D Fleck, *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford University Press, 1995) 251. Art 6 of the Fourth Geneva Convention provides merely that the application of the Convention shall cease one year after the general close of military operations, although the occupying power will be bound by a number of key provisions to the extent that the power exercises the functions of government in the territory.

to English criminal law wherever they are, as if they are in the jurisdiction.[201] This will include legislative provisions concerning war crimes, crimes against humanity and genocide and will include the provisions of the European Convention on Human Rights as incorporated by the Human Rights Act 1998 in certain situations.[202]

In the case of the international administration of territory, the applicable law will usually be specified in an enactment by the mission in question. To the local law will usually be added the legislative acts of the mission authorities, as in the case of Kosovo and East Timor, for example, and priority will be accorded to the latter, as indeed was the case with Namibia. Sometimes the provisions of the local law will be deemed to apply to the extent that they are consistent with the international administration's decrees. In Kosovo, the applicable local law was redefined from that in being at the date of the relevant Security Council resolution to that in force on 22 March 1989 due to the introduction after that date of discriminatory laws. Priority is given to the Regulations of UNMIK and the application of international human rights provisions is established. A further question is whether international humanitarian law also applies. Until relatively recently, international organisations were ambivalent as to the application of humanitarian law to their mission.[203] On 6 August 1999 the Secretary General issued a statement confirming that the principles and rules of international humanitarian law apply to UN forces when in situations of armed conflict they are actively engaged as combatants.[204] However, this statement does not appear to cover forces not operating under UN command and control, so many questions remain,[205] although it should be pointed out that the states supplying forces for international administration duties are bound by humanitarian law.

Other issues of priority with regard to the established applicable law that are raised include the position with regard to any conflict between

[201] See s 70 of the Army Act 1955 as amended and Lord Bingham, *R v Boyd* [2002] UKHL 31 at paras 4–5. See also the International Criminal Court Act 2001.

[202] See the decision of the House of Lords in *Al-Skeini v Secretary of State for Defence* [2007] UKHL 26. Currently the situation in English law is that persons held in British military detention facilities benefit from the application of the European Human Rights Convention, but that the Convention would not apply outside of the UK where British forces are simply on patrol in areas not within their effective overall control as per the Convention case law, See, eg, *Cyprus v Turkey* (Judgment) ECHR 10 May 2001; *Banković v Belgium* (Judgment) 12 December 2001and *Issa v Turkey* (Judgment) 16 November 2004.

[203] See, eg, L Green, *The Contemporary Law of Armed Conflict* (2nd edn, Manchester, Manchester University Press, 2000), ch 20 and C Greenwood, 'International Humanitarian Law and United Nations Military Operations' (1998) 1 *Yearbook of International Humanitarian Law* 3. See also the resolutions of the Institut de Droit International stating that humanitarian law applied to the UN, (1971) 54 (II) *Annuaire de l'Institut de Droit International* 465 and (1975) 56 *Annuaire de l'Institut de Droit International* 540

[204] ST/SGB/1999/13.

[205] See Ratner, 'Foreign Occupation', above n 23, 705–6.

the provisions of humanitarian law and human rights law conflict, for example, with regard to the detention of persons and by extension between a Security Council mandate and human rights. With regard to the latter, the recent English Court of Appeal case of *Al-Jedda v Secretary of State for Defence* came to the conclusion that in such a situation priority lies with the Security Council in view of Article 103 of the Charter providing for the superiority of Charter obligations over those arising from other international instruments.[206]

D. Accountability Issues

In the case of occupations, occupying forces are subject to their own domestic law, which will usually contain international humanitarian law principles, either by direct legislative action incorporating the Geneva Conventions and other pertinent agreements or by way of international customary law, such as the Hague Regulations, deemed part of the internal law, as well as relevant public law principles. Together with relevant human rights provisions, a framework for accountability thus exists. Internationally, the existence of, for example, the International Committee of the Red Cross and other non-governmental organisations, and the operations of various international organisations will or may constitute sources of pressure for the accountability of those violating the law in occupied territories. Further, the Security Council or the International Court of Justice may adopt relevant binding measures.

In the case of international administrations of territory, the matter is more complex. UN missions will be subject to a measure of UN control, being accountable in principle to the Secretary General and Security Council,[207] but in practice this may be seen as operating in a less than efficacious manner. Officials and forces on UN mission will remain subject to accountability under their own domestic legal systems, but accountability within the territory being administered is likely to prove problematic. This issue has received much attention in Kosovo in view of the wide immunities conferred on UNMIK and KFOR in Regulation 47/2000, thereby depriving the local courts of jurisdiction with regard to such personnel and their property and assets. In Bosnia, the High Representative has often asserted that certain executive decisions are not subject to domestic review as they were adopted pursuant to an international mandate and in the light of his position as a 'final authority' under the Dayton Agreement, and this has been accepted by the Consti-

[206] [2006] EWCA Civ 327.

[207] See, eg, SR Ratner, *The New UN Peacekeeping: Building Peace in Lands of Conflict After the Cold War,* (New York, St Martin's Press, 1995) 41–50.

tutional Court of Bosnia and Herzegovina.[208] An Ombudsman has been established and ways to rendering enforceable the European Convention on Human Rights in the territory are being investigated, although complications exist in view of the uncertain status of the territory in international law and for the purposes of identifying the state or states within whose jurisdiction the territory may be deemed to fall in view of the lack of control exercised by Serbia and Montenegro (the former Federal Republic of Yugoslavia). Further, the ECHR held in *Behrami v France* that both KFOR and UNMIK were operating under the valid and binding authority of Chapter VII of the UN Security Council and that any impugned action would therefore be attributable to the United Nations, which benefited from an international legal personality separate from that of its member states. Since the UN was not a member of the European Convention system, the ECHRwould not have jurisdiction with regard to a complaint against a state or states acting in Kosovo within the framework of either or both KFOR and UNMIK.[209]

While UNMIK has recently signed an agreement to implement the Framework Convention for the Protection of National Minorities of the Council of Europe and for the extension of the right of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment to visit places of detention coming under the authority of the interim civil administration in Kosovo, such an agreement with regard to KFOR has not been reached.

E. Sovereignty and Third-Party Administration

In the light of the extensive developments taking place with regard both to traditional occupations and to international administration of territory, the question may finally be asked as to the place of sovereignty in the changed world. Sovereignty remains as a totemic symbol. No entity seeking sovereignty will willingly settle for less; no state will willingly forego its sovereign status. Compromises will usually be made on the exercise of sovereignty in specific areas in order to maximise particular benefits, especially economic ones, as the evolution of international trade law demonstrates, or indeed to further human rights, but no surrender of the very existence of that status can easily be achieved. However, the problems arise not where states exist without existential challenge or where aspirant candidates encounter no opposition, but in the troubled region of significant breakdown in civil society, whether internal or international, whether actual or potential. In such instances, mechanisms

[208] See, eg, *Milorad Bilbija et al*, AP-953/05, decision of the Constitutional Court of Bosnia and Herzegovina, 8 July 2006, http://www.esiweb.org/pdf/esi_news_id_113a.pdf.
[209] Judgment of 2 May 2007.

will be sought to resolve or cope with the crises in question and it is here that recourse to the nature of sovereignty is of little assistance in practice. The suspension, or by-passing, or sovereignty may in certain situations be the best way to move forward. As the scope of international law increases to cover an ever broader range of persons and issues, so the legal advantages of formal sovereign status tend to fade. Effective control, which is in any event a component of territorial title, may be the best way in which to resolve an actual or threatened breakdown of peace and security pending a final settlement acceptable to all, and functional administrative operations may constitute a perfectly acceptable alternative to a highly contested sovereignty, at least as an interim or transitional measure. Of course, there may be circumstances where an administrative arrangement involving less than full sovereignty may in any event be the optimum solution with elements of divided control by overlapping authorities. The goal will tend to be sovereignty, but reality may interpose an alternative solution, and if it works, that will be its own justification.

CASE NO. 35

THE JUSTICE TRIAL

TRIAL OF JOSEF ALTSTÖTTER AND OTHERS

UNITED STATES MILITARY TRIBUNAL, NUREMBERG, 17TH FEBRUARY–4TH DECEMBER, 1947

Liability for War Crimes, Crimes against Humanity and Membership of Criminal Organisations of German Judges, Prosecutors and Officials of the Reich Ministry of Justice.

Altstötter and the other accused in this trial were former German Judges, Prosecutors or officials in the Reich Ministry of Justice. All were charged with committing war crimes and crimes against humanity between September, 1939, and April, 1945 and with conspiring between January, 1933 and April, 1945 to commit such offences. Several were also charged with membership of criminal organisations as defined in the judgment of the Nuremberg International Military Tribunal.

The Count alleging conspiracy was attacked by Defence Counsel and the Tribunal ruled that it had no jurisdiction to try a defendant upon a charge of conspiracy considered as a separate offence.

One accused died before the opening of the trial and the Tribunal declared a mis-trial as regards a second. Four accused were found not guilty and the remaining ten were held guilty of war crimes, crimes against humanity, membership of criminal organisations, or of two or all three of the foregoing. Sentences imposed ranged from imprisonment for life to imprisonment for five years.

In its judgment the Tribunal dealt, *inter alia*, with the legal basis of the Tribunal and of the Law which it applied, the scope of the concept of crimes against humanity, the legal position of countries occupied by Germany during the war, the illegality of condemning to death nationals of such territories for high treason against Germany, the illegality of proceedings taken under the Nacht und Nebel plan, and in general the legal aspects of the part taken in furthering the persecution of Jews and Poles and other aspects of Nazi policy by various of the accused acting in their official or judicial capacities.

A. OUTLINE OF THE PROCEEDINGS

1. THE COURT

The Court before which this trial was held was a United States Military Tribunal set up under the authority of Law No. 10 of the Allied Control Council for Germany and Ordinance No. 7 of the Military Government of the United States Zone of Germany.(1)

2. THE CHARGES

The accused whose names appeared in the Indictment were the following : Josef Altstötter, Wilhelm von Ammon, Paul Barnickel, Hermann Cuhorst, Karl Engert, Guenther Joel, Herbert Klemm, Ernst Lautz, Wolfgang Mettgenberg, Guenther Nebelung, Rudolf Oeschey, Hans Petersen, Oswald Rothaug, Curt Rothenberger, Franz Schlegelberger and Carl Westphal.

Detailed allegations were made against them in the Indictment and were arranged under four Counts, headed : *The Common Design and Conspiracy*, *War Crimes*, *Crimes against Humanity*, *and Membership in Criminal Organisations*. The first three counts related to all accused, but the fourth to some only.

The essence of Count One (*Common Design and Conspiracy*) is contained in the first three paragraphs appearing under this heading, which run as follows :

> " 1. Between January, 1933 and April, 1945, all of the defendants herein, acting pursuant to a common design, unlawfully, wilfully, and knowingly did conspire and agree together and with each other and with divers other persons, to commit War Crimes and Crimes against Humanity, as defined in Control Council Law No. 10, Article II.
>
> " 2. Throughout the period covered by this Indictment all of the defendants herein, acting in concert with each other and with others, unlawfully, wilfully, and knowingly were principals in, accessories to, ordered, abetted, took a consenting part in, and were connected with plans and enterprises involving, the commission of War Crimes and Crimes against Humanity.
>
> " 3. All of the defendants herein, acting in concert with each other and with others, unlawfully, wilfully, and knowingly participated as leaders, organisers, instigators, and accomplices in the formulation and execution of the said common design, conspiracy, plans, and enterprises to commit, and which involved the commission of, War Crimes and Crimes against Humanity, and accordingly are individually responsible for their own acts and for all acts performed by any person or persons in execution of the said common design, conspiracy, plans, and enterprises."

The crimes involved were said to embrace " atrocities and offences against persons and property, including plunder of private property, murder,

(1) For a general account of the United States law and practice regarding war crime trials held before Military Commissions and Tribunals and Military Government Courts, see Volume III of this series, pp. 103-120. The present is the first report in this series of volumes to deal with a case tried before such a Military Tribunal. Reports on others of the twelve trials held before the United States Military Tribunals in Nuremberg will appear in subsequent volumes.

extermination, enslavement, deportation, unlawful imprisonment, torture, persecutions on political, racial and religious grounds, and ill-treatment of, and other inhumane acts against thousands of persons, including German civilians, nationals of other countries, and prisoners of war ". The methods allegedly used were described in these terms: " It was a part of the said common design, conspiracy, plans, and enterprises to enact, issue, enforce, and give effect to certain purported statutes, decrees, and orders, which were criminal both in inception and execution, and to work with the Gestapo, SS, SD, SIPO and RSHA for criminal purposes, in the course of which the defendants, by distortion and denial of judicial and penal process, committed the murders, brutalities, cruelties, tortures, atrocities, and other inhumane acts, more fully described in Counts Two and Three of this Indictment ". The Indictment subsequently went on to claim that: " The said common design, conspiracy, plans, and enterprises embraced the use of the judicial process as a powerful weapon for the persecution and extermination of all opponents of the Nazi régime regardless of nationality and for the persecution and extermination of ' races '."

Paragraph 8 of the Indictment set out the substance of Count Two (*War Crimes*):

> " Between September, 1939 and April, 1945, all of the defendants herein unlawfully, wilfully, and knowingly committed War Crimes, as defined by Control Council Law No. 10, in that they were principals in, accessories to, ordered, abetted, took a consenting part in, and were connected with plans and enterprises involving the commission of atrocities and offences against persons and property, including, but not limited to, plunder of private property, murder, torture, and illegal imprisonment of, and brutalities, atrocities, and other inhumane acts against thousands of persons. These crimes included, but were not limited to, the facts set out in Paragraphs 9 to 18, inclusive, of this Indictment, and were committed against civilians of occupied territories and members of the Armed Forces of nations then at war with the German Reich and who were in the custody of the German Reich in the exercise of belligerent control."

In paragraph 9 it was alleged that all defendants used " extraordinary irregular courts, superimposed upon the regular court system . . . to suppress political opposition to the Nazi régime ".

Paragraphs 10 to 18 alleged against various named accused in particular, *inter alia*, the trial by Special Courts, involving the " denial of all semblance of judicial process ", of Jews of all nationalities, Poles, Ukrainians, Russians, and other nationals of the occupied Eastern territories, indiscriminately classed as " Gipsies "; the extension of discriminatory German laws to non-German territories for the purpose of exterminating Jews and other nationals of occupied countries; the denial of access to impartial justice to these nationals; participation on the part of the Ministry of Justice with the OKW[1] and the Gestapo, in the execution of Hitler's decree of " Night and Fog " (Nacht und Nebel) whereby civilians of occupied territories who had been accused of crimes of resistance against occupying forces were

[1] I.e. Oberkommando Wehrmacht (Army High Command).

spirited away for secret trial by certain Special Courts of the Justice Ministry within the Reich, in the course of which the victims' whereabouts, trial, and subsequent disposition were kept completely secret, thus serving the dual purpose of terrorising the victims' relatives and associates and barring recourse to any evidence, witnesses, or counsel for defence ; and taking part in " Hitler's programme of inciting the German civilian population to murder Allied airmen forced down within the Reich ". These war crimes were said to constitute " violations of international conventions, particularly of Articles 4, 5, 6, 7, 23, 43, 45, 46 and 50 of the Hague Regulations, 1907, and of Articles 2, 3 and 4 of the Prisoner of War Convention (Geneva, 1929), the laws and customs of war, the general principles of criminal law as derived from the criminal laws of all civilised nations, the internal penal laws of the countries in which such crimes were committed, and of Article II of Control Council Law No. 10."

The kernel of the charges made under Count Three (*Crimes against Humanity*) is contained in paragraph 20 of the Indictment, which claims that :

> " Between September, 1939 and April, 1945, all of the defendants herein unlawfully, wilfully, and knowingly committed Crimes against Humanity as defined by Control Council Law No. 10, in that they were principals in, accessories to, ordered, abetted, took a consenting part in, and were connected with plans and enterprises involving the commission of atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, illegal imprisonment, torture, persecution on political, racial and religious grounds, and ill-treatment of, and other inhumane acts against German civilians and nationals of occupied countries ".

The detailed allegations which also appear under this Count related to offences which were said to be " further particularised " in the paragraphs appearing under Count Two (War Crimes), which were " incorporated herein by reference ". It was charged that " the said Crimes against Humanity constitute violations of international conventions, including Article 46 of the Hague Regulations, 1907, the laws and customs of war, the general principles of criminal law as derived from the criminal laws of all civilised nations, the internal penal laws of the countries in which such crimes were committed, and of Article II of Control Council Law No. 10."

Finally, under Count Four (*Membership in Criminal Organisations*) it was charged that the defendants Altstötter, Cuhorst, Engert, and Joel were guilty of " membership in an organisation declared to be criminal by the International Military Tribunal in Case No. 1,(1) in that each of the said defendants was a member of Die Schutzstaffeln der National Sozialistischen Deutschen Arbeiterpartei (commonly known as the " SS ") after 1st September, 1939." Similarly, Cuhorst, Oeschey, Nebelung, and Rothaug were said to be guilty of membership of the Leadership Corps of the Nazi Party at Gau level after 1st September, 1939, and Joel of membership of the

(1) That is to say by the Nuremberg International Military Tribunal in its Judgment, delivered 30th September and 1st October, 1946, on the trial of Göring and others. See pp. 65-72.

Sicherheitsdienst des Reichsführer SS (commonly known as the " SD ") after 1st September, 1939. Such membership was said to be in violation of Paragraph I (d) Article II of Control Council Law No. 10.

The defendants, having each been served with a copy of the Indictment in German at least thirty days before the commencement of the trial, were arraigned on 17th February, 1947. Each pleaded not guilty to all charges made against him. German Counsel selected by the accused were approved by the Tribunal and represented the defendants throughout the trial.

The defendant Carl Westphal died before the commencement of the trial and on 22nd August, 1947, the Tribunal entered an order declaring a mistrial as to the defendant Karl Engert, who had been able to attend court for only two days after 5th March, 1947.

The trial was conducted in two languages with simultaneous translations of German into English and English into German throughout the proceedings.

3. A CHALLENGE TO THE SUFFICIENCY OF COUNT ONE OF THE INDICTMENT

The sufficiency of Count 1 of the indictment was challenged by the defendants upon jurisdictional grounds, and on 11th July, 1947, the Tribunal made the following order :([1])

> " Count 1 of the indictment in this case charges that the defendants, acting pursuant to a common design, unlawfully, wilfully and knowingly did conspire and agree together to commit war crimes and crimes against humanity as defined in Control Council Law No. 10, Article 2. It is charged that the alleged crime was committed between January, 1933 and April, 1945.
>
> " It is the ruling of this Tribunal that neither the Charter of the International Military Tribunal nor Control Council Law No. 10 has defined conspiracy to commit a war crime or crime against humanity as a separate substantive crime ; therefore, this Tribunal has no jurisdiction to try any defendant upon a charge of conspiracy considered as a separate substantive offence.
>
> " Count 1 of the indictment, in addition to the separate charge of conspiracy, also alleged unlawful participation in the formulation and execution of plans to commit war crimes and crimes against humanity which actually involved the commission of such crimes. We therefore cannot properly strike the whole of Count 1 from the indictment, but, in so far as Count 1 charges the commission of the alleged crime of conspiracy as a separate substantive offence, distinct from any war crime or crime against humanity, the Tribunal will disregard that charge.
>
> " This ruling must not be construed as limiting the force or effect of Article 2, paragraph 2, of Control Council Law No. 10, or as denying to either prosecution or defence the right to offer in evidence any facts or circumstances occurring either before or after September, 1939, if

([1]) See pp. 104-110.

such facts or circumstances tend to prove or to disprove the commission by any defendant of war crimes or crimes against humanity as defined in Control Council Law No. 10."

It may be added here that the final Judgment of the Tribunal included the following words :

" This Tribunal has held that it has no jurisdiction to try any defendant for the crime of conspiracy as a separate substantive offence, but we recognise that there are allegations in Count One of the Indictment which constitute charges of direct commission of war crimes and crimes against humanity. However, after eliminating the conspiracy charge from Count One, we find that all other alleged criminal acts therein set forth and committed after 1st September, 1939, are also charged as crimes in the subsequent counts of the indictment. We therefore find it unnecessary to pass formally upon the remaining charges in Count One. Our pronouncements of guilt or innocence under Counts Two, Three, and Four dispose of all issues which have been submitted to us."

4. THE EVIDENCE BEFORE THE TRIBUNAL

The presentation of evidence was begun on 6th March and ended on 13th October, 1947. The Tribunal heard the oral testimony of 138 witnesses and received some 2,100 documentary exhibits, the majority being put in by the Defence.

The facts contained in the evidence put before the Tribunal may be summarised under the following headings :

(i) *The Progressive Degradation of the German Judicial System under Hitler*

The Tribunal admitted evidence relating to the degeneration of the German judicial system from 1933 onwards ; their reason for doing so is set out elsewhere.[1]

It was shown for instance that, beginning in 1933, there developed side by side two processes by which, in the words of the Judgment of the Tribunal, " the Ministry of Justice and the courts were equipped for the terroristic functions in support of the Nazi régime." By the first, the power of life and death was ever more broadly vested in the courts. By the second, the penal laws were extended in such inclusive and indefinite terms as to vest in the judges the widest discretion in the choice of law to be applied, and in the construction of the chosen law in any given case. The texts of many statutes were put as evidence of the increased severity of the criminal law and the development of a less strict definition of the legal nature of punishable acts. The latter was especially evident in the statutes concerning the " sound sentiment of the people " and crime by analogy, and those regarding " undermining the defensive strength of the nation ".

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[1] See p. 73.

Thus, Article 2 of the " Law to Change the Penal Code ", which was promulgated on 28th June, 1935, by Adolph Hitler as Führer and Reich Chancellor, and by Dr. Guertner as Reich Minister of Justice, ran as follows :

> " Article 2. Whoever commits an act which the law declares as punishable or which deserves punishment according to the fundamental idea of a penal law and the sound concept of the people, shall be punished. If no specific penal law can be directly applied to this act, then it shall be punished according to the law whose underlying principle can be most readily applied to the act ".(1)

On 17th August, 1938, a decree was promulgated against " undermining German defensive strength ". It provided in part :

> " Section 5. (1) the following shall be guilty of undermining German defensive strength, and shall be punished by death :
>
> > " 1. Whoever openly solicits or incites others to evade the fulfilment of compulsory military service in the German or an allied armed force, or otherwise openly seeks to paralyse or undermine the will of the German people or an allied nation to self-assertion by bearing arms."

Furthermore, on 20th August, 1942, Hitler issued a decree which ran as follows :

> " A strong administration of justice is necessary for the fulfilment of the tasks of the great German Reich. Therefore, I commission and empower the Reich Minister of Justice to establish a National Socialist Administration of Justice and to take all necessary measures in accordance with my directives and instructions made in agreement with the Reich Minister and Chief of the Reich Chancellery and the Leader of the Party Chancellery. He can hereby deviate from any existing law."

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(1) The Tribunal in its Judgment commented as follows :

" As amended, Section 2 remained in effect until repealed by Law No. 11 of the Allied Control Council. The term ' the sound people's sentiment ' as used in amended Section 2 has been the subject of much discussion and difference of view as to both its proper translation and interpretation. We regard the statute as furnishing no objective standards ' by which the people's sound sentiment may be measured '. In application and in fact this expression became the ' healthy instincts ' of Hitler and his co-conspirators.

" What has been said with regard to the amendment to Section 2 of the Criminal Code is equally true of the amendment of Section 170a of the Code by the decree of Hitler of 28th June, 1935, which is also signed by Minister Guertner and which provides :

" ' If an act deserves punishment according to the common sense of the people but is not declared punishable in the Code, the prosecution must investigate whether the underlying principle of a penal law can be applied to the act and whether justice can be helped to triumph by the proper application of this penal law '.

" This new conception of criminal law was a definite encroachment upon the rights of the individual citizen because it subjected him to the arbitrary opinion of the judge as to what constituted an offence. It destroyed the feeling of legal security and created an atmosphere of terrorism. This principle of treating crimes by analogy provided an expedient instrumentality for the enforcement of Nazi principles in the occupied countries. German criminal law was therefore introduced in the incorporated areas and also in the non-incorporated territories, and German criminal law was thereafter applied by German courts in the trial of inhabitants of occupied countries though the inhabitants of those countries could have no possible conception of the acts which would constitute criminal offences."

These laws were, upon their face, of general applicability. Discriminations on political, racial, and religious grounds were to be found not in the text, but in the application of the text.

Coincidentally with the development of these laws and decrees there arose, however, another body of substantive law which expressly discriminated against minority groups both within and without the Reich, and which formed the basis for racial, religious, and political persecution on a vast scale. A decree of 4th December, 1941, " Concerning the Organisation and Criminal Jurisdiction against Poles and Jews in the Incorporated Eastern Territories", is an outstanding example of this body of law and also illustrates the extension of German laws to purportedly annexed territory, and to territory of the so-called protectorates.(1)

It was also deemed necessary to use the Ministry of Justice and the entire system of courts for the enforcement of the penal laws in accordance with National Socialist ideology. Thus, by a decree of 21st March, 1933, Special Courts were established within the district of every court of appeal ; these Courts and the " People's Court " were given wide discretionary powers and jurisdiction, and during the war their sphere of operation was extended to the occupied territories.

The evidence relating to the actual operation of the law in Nazi Germany showed that two basic principles were held to govern the conduct of the Ministry of Justice. The first was the absolute power of Hitler in person or by delegated authority to enact, enforce, and adjudicate law. The second was the incontestability of such law. In German legal theory, Hitler was not only the Supreme Legislator ; he was also the Supreme Judge. The evidence also demonstrated that Hitler and his highest associates were not content with the issuance of general directives for the guidance of the judicial process, but also insisted upon the right to interfere with individual criminal sentences. Furthermore, by issuing " Judges' Letters" and " Lawyers' Letters ", Thierack, Minister of Justice, sought to ensure that the Bench and Bar should both act according to Nazi principles.

To the domination by Hitler and the political " guidance " of the Ministry of Justice was added the direct pressure of Party functionaries and police officials.

(ii) *The Nacht und Nebel (Night and Fog) Plan*

A decree of Hitler's signed by Keitel on 7th December, 1941, provided, *inter alia*, in substance as follows :

(*a*) that criminal acts committed by non-German civilians directed against the Reich or occupation forces endangering their safety or striking power should require the application of the death penalty in principle ;

(*b*) that such criminal acts would be tried in occupied territories only when it appeared probable that the death sentence would be

(1) See pp. 11-13, 62, and 92-4.

passed and carried out without delay. Otherwise the offenders would be taken to Germany ;

(*c*) that offenders taken to Germany were subject to court martial procedures there only when a particular military concern should require it ;

(*d*) that the Commanders-in-Chief in occupied territories and certain subordinates within their command would be held personally responsible for the execution of this decree ;

(*e*) that the Chief of the OKW would decide in which of the occupied territories this decree would be applied.

The Hitler decree was sent to the Reich Minister of Justice on 12th December, 1941, endorsed for the attention of defendant Schlegelberger. The latter signed a decree of 7th February, 1942, whereby the Ministry of Justice took over the conduct of Nacht und Nebel operations.

The defendant von Ammon commented in evidence :

" The essential point of the NN procedure, in my estimation, consisted of the fact that the NN prisoners disappeared from the occupied territories and that their subsequent fate remained unknown."

The Night and Fog decree was from time to time implemented by several plans, which were enforced by various of the defendants. One such scheme was for the transfer of alleged resistance prisoners, or persons from occupied territories who had served their sentences or had been acquitted, to concentration camps in Germany where they were held incommunicado and were never heard from again. Another scheme was for the transfer of the inhabitants of occupied territories to concentration camps in Germany as a substitute for a court trial.

The evidence established that in the execution of the Hitler Nacht und Nebel Decree the Ministry of Justice, special courts, and public prosecutors acted together with the OKW and Gestapo in causing to be arrested, transported to Germany, tried, sentenced to death and executed, or imprisoned under inhumane conditions in prisons and concentration camps, thousands of the civilian population of the countries overrun and occupied by the German military forces.

Many accused Nacht und Nebel persons were arrested and secretly transported to Germany and other countries for trial. Often they were denied the right to introduce evidence, to be confronted by witnesses against them, or to present witnesses on their own behalf. They were denied the right of counsel of their own choice, and were sometimes denied the aid of any counsel. No indictment was served in many instances and in such cases the accused learned only a few moments before the trial of the nature of the alleged crime for which he was to be tried. The entire proceedings were secret.

In autumn, 1944, Hitler ordered the discontinuance of the Nacht und Nebel proceedings by the civil and the OKW courts and transferred the entire operation to the Gestapo.

The Night and Fog Decree originated with Hitler as a plan or scheme to combat alleged resistance movements against the German occupation

forces, but it was early extended by the Ministry of Justice to include " offences " against the German Reich. Often the " offences " in no way concerned the security of the armed forces in the occupied territories. Many of them occurred after military operations had ceased or in areas where there were no military operations.

(iii) *The Plan for Racial Extermination*

The evidence also revealed the existence under Hitler's rule of a plan for the persecution and extermination of Jews and Poles, either by means of killing or by confinement in concentration camps, which often involved the death of the victims. Lesser forms of racial persecution were also practised by governmental authority and was shown to have constituted an integral part of the general policy of the Reich.

The Reich Ministry of Justice was in many ways involved in the execution of this plan, as will appear from the following paragraphs which set out a summary of the most important evidence brought specifically against each accused.

(iv) *The Evidence Concerning Individual Accused*: (1) *Schlegelberger*

This accused was appointed, on 10th October, 1931, Secretary of State in the Reich Ministry of Justice under Minister of Justice Guertner, which position he held until Guertner's death on 29th January, 1941, when he was put in charge of the Reich Ministry of Justice as Administrative Secretary of State. When Thierack became the new Minister of Justice on 20th August, 1942, Schlegelberger resigned from the Ministry.

The evidence against this defendant concerned first his connection with the general debasement of the German legal system. A decree signed by Adolph Hitler and by Schlegelberger on 4th September, 1941, amended the Criminal Code to provide the death penalty for dangerous habitual criminals and sex criminals " if necessitated for the protection of the national community or by the desire for just expiation ". The decree also contained provisions for the establishment of martial law in the incorporated Eastern territories. Pursuant to a decree of the Führer of 16th March, 1939, Schlegelberger, together with Keitel and the Minister of the Interior, issued a decree which, *inter alia*, released the Reich Court from the necessity to follow precedents set up under the pre-Nazi régime in Germany ; the Court must " effect an interpretation of the law which takes into account the change of ideology and of legal concepts which the new State has brought about." There were also in evidence several examples of the assistance and encouragement given by the accused to Hitler in his personal interferences in the operation of the law. For instance, it was shown that a Jew who had been sentenced to two and one-half years imprisonment for hoarding eggs was handed over by Schlegelberger to the Gestapo for execution, because Hitler had desired the victim's death. In 1941 Schlegelberger removed from their offices three justices of the Lüneberg Court, who had passed a sentence on.

(1) In the interests of space, no summary will appear of the evidence relating to Westphal or Engert (see p. 5) or of Barnickel, Petersen, Nebelung and Cuhorst, who were found not guilty. The Tribunal expanded upon its finding of not guilty regarding Cuhorst, and its words are set out on p. 69.

a Polish farmhand which Hitler regarded as too light. In December, 1941, the accused, at the wish of Himmler, quashed a sentence passed on a German police officer who had obtained by beating a confession from a milking-hand named Bloeding.

It was Schlegelberger's signature on a decree of 7th February, 1942, which imposed upon the Ministry of Justice and the German courts the tasks involved in the prosecution, trial, and disposal of the victims of Hitler's Night and Fog plan. In an affidavit, the accused von Ammon stated, *inter alia :* " The decree of 7th February, 1942, signed by Schlegelberger, contained, among others, the following provisions : Foreign witnesses could be heard in these special cases only with the approval of the Public Prosecutor, since it was to be avoided that the fate of NN prisoners became known outside of Germany."

Schlegelberger prepared a draft of a proposed ordinance " concerning the administration of justice regarding Poles and Jews in the incorporated Eastern territories ". A comparison of its phraseology with the phraseology contained in the law against Poles and Jews of 4th December, 1941, disclosed that Schlegelberger's draft constituted the basis on which, with certain modifications and changes, the law against Poles and Jews was enacted. This law provided :

" 1. *Criminal Law*

" I. (1) Poles and Jews in the incorporated Eastern territories are to conduct themselves in conformity with the German laws and with the regulations introduced for them by the German authorities. They are to abstain from any conduct liable to prejudice the sovereignty of the German Reich or the prestige of the German people.

" (2) The death penalty shall be imposed on any Pole or Jew if he commits an act of violence against a German on account of his being of German blood.

" (3) A Pole or Jew shall be sentenced to death, or in less serious cases to imprisonment, if he manifests anti-German sentiments by malicious activities or incitement, particularly by making anti-German utterances, or by removing or defacing official notices of German authorities or offices, or if he, by his conduct, lowers or prejudices the prestige or the well being of the German Reich or the German people.

" (4) The death penalty, or in less serious cases imprisonment, shall be imposed on any Jew or Pole :

" 1. If he commits any act of violence against a member of the German Armed Forces or associated services, of the German Police Force or its auxiliaries, of the Reich Labour service, of any German authority or office or of a section of the N.S.D.A.P. ;

" 2. If he purposely damages installations of the German authorities or offices, objects used by them in performance of their duties or objects of public utility ;

" 3. If he urges or incites to disobedience to any decree or regulation issued by the German authorities ;

" 4. If he conspires to commit an act punishable under sub-sections (2), (3) and (4), paragraphs 1 to 3; or if he seriously contemplates the carrying out of such an act, or if he offers himself to commit such an act, or accepts such an offer, or if he obtains credible information of such act, or of the intention of committing it, and fails to notify the authorities or any person threatened thereby at a time when danger can still be averted.

" 5. If he is in unlawful possession of firearms, hand-grenades or any weapon for stabbing or hitting, of explosives, ammunition or other implements of war, or if he has credible information that a Pole or a Jew is in unlawful possession of such objects, and fails to notify the authorities forthwith.

" II. Punishment shall also be imposed on Poles or Jews if they act contrary to German Criminal Law or commit any act for which they deserve punishment in accordance with the fundamental principles of German Criminal Law and in view of the interests of the State in the incorporated Eastern territories.

" III. . . . (2) The death sentence shall be imposed in all cases where it is prescribed by the law. Moreover, in these cases where the law does not provide for the death sentence, it may and shall be imposed if the offence points to particularly objectionable motives or is particularly grave for other reasons ; the death sentence may also be passed upon juvenile offenders.

" 2. *Criminal Procedure*

" IV. The State Prosecutor shall prosecute a Pole or a Jew if he considers that punishment is in the public interest.

" V. (1) Poles and Jews shall be tried by a Special Court or by the District Judge.

" (2) The State Prosecutor may institute proceedings before a Special Court in all cases. Proceedings may be instituted by him before a District Judge if the punishment to be imposed is not likely to be heavier than five years in a penal camp, or three years in a more rigorous penal camp.

" (3) The jurisdiction of the People's Court remains unaffected.

"VI. (1) Every sentence will be enforced without delay. The State Prosecutor may, however, appeal from the sentence of a District Judge to the Court of Appeal. The appeal has to be lodged within two weeks.

" (2) The right to lodge complaints which are to be heard by the Court of Appeal is reserved exclusively to the State Prosecutor.

" VII. Poles and Jews cannot challenge a German Judge on account of alleged partiality.

" VIII. (1) Arrest and temporary detention are allowed whenever there are good grounds to suspect that an offence has been committed.

" (2) During the preliminary inquiry, the State Prosecutor may order the arrest and any other coercive measures permissible.

" IX. Poles and Jews are not sworn in as witnesses in criminal proceedings. If the unsworn deposition made by them before the

Court is found false, the provisions as prescribed for perjury and false depositions on oath shall be applied accordingly.

" X. (1) Only the State Prosecutor may apply for the reopening of a case. In a case tried before a Special Court, the decision concerning an application for the reopening of the proceedings rests with this Court.

" (2) The right to lodge a plea of nullity rests with the State Prosecutor-General. The decision on the plea rests with the Court of Appeal.

" XI. Poles and Jews are not entitled to act as prosecutors either in a principal or a subsidiary capacity.

" XII. The Court and the State Prosecutor shall conduct proceedings within their discretion and according to the principles of the German Law of Procedure. They may, however, dispense with the provisions of the German Law on the Organisation of Courts and on Criminal Procedure, whenever this may appear to them advisable for the rapid and more efficient conduct of proceedings.

" 3. *Martial Law*

" XIII. (1) Subject to the consent of the Reich Minister of the Interior and the Reich Minister of Justice, the Reich Governor (*Oberpräsident*) may until further notice enforce Martial Law in the incorporated Eastern territories, either in the whole area under his jurisdiction or in parts thereof, upon Poles and Jews guilty of grave excesses against the Germans or of other offences which seriously endanger the German work of reconstruction.

" (2) The Courts established under Martial Law impose the death sentence. They may, however, dispense with punishment and refer the case to the Secret State Police.

" (3) Subject to the consent of the Reich Minister of the Interior, the constitution and procedure of the Courts established under Martial Law shall be regulated by the Reich Governor (*Oberpräsident*).

" 4. *Extent of Application of this Decree*

" XIV. (1) The provisions contained in Sections I–IV of this decree apply also to those Poles and Jews who on 1st September, 1939, were domiciled or had their residence within the territory of the former Polish State, and who committed criminal offences in any part of the German Reich other than the incorporated Eastern territories.

" (2) The case may also be tried by the Court within whose jurisdiction the former domicile or residence of the offender is situated. Sections V–VIII apply accordingly.

" (3) Paragraphs 1 and 2 do not apply to offences tried by the Courts in the Government General.

" 5. *Supplementary Provisions*

" XV. Within the meaning of this decree the term ' Poles ' includes *Schutzanghörige* or those who are stateless."

Section XIV of the law was repeatedly employed by the courts in the prosecution of Poles, and on 21st January, 1942, Schlegelberger issued a

decree providing that the law against Poles and Jews " will be equally applicable with the consent of the Public Prosecutor to offences committed before the decree came into force."

Schlegelberger was unwilling to extend the system of deportation to the east to half-Jews. His solution, however, was that proposed by him to Reich Minister Lammers, in a secret letter on 5th April, 1942 :

> " Those half-Jews who are capable of propagation should be given the choice to submit to sterilisation or to be evacuated in the same manner as Jews."

(v) *Klemm*

From July, 1940 to March, 1941, Klemm was in Holland as head of the department dealing with legal matters in the occupation government of Seyss-Inquart and had charge of both civil and penal law. The penal section in Holland had jurisdiction over German citizens not in the army and Dutch nationals whose acts were said to infringe on German interests. He was also liaison officer between the Commissioner General for the Administration of Justice and the Secretary of the Dutch Ministry of Justice at The Hague. From March, 1941 to January, 1944, Klemm was in the office of the Deputy of the Führer and Party Chancellery in Berlin as Chief of Group III–C. During this period he was the liaison officer between Minister of Justice Thierack and the Party Chancellery. He later became State Secretary in the Ministry of Justice.

During his period of service in Holland, the accused wrote letters dated 24th and 30th September, 1940, marked " Secret ", to the Department for Legislation Lange Vijverberg, with opinions and recommendations as to the registration and confiscation of Jewish property in Holland. He knew of the persecution of the Jews in Holland. As State Secretary in the Ministry of Justice, he exercised supervision over the enforcement of the Law of 4th December, 1946, against Poles and Jews and dealt with clemency matters pertaining to cases tried under that decree. Further, during his term of office in the Party Chancellery, he wrote to the Minister of Justice, stating that while the German Criminal Code for juveniles could be made applicable to other foreign juveniles, it should not be applied to Jewish, Polish and gipsy juveniles. The letter also stated that " a special regulation will come into effect which will prevent the German Criminal Code for juveniles from applying to gipsies and those of gipsy descent."(1)

While in the Party Chancellery, Klemm took part in drafting the act to make the law relating to treason retroactive and applying it to the " annexed " Eastern territories, and this draft bears his signature.

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(1) As to this act the Judgment states: " This Tribunal does not construe that letter as a legal opinion but as an expression of Party policy submitted through the Party Chancellery to the Ministry of Justice to the effect that minors of the proscribed races must be subject to the merciless provisions of the decree against Poles and Jews. The argument that they were necessarily excluded because they were foreigners and that the German Juvenile Act contemplated entrance into the Hitler Youth and similar provisions applicable only to Germans, has little significance when the letter itself expressly states that there were no objections to applying the German Criminal Code for juveniles to foreign juveniles, unless they were Poles, Jews, or gipsies. Further, it can hardly be construed as a legal opinion as to gipsies in view of the statement therein made that a special regulation will come into effect which will prevent the German Criminal Code for juveniles from applying to gipsies and those of gipsy descent merely because a definite regulation is lacking."

There was also some evidence implicating Klemm in the operation of the Nacht und Nebel Decree. When the defendant von Ammon attended conferences with public prosecutors in Breslau and Kattowice on 18th and 19th February, 1944, concerning the housing of Nacht und Nebel prisoners and possibility of transferring Nacht und Nebel cases from the Netherlands, Belgium and Northern France to special courts in Poland for trial, he reported to Klemm among others. As Under-Secretary, Klemm was required to pass judgment upon clemency matters either while acting with or in the absence of the Minister of Justice. He admitted deciding on eight clemency pleas in Nacht und Nebel cases where death sentences had been passed and refusing all of them. He knew of the transfer of Nacht und Nebel cases from Essen to Silesia and knew of the " routine " Nacht und Nebel matters which passed through his department.(1)

During the time when Klemm was State Secretary, the plan of the leaders of the Nazi State to inspire the lynching of forced-down Allied flyers by the people of Germany was inaugurated. The Ministry of Justice took over in substance the disposition of cases where Germans were alleged to have killed such captives and by its action the prosecution throughout Germany was restricted in its normal duty of filing indictments against those who had murdered Allied airmen and were criminals under German law. The evidence showed many instances of the lynching of Allied airmen by the German population, yet no case was brought to the attention of the Tribunal where an indictment was actually filed for such offences. There was evidence that Klemm knew of this policy.(2)

The evidence before the Tribunal showed that in the latter part of January, 1945, the penitentiary at Sonnenburg under the Ministry of Justice was evacuated and that prior thereto, between seven and eight hundred political prisoners therein were shot by the Gestapo. The accused denied knowledge of this matter.(3)

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(1) In its Judgment the Tribunal summed up Klemm's responsibility in this sphere as follows : " As State Secretary he knew of the NN procedure and was connected therewith, particularly as to the approximately 123 NN prisoners sentenced to death who were denied clemency while he sat in conference with Thierack, and in the eight cases where he denied clemency as Deputy for Thierack."

(2) The Tribunal gave voice to the following conclusion : " In this plan to incite the population to murder Allied airmen, the part of the Ministry of Justice was, to some extent, a negative one. However, neither its action in calling for a report on pending cases for quashing, nor its action in calling for reports and files pertaining to all such incidents, was negative. Certainly the net effect of the procedure followed by the Ministry of Justice resulted in the suppression of effective action in such cases. . . . The defendant Klemm was familiar with the entire correspondence on this matter . . . and it is the judgment of this Tribunal that he knowingly was connected with the part of the Ministry of Justice in the suppression of the punishment of those persons who participated in the murder of Allied airmen."

(3) Regarding the accused's connection with these shootings, however, the Tribunal said : " That the defendant Klemm knew nothing about the liquidation of some 800 people in this institution until he learned it in this trial, over-taxes the credulity of this Tribunal. Even in Nazi Germany the evacuation of a penal institution and the liquidation of 800 people could hardly have escaped the attention of the Minister of Justice himself or his State Secretary charged with supervision of Department V, which was competent for penal institutions. Exhibit 290, herein extensively quoted, shows that the operations of penal institutions and the disposition of the inmates remained a function of the Ministry of Justice, and it is the opinion of this Tribunal that the Ministry of Justice was, at the time of the evacuation of Sonnenburg, responsible for the turning over of the inmates to the Gestapo for liquidation, and that the defendant Klemm approved in substance, if not in detail, this transaction."

Exhibit 290 contained directives of the Ministry of Justice which were issued shortly after the incident at Sonnenburg and concerned the disposition of prisoners in the penitentiaries of the Reich in areas threatened by the Allied advance.

(vi) *Rothenberger*

This accused was, from 1935 to 1942, President of the District Court of Appeals in Hamburg. In 1942 he was appointed Under-Secretary in the Ministry of Justice under Thierack. He remained in that office until he left the Ministry in December, 1943, after which he served as a notary in Hamburg. He was a Dienstleiter in the Nazi Party during 1942 and 1943, and from 1934 to 1942 he was Gauführer in the National Socialist Jurists' League.(1)

Rothenberger took an active part in making the German legal system subservient to the ends of Nazism. He expressed his conviction that the duty of a judge as the " vassal " of the Führer was to decide cases as the Führer would decide them. The evidence indicated not that Rothenberger objected to the exertion of influence upon the courts by Hitler, the Party leaders, or the Gestapo, but that he wished that influence to be channelled through him personally.

On the one hand he established liaison with the Party officials and the police, and on the other he organised a system of political guidance for the judges who were his subordinates in the Hamburg area. This system of guidance was illustrated by the holding of conferences before trial concerning pending cases of political importance. The evidence showed also that he used his influence with the subordinate judges in his district to protect Party members who had been charged or convicted of crime ; that on occasions he severely criticised judges for decisions rendered against Party officials, and on at least one occasion was instrumental in having a judge removed from his position because he had insisted upon proceeding with a criminal case against a Party official.

He protested against the practice of Party officials and Gestapo officers of interfering with the judges in trying cases, but he made arrangements with the Gestapo, the SS, and the SD whereby they were to come to him with their political affairs and he then instituted a system of reviewing from a political point of view sentences passed by the judges who were his inferiors.

In a report addressed to the Hamburg judges, Rothenberger discussed the opinion of the Ministry concerning the legal treatment of Jews. He stated that the fact that a debtor in a civil case was a Jew should as a rule be a reason for arresting him ; that Jews might be heard as witnesses but that extreme caution was to be exercised in weighing their testimony. He requested that no verdict should be passed in Hamburg when a condemnation was exclusively based on the testimony of a Jew, and the judges be advised accordingly.

On 21st April, 1943, Rothenberger took part in a conference of State Secretaries concerning the limitation of legal rights of Jews, in which Kaltenbrunner also participated. At this meeting consideration was given to drafts of a decree which had long been under discussion. Modifications were agreed upon and the result was the promulgation of the 13th Regulation under the Reich Citizenship Law which provided that criminal actions

(1) Concerning the dual capacity in which he served, the accused said : " On account of the identity, of course, between President of the District Court of Appeals and Gauführer, I was envied by all other district courts of appeal because they continually had to struggle against the Party while I was saved this struggle."

committed by Jews were to be punished by the police and that after the death of a Jew his property was to be confiscated.

Rothenberger also participated in the deprivation of the rights of Jews in civil litigation. In the report referred to above the defendant wrote :

> " The lower courts do not grant to Jews the right to participate in court proceedings *in forma pauperis*. The district court suspended such a decision in one case. The refusal to grant this right of participation in court proceedings *in forma pauperis* is in accordance with today's legal thinking. But since a direct legal basis is missing, the refusal is unsuitable. We therefore think it urgently necessary that a legal regulation or order be given on the basis of which the rights of a pauper can be denied to a Jew."

Notwithstanding this statement that it would be unsuitable to deprive Jews of this right without a legal regulation there was evidence that, in practice, he did help to secure the denial to Jews of the benefits of the German poor law.

The accused was also shown to have played a minor part in the carrying out of the Nacht und Nebel plan, and in 1941 and 1942 he visited Mauthausen concentration camp, but there was no evidence that after his inspection of Mauthausen he took any action with regard to the knowledge which he had gathered there.(1)

(vii) *Lautz*

The defendant Lautz served from 20th September, 1939, until the end of the war as Chief Public Prosecutor at the People's Court in Berlin. The defendant Rothaug was among the senior public prosecutors under the general supervision of Lautz and the crimes with which his office dealt were those over which the People's Court had jurisdiction. The matters which came before him included prosecutions for " undermining the German defensive strength ", " high treason " and " treason ", cases of attempted escape from the Reich by Poles and other non-Germans, and Nacht und Nebel cases.

A great number of prosecutions were brought under the decree of 17th August, 1938, which provided that " Whoever openly seeks to paralyse or undermine the will of the German people or an allied nation to self-assertion by bearing arms " should be punished by death.(2) The prosecutor's office was required to deal at one time with approximately 1,500 cases a month involving charges of this type. Under the supervision of the defendant Lautz all of these charges had to be examined and assigned for trial to the People's Court in serious cases, or to other courts. In the cases

(1) The Tribunal found the evidence on this point sufficiently incriminating to enable it to say that : " The defendant Rothenberger, contrary to his sworn testimony, must have known that the inmates of the Mauthausen concentration camp were there by reason of the ' correction of sentences ' by the police, for the inmates were in the camp either without trial or after acquittal, or after the expiration of their term of imprisonment. . . . We concede that the concentration camps were not under the direct jurisdiction of the Reich Minister of Justice, but are unable to believe that an Under-Secretary in the Ministry, who makes an official tour of inspection, is so feeble a person that he could not even raise his voice against the evil of which he certainly knew."

(2) The Tribunal commented that : " This was the law which effectively destroyed the right of free speech in Germany."

which were assigned to the People's Court for trial " there was always the possibility that the death sentence would be pronounced ".

Lautz testified that the signature of his deputy " meant, of course, that I assumed responsibility for that matter".

In connection with the work of his department it was the duty of the defendant Lautz to sign all indictments, all suspensions of proceedings, and all reports to his superior, the Minister of Justice. This work assumed such proportions that it became necessary to delegate parts thereof to his subordinates, but the defendant Lautz required that important matters be reported directly to him. As an illustration of the type of case which was prosecuted under the law against " undermining the defensive strength of the nation " was that of the defendant who said to a woman: " Don't you know that a woman who takes on work sends another German soldier to his death ? " This offence was described by Lautz and Rothaug as a serious case of undermining the defensive strength of the nation.

The office of the Chief Public Prosecutor of the People's Court was vested with a wide discretion in the assignment of cases to the various courts for trial. Under the law against undermining the defensive strength of the nation the death penalty was mandatory. If the prosecutor sent the case for trial to the People's Court on the charge of " undermining," as Lautz often did, instead of sending it to a lower court for trial under the Malicious Acts Law of 1934, under which imprisonment could be awarded, he determined for all practical purposes the character of the punishment to be inflicted, and yet the evidence showed that there was no rule by which the cases were classified and that the fate of the victims depended merely on the opinion of the prosecutor as to the seriousness of the words spoken.

Lautz also took part in the enforcement of the Nacht und Nebel Decree until late 1944, when he was ordered to suspend People's Court proceedings against Nacht und Nebel prisoners and transfer them to the Gestapo. The People's Court acquired jurisdiction of Nacht und Nebel cases under the decree of the Reich Minister of Justice of 14th October, 1942. Lautz estimated that the total number of Nacht und Nebel cases examined by his department was approximately one thousand, of which about two hundred were assigned to the People's Court for trial, but he added that each case could concern several defendants.

Lautz estimated that from 150 to 200 persons were prosecuted for leaving their places of work and attempting to escape from Germany by crossing the border into Switzerland. These cases were prosecuted under the provisions of the penal code concerning treason and high treason and the persons charged included many Poles. For instance, upon an indictment filed by authority of the defendant Lautz, the People's Court sentenced three Poles to death upon a charge of preparation of high treason " because they, as Poles, harmed the welfare of the German people, and because in a treasonable way they helped the enemy and also prepared for high treason ". The specific facts found by the court were that the defendants attempted to cross the border into Switzerland for the purpose of joining a Polish Legion which was supposed to exist there. By such conduct and by depriving the German Reich of the benefit of their labour, it was held that the efforts of the defendants aimed "at forcibly detaching the Eastern regions incorporated in the Reich from the German Reich."

In a secret communication by the defendant Lautz to the Reich Minister of Justice the former proposed that the German courts should try and convict Poles, including one Golek, upon the charge of high treason on account of acts done in Poland before the war, namely instituting proceedings against Polish citizens of German blood, charging these racial Germans with Fifth Column activities directed against Poland.

(viii) *Mettgenberg*

Mettgenberg held the position of Ministerialdirigent in Divisions III and IV of the Reich Ministry of Justice. In Division III, for penal legislation, he dealt with questions of international law, formulating secret, general and circular directives.

His statements showed that he exercised wide discretion and had extensive authority over the entire Night and Fog plan from the time the Night and Fog prisoners were arrested in occupied territory onwards to their transfer to Germany, trial and execution or imprisonment. He knew that an agreement existed between the Gestapo, the Reich Ministry of Justice, the Party Chancellery, and the OKW with respect to the purposes of the Night and Fog Decree and the manner in which such matters were to be treated. There was evidence, for instance, that the accused had dealt with questions of procedure and of clemency in Nacht und Nebel cases and questions relating to the place of trial of such cases. Mettgenberg and von Ammon were sent to the Netherlands because certain German courts set up there were receiving Night and Fog cases in violation of the order that they should be transferred to Germany. They held a conference at The Hague with the highest military justice authorities and the heads of the German courts in the Netherlands, which resulted in the sending of a report of the matter to the OKW at Berlin, which set out the opinion of Mettgenberg and von Ammon that: " The same procedure should be used in the Netherlands as in other occupied territories, that is, that all Night and Fog matters should be transferred to Germany."

Mettgenberg referred to and approved the testimony of the defendant Schlegelberger, which stated " that the Night and Fog prisoners were expected, and were to be tried materially according to the same regulations which would have applied to them by the courts martial in the occupied territories " and that, accordingly, " the rules of procedure had been curtailed to the utmost extent." This court martial procedure was shown to have been used in the prosecution of Night and Fog prisoners who had been charged with high treason or preparation of treason against the Reich.

In an affidavit Mettgenberg stated: " The ' Night and Fog '. Section within my sub-division was headed by Ministerial Counsellor von Ammon. This matter was added to my sub-division because of its international character. I know, of course, that a Führer decree to the OKW was the basis for this ' Night and Fog ' procedure and that an agreement had been reached between the OKW and the Gestapo, that the OKW had also established relations with the Minister of Justice and that the handling of this matter was regulated accordingly . . . . Whenever von Ammon had doubts concerning the handling of individual cases, we talked these questions over together, and when they had major importance, referred them to higher

officials for decision. When he had no doubts, he could decide all matters himself."

In response to several inquiries from prosecutors at Special Courts in Hamm, Kiel, and Cologne, citing pending Night and Fog cases, the defendants Mettgenberg and von Ammon replied that in view of the regulations for the keeping of Night and Fog trials absolutely secret defence counsel chosen by Night and Fog defendants would not be permitted to act for them.

A letter dated 3rd June, 1943, from the Reich Ministry of Justice to the People's Court Justices and the Chief Public Prosecutors, initialed by Mettgenberg, dealt with the subject of trials under the Night and Fog Decree of foreigners who were nationals of other countries than those occupied by the Nazi forces.(1) The question arose whether the usual secrecy measures should apply. The reply was that if the trial of such foreigners could not be carried out separately from the trial of the nationals of the occupied countries for reasons pertaining to the presentation of evidence, then the trials were to be strictly in accordance with the provisions of Nacht und Nebel procedure ; otherwise foreign nationals would obtain knowledge of the course of the trial against their accomplices.

(ix) *Von Ammon*

Von Ammon, having joined the Reich Ministry of Justice in 1935, was employed, after the Austrian Anschluss, as liaison officer of Department III (penal matters) and Department VIII (Austria), in the Reich Ministry of Justice. He was consultant in the department for the administration of penal law. He was transferred to the Munich Court of Appeals as Oberlandesgerichtsrat, where he served until June, 1940, at which time he was recalled to the Reich Ministry of Justice. On 1st March, 1943, he became Ministerial Counsellor in the Ministry of Justice. He stated in evidence that :

> " From 1942 onwards I dealt mainly with Nacht und Nebel cases in the occupied territories. In my capacity as consultant for Nacht und Nebel cases I made several duty trips to the occupied territories and took part in discussions in Paris and Holland which dealt with questions of Nacht und Nebel proceedings."

Von Ammon's position involved the exercise of personal discretion. Within the Ministry he was Ministerial Counsellor in Mettgenberg's subdivision and was in charge of the Night and Fog matters ; the distribution of the Night and Fog cases to the several competent special courts and the People's Court was decided upon by him. The defendant Mettgenberg stated that whenever von Ammon had doubts concerning the handling of individual cases joint discussions between the two were held. He added : " When he had no doubts he could decide on matters himself."

Von Ammon and Mettgenberg acted together on doubtful matters and referred difficult questions to competent officials in the Reich Ministry of Justice and the Party Chancellery.

Von Ammon and Mettgenberg were the representatives of the Reich Ministry of Justice at a conference at The Hague on 2nd November, 1943, concerning " New Regulations for Dealing with Night and Fog Cases from

(1) In referring to this evidence, the Tribunal pointed out that : " The difficulty obviously involved a violation of international law as to such nationals of other countries."

the Netherlands." The broad scope and the variety of the official activities of von Ammon were also illustrated by reference to reports which he made to officials of the Ministry of Justice during the year 1944 on questions relating to Nacht und Nebel procedure. A declaration signed by von Ammon, dated 2nd October, 1947, stated that Nacht und Nebel prisoners were often ignorant of charges against them until a few moments before the trial.

A directive by the Reich Minister of Justice with respect to the treatment of Nacht und Nebel prisoners, dated Berlin, 21st January, 1944, initialed by defendant von Ammon, to the President of the People's Court, to the Reichsführer SS, Reich Prosecutor of the People's Court (defendant Lautz), to the Chief Public Prosecutor at Hamm (defendant Joel), and others, stated that :

> " If in the main trial of an NN proceeding it appears that the accused is innocent or if his guilt has not been sufficiently established, then he is to be handed over to the Secret State Police ; the Public Prosecutor informs the Secret State Police about his opinion whether the accused can be released and return into the occupied territories, or whether he is to be kept under detention. The Secret State Police decide which further actions are to be taken.
>
> " Accused who were acquitted or whose proceedings were closed in the main trial, or who served a sentence during the war, are to be handed over to the Secret State Police for detention for the duration of the war."

In conferences attended by von Ammon, the Ministry of Justice agreed to the transfer of Nacht und Nebel proceedings which had been ordered by Hitler(1) and moved the victims from the Ministry's prisons to the Gestapo's custody.(2)

(x) *Joel*

Having entered the Ministry of Justice in May, 1933, as a junior public prosecutor, Joel had, by May, 1941, risen to the rank of Ministerial Counsellor. He remained with the Reich Ministry of Justice until 12th May, 1943, when he was appointed Attorney-General to Supreme Provincial Court of Appeals in Hamm (Westphalia). Joel became Chief Prosecutor of the Court of Appeals in Hamm, covering all of Westphalia and the district of Essen, on 17th August, 1943, which office he continued to hold until the end of the war. At the same time he rose in the ranks of the SS, reaching, on 9th November, 1943, the rank of SS Obersturmbannführer, his appointment being approved by Himmler. After December, 1937, Joel in his several capacities at the Ministry of Justice, in addition to his other duties acted as liaison officer between the Ministry and the SS, the SD, and the Gestapo. To this position a successor was appointed on 1st August, 1943.

In his position as Chief Prosecutor of the Court of Appeals in Hamm he was in charge of the Night and Fog prosecutions for the Special Courts in Essen until 15th March, 1944, when these courts were transferred farther east to Oppeln in the Kattowice district. It was his task to supervise the work of all prosecutors assigned to his office.

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(1) See p. 9.
(2) Regarding von Ammon see also pp. 15 and 19.

Joel was also a Referent in the Reich Ministry of Justice with the authority and duty to review penal cases from the incorporated Eastern territories after the occupation of Poland. In this capacity he dealt with many of the cases tried pursuant to the decree against Poles and Jews. In defence of these acts, Joel testified that " he felt obligated by the existing laws and so complied with them ". Joel did not have the same view as other officials that after the occupation of Poland the nationals of the annexed part of Poland became German nationals. He testified that such a Polish citizen after 1st September, 1939, remained a Polish national and that " a Polish national is never a German ". Joel admitted that he knew he was not dealing with Germans but with foreign nationals.

In his capacity as Referent for the incorporated Eastern territories and liaison officer between the Reich Ministry of Justice and the Gestapo, Joel took part in conferences concerning the disposition of such Jewish and Polish cases. In one instance he reported having discussed an order of Himmler's as to the treatment Poles and Jews should receive. In another instance he reported ordering the transfer of Poles who had been sentenced to a penal camp for three years to the Gestapo. Schlegelberger testified that Minister of Justice Guertner charged Joel with the mission of representing the Ministry of Justice with the police in connection with such transfers.

In his capacity as Referent, Joel reviewed 16 death sentences passed on Poles who had committed alleged crimes against the Reich or the German occupation forces. One of these Poles was born in Cleveland, Ohio, in the United States, and his death sentence was commuted to life imprisonment because Joel was fearful his execution would involve the Reich in international complications. The remaining 15 Poles were executed.

(xi) *Rothaug*

This accused was, from April, 1937 to May, 1943, Director of the District Court in Nuremberg, except for a period in August and September of 1939, when he was in the Wehrmacht. During this time he was Chairman of the Court of Assizes, of a penal chamber, and of the Special Court.

From May, 1943 to April, 1945, he was Public Prosecutor of the Public Prosecution at the People's Court in Berlin. Here, as head of Department I, he dealt for a time with cases of high treason in the Southern Reich territory, and, from January, 1944, with cases concerning the undermining of public morale in the Reich territory.

His attitude of hostility towards the Polish and Jewish races was proved from many sources and was not shaken by the affidavits which he submitted on his own behalf. One witness testified that recommendations regarding the treatment of Poles and Jews were made by the defendant Rothaug, through the witness, to higher levels and that the subsequent decree of 1941 against Poles and Jews conformed to Rothaug's ideas. In a communication to Deputy Gauleiter Holz the accused Oeschey made many charges against one Doebig for his failure to take action against officials under him who had failed to carry out the Nazi programme against the Jews and Poles. Oeschey testified that these charges were copied from a letter submitted to him by the defendant Rothaug and that the defendant assumed responsibility for these charges.

Evidence of Rothaug's participation in the Nazi policy of persecution and extermination of persons of these races included accounts of three cases which were tried by Rothaug as Presiding Judge.

In the first trial, two Polish girls of under 18 years of age were accused of starting a fire in an armament plant in Bayreuth. A person named Kern was summoned by the defendant Rothaug to act as defence counsel in the case approximately two hours before the case came to trial. He informed Rothaug that he would not have time to prepare a defence. According to Kern's evidence to the United States Military Tribunal, Rothaug stated that if he did not take over the defence, the trial would have to be conducted without a defence counsel. Rothaug on the other hand claimed to have told Kern that he would secure another defence counsel. In either event the trial was to go on at once.

The trial itself, according to Kern, lasted about half an hour ; according to the defendant, approximately an hour ; in the view of Markl, the prosecutor in the case, it was conducted with the speed of a court martial.

The evidence consisted of alleged confessions which one of the defendants repudiated before the Court. The two young Polish women were sentenced to death and executed four days after trial.(1)

In the second trial a Polish farmhand, approximately 25 years of age, was alleged to have made indecent advances to his employer's wife. The defendant was sentenced to death under the Law Against Poles and Jews in the Incorporated Eastern Territories. The verdict was signed by the defendant Rothaug, and an application for clemency was disapproved by him. The victim was subsequently executed. The judgment of Rothaug's court included the following words : " The whole inferiority of the defendant, I would say, lies in the sphere of character and is obviously based on his being a part of Polish sub-humanity, or in his belonging to Polish sub-humanity. . . . Beyond disregarding the feminine honour of the wife of farmer Schwenzl the attack of the defendant is directed against the purity of the German blood. Looking at it from this point of view, the defendant showed such a great deal of disobedience in the German living-space that his action has to be considered as especially significant."

In the third trial, a merchant who was head of the Jewish community in Nuremberg and 68 years of age was sentenced to death for an " offence " said to amount to race pollution, against Article 2 of the Law for the Protection of German Blood and Honour and Sections 2 and 4 of the Decree Against Public Enemies. These read respectively as follows :

" *Article* 2.

" Sexual intercourse (except in marriage) between Jews and German nationals of German or German-related blood is forbidden ; "

" *Section* 2.

" Crimes During Air Raids.

" Whoever commits a crime or offence against the body, life, or property, taking advantage of air raid protection measures, is punishable

(1) Rothaug stated in contradiction to the other witnesses, that a clear case of sabotage had been established, but the United States Tribunal ruled : " Under the circumstances and in the brief period of the trial, the Tribunal does not believe the defendant could have established those facts from evidence."

by hard labour of up to fifteen (15) years or for life, and in particularly severe cases, punishable by death."

" *Section* 4.

" Exploitation of the State of War a Reason for More Severe Punishment.

" Whoever commits a criminal act exploiting the extraordinary conditions caused by war is punishable beyond the regular punishment limits with hard labour of up to fifteen (15) years or for life, or is punishable by death if the sound common sense of the people requires it on account of the crime being particularly despicable."

The indictment before the Special Court which tried the victim was prepared according to the orders of Rothaug. Before the trial, Rothaug told Prosecutor Markl that there was sufficient proof of sexual intercourse to convince him, and that he was prepared to condemn the Jew to death. Also before the trial, Rothaug called on Dr. Armin Bauer, medical counsellor for the Nuremberg Court, as the medical expert for the case. He stated to Bauer that he wanted to pronounce a death sentence and that it was therefore necessary for the defendant to be examined. This examination, Rothaug said, was a mere formality since the male accused " would be beheaded anyhow ". To the doctor's reply that the latter was old and that it seemed questionable whether he could be charged with race defilement, Rothaug stated : " It is sufficient for me that the swine said that a German girl had sat upon his lap."

During the proceedings, Rothaug made repeated attempts to encourage the witnesses to make incriminating statements against the defendant. Scant attention was paid by the Court to the defendant's evidence. The witnesses found great difficulty in giving testimony because of the way in which the trial was conducted, since Rothaug constantly anticipated the evaluation of the facts and gave expression to his own opinions.

The proof before the Special Court seemed to have proved little more than the fact that the female defendant had at times sat upon the male accused's lap and that he had kissed her, which facts were admitted.

After the introduction of evidence was concluded, a recess was taken, during which time Rothaug made it clear to Prosecutor Markl that he expected the prosecution to ask for a death sentence against the male defendant and a term in the penitentiary for the German girl. Rothaug at this time also gave him suggestions as to what he should include in his arguments. As previously stated the male victim was sentenced to death.[1]

(xii) *Oeschey*

The defendant Oeschey joined the Nazi Party on 1st December, 1931 By a decision of 30th July, 1940, of the Reich Legal Office of the Nazi Party he was provisionally commissioned with the direction of the legal office of the Party in the Franconia Gau, and the Leadership of the Franconia Gau in the NSRB, the National Socialist Lawyers' League. In his testimony he stated that from 1940 to 1942 he was solely in charge of the Gau legal office as section chief. The evidence clearly established the defendant's

[1] Regarding Rothaug, see also pp. 18 and 26.

voluntary membership as the chief of a Gau staff office subsequent to 1st September, 1939. Oeschey was appointed on 1st January, 1939, to the office of Senior Judge of the District Court at Nuremberg, which office he held until 1st April, 1941. He was then appointed District Court Director at the same court. He was a presiding judge of the Special Court in Nuremberg. He carried out his Party duties at the same time as he served as a judge of the Special Court.

He was drafted into the army in February, 1945, and remained in the army until the end of the war ; but he was released for the period from 4th April until 14th April, 1945, during which time he functioned as chairman of the civilian court martial at Nuremberg.

Among the evidence of the arbitrary character of the defendant's behaviour while acting in a judicial capacity appeared accounts of the following incidents.

A female Pole and a male Ukrainian were indicted before the Special Court at Nuremberg for these alleged crimes : she for a violation of the law against Poles and Jews in connection with the crime of assault and battery and threat and resistance to a German officer ; he for the alleged offence of being accessory to a crime according to the law against Poles and Jews, and for attempting to free a prisoner. The case was tried before the Special Court, the defendant Oeschey presiding. The Pole was found guilty under the Penal Law against Poles, and the Ukrainian, who had used at most only a little force in attempting to protect her, was found guilty of having taken advantage of extraordinary war-time conditions and of violating the law against violent criminals. Both defendants were sentenced to death by the defendant Oeschey, who imposed his will upon his two fellow judges and induced them to concur.

A decree by Minister of Justice Thierack on 13th December, 1944, abrogated the rules concerning the obligatory representation of accused persons by defence counsel. It was left for the judge to decide whether defence counsel was required. On 15th February, 1945, a law was passed for the establishment of civilian courts martial. The statute provided that sentence should be either death, acquittal, or commitment to the regular court. Pursuant to the law Gauleiter Holz set up a court martial in Nuremberg, of which the defendant Oeschey was presiding judge. The first case to be tried was that of a German Count who was tried, convicted and shot for having allegedly made insulting remarks concerning Hitler to a lady in a private room in the Grand Hotel and expressed approval of the attempt upon Hitler's life of 20th July, 1944. The victim was indicted on 3rd April, tried on 5th April, and shot on 6th April, without the knowledge of his counsel, after secret proceedings during which he was without the benefit as a witness of the lady mentioned above, who would have testified for him. Oeschey had informed the prosecutor that he would conduct the trial without defence counsel because the " legal prerequisites for trial without defence counsel did exist ".

There was also evidence of a trial of a group of foreign boys who had fights with boys in the Nuremberg Hitler Youth Home. A witness characterised the actions of the boys as harmless pranks. Oeschey held that they constituted a resistance movement and sentenced several of the boys to death.

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Much evidence was also supplied, by colleagues of Oeschey and Rothaug and other officials and lawyers of the Nuremberg Courts, of the offensive behaviour of these two accused towards defendants and their autocratic and arbitrary conduct of judicial proceedings.

(xiii) *Altstötter*

Altstötter, after a pre-war record of service in the Bavarian and Reich Ministries of Justice and in a judicial capacity, served from 1939 to 1943 with the Wehrmacht. In 1943 he was assigned to the Reich Ministry of Justice where he was made Chief of the Civil Law and Procedure Division, with the title of Ministerialdirektor, and served in that capacity until the surrender. He had been a member of the Stahlhelm prior to the Nazi rise to power. When the Stahlhelm was absorbed into the Nazi organisation, he automatically became a member of the SA. Prior to May, 1937, he resigned from the SA to become a member of the SS on Himmler's request. His membership in the SS, according to his personnel files, dated from 15th May, 1937. He applied for membership in the Nazi Party in 1938 and his membership was dated back to 1st May, 1937. He was awarded the Golden Party Badge for service to the Party. He received several promotions in the SS, and finally, by a letter dated 16th June, 1944, he was notified that the Reichsführer SS had promoted him to the rank of Oberführer. The evidence established that the defendant joined and retained his membership in the SS on a voluntary basis, and that he took considerable interest in his SS rank and honours. Evidence of his high reputation in SS circles was provided, for instance, by the fact that Himmler on 18th September, 1942, at a meeting with Thierack and Rothenberger, referred to him as a reliable SS Obersturmführer.

5. THE JUDGMENT OF THE TRIBUNAL

The Judgment was delivered on 3rd-4th December, 1947. In it the Tribunal summarised the main events of the trial and the evidence which had been brought regarding the accused, and dealt with a number of questions of law. These last, together with the findings and sentences, are set out in the following pages.

(i) *The Relevance of Control Council Law No.* 10 *and of Ordinance No.* 7 *of the United States Zone of Germany.*[1]

The Tribunal cited and commented briefly upon the main relevant provisions of Control Council Law No. 10 and of Ordinance No. 7 of the United States Military Government in Germany, in the following words :

> " The indictment alleges that the defendants committed crimes ' as defined in Control Council Law No. 10, duly enacted by the Allied Control Council '. We therefore turn to that law.
>
> " The Allied Control Council is composed of the authorised representatives of the Four Powers : The United States, Great Britain, France, and the Soviet Union.

(1) As to the United States law and practice regarding Military Tribunals and Commissions and Military Government Courts for the trial of war criminals in general, see p. 2, note 1.

" The preamble to Control Council Law No. 10 is in part as follows :

' In order to give effect to the terms of the Moscow Declaration of 30th October, 1943, and the London Agreement of 8th August, 1945, and the Charter issued pursuant thereto and in order to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders . . . the Control Council enacts as follows : '

" Article I reads in part as follows :

' The Moscow Declaration of 30th October, 1943, " Concerning Responsibility of Hitlerites for Committed Atrocities " and the London Agreement of 8th August, 1945, " Concerning Prosecution and Punishment of Major War Criminals of the European Axis " are made integral parts of this Law. . . . '

" The London Agreement, *supra*, provides that the Charter of the International Military Tribunal (hereinafter called the IMT Charter) ' shall form an integral part of this agreement '. (London Agreement, Article II.) Thus, it appears that the indictment is drawn under and pursuant to the provisions of Control Council Law No. 10 (hereinafter called C.C. Law 10), that C.C. Law 10 expressly incorporates the London Agreement as a part thereof, and that the IMT Charter is a part of the London Agreement.

" Article 2 of C.C. Law 10 defines acts, each of which ' is recognised as a crime ', namely : (*a*) crimes against peace ; (*b*) war crimes ; (*c*) crimes against humanity ; (*d*) membership in criminal organisations. We are concerned here with categories *b*, *c*, *d*, only, each of which will receive later consideration.

" C.C. Law 10 provides that :

' Each occupying authority, within its zone of occupation, (*a*) shall have the right to cause persons within such zone suspected of having committed a crime, including those charged with crime by one of the United Nations, to be arrested . . . ' (Article III, paragraph 1 (*a*)), and ' shall have the right to cause all persons so arrested and charged . . . to be brought to trial before an appropriate tribunal '. (Article III, paragraph 1 (*d*).) ' The Tribunal by which persons charged with offences hereunder shall be tried, and the rules and procedure thereof, shall be determined or designated by each zone commander for his respective zone. . . . ' (Article III, paragraph 2.)

" Pursuant to the foregoing authority, Ordinance No. 7 was enacted by the Military Governor of the American Zone. It provides :

' Article I. Purpose.—The purpose of this Ordinance is to provide for the establishment of military tribunals which shall have power to try and punish persons charged with offences recognised as crimes in Article II of Control Council Law No. 10, including conspiracies to commit any such crimes. . . . '

' Article II. Military Tribunal Constituted : (*a*) Pursuant to the powers of the Military Governor for the United States Zone of Occupation within Germany and further pursuant to the powers conferred upon the Zone Commander by Control Council Law No. 10 and Articles 10 and 11 of the Charter of the International

Military Tribunal annexed to the London Agreement of 8th August, 1945, certain tribunals to be known as " Military Tribunals " shall be established hereunder.'

" The Tribunals authorised by Ordinance 7 are dependent upon the substantive jurisdictional provisions of C.C. Law 10 and are thus based upon international authority and retain international characteristics. It is provided that the United States Military Governor may agree with other zone commanders for a joint trial. (Ordinance 7, Article 2 (*c*).) The Chief of Counsel for War Crimes, United States, may invite others of the United Nations to participate in the prosecution. (Ordinance 7, Article 3 (*b*).)

" The Ordinance provides :

' The determinations of the International Military Tribunal in the judgments in Case No. 1 that invasions, aggressive acts, aggressive wars, crimes, atrocities, or inhumane acts were planned or occurred, shall be binding on the tribunals established hereunder and shall not be questioned except in so far as the participation therein or knowledge thereof by any particular person may be concerned. Statements of the International Military Tribunal in the judgment in Case No. 1 constitute proof of the facts stated, in the absence of substantial new evidence to the contrary.' (Ordinance No. 7, Article X.)

" The sentences authorised by Ordinance No. 7 are made definite only by reference to those provided for by C.C. Law 10. (Ordinance No. 7, Article 16.)

" As thus established the Tribunal is authorised and empowered to try and punish the major war criminals of the European Axis and ' those German officers and men and members of the Nazi Party who have been responsible for, or have taken a consenting part in ', or have aided, abetted, ordered, or have been connected with plans or enterprises involving the commission of the offences defined in C.C. Law 10."

(ii) *The Source of Authority of Control Council Law No.* 10 *and of the Charter of the International Military Tribunal*

Having identified the instruments which purported to establish its jurisdiction, the Tribunal next considered the legal basis of those instruments. The Judgment reads as follows :

" The unconditional surrender of Germany took place on 8th May, 1945. (Department of State publication No. 2423, page 24.) The surrender was preceded by the complete disintegration of the central government and was followed by the complete occupation of all of Germany. There were no opposing German forces in the field ; the officials who during the war had exercised the powers of the Reich Government were either dead, in prison, or in hiding. On 5th June, 1945, the Allied Powers announced that they ' hereby assume supreme authority with respect to Germany, including all the powers possessed by the German Government, the high command, and any State, municipal or local government or authority ', and declared that ' there is no central government or authority in Germany capable of accepting

responsibility for the maintenance of order, the administration of the country, and compliance with the requirements of the victorious powers '. The Four Powers further declared that they ' will hereafter determine the boundaries of Germany or any part thereof and the status of Germany or of any area at present being a part of German territory'. (Berlin Declaration of 5th June, 1945, Department of State publication No. 2423, pages 62, 63.)

" On 2nd August, 1945, at Berlin, President Truman, Generalissimo Stalin, and Prime Minister Attlee, as heads of the Allied Powers, entered into a written agreement setting forth the principles which were to govern Germany during the initial control period. Reference to that document will disclose the wide scope of authority and control which was assumed and exercised by the Allied Powers. They assumed ' supreme authority ' and declared that it was their purpose to accomplish complete demilitarisation of Germany ; to destroy the National Socialist Party ; to prevent Nazi propaganda ; to abolish all Nazi laws which ' established discrimination on grounds of race, creed, or political opinion ' . . . ' whether legal, administrative, or otherwise ' ; to control education ; to reorganise the judicial system in accordance with the principles of democracy and of equal rights ; to accomplish the decentralisation of the political structure. The agreement provided that ' for the time being no central German government shall be established '. In the economic field they assumed control of ' German industry and all economic and financial international transactions '. Finally, the Allies re-affirmed their intention to bring the Nazi war criminals to swift and sure justice. (Department of State publication No. 2423, pages 10 *et seq.*)

" It is this fact of the complete disintegration of the government in Germany, followed by unconditional surrender and by occupation of the territory, which explains and justifies the assumption and exercise of supreme governmental power by the Allies. The same fact distinguishes the present occupation of Germany from the type of occupation which occurs when, in the course of actual warfare, an invading army enters and occupies the territory of another State, whose government is still in existence and is in receipt of international recognition, and whose armies, with those of its Allies, are still in the field. In the latter case the occupying power is subject to the limitations imposed upon it by the Hague Convention and by the laws and customs of war. In the former case (the occupation of Germany) the Allied Powers were not subject to those limitations. By reason of the complete breakdown of government, industry, agriculture and supply, they were under an imperative humanitarian duty of far wider scope to reorganise government and industry and to foster local democratic governmental agencies throughout the territory.

" In support of the distinction made, we quote from two recent and scholarly articles in *The American Journal of International Law*.

> ' On the other hand, a distinction is clearly warranted between measures taken by the Allies prior to destruction of the German government and those taken thereafter. Only the former need be tested by the Hague Regulations, which are inapplicable to the

situation now prevailing in Germany. Disappearance of the German State as a belligerent entity, necessarily implied in the Declaration of Berlin of 5th June, 1945, signifies that a true state of war—and hence *belligerent* occupation—no longer exists within the meaning of international law.' (Freeman, in *The American Journal of International Law*, July, 1947, page 605.)

' Through the subjugation of Germany the outcome of the war has been decided in the most definite manner possible. One of the prerogatives of the Allies resulting from the subjugation is the right to occupy German territory at their discretion. This occupation is, both legally and factually, fundamentally different from the belligerent occupation contemplated in the Hague Regulations, as can be seen from the following observations.

' The provisions of the Hague Regulations restricting the rights of an occupant refer to a belligerent who, favoured by the changing fortunes of war, actually exercises military authority over enemy territory and thereby prevents the legitimate sovereign—who remains the legitimate sovereign—from exercising his full authority. The regulations draw important legal conclusions from the fact that the legitimate sovereign may at any moment himself be favoured by the changing fortunes of war, reconquer the territory, and put an end to the occupation. " The occupation applies only to territory where such authority (i.e., the military authority of the hostile State) is established and can be exercised " (Art. 42, 2). In other words, the Hague Regulations think of an occupation which is a phase of an as yet undecided war. Until 7th May, 1945, the Allies were belligerent occupants in the then-occupied parts of Germany, and their rights and duties were circumscribed by the respective provisions of the Hague Regulations. As a result of the subjugation of Germany the legal character of the occupation of German territory was drastically changed.' (Fried, *The American Journal of International Law*, Vol. 40, No. 2, April, 1946, page 327.)

" The view expressed by the two authorities cited appears to have the support of the International Military Tribunal judgment in the case against Göring *et al.* In that case the defendants contended that Germany was not bound by the rules of land warfare in occupied territory because Germany had completely subjugated those countries and incorporated them into the German Reich. The Tribunal refers to the ' doctrine of subjugation, dependent as it is upon military conquest ', and holds that it is unnecessary to decide whether the doctrine has any application where the subjugation is the result of aggressive war. The reason given is significant. The Tribunal said :

' The doctrine was never considered to be applicable so long as there was an army in the field attempting to restore the occupied territories to their true owners, and in this case, therefore, the doctrine could not apply to any territories occupied after 1st September, 1939.' (Volume 1, Official Text, IMT Trials, page 254.)

" The clear implication from the foregoing is that the rules of land warfare apply to the conduct of a belligerent in occupied territory so long as there is an army in the field attempting to restore the country to

its true owner, but that those rules do not apply when belligerency is ended, there is no longer an army in the field, and, as in the case of Germany, subjugation has occurred by virtue of military conquest.

" The views which we have expressed are supported by modern scholars of high standing in the field of international law. While they differ somewhat in theory as to the present legal status of Germany and concerning the situs of residual sovereignty, they appear to be in accord in recognising that the powers and rights of the allied governments under existing conditions in Germany are not limited by the provisions of the Hague Regulations concerning land warfare. For reference see :

" ' The Legal Status of Germany according to the Declaration of Berlin ', by Hans Kelsen, Professor of International Law, University of California, *The American Journal of International Law*, 1945.

" ' Germany's Present Status ', by F. A. Mann, Doctor of Law (Berlin) (London), paper read on 5th March, 1947, before the Grotius Society in London, published in *Sueddeutsche Juristen-Zeitung*, (Lawyers' Journal of Southern Germany), Volume 2, No. 9, September, 1947.

" ' The influence of the Legal Position of Germany upon the War Crimes Trials ', Dr. Hermann Mosler, Assistant Professor of the University of Bonn, published in *Sueddeutsche Juristen-Zeitung*, Volume 2, No. 7, July, 1947.

" Article published in *Neue Justiz* (New Justice) by Dr. Alfons Steininger, Berlin, Volume I, No. 7, July, 1947, pages 146–150.

" In an article by George A. Zinn, Minister of Justice of Hessen, entitled ' Germany as the Problem of the Law of States ', the author points out that if it be assumed that the present occupation of Germany constitutes ' belligerent occupation ' in the traditional sense, then all statutory and constitutional changes brought about since 7th May, 1945, would cease to be valid once the Allied troops were withdrawn and all Nazi laws would again and automatically become the law of Germany, a consummation devoutly to be avoided.

" Both of the authorities first cited directly assert that the situation at the time of the unconditional surrender resulted in the transfer of sovereignty to the Allies. In this they are supported by the weighty opinion of Lord Wright, eminent jurist of the British House of Lords and head of the United Nations War Crimes Commission. For our purposes, however, it is unnecessary to determine the present situs of ' residual sovereignty '. It is sufficient to hold that, by virtue of the situation at the time of unconditional surrender, the Allied Powers were provisionally in the exercise of supreme authority, valid and effective until such time as, by treaty or otherwise, Germany shall be permitted to exercise the full powers of sovereignty. We hold that the legal right of the Four Powers to enact C.C. Law 10 is established and that the jurisdiction of this Tribunal to try persons charged as major war criminals by the European Axis must be conceded.

" We have considered it proper to set forth our views concerning the nature and source of the authority of C.C. Law 10 in its aspect as substantive legislation. It would have been possible to treat that law

as a binding rule regardless of the righteousness of its provisions, but its justification must ultimately depend upon accepted principles of justice and morality, and we are not content to treat the statute as a mere rule of thumb to be blindly applied. We shall shortly demonstrate that the Charter and C.C. Law 10 provide for the punishment of crimes against humanity. As set forth in the indictment the acts charged as crimes against humanity were committed before the occupation of Germany. They were described as racial persecutions by Nazi officials perpetrated upon German nationals. The crime of genocide is an illustration. We think that a tribunal charged with the duty of enforcing these rules will do well to consider, in determining the degree of punishment to be imposed, the moral principles which underlie the exercise of power. For that reason we have contrasted the situation when Germany was in belligerent occupation of portions of Poland, with the situation existing under the Four-Power occupation of Germany since the surrender. The occupation of Poland by Germany was in every sense belligerent occupation, precarious in character, while opposing armies were still in the field. The German occupation of Poland was subject to the limitations imposed by the Hague Convention and the laws and customs of land warfare. In view of these limitations we doubt if any person would contend that Germany, during that belligerent occupation, could lawfully have provided tribunals for the punishment of Polish officials who, before the occupation by Germany, had persecuted their own people, to wit: Polish nationals. Now the Four Powers are providing by C.C. Law 10 for the punishment of German officials who, before the occupation of Germany, passed and enforced laws for the persecution of German nationals upon racial grounds. It appears that it would be equally difficult to justify such action of the Four Powers if the situation here is the same as the situation which existed in Poland under German occupation and if consequently the limitations of the Hague Convention were applicable. For this reason it seems appropriate to point out the distinction between the two situations. As we have attempted to show, the moral and legal justification under principles of international law which authorises the broader scope of authority under C.C. Law 10 is based on the fact that the Four Powers are not now in belligerent occupation or subject to the limitations set forth in the rules of land warfare. Rather, they have justly and legally assumed the broader task in Germany which they have solemnly defined and declared, to wit: the task of reorganising the German government and economy and of punishing persons who, prior to the occupation, were guilty of crimes against humanity committed against their own nationals. We have pointed out that this difference in the nature of the occupations is due to the unconditional surrender of Germany and the ensuing chaos which required the Four Powers to assume provisional supreme authority throughout the German Reich. We are not attempting to pass judicially upon a question which is solely within the jurisdiction of the political departments of the Four Powers. The fixing of the date of the formal end of the war and similar matters will, of course, be dependent upon the action of the political departments. We do not usurp their function. We merely inquire, in the course of litigation when the lives of men are

dependent upon decisions which must be both legal and just, whether the great objectives announced by the Four Powers are themselves in harmony with the principles of international law and morality.

" In declaring that the expressed determination of the victors to punish German officials who slaughtered their own nationals is in harmony with international principles of justice, we usurp no power ; we only take judicial notice of the declarations already made by the chief executive of the United States and her former Allies. The fact that C.C. Law 10, on its face, is limited to the punishment of German criminals does not transform the Tribunal into a German court. The fact that the Four Powers are exercising supreme legislative authority in governing Germany and for the punishment of German criminals does not mean that the jurisdiction of this Tribunal rests in the slightest degree upon any German law, prerogative, or sovereignty. We sit as a Tribunal drawing its sole power and jurisdiction from the will and command of the four occupying powers.

" Examination will disclose that C.C. Law 10 possesses a dual aspect. In its first aspect and on its face it purports to be a statute defining crimes and providing for the punishment of persons who violate its provisions. It is the legislative product of the only body in existence having and exercising general law-making power throughout the Reich. The first International Military Tribunal in the case against Göring *et al.* recognised similar provisions of the IMT Charter as binding legislative enactments. We quote :

> ' The making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered ; and the undoubted right of these countries to legislate for the occupied territories has been recognised by the civilised world. . . . These provisions are binding upon the Tribunal *as the law to be applied to the case*.' (*Trial of the Major War Criminals* (Official Text—Nuremberg, 1947), Volume 1, pages 218 and 174.)

" Since the Charter and C.C. Law 10 are the product of legislative action by an international authority, it follows of necessity that there is no national constitution of any one State which could be invoked to invalidate the substantive provisions of such international legislation. It can scarcely be argued that a court which owes its existence and jurisdiction solely to the provisions of a given statute could assume to exercise that jurisdiction and then, in the exercise thereof, declare invalid the act to which it owes its existence. Except as an aid to construction, we cannot and need not go behind the statute. This was discussed authoritatively by the first International Military Tribunal in connection with the contention of defendants that the Charter was invalid because it partook of the nature of *ex post facto* legislation. That Tribunal said, ' The Charter makes the planning or waging of a war of aggression or a war in violation of international treaties a crime ; and *it is, therefore, not strictly necessary to consider whether and to what extent aggressive war was a crime before the execution of the London Agreement*.' (*Trial of the Major War Criminals*, Volume 1, page 219.)

" As recently said by an American authority : ' The Charter was, of course, binding upon the Tribunal in the same way that a constitutional statute would bind a domestic court.' (' Issues of the Nuremberg Trials,' by Herbert Wechsler, *Political Science Quarterly*, March, 1947, page 14.)

" In its aspect as a statute defining crime and providing punishment the limited purpose of C.C. Law 10 is clearly set forth. It is an exercise of supreme legislative power in and for Germany. It does not purport to establish by legislative act any new crimes of international applicability. The London Agreement refers to the trial of ' those German officers and men and members of the Nazi Party who have been responsible for . . . atrocities.' C.C. Law 10 recites that it was enacted to establish a ' uniform legal basis *in Germany* ' for the prosecution of war criminals.

" Military Government Ordinance No. 7 was enacted pursuant to the powers of the Military Government for the United States Zone of Occupation ' *within Germany* '.

" We concur in the view expressed by the first International Military Tribunal as quoted above, but we observe that the decision was supported on two grounds. The Tribunal in that case did not stop with the declaration that it was bound by the Charter as an exercise of sovereign legislative power. The opinion went on to show that the Charter was also ' an expression of international law at the time of its creation '. All of the war crimes and many, if not all, of the crimes against humanity as charged in the indictment in the case at bar, were, as we shall show, violative of pre-existing principles of international law. To the extent to which this is true, C.C. Law 10 may be deemed to be a codification rather than original substantive legislation. In so far as C.C. Law 10 may be thought to be beyond established principles of international law, its authority, of course, rests upon the exercise of the ' sovereign legislative power ' of the countries to which the German Reich unconditionally surrendered.

" We have discussed C.C. Law 10 in its first aspect as substantive legislation. We now consider its other aspect. Entirely aside from its character as substantive legislation, C.C. Law 10, together with Ordinance No. 7, provides procedural means previously lacking for the enforcement within Germany of certain rules of international law which exist throughout the civilised world independently of any new substantive legislation. (*Ex parte* Quirin, 317 U.S. 1 ; 87 L. ed. 3 ; 63 S. Ct. 2.) International law is not the product of statute. Its content is not static. The absence from the world of any governmental body authorised to enact substantive rules of international law has not prevented the progressive development of that law. After the manner of the English common law it has grown to meet the exigencies of changing conditions.

' It must be conceded that the circumstance which gives to principles of international conduct the dignity and authority of law is their general acceptance as such by civilised nations, which acceptance is manifested by international treaties, conventions, authoritative text-

books, practice and judicial decisions.' (Hackworth, *Digest of International Law*, Volume 1, Pages 1–4.)

" It does not, however, follow from the foregoing statements that general acceptance of a rule of international conduct must be manifested by express adoption thereof by all civilised States.

' The basis of the law, that is to say, what has given to some principles of general applicability the quality or character of law, has been the acquiescence of the several independent States which were to be governed thereby.' (Hyde, *International Law* (2nd rev. ed.), Vol. 1, page 4.)

' The requisite acquiescence on the part of individual States has not been reflected in formal or specific approval of every restriction which the acknowledged requirements of international justice have appeared, under the circumstances of the particular case, to dictate or imply. It has been rather a yielding to principle, and by implication, to logical applications thereof which have begotten deep-rooted and approved practices.' (Hyde, *supra*, page 5.)

' It should be observed, however, that acquiescence in a proposal may be inferred from the failure of interested States to make appropriate objection to practical applications of it. Thus it is that changes in the law may be wrought gradually and imperceptibly, like those which by process of accretion alter the course of a river and change an old boundary. Without conventional arrangement, and by practices manifesting a common and sharp deviation from rules once accepted as the law, the community of States may in fact modify that which governs its members.' (Hyde, *supra*, page 9.)

' States may through the medium of an international organisation such as the League of Nations, itself the product of agreement, find it expedient to create and accept fresh restraints that ultimately win widest approval and acceptance as a part of the law of nations. The Acts of the organisation may thus in fact become sources of international law, at least in case the members thereof have by their general agreement clothed it with power to create and put into force fresh rules of restraint.' (Hyde, *supra*, page 11.)

' But international law is progressive. The period of growth generally coincides with the period of world upheavals. The pressure of necessity stimulates the impact of natural law and of moral ideas and converts them into rules deliberately and overtly recognised by the consensus of civilised mankind. The experience of two great world wars within a quarter of a century cannot fail to have deep repercussions on the senses of the peoples and their demand for an international law which reflects international justice. I am convinced that international law has progressed, as it is bound to progress if it is to be a living and operative force in these days of widening sense of humanity.' (Lord Wright, ' War Crimes under International Law ', *The Law Quarterly Review*, Vol. 62, January, 1946, page 51.)

" For the reasons stated by Lord Wright, this growth by accretion has been greatly accelerated since the First World War. (Hyde, *International Law* (2nd rev. ed.), Volume 1, page 8.) The Charter,

the I.M.T. Judgment, and C.C. Law 10 are merely ' great new cases in the book of international law '. They constitute authoritative recognition of principles of individual penal responsibility in international affairs which, as we shall show, had been developing for many years. Surely C.C. Law 10, which was enacted by the authorised representatives of the four greatest powers on earth, is entitled to judicial respect when it states, ' Each of the following acts is *recognised* as a crime '. Surely the requisite international approval and acquiescence is established when twenty-three States, including all of the great powers, have approved the London Agreement and the I.M.T. Charter without dissent from any State. Surely the Charter must be deemed declaratory of the principles of international law in view of its recognition as such by the General Assembly of the United Nations. We quote :

> ' The General Assembly recognises the obligation laid upon it by Article 13, paragraph 1, sub-paragraph (*a*) of the Charter, to initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification ;
>
> ' Takes note of the agreement for the establishment of an International Military Tribunal for the prosecution and punishment of the major war criminals of the European Axis, signed in London on 8th August, 1945, and of the Charter annexed thereto, and of the fact that similar principles have been adopted in the Charter of the International Military Tribunal for the trial of the major war criminals in the Far East, proclaimed at Tokyo on 19th January, 1946 ;
>
> ' Therefore,
>
> ' Affirms the principles of international law recognised by the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal ;
>
> Directs the committee on codification of international law established by the resolution of the General Assembly of . . . December, 1946, to treat as a matter of primary importance plans for the formulation, in the text of a general codification of offences against the peace and security of mankind, or of an International Criminal Code, of the principles recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal.' (*Journal of the United Nations*, No. 58, Supp. A–A/P. V./55, page 485 ; ' The Crime of Aggression and the Future of International Law ', by Philip C. Jessup, *Political Science Quarterly*, Vol. LXII, March, 1947, Number 1, page 2.)

" Before the International Military Tribunal had convened for the trial of Göring *et al.*, the opinion had been expressed that through the process of accretion the provisions of the I.M.T. Charter and consequently of C.C. Law 10 had already, in large measure, become incorporated into the body of international law. We quote :

> ' I understand the Agreement to import that the three classes of persons which it specifies are war criminals, that the acts mentioned in classes (*a*), (*b*) and (*c*) are crimes for which there is properly individual responsibility ; that they are not crimes because of the Agreement of the four governments, but the governments have scheduled them as coming under the jurisdiction of the Tribunal because they are already crimes by existing law. On any other assumption the

court would not be a court of law but a manifestation of power. The principles which are declared in the agreement are not laid down as an arbitrary direction to the court but are intended to define and do, in my opinion, accurately define what is the existing international law on these matters.' (Lord Wright, ' War Crimes under International Law ', *The Law Quarterly Review*, Vol. 62, January, 1946, page 41.)

" A similar view was expressed in the Judgment of the International Military Tribunal. We quote :

' The Charter is not an arbitrary exercise of power on the part of the victorious nations, but in the view of the Tribunal, as will be shown, it is the expression of international law existing at the time of its creation ; and to that extent is itself a contribution to international law.' (*I.M.T. Judgment*, page 218.)

" We are empowered to determine the guilt or innocence of persons accused of acts described as ' war crimes ' and ' crimes against humanity ' under rules of international law. At this point, in connection with cherished doctrines of national sovereignty, it is important to distinguish between the rules of common international law which are of universal and superior authority on the one hand, and the provisions for enforcement of those rules which are by no means universal on the other. As to the superior authority of international law, we quote :

' If there exists a body of international law which States, from a sense of legal obligation, do in fact observe in their relations with each other, and which they are unable individually to alter or destroy, that law must necessarily be regarded as the law of each political entity deemed to be a State, and as prevailing throughout places under its control. This is true although there be no local affirmative action indicating the adoption by the individual State of international law. . . . International law, as the local law of each State, is necessarily superior to any administrative regulation or statute or public act at variance with it. There can be no conflict on an equal plane.' (Hyde, *International Law* (2nd rev. ed.), Vol. 1, pages 16, 17.)

" This universality and superiority of international law does not necessarily imply universality of its enforcement. As to the punishment of persons guilty of violating the laws and customs of war (war crimes in the narrow sense), it has always been recognised that tribunals may be established and punishment imposed by the State into whose hands the perpetrators fall. Those rules of international law were recognised as paramount, and jurisdiction to enforce them by the injured belligerent government, whether within the territorial boundaries of the State or in occupied territory, has been unquestioned. (*Ex parte* Quirin, *supra ; In re :* Yamashita, 90 L. ed. 343.) However, enforcement of international law has been traditionally subject to practical limitations. Within the territorial boundaries of a State having a recognised, functioning government presently in the exercise of sovereign power throughout its territory, a violator of the rules of international law could be punished only by the authority of the officials of that State. The law is universal, but such a State reserves unto itself the exclusive power within its boundaries to apply or withhold sanctions.

Thus, notwithstanding the paramount authority of the substantive rules of common international law the doctrines of national sovereignty have been preserved through the control of enforcement machinery. It must be admitted that Germans were not the only ones who were guilty of committing war crimes ; other violators of international law could, no doubt, be tried and punished by the State of which they were nationals, by the offended State if it can secure jurisdiction of the person, or by an International Tribunal if of competent authorised jurisdiction.

" Applying these principles, it appears that the power to punish violators of international law in Germany is not solely dependent on the enactment of rules of substantive penal law applicable only in Germany. Nor is the apparent immunity from prosecution of criminals in other States based on the absence there of the rules of international law which we enforce here. Only by giving consideration to the extraordinary and temporary situation in Germany can the procedure here be harmonised with established principles of national sovereignty. In Germany an international body (the Control Council) has assumed and exercised the power to establish judicial machinery for the punishment of those who have violated the rules of the common international law, a power which no international authority without consent could assume or exercise within a State having a national government presently in the exercise of its sovereign powers."

(iii) *The Construction of the Provisions of Control Council Law No.* 10 *Regarding War Crimes and Crimes Against Humanity*

The Tribunal dealt next with the problem of the construction of Control Council Law No. 10, for, in its opinion, " whatever the scope of international common law may be, the power to enforce it in this case is defined and limited by the terms of the jurisdictional act." The Judgment states :'

" The first penal provision of Control Council Law No. 10 with which we are concerned is as follows :

' Article II, 1.—Each of the following acts is recognised as a crime : . . . (*b*) War crimes. Atrocities or offences against persons or property constituting violations of the laws or customs of war, including, but not limited to, murder, ill-treatment or deportation to slave labour or for any other purpose, of civilian population from occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.'

" Here we observe the controlling effect of common international law as such, for the statutes by which we are governed have adopted and incorporated the rules of international law as the rules by which war crimes are to be identified. This legislative practice by which the laws and customs of war are incorporated by reference into a statute is not unknown in the United States. See cases cited in *Ex parte Quirin, supra.*

" The scope of inquiry as to war crimes is, of course, limited by the provisions, properly construed, of the Charter and C.C. Law 10.

In this particular, the two enactments are in substantial harmony. Both indicate by inclusion and exclusion the intent that the term ' war crimes ' shall be employed to cover acts in violation of the laws and customs of war directed against non-Germans, and shall not include atrocities committed by Germans against their own nationals. It will be observed that Article VI of the Charter enumerates as war crimes acts against prisoners of war, persons on the seas, hostages, wanton destruction of cities and the like, devastation not justified by military necessity, plunder of public or private property (obviously not property of Germany or Germans), and ' ill-treatment or deportation to slave labour, or for any other purpose, of civilian population *of, or in*, occupied territory '. C.C. Law 10, *supra*, employs similar language. It reads :

> ' . . . ill-treatment or deportation to slave labour or for any other purpose *of civilian population from occupied territory* '.

" This legislative intent becomes more manifest when we consider the provisions of the Charter and of C.C. Law 10 which deal with crimes against humanity. Article VI of the Charter defines crimes against humanity as follows :

> ' . . . murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war ;(1) or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.'

" C.C. Law 10 defines as criminal :

> ' . . . Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.'

" Obviously, these sections are not surplusage. They supplement the preceding sections on war crimes and include within their prohibition not only war crimes, but also acts not included within the preceding definition of war crimes. In place of atrocities committed against civilians of or in or from occupied territory, these sections prohibit atrocities ' against any civilian population '. Again, persecutions on racial, religious, or political grounds are within our jurisdiction ' whether or not in violation of the domestic laws of the country where perpetrated '. We have already demonstrated that C.C. Law 10 is specifically directed to the punishment of German criminals. It is, therefore, clear that the intent of the statute on crimes against humanity is to punish for persecutions and the like, whether in accord with or in violation of the domestic laws of the country where perpetrated, to wit : Germany. The intent was to provide that compliance with

(1) It should be added that by the Berlin Protocol of 6th October, 1945, the semi-colon which appears in the above text was replaced by a comma. The effect of this amendment was that the words " in execution of or in connection with any crime within the jurisdiction of the Tribunal " governed the whole of the text of Article 6 (c) of the Charter which defined the term " crimes against humanity ".

German law should be no defence. Article III of C.C. Law 10 clearly demonstrates that acts by Germans against German nationals may constitute crimes against humanity within the jurisdiction of this Tribunal to punish. That Article provides that each occupying authority within its zone of occupation shall have the right to cause persons suspected of having committed a crime to be arrested and . . . (*d*) shall have the right to cause all persons so arrested . . . to be brought to trial. . . . Such Tribunal may, in case of crimes committed by persons of German citizenship or nationality against other persons of German citizenship or nationality, or stateless persons, be a German court, if authorised by the occupying authorities.

" As recently asserted by General Telford Taylor before Tribunal No. IV, in the case of the United States *v.* Flick *et al.*:

> ' This constitutes an explicit recognition that acts committed by Germans against other Germans are punishable as crimes under Law No. 10, according to the definitions contained therein, since only such crimes may be tried by German courts, in the discretion of the occupying power. If the occupying power fails to authorise German courts to try crimes committed by Germans against other Germans (and in the American Zone of Occupation no such authorisation has been given), then these cases are tried only before non-German tribunals, such as these Military Tribunals.'

" Our jurisdiction to try persons charged with crimes against humanity is limited in scope, both by definition and illustration, as appears from C.C. Law 10. It is not the isolated crime by a private German individual which is condemned, nor is it the isolated crime perpetrated by the German Reich through its officers against a private individual. It is significant that the enactment employs the words ' against any civilian population ' instead of ' against any civilian individual '. The provision is directed against offences and inhumane acts and persecutions on political, racial, or religious grounds systematically organised and conducted by or with the approval of government.

" The opinion of the first International Military Tribunal in the case against Göring *et al.* lends support to our conclusion. That opinion recognised the distinction between war crimes and crimes against humanity, and said:

> ' . . . in so far as the inhumane acts charged in the indictment and committed after the beginning of the war did not constitute war crimes, they were all committed in execution of, or in connection with, aggressive war and, therefore, constituted crimes against humanity.' (*Trial of Major War Criminals*, Vol. I, pages 254–255.)

" The evidence to be later reviewed established that certain inhumane acts charged in Count 3 of the indictment were committed in execution of, and in connection with, aggressive war and were, therefore, crimes against humanity even under the provisions of the I.M.T. Charter, but it must be noted that C.C. Law 10 differs materially from the Charter. The latter defines crimes against humanity as inhumane acts, etc., committed ' . . . in execution of, or in connection with, any crime within the jurisdiction of the Tribunal . . . ', whereas in C.C.

Law 10 the words last quoted are deliberately omitted from the definition."

(iv) *The Ex Post Facto Principle Regarded as Constituting No Legal or Moral Barrier to the Present Trial*

The Judgment states:

" The defendants claim protection under the principle *nullum crimen sine lege*, though they withheld from others the benefit of that rule during the Hitler régime. Obviously the principle in question constitutes no limitation upon the power or right of the Tribunal to punish acts which can properly be held to have been violations of international law when committed. By way of illustration, we observe that C.C. Law 10, Article II, 1 (*b*), ' War Crimes ', has by reference incorporated the rules by which war crimes are to be identified. In all such cases it remains only for the Tribunal, after the manner of the common law, to determine the content of these rules under the impact of changing conditions.

" Whatever view may be held as to the nature and source of our authority under C.C. Law 10 and under common international law, the *ex post facto* rule, properly understood, constitutes no legal nor moral barrier to the prosecution in this case.

" Under written constitutions the *ex post facto* rule condemns statutes which define as criminal acts committed before the law was passed, but the *ex post facto* rule cannot apply in the international field as it does under constitutional mandate in the domestic field. Even in the domestic field the prohibition of the rule does not apply to the decisions of common law courts, although the question at issue be novel. International law is not the product of statute for the simple reason that there is as yet no world authority empowered to enact statutes of universal application. International law is the product of multipartite treaties, conventions, judicial decisions and customs which have received international acceptance or acquiescence. It would be sheer absurdity to suggest that the *ex post facto* rule, as known to constitutional States, could be applied to a treaty, a custom, or a common law decision of an international tribunal, or to the international acquiescence which follows the event. To have attempted to apply the *ex post facto* principle to judicial decisions of common international law would have been to strangle that law at birth. As applied in the field of international law, the principle *nullum crimen sine lege* received its true interpretation in the opinion of the I.M.T. in the case *versus* Göring *et al.* The question arose with reference to crimes against the peace, but the opinion expressed is equally applicable to war crimes and crimes against humanity. The Tribunal said:

' In the first place, it is to be observed that the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring States without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished.'

" To the same effect we quote the distinguished statesman and international authority, Henry L. Stimson :

' A mistaken appeal to this principle has been the cause of much confusion about the Nuremberg trial. It is argued that parts of the Tribunal's Charter, written in 1945, make crimes out of what before were activities beyond the scope of national and international law. Were this an exact statement of the situation we might well be concerned, but it is not. It rests on a misconception of the whole nature of the law of nations. International law is not a body of authoritative codes or statutes ; it is the gradual expression, case by case, of the moral judgments of the civilised world. As such, it corresponds precisely to the common law of Anglo-American tradition. We can understand the law of Nuremberg only if we see it for what it is—a great new case in the book of international law, and not a formal enforcement of codified statutes. A look at the charges will show what I mean.

' It was the Nazi confidence that we would never chase and catch them, and not a misunderstanding of our opinion of them, that led them to commit their crimes. Our offence was thus that of the man who passed by on the other side. That we have finally recognised our negligence and named the criminals for what they are is a piece of righteousness too long delayed by fear.' (' The Nuremburg Trial,' Landmark and Law ; *Foreign Affairs*, January, 1947.)

" That the conception of retrospective legislation which prevails under constitutional provisions in the United States does not receive complete recognition in other enlightened legal systems is illustrated by the decision in Phillips *v.* Eyre, L.R. 6 Q.B. 1, described by Lord Wright as ' a case of great authority '. We quote :

' In fine, allowing the general inexpediency of retrospective legislation, it cannot be pronounced naturally or necessarily unjust. There may be occasions and circumstances involving the safety of the State or even the conduct of individual subjects, the justice of which prospective laws made for ordinary occasions and the usual exigencies of society, for want of prevision, fail to meet, and in which the inconvenience and wrong *summum jus summa injuria.*'

" We quote with approval the words of Sir David Maxwell Fyfe ; as follows :

' With regard to " crimes against humanity ", this at any rate is clear : the Nazis, when they persecuted and murdered countless Jews and political opponents in Germany, knew that what they were doing was wrong and that their actions were crimes which had been condemned by the criminal law of every civilised State. When these crimes were mixed with the preparation for aggressive war and later with the commission of war crimes in occupied territories, it cannot be a matter of complaint that a procedure is established for their punishment.' (Fyfe, Foreword to *The Nuremberg Trial*, by R. W. Cooper.)

" Concerning the mooted *ex post facto* issue, Professor Wechsler of Columbia University writes :

' These are, indeed, the issues that are currently mooted. But

there are elements in the debate that should lead us to be suspicious of the issues as they are drawn in these terms. For, most of those who mount the attack on one or another of these contentions hasten to assure us that their plea is not one of immunity for the defendants ; they argue only that they should have been disposed of politically, that is, dispatched out of hand. This is a curious position indeed. A punitive enterprise launched on the basis of general rules, administered in an adversary proceeding under a separation of prosecutive and adjudicative powers, is, in the name of law and justice, asserted to be less desirable than an *ex parte* execution list or a drumhead court martial constituted in the immediate aftermath of war. I state my view reservedly when I say that history will accept no conception of law, politics or justice that supports a submission in these terms.'

" Again, he says :

' There is, indeed, too large a disposition among the defenders of Nuremberg to look for stray tags of international pronouncements and reason therefrom that the law of Nuremberg was previously fully laid down. If the Kellogg-Briand Pact or a general conception of international obligation sufficed to authorise England, and would have authorised us, to declare war on Germany in defence of Poland—and in this enterprise to kill countless thousands of German soldiers and civilians—can it be possible that it failed to authorise punitive action against individual Germans judicially determined to be responsible for the Polish attack ? To be sure, we would demand a more explicit authorisation for punishment in domestic law, for we have adopted for the protection of individuals a prophylactic principle absolutely forbidding retroactivity that we can afford to carry to that extreme. International society, being less stable, can afford less luxury. We admit that in other respects. Why should we deny it here ? ' (Wechsler, ' Issues of Nuremberg Trial ', *Political Science Quarterly*, Vol. LXII, No. 1, March, 1947, pages 23–25.)

" Many of the laws of the Weimar era which were enacted for the protection of human rights have never been repealed. Many acts constituting war crimes or crimes against humanity as defined in C.C. Law 10 were committed or permitted in direct violation also of the provisions of the German criminal law. It is true that this Tribunal can try no defendant merely because of a violation of the German penal code, but it is equally true that the rule against retrospective legislation, as a rule of justice and fair play, should be no defence if the act which he committed in violation of C.C. Law 10 was also known to him to be a punishable crime under his own domestic law.

" As a principle of justice and fair play, the rule in question will be given full effect. As applied in the field of international law that principle requires proof before conviction that the accused knew or should have known that in matters of international concern he was guilty of participation in a nationally organised system of injustice and persecution shocking to the moral sense of mankind, and that he knew or should have known that he would be subject to punishment if caught. Whether it be considered codification or substantive legisla-

tion, no person who knowingly committed the acts made punishable by C.C. Law 10 can assert that he did not know that he would be brought to account for his acts. Notice of intent to punish was repeatedly given by the only means available in international affairs, namely, the solemn warning of the governments of the States at war with Germany. Not only were the defendants warned of swift retribution by the express declaration of the Allies at Moscow of 30th October, 1943. Long prior to the Second World War the principle of personal responsibility had been recognised.

> ' The Council of the Conference of Paris of 1919 undertook, with the aid of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, to incorporate in the treaty of peace arrangements for the punishment of individuals charged with responsibility for certain offences.' (Hyde, *International Law* (2nd rev. ed.), Vol. III, page 2409.)

" That Commission on Responsibility of Authors of the War found that :

> ' The war was carried on by the Central Empires, together with their Allies, Turkey and Bulgaria, by barbarous or illegitimate methods in violation of the established laws and customs of war and the elementary laws of humanity.' (Hyde, *International Law* (2nd rev. ed.), Vol. III, pages 2409–2410.)

" As its conclusion the Commission solemnly declared :

> ' All persons belonging to enemy countries, however high their position may have been, without distinction of rank, including chiefs of States, who have been guilty of offences against the laws and customs of war or the laws of humanity, are liable to criminal prosecution.' (*American Journal of International Law*, Vol. 14 (1920), page 117.)

" The American members of that Commission, though in substantial accord with the finding, nevertheless expressed a reservation as to ' the laws of humanity '. The express wording of the London Charter and of C.C. Law 10 constitutes clear evidence of the fact that the position of the American government is now in harmony with the Declaration of the Paris Commission concerning the ' laws of humanity '. We quote further from the report of the Paris Commission :

> ' Every belligerent has, according to international law, the power and authority to try the individuals alleged to be guilty of the crimes of which an enumeration has been given in Chapter II on Violations of the Laws and Customs of War, if such persons have been taken prisoner or have otherwise fallen into its power. Each belligerent has, or has power to set up, pursuant to its own legislation, an appropriate tribunal, military or civil, for the trial of cases.' (Hyde, *International Law* (2nd rev. ed.), Vol. III, page 2412.)

" According to the Treaty of Versailles, Article 228, the German government itself ' recognised the right of the Allied and associated powers to bring before military tribunals persons accused of offences against the laws and customs of war. Such persons who might be found guilty were to be sentenced to punishments " laid down by law ".'

Some Germans were, in fact, tried for the commission of such crimes. (See : Hyde, *International Law* (2nd rev. ed.), Vol. III, page 2414.)

" The foregoing considerations demonstrate that the principle *nullum crimen sine lege*, when properly understood and applied, constitutes no legal or moral barrier to prosecution in the case at bar."

(v) *The Development of the Concept of Crimes Against Humanity as Violations of International Law.* The Judgment continues :

" C.C. Law 10 is not limited to the punishment of persons guilty of violating the laws and customs of war in the narrow sense ; furthermore, it can no longer be said that violations of the laws and customs of war are the only offences recognised by common international law. The force of circumstance, the grim fact of worldwide interdependence, and the moral pressure of public opinion have resulted in international recognition that certain crimes against humanity committed by Nazi authority against German nationals constituted violations not alone of statute but also of common international law. We quote :

" 'If a State is unhampered in its activities that affect the interests of any other, it is due to the circumstance that the practice of nations has not established that the welfare of the international society is adversely affected thereby. Hence, that society has not been incited or aroused to endeavour to impose restraints ; and by its law none are imposed. The Covenant of the League of Nations takes exact cognisance of the situation in its reference to disputes " which arise out of a matter which by international law is solely within the domestic jurisdiction " of a party thereto. It is that law which as a product of the acquiescence of States permits the particular activity of the individual State to be deemed a domestic one.

" 'Inasmuch as changing estimates are to be anticipated, and as the evolution of thought in this regard appears to be constant and is perhaps now more obvious than at any time since the United States came into being, the circumstance that at any given period the solution of a particular question is by international law deemed to be solely within the control or jurisdiction of one State gives frail assurance that it will always be so regarded.' (Hyde, *International Law* (2nd rev. ed.), Vol. I, pages 7, 8.)

" 'The family of nations is not unconcerned with the life and experience of the private individual in his relationships with the State of which he is a national. Evidence of concern has become increasingly abundant since World War I, and is reflected in treaties through which that conflict was brought to a close, particularly in provisions designed to safeguard the racial, linguistic and religious minorities inhabiting the territories of certain States, and in the terms of Part XIII of the Treaty of Versailles, of 28th June, 1919, in respect to Labour, as well as in Article XXIII of that treaty embraced in the Covenant of the League of Nations.' (Hyde, *International Law* (2nd rev. ed.), Vol. I, page 38.)

" 'The nature and extent of the latitude accorded a State in the treatment of its own nationals has been observed elsewhere. It has been seen that certain forms or degrees of harsh treatment of such individuals may be deemed to attain an international significance because

of their direct and adverse effect upon the rights and interests of the outside world. For that reason it would be unscientific to declare at this day that tyrannical conduct, or massacres, or religious persecutions are wholly unrelated to the foreign relations of the territorial sovereign which is guilty of them. If it can be shown that such acts were immediately and necessarily injurious to the nationals of a particular foreign State, grounds for interference by it may be acknowledged. Again, the society of nations, acting collectively, may not unreasonably maintain that a State yielding to such excesses renders itself unfit to perform its international obligations, especially in so far as they pertain to the protection of foreign life and property within its domain.[3] The propriety of interference obviously demands in every case a convincing showing that there is in fact a causal connection between the harsh treatment complained of, and the outside State that essays to thwart it.

" ' Note 3.—Since the World War of 1914–1918, there has developed in many quarters evidence of what might be called an international interest and concern in relation to what was previously regarded as belonging exclusively to the domestic affairs of the individual State ; and with that interest there has been manifest also an increasing readiness to seek and find a connection between domestic abuses and the maintenance of the general peace. See Art. XI of the Covenant of the League of Nations, U.S. Treaty, Vol. III, 3339.' (Hyde, *International Law* (2nd rev. ed.), Vol. I, pages 249–250.)

" ' The international concern over the commission of crimes against humanity has been greatly intensified in recent years. The fact of such concern is not a recent phenomenon, however. England, France, and Russia intervened to end the atrocities in the Greco-Turkish warfare in 1827.' (Oppenheim, *International Law*, Vol. I (3rd ed.) (1920), page 229.)

" ' President Van Buren, through his Secretary of State, intervened with the Sultan of Turkey in 1840 on behalf of the persecuted Jews of Damascus and Rhodes.' (*State Department Publication No.* 9, pages 153–154.)

" ' The French intervened and by force undertook to check religious atrocities in Lebanon in 1861.' (Bentwich, ' The League of Nations and Racial Persecution in Germany ', Vol. 19, *Problems of Peace and War*, page 75, (1934).)

" ' Various nations directed protests to the governments of Russia and Roumania with respect to pogroms and atrocities against Jews. Similar protests were made to the government of Turkey on behalf of the persecuted Christian minorities. In 1872 the United States, Germany, and five other powers protested to Roumania ; and, in 1915, the German government joined in a remonstrance to Turkey on account of similar persecutions.' (Bentwich, *op. cit., supra.*)

" In 1902 the American Secretary of State, John Hay, addressed to Roumania a remonstrance ' in the name of humanity ' against Jewish persecutions, saying : ' This government cannot be a tacit party to such international wrongs.'

" Again, in connection with the Kishenef and other massacres in Russia in 1903, President Theodore Roosevelt stated :

' Nevertheless, there are occasional crimes committed on a vast scale and of such peculiar horror as to make us doubt whether it is not our manifest duty to endeavour at least to show our disapproval of the deed and our sympathy with those who have suffered by it. The case must be extreme in which such a course is justifiable. . . . The cases in which we could interfere by force of arms, as we interfered to put a stop to the intolerable conditions in Cuba, are necessarily very few.' (President's Message to Congress, 1904.)

" Concerning the American intervention in Cuba in 1898, President McKinley stated :

' First. In the cause of humanity and to put an end to the barbarities, bloodshed, starvation, and horrible miseries now existing there, and which the parties to the conflict are either unable or unwilling to stop or mitigate. It is no answer to say this is all in another country, belonging to another nation, and therefore none of our business. It is specially our duty, for it is right at our door.' (President's Special Message of 11th April, 1898. Hyde, *International Law*, Vol. 1 (2nd ed.), page 259 (1945).)

" The same principle was recognised as early as 1878 by a learned German professor of law, who wrote :

' States are allowed to interfere in the name of international law if " humanity rights " are violated to the detriment of any single race.' (J. K. Bluntschel, Professor of Law, Heidelberg University, in *Das Moderne Volkerrecht der Civilisierten Staaten* (3rd ed.), page 270 (1878).)

" Finally, we quote the words of Sir Hartley Shawcross, the British Chief Prosecutor at the trial of Göring *et al.* :

' The right of humanitarian intervention on behalf of the rights of man trampled upon by a State in a manner shocking the sense of mankind has long been considered to form part of the law of nations. Here too, the Charter merely develops a pre-existing principle.' (*Transcript*, page 813.)

" We hold that crimes against humanity as defined in C.C. Law 10 must be strictly construed to exclude isolated cases of atrocities or persecutions whether committed by private individuals or by a governmental authority. As we construe it, that section provides for the punishment of crimes committed against German nationals only where there is proof of conscious participation in systematic governmentally organised or approved procedures, amounting to atrocities and offences of that kind specified in the act and committed against populations or amounting to persecutions on political, racial, or religious grounds.

" Thus the statute is limited by the construction of the type of criminal activity which prior to 1939 was and still is a matter of international concern. Whether or not such atrocities constituted technical violations of laws and customs of war, they were acts of such scope and malevolence, and they so clearly imperilled the peace of the world that they must be deemed to have become violations of international law.

This principle was recognised although it was misapplied by the Third Reich. Hitler expressly justified his early acts of aggression against Czechoslovakia on the ground that the alleged persecution of the racial Germans by the government of that country was a matter of international concern warranting intervention by Germany. Organised Czechoslovakian persecution of racial Germans in Sudetenland was a fiction supported by ' framed ' incidents, but the principle invoked by Hitler was one which we have recognised, namely that governmentally organised racial persecutions are violations of international law.

" As the prime illustration of a crime against humanity under C.C. Law 10, which by reason of its magnitude and its international repercussions has been recognised as a violation of common international law, we cite ' genocide ' which will receive our full consideration. A resolution recently adopted by the General Assembly of the United Nations is in part as follows :

' Genocide is a denial of the right of existence of entire human groups as homicide is a denial of the right to live of individual human beings ; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations.

' Many instances of such crimes of genocide have occurred when racial, religious, political and other groups have been destroyed, entirely or in part.

' The punishment of the crime of genocide is a matter of international concern.'

" The General Assembly therefore

' Affirms that genocide is a crime under international law which the civilised world condemns, and for the commission of which principals and accomplices—whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds—are punishable ; . . . ' (*Journal of the United Nations*, No. 58, Supp. A–C/P. V./55, page 485 ; *Political Science Quarterly* (March, 1947), Vol. LXII, No. 1, page 3.)

" The General Assembly is not an international legislature, but it is the most authoritative organ in existence for the interpretation of world opinion. Its recognition of genocide as an international crime is persuasive evidence of the fact. We approve and adopt its conclusions. Whether the crime against humanity is the product of statute or of common international law, or, as we believe, of both, we find no injustice to persons tried for such crimes. They are chargeable with knowledge that such acts were wrong and were punishable when committed."

(vi) *The Plea of Alleged Legality Under Municipal Law*

The Tribunal pointed out that " The defendants contend that they should not be found guilty because they acted within the authority and by the command of the German laws and decrees." On this point the Judgment runs as follows :

" Concerning crimes against humanity, C.C. Law 10 provides for

punishment whether or not the acts were in violation of the domestic laws of the country where perpetrated. (C.C. Law 10, Article II, 1 (*c*).) That enactment also provides ' the fact that any person acted pursuant to the order of his government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation.' (C.C. Law 10, Article II, paragraph 4 (*b*).)

" The foregoing provisions constitute a sufficient, but not an entire, answer to the contention of the defendants. The argument that compliance with German law is a defence to the charge rests upon a misconception of the basic theory which supports our entire proceedings. The Nuremberg Tribunals are not German courts. They are not enforcing German law. The charges are not based on violations by the defendants of German law. On the contrary, the jurisdiction of this Tribunal rests on international authority. It enforces the law as declared by the Charter and C.C. Law 10, and within the limitations on the power conferred, it enforces international law as superior in authority to any German statute or decree. It is true, as defendants contend, that German courts under the Third Reich were required to follow German law (i.e., the expressed will of Hitler) even when it was contrary to international law. But no such limitation can be applied to this Tribunal. Here we have the paramount substantive law, plus a Tribunal authorised and required to apply it notwithstanding the inconsistent provisions of German local law. The very essence of the prosecution case is that the laws, the Hitler decrees and the Draconic, corrupt, and perverted Nazi judicial system themselves constituted the substance of war crimes and crimes against humanity and that participation in the enactment and enforcement of them amounts to complicity in crime. We have pointed out that governmental participation is a material element of the crime against humanity. Only when official organs of sovereignty participated in atrocities and persecutions did those crimes assume international proportions. It can scarcely be said that governmental participation, the proof of which is necessary for conviction, can also be a defence to the charge."

(vii) *United States Law and Procedure not Applicable in the Present Trial*

The Judgment pointed out that it was essential to recognise that :

" The jurisdictional enactments of the Control Council, the form of the indictment, and the judicial procedure prescribed for this Tribunal are not governed by the familiar rules of American criminal law and procedure. This Tribunal, although composed of American judges schooled in the system and rules of common law, is sitting by virtue of international authority and can carry with it only the broad principles of justice and fair play which underlie all civilised concepts of law and procedure.

" No defendant is specifically charged in the indictment with the murder or abuse of any particular person. If he were, the indictment would, no doubt, have named the alleged victim. Simple murder and isolated instances of atrocities do not constitute the gravamen of the charge. Defendants are charged with crimes of such immensity that mere specific instances of criminality appear insignificant by comparison. The charge, in brief, is that of conscious participation in a nation-wide governmentally organised system of cruelty and injustice,

in violation of the laws of war and of humanity, and perpetrated in the name of law by the authority of the Minister of Justice, and through the instrumentality of the courts. The dagger of the assassin was concealed beneath the robe of the jurist. The record is replete with evidence of specific criminal acts, but they are not the crimes charged in the indictment. They constitute evidence of the intentional participation of the defendants and serve as illustrations of the nature and effect of the greater crimes charged in the indictment. Thus it is that apparent generality of the indictment was not only necessary but proper. No indictment couched in specific terms and in the manner of the common law could have encompassed within practicable limits the generality of the offence with which these defendants stand charged."

(viii) *Nazi Judges not Entitled to the Benefits of the Doctrine of Judicial Immunity*

" In view of the conclusive proof of the sinister influences which were in constant interplay between Hitler, his Ministers, the Ministry of Justice, the Party, the Gestapo, and the courts ", the Tribunal saw " no merit in the suggestion that Nazi judges are entitled to the benefit of the Anglo-American doctrine of judicial immunity ".

According to the Tribunal, " The doctrine that judges are not personally liable for their judicial actions is based on the concept of an independent judiciary administering impartial justice. Furthermore, it has never prevented the prosecution of a judge for malfeasance in office. If the evidence cited *supra* does not demonstrate the utter destruction of judicial independence and impartiality, then we ' never write nor no man ever proved '. The function of the Nazi courts was judicial only in a limited sense. They more closely resembled administrative tribunals acting under directives from above in a quasi-judicial manner.

" In operation the Nazi system forced the judge into one of two categories. In the first we find the judges who still retained ideals of judicial independence and who administered justice with a measure of impartiality and moderation. Judgments which they rendered were set aside by the employment of the nullity plea and the extraordinary objection. The defendants they sentenced were frequently transferred to the Gestapo on completion of prison terms and were then shot or sent to concentration camps. The judges themselves were threatened and criticised and sometimes removed from office. To this group the defendant Cuhorst belonged. In the other category were the judges who with fanatical zeal enforced the will of the Party with such severity that they experienced no difficulties and little interference from party officials."

(ix) *Classification of Cases in which the Death Penalty had been Imposed by Various of the Accused*

The Judgment states that the prosecution had introduced " captured documents in great number which establish the Draconic character of the Nazi criminal laws ", documents which proved that " the death penalty was imposed by courts in thousands of cases." Cases in which the extreme penalty was imposed might in large measure be classified in the following groups :

(*a*) " Cases against proven habitual criminals " ;

(*b*) " Cases of looting in the devastated areas of Germany ; committed after air raids and under cover of blackout " ;
(*c*) " Crimes against the war economy—rationing, hoarding, and the like " ;
(*d*) " Crimes amounting to an undermining of the defensive strength of the nation ; defeatist remarks, criticisms of Hitler, and the like " ;
(*e*) " Crimes of treason and high treason " ;
(*f*) " Crimes committed under the ' Nacht und Nebel ' programme and similar procedures " ;
(*g*) " Crimes of various types committed by Poles, Jews, and other foreigners ".

(x) *Instances where the Death Penalty might be Considered Justifiable*

The Judgment continues :

" The Tribunal is keenly aware of the danger of incorporating in the judgment as law its own moral convictions or even those of the Anglo-American legal world. This we will not do. We may and do condemn the Draconic laws and express abhorrence at the limitations imposed by the Nazi régime upon freedom of speech and action, but the question still remains unanswered : Do those Draconic laws or the decisions rendered under them constitute war crimes or crimes against humanity ?

" Concerning the punishment of habitual criminals, we think the answer is clear. In many civilised States statutory provisions require the courts to impose sentences of life imprisonment upon proof of conviction of three or more felonies. We are unable to say in one breath that life imprisonment for habitual criminals is a salutary and reasonable punishment in America in peace time, but that the imposition of the death penalty was a crime against humanity here when the nation was in the throes of war. The same considerations apply largely in the case of looting. Every nation recognises the absolute necessity of more stringent enforcement of the criminal law in times of great emergency. Anyone who has seen the utter devastation of the great cities of Germany must realise that the safety of the civilian population demanded that the ' were-wolves ' who roamed the streets of the burning cities, robbing the dead and plundering the ruined homes, should be severely punished. The same considerations apply, though in a lesser degree, to prosecutions of hoarders and violators of war economy decrees.

" Questions of far greater difficulty are involved when we consider the cases involving punishment for undermining military morale. The limitations on freedom of speech which were imposed in the enforcement of these laws are revolting to our sense of justice. A court would have no hesitation in condemning them under any free constitution, including that of the Weimar Republic, if the limitations were applied in time of peace ; but even under the protection of the Constitution of the United States a citizen is not wholly free to attack the government or to interfere with its military aims in time of war. In the face of a real and present danger, freedom of speech may be somewhat restricted even in America. Can we then say that in the throes of total

war and in the presence of impending disaster these officials who enforced these savage laws in a last desperate effort to stave off defeat were guilty of crimes against humanity ?

" It is persuasively urged that the fact that Germany was waging a criminal war of aggression colours all of these acts with the dye of criminality. To those who planned the war of aggression and who were charged with and were guilty of the crime against the peace as defined in the Charter, this argument is conclusive, but these defendants are not charged with crimes against the peace nor has it been proven here that they knew that the war which they were supporting on the home front was based upon a criminal conspiracy or was *per se* a violation of international law. The lying propaganda of Hitler and Göbbels concealed even from many public officials the criminal plans of the inner circle of aggressors. If we should adopt the view that by reason of the fact that the war was a criminal war of aggression every act which would have been legal in a defensive war was illegal in this one, we would be forced to the conclusion that every soldier who marched under orders into occupied territory or who fought in the homeland was a criminal and a murderer. The rules of land warfare upon which the prosecution has relied would not be the measure of conduct and the pronouncement of guilt in any case would become a mere formality. In the opinion of the Tribunal the territory occupied and annexed by Germany after September, 1939, never became a part of Germany, but for that conclusion we need not rest upon the doctrine that the invasion was a crime against the peace. Such purported annexations in the course of hostilities while armies are in the field are provisional only, and dependent upon the final successful outcome of the war. If the war succeeds, no one questions the validity of the annexation. If it fails, the attempt to annex becomes abortive. In view of our clear duty to move with caution in the recently charted field of international affairs, we conclude that the domestic laws and judgments in Germany which limited free speech in the emergency of war cannot be condemned as crimes against humanity merely by invoking the doctrine of aggressive war. All of the laws to which we have referred could be applied in a discriminatory manner and in the case of many, the Ministry of Justice and the courts enforced them by arbitrary and brutal means, shocking to the conscience of mankind and punishable here. We merely hold that under the particular facts of this case we cannot convict any defendant merely because of the fact, without more, that laws of the first four types were passed or enforced."

The Tribunal was of the opinion that a different situation was presented by the last three types of cases. Its views on these are set out under the next three headings.

(xi) *The Inflicting of the Death Penalty for Alleged Treason and High Treason*

On this category of executions, the Tribunal stated : " We have expressed the opinion that the purported annexation of territory in the East which occurred in the course of war and while opposing armies were still in the field was invalid and that in point of law such territory never became a part of the Reich, but merely remained in German military control under belligerent occupancy. On 27th October, 1939, the Polish Ambassador at

Washington informed the Secretary of State that the German Reich had decreed the annexation of part of the territory of the Polish Republic. In acknowledging the receipt of this information, Secretary Hull stated that he had ' taken note of the Polish government's declaration that it considers this act as illegal and therefore null and void.' (*Department of State Bulletin*, 4th November, 1939, page 458 ; Hyde, *International Law*, Vol. I (2nd Ed.), page 391.) The foregoing fact alone demonstrates that the Polish government was still in existence and was recognised by the government of the United States. Sir Arnold D. McNair expressed a principle which we believe to be incontestable in the following words :

> ' A purported incorporation of occupied territory by a military occupant into his own kingdom during the war is illegal and ought not to receive any recognition.' (*Legal Facts of War* (2nd Ed.) (Cambridge, 1944), page 320, Note.)

> " We recognise that in territory under belligerent occupation the military authorities of the occupant may, under the laws of customs of war, punish local residents who engage in Fifth Column activities hostile to the occupant. It must be conceded that the right to punish such activities depends upon the specific acts charged and not upon the name by which these acts are described. It must also be conceded that Poles who voluntarily entered the Alt Reich could, under the laws of war, be punished for the violation of non-discriminatory German penal statutes.

> " These considerations, however, do not justify the action of the Reich prosecutors who in numerous cases charged the Poles with high treason under the following circumstances : Poles were charged with attempting to escape from the Reich. The indictments in these cases alleged that the defendants were guilty of attempting, by violence or threat of violence, to detach from the Reich territory belonging to the Reich, contrary to the express provisions of Section 80 of the law of 24th April, 1934. The territory which defendants were charged with attempting to detach from the Reich consisted of portions of Poland, which the Reich had illegally attempted to annex. If the theory of the German prosecutors in these cases were carried to its logical conclusion it would mean that every Polish soldier from the occupied territories fighting for the restoration to Poland of territory belonging to it could be guilty of high treason against the Reich and, on capture, could be shot. The theory of the Reich prosecutors carries with it its own refutation.

> " Prosecution in these cases represented an unwarrantable extension of the concept of high treason, which constituted in our opinion a war crime and a crime against humanity. The wrong done in such prosecutions was not merely in misnaming the offence of attempting to escape from the Reich ; the wrong was in falsely naming the act high treason and thereby invoking the death penalty for a minor offence."

(xii) *The Inflicting of the Death Penalty Under the Night and Fog Decree*

The Judgment states : " Paragraph 13 of Count II of the indictment charges in substance that the Ministry of Justice participated with the OKW and the Gestapo in the execution of the Hitler decree of ' Night and

Fog ' (Nacht und Nebel) whereby civilians of occupied countries accused of alleged crimes in resistance activities against German occupying forces were spirited away for secret trial by special courts of the Ministry of Justice within the Reich ; that the victim's whereabouts, trials, and subsequent disposition were kept completely secret, thus serving the dual purpose of terrorising the victim's relatives and associates and barring recourse to evidence, witnesses, or counsel for defence. If the accused was acquitted, or if convicted, after serving his sentence, he was handed over to the Gestapo for ' protective custody ' for the duration of the war. These proceedings resulted in the torture, ill-treatment, and murder of thousands of persons. These crimes and offences are alleged to be war crimes in violation of certain established international rules and customs of warfare and as recognised in Control Council Law No. 10.

" Paragraph 25 of Count III of the indictment incorporates by reference paragraph 13 of Count II of the indictment and alleges that the same acts, offences, and crimes are crimes against humanity as defined by Allied Control Council Law No. 10. The same facts were introduced to prove both the war crimes and crimes against humanity and the evidence will be so considered by us.

" Paragraph 13 of Count II of the indictment, which particularly describes the Hitler NN plan or scheme, charges the defendants Altstötter, von Ammon, Engert, Joel, Klemm, Mettgenberg and Schlegelberger with ' special responsibility for and participation in these crimes ', which are alleged to be war crimes.

" Paragraph 8 of Count II of the indictment charges all of the defendants with having committed the war crimes set forth in paragraphs 9 to 18 inclusive of Count II, in that they were principals in, accessories to, ordered, abetted, took a consenting part in, and were connected with plans and enterprises involving the commission of atrocities and offences against persons, including but not limited to murder, illegal imprisonment, brutalities, atrocities, transportation of civilians, and other inhumane acts which were set out in paragraphs 9 to 18 inclusive of the indictment as war crimes against the civilian population in occupied territories.

" Paragraph 20 of Count III of the indictment charges all of the defendants with having committed the same acts as contained in paragraph 8 of Count II as being crimes against humanity. Paragraphs 21 to 30 inclusive of Count III refer to and adopt the facts alleged in paragraphs 9 to 18 inclusive of Count II, and thus all defendants are charged with having committed crimes against humanity upon the same allegations of facts as are contained in paragraphs 9 to 18 inclusive of Count II.

" In the foregoing manner all of the defendants are charged with having participated in the execution or carrying out of the Hitler NN decree and procedure either as war crimes or as crimes against humanity, and all defendants are charged with having committed numerous other acts which constitute war crimes and crimes against humanity against the civilian population of occupied countries during the period between 1st September, 1939 and April, 1945."

The Judgment points out that :

" The Night and Fog Decree (Nacht und Nebel Erlass) arose as the plan or scheme of Hitler to combat so-called resistance movements in occupied territories. Its enforcement brought about a systematic rule of violence, brutality, outrage, and terror against the civilian population of territories overrun and occupied by the Nazi armed forces. The IMT treated the crimes committed under the Night and Fog Decree as war crimes and found as follows :

' The territories occupied by Germany were administered in violation of the laws of war. The evidence is quite overwhelming of a systematic rule of violence, brutality, and terror. On 7th December, 1941, Hitler issued the directive since known as the "Nacht und Nebel Erlass" (Night and Fog Decree), under which persons who committed offences against the Reich or the German forces in occupied territories, except where the death sentence was certain, were to be taken secretly to Germany and handed over to the SIPO and SD for trial and punishment in Germany. This decree was signed by the defendant Keitel. After these civilians arrived in Germany, no word of them was permitted to reach the country from which they came, or their relatives ; even in cases when they died awaiting trial the families were not informed, the purpose being to create anxiety in the minds of the family of the arrested person. Hitler's purpose in issuing this decree was stated by the defendant Keitel in a covering letter, dated 12th December, 1941, to be as follows :

" Efficient and enduring intimidation can only be achieved either by capital punishment or by measures by which the relatives of the criminal and the population do not know the fate of the criminal. This aim is achieved when the criminal is transferred to Germany."

' The brutal suppression of all opposition to the German occupation was not confined to severe measures against suspected members of resistance movements themselves, but was also extended to their families.'

" The Tribunal also found that :

' One of the most notorious means of terrorising the people in occupied territories was the use of the concentration camps.'

" Reference is here made to the detailed description by the IMT Judgment of the manner of operation of concentration camps and to the appalling cruelties and horrors found to have been committed therein. Such concentration camps were used extensively for the NN prisoners in the execution of the Night and Fog Decree. . . .

" The IMT further found that the manner of arrest and imprisonment of Night and Fog prisoners before they were transferred to Germany was illegal, as follows :

' The local units of the Security Police and SD continued their work in the occupied territories after they had ceased to be an area of operations. The Security Police and SD engaged in widespread arrests of the civilian population of these occupied countries, imprisoned many of them under inhumane conditions, and subjected

them to brutal third degree methods, and sent many of them to concentration camps. Local units of the Security Police and SD were also involved in the shooting of hostages, the imprisonment of relatives, the execution of persons charged as terrorists and saboteurs without a trial, and the enforcement of the " Nacht und Nebel " Decree under which persons charged with a type of offence believed to endanger the security of the occupying forces was either executed within a week or secretly removed to Germany without being permitted to communicate with their family and friends.'

" The foregoing quotations from the IMT Judgment will suffice to show the illegality and cruelty of the entire NN plan or scheme. The transfer of NN prisoners to Germany and the enforcement of the plan or scheme did not cleanse it of its iniquity or render it legal in any respect."

After a general review of the evidence regarding the Nacht und Nebel Decree, the Tribunal continued :

" The enforcement of the directives under the Hitler NN plan or scheme became a means of instrumentality by which the most complete control and coercion of a lot of the people of occupied territories were effected and under which thousands of the civilian population of occupied areas were imprisoned, terrorised, and murdered. The enforcement and administration of the NN directives resulted in the commission of war crimes and crimes against humanity in violation of the international law of war and international common law relating to recognised human rights, and of Article II, 1*b* and *c*, of Control Council Law No. 10.

" During the war, in addition to deporting millions of inhabitants of occupied territories for slave labour and other purposes, Hitler's Night and Fog programme was instituted for the deportation to Germany of many thousands of inhabitants of occupied territories for the purpose of making them disappear without trace and so that their subsequent fate remained secret. This practice created an atmosphere of constant fear and anxiety amongst relatives, friends, and the population of the occupied territories.

" The report of the Paris Conference of 1919, above referred to, listed 32 crimes as constituting ' the most striking list of crimes that has ever been drawn up, to the eternal shame of those who committed them'. This list of crimes was considered and recognised by the Versailles Treaty and was later recognised as international law in the manner hereinabove indicated. Among the crimes so listed was the ' deportation of civilians ' from enemy-occupied territories.

" Control Council Law No. 10, in illustrating acts constituting violations of laws or customs of war, recognises as war crimes the ' deportation to slave labour or for any other purpose of civilian population from occupied territory '. (Article II, 1*b*.) C.C. Law 10 (1*c*) also recognises as crimes against humanity the ' enslavement, deportation, imprisonment of any civilian population '.

" The IMT held that the deportation of inhabitants from occupied territories for the purpose of ' efficient and enduring intimidation '

constituted a violation of the laws and customs of war. The deportation for the purpose of ' efficient and enduring intimidation ' is likewise condemned by Control Council Law No. 10, under the provision inhibiting ' deportation . . . for any other purpose, of civilian population from occupied territory '.

" Also among the list of 32 crimes contained in the Conference Report of 1919 are ' murder and massacre, and systematic terrorism '. Control Council Law No. 10 makes deportation of civilian population ' for any purpose ' a crime recognised as coming within the jurisdiction of the law. The admitted purpose of the Night and Fog Decree was to provide an ' efficient and enduring intimidation ' of the population of occupied territories. The IMT held that the Hitler NN Decree was ' a systematic rule of violence, brutality, and terror ', and was therefore in violation of the laws of war as a terroristic measure.

" The evidence shows that many of the Night and Fog prisoners who were deported to Germany were not charged with serious offences and were given comparatively light sentences or acquitted. This shows that they were not a menace to the occupying forces and were not dangerous in the eyes of the German justices who tried them. But they were kept secretly and not permitted to communicate in any manner with their friends and relatives. This is inhumane treatment. It was meted out not only to the prisoners themselves but to their friends and relatives back home who were in constant distress of mind as to their whereabouts and fate. The families were deprived of the support of the husband, thus causing suffering and hunger. The purpose of the spiriting away of persons under the Night and Fog Decree was to deliberately create constant fear and anxiety amongst the families, friends, and relatives as to the fate of the deportees. Thus, cruel punishment was meted out to the families and friends without any charge or claim that they actually did anything in violation of any occupation rule of the army, or any crime against the Reich.

" It is clear that mental cruelty may be inflicted as well as physical cruelty. Such was the express purpose of the NN Decree, and thousands of innocent persons were so penalised by its enforcement.

" The foregoing documents show without dispute that the NN victim was held incommunicado and the rest of the population only knew that a relative or citizen had disappeared in the night and fog ; hence the name for the decree. If relatives or friends inquired, they were given no information. If diplomats or lawyers inquired concerning the fate of an NN prisoner, they were told that the state of the record did not admit of further inquiry or information. The population, relatives, or friends were not informed for what character of offence the victim had been arrested. Thus they had no guide or standard by which to avoid committing the same offence as the unfortunate victims had committed, which necessarily created in their minds terror and dread that a like fate awaited them.

" Throughout the whole Night and Fog programme ran this element of utter secrecy. This secrecy of the proceedings was a particularly obnoxious form of terroristic measure and was without parallel in the annals of history. It could have been promulgated only by the cruel

Nazi régime which sought to control and terrorise the civilian population of the countries overrun by its aggressive war. There was no proof that the deportation of the civilian population from the occupied territories was necessary to protect the security of the occupant forces. The NN plan or scheme fitted perfectly into the larger plan or scheme of transportation of millions of persons from occupied territories to Germany.

" Control Council Law No. 10 makes deportation of the civilian population for any purpose an offence. The international law of war has for a long period of time protected the civilian population of any territory or country occupied by an enemy war force. This law finds its source in the unwritten international law as established by the customs and usages of the civilised nations of the world. Under international law the inhabitants of an occupied area or territory are entitled to certain rights which must be respected by the invader occupant.

" This law of military occupation has been in existence for a long period of time. It was officially interpreted and applied nearly a half-century ago by the President of the United States of America during the war with Spain in 1898. By General Order No. 101, 18th July, 1898 (*Foreign Relations of the United States*, page 783), the President declared that the inhabitants of the occupied territory ' are entitled to the security of their person and property and in all their private rights and religions.' He further declared that it was the duty of the commander of the army of occupation ' to protect them in their homes, in their employment, and in their personal and religious rights ', and that ' the municipal laws of the conquered territories, such as affect private rights of persons and property and provide for punishment of crime, are continued in force ' and ' are to be administered by the ordinary tribunals substantially as they were before the occupation '. The President referred to the fact that these humane standards of warfare had previously been established by the laws and customs of war, which were later codified by the Hague Conventions of 1899 and 1907, and which constituted the effort of the civilised participating nations to diminish the evils of war by the limitation of the power of the invading occupant over the people and by placing the inhabitants of the occupied area or territory ' under the protection and rules of principles of law of nations as they result from usage established among the civilised peoples from the laws of humanity and the dictates of public conscience.'

" A similar order was issued during the first war with Germany by the President of the United States of America when the American Expeditionary Forces entered the Rhineland in November, 1918. (General Order 218, 28th November, 1918.) At the conclusion of this occupancy, the German government expressed its appreciation of the conduct of the American occupying forces.

" But Germany soon forgot these humane standards of warfare, as is shown by the undisputed evidence. The general policy of the Nazi régime was to terrorise and in some instances to exterminate the civilian populations of occupied territories.

" Pertinent here is the finding of the IMT that :

' In an order issued by the defendant Keitel on 23rd July, 1941, and drafted by the defendant Jodl, it was stated that :

" In view of the vast size of the occupied areas in the East, the forces available for establishing security in these areas will be sufficient only if all resistance is punished not by legal prosecution of the guilty, but by the spreading of such terror by the armed forces as is alone appropriate to eradicate every inclination to resist among the population. Commanders must find the means of keeping order by applying suitable Draconian measures ".'

" Both Keitel and Jodl were sentenced to death by the IMT and later executed. It was the same Keitel who later issued, over his own signature, the Hitler NN Decree which provided that :

' An efficient and enduring intimidation can only be achieved either by capital punishment or by measures by which the relatives of the criminal and the population do not know the fate of the criminal. This aim is achieved when the criminal is transferred to Germany.'

" Beyond dispute the foregoing decrees were inspired by the same thought and purpose and represent the general policy of the Nazi régime in the prosecution of its aggressive war. This general policy was to terrorise, torture, and in some occupied areas to exterminate the civilian population. The undisputed evidence in this case shows that Germany violated during the recent war every principle of the law of military occupation. Not only under NN proceedings but in all occupations she immediately, upon occupation of invaded areas and territories, set aside the laws and courts of the occupied territories. She abolished the courts of the occupied lands and set up courts manned by members of the Nazi totalitarian régime and system. These laws of occupation were cruel and extreme beyond belief, and were enforced by the Nazi courts in a cruel and ruthless manner against the inhabitants of the occupied territories, resulting in grave outrages against humanity, against human rights and morality and religion, and against international law, and against the law as declared by Control Council Law No. 10, by authority of which this Court exercises its jurisdiction in the instant case. The evidence adduced herein provides undeniable and positive proof of the ill-treatment of the subjugated peoples by the Nazi Ministry of Justice and prosecutors to such an extent that jurists as well as civilians of civilised nations who respect human rights and human personality and dignity can hardly believe that the Nazi judicial system could possibly have been so cruel and ruthless in its treatment of the population of occupied areas and territories.

" The foregoing procedure under the NN Decree was clearly in violation of the following provisions sanctioned by the Hague Regulations :

' Article 5. Prisoners of war . . . cannot be confined except as an indispensable measure of safety, and only while the circumstances which necessitate the measure continue to exist.

' Article 23 (*h*). . . . It is expressly forbidden to declare abolished, suspended, or inadmissible in a court of law the rights and actions of the hostile party.

' Article 43. The authority of the legitimate power having, in fact, passed into the hands of the occupant, the latter shall take all the measures in his power to restore and ensure, as far as possible, public order and safety while respecting, unless absolutely prevented, the law enforced in the country.

' Article 46. Family honour and rights, the lives of persons and private property as well as religious convictions and practice must be respected. Private property cannot be confiscated.'

" Both the international rules of war and Control Council Law No. 10 inhibit the torture of civilians by the occupying forces. Under the Night and Fog Decree civilians were secretly transported to concentration camps and were imprisoned under the most inhumane conditions as was shown by the above statements from captured documents. They were starved and ill-treated while in concentration camps and prisons. Thus the Night and Fog Decree violated these express inhibitions of international law of war as well as the express provisions of Control Council Law No. 10.

" Such imprisonment and ill-treatment were also in violation of the rule prescribed by the Conference of Paris of 1919 which prohibits the ' internment of civilians under inhumane conditions '. The Night and Fog Decree was in violation of the international law as recognised by the Paris Conference of 1919 in that the NN prisoners were deported to Germany and forced to labour in the munition plants of the enemy power.

" The foregoing documents establish beyond dispute that they were so employed in munition plants with the sanction and approval of the Reich Ministry of Justice under the approval of the defendant von Ammon."

Turning to the plea of Act of State, the Tribunal said:

" Each defendant has pleaded in effect as a defence the act of State as well as superior orders in justification or mitigation of any crime he may have committed in the execution of the Night and Fog Decree. The basis for individual liability for crimes committed and the law relating thereto was clearly and ably declared by the IMT Judgment which reads as follows:

' It was submitted that international law is concerned with the actions of sovereign States, and provides no punishment for individuals; and further, that where the act in question is an act of State, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the State. In the opinion of the Tribunal, both these submissions must be rejected. That international law imposes duties and liabilities upon individuals as well as upon States has long been recognised. In the recent case of *ex parte* Quirin (1942 317 U.S. 1), before the Supreme Court of the United States, persons were charged during the war with landing in the United States for purposes of spying and sabotage. The late Chief Justice Stone, speaking for the Court, said:

" From the very beginning of its history this Court has applied the law of war as including that part of the law of nations which

prescribes for the conduct of war, the status, rights, and duties of enemy nations as well as enemy individuals."

' He went on to give a list of cases tried by the Courts, where individual offenders were charged with offences against the laws of nations, and particularly the laws of war. Many other authorities could be cited, but enough has been said to show that individuals can be punished for violations of international law. Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.' (*IMT Judgment*, Vol. 1, pages 222, 223.) "

Later, during its treatment of the evidence against Schlegelberger, the Tribunal made the following general statement :

" All of the defendants who entered into the plan or scheme, or who took part in enforcing or carrying it out knew that its enforcement violated international law of war. They also knew, which was evident from the language of the decree, that it was a hard, cruel, and inhuman plan or scheme and was intended to serve as a terroristic measure in aid of the military régime."

Finally, in dealing with the evidence relating to Mettgenberg, the Tribunal said :

" With respect to the legal foundation for the NN cases, three laws or decrees are presented as justifying the proceedings. The first is Article 161 of the Military Penal Code which dates back to the 1870's and which, as amended, provided :

' A foreigner or a German who, in a foreign territory occupied by German troops, acts against German troops or their members or against an authority established by order of the Führer and thereby commits an act which is punishable according to the laws of the Reich, is to be punished, just as if that act would have been committed by him within the territory of the Reich.'

" Whether this law violates international law of war need not be determined here because the defendants did not act under it in the execution and enforcement of the Hitler Night and Fog Decree. Nor does this law authorise the execution and enforcement of any such decree.

" The second legal ground presented is Article 3, Section 2, of the Code of Penal Procedure of 17th August, 1938, which provides for the punishment of criminal acts committed in the areas of military operations in occupied territory by foreigners or Germans and further provides that :

' If a requirement of warfare demands it, . . . they may turn over the prosecution to the ordinary courts in the rear army area.'

" There can be no criticism of this law. It was not applied in any respect in the Night and Fog cases ; hence it constitutes no defence for the manner in which the Night and Fog Decree was carried out.

" The third legal foundation for the proceeding is based upon the claim that the Hitler decree of 7th December, 1941, was a legal regulation for the handling of offences against the Reich or against the occupation

forces of the German army in occupied areas. With respect to this decree we are convinced that it has no legal basis either under the international law of warfare or under the international common law as recognised by all civilised nations as heretofore set out in this judgment."

(xiii) *Racial Persecution*

On this issue the Judgment begins as follows :

" The record contains innumerable acts of persecution of individual Poles and Jews, but to consider these cases as isolated and unrelated instances of perversion of justice would be to overlook the very essence of the offence charged in the indictment. The defendants are not now charged with conspiracy as a separate and substantive offence, but it is alleged that they participated in carrying out a governmental plan and programme for the persecution and extermination of Jews and Poles, a plan which transcended territorial boundaries as well as the bounds of human decency. Some of the defendants took part in the enactment of laws and decrees the purpose of which was the extermination of Poles and Jews in Germany and throughout Europe. Others, in executive positions, actively participated in the enforcement of those laws and in atrocities, illegal even under German law, in furtherance of the declared national purpose. Others, as judges, distorted and then applied the laws and decrees against Poles and Jews as such in disregard of every principle of judicial behaviour. The overt acts of the several defendants must be seen and understood as deliberate contributions toward the effectuation of the policy of the Party and State. The discriminatory laws themselves formed the subject matter of war crimes and crimes against humanity with which the defendants are charged. The material facts which must be proved in any case are : (1) the fact of the great pattern or plan of racial persecution and extermination ; and (2) specific conduct of the individual defendant in furtherance of the plan. This is but an application of general concepts of criminal law. The person who persuades another to commit murder, the person who furnishes the lethal weapon for the purpose of its commission, and the person who pulls the trigger are all principals or accessories to the crime."

At a later point in its Judgment, the Tribunal stated that :

" It will be recalled that the law of 4th December, 1941, against Poles and Jews applied to the ' incorporated Eastern territories '. These territories were seized in the course of criminal aggressive war, but aside from that fact it is clear, as we have indicated, *supra*, that the purported annexation was premature and invalid under the laws and customs of war. The so-called annexed territories in Poland were in reality nothing more than territory under belligerent occupation of the military forces of Germany. The extension to and application in those territories of the discriminatory law against Poles and Jews was in furtherance of the avowed purpose of racial persecution and extermination. In the passing and enforcement of that law the occupying power in our opinion violated the provisions of the Hague Convention," in its Preamble and Articles 43 and 46.[1]

[1] See pp. 90 and 92.

The Tribunal continued :

" The prosecutions which were proposed by Lautz cannot be justified upon any honest claim of military necessity.(1)

" Although the authorities are not in accord as to the proper construction of Article 23*h* of the regulations annexed to the Hague Convention of 1907, we are of the opinion that the introduction and enforcement of the law against Poles and Jews in occupied Poland resulted in a violation of that provision which is as follows :

' It is forbidden . . . to declare suspended, or inadmissible in a court of law the right and actions of the nationals of the hostile party.' (Hyde, *International Law*, Vol. 2 (2nd Ed.), page 1714.)

The Tribunal stated that it found the claim of the defendants that they were unaware of the atrocities committed by the Gestapo and in concentration camps subject to serious question, and concurred in the finding of the International Military Tribunal regarding the use of concentration camps, which read as follows :

" Their original purpose was to imprison without trial all those persons who were opposed to the government, or who were in any way obnoxious to German authority. With the aid of a secret police force, this practice was widely extended, and in course of time concentration camps became places of organised and systematic murder, where millions of people were destroyed. . . .

" A certain number of the concentration camps were equipped with gas chambers for the wholesale destruction of the inmates, and with furnaces for the burning of the bodies. Some of them were in fact used for the extermination of Jews as part of the ' final solution ' of the Jewish problem. . . .

" In Poland and the Soviet Union these crimes were part of a plan to get rid of whole native populations by expulsion and annihilation, in order that their territory could be used for colonisation by Germans. Hitler had written in *Mein Kampf* on these lines, and the plan was clearly stated by Himmler in July, 1942, when he wrote :

' It is not our task to Germanise the East in the old sense, that is, to teach the people there the German language and the German law, but to see to it that only people of purely Germanic blood live in the East '." (*IMT Judgment*, pages 234, 237.)

The Judgment of the Tribunal in the case now being reported continued :

" A large proportion of all of the Jews in Germany were transported to the East. Millions of persons disappeared from Germany and the

(1) See p. 19. The Tribunal was of the opinion that Lautz's proposal that the German courts should try and convict Poles for acts which violated no statute of any kind, if they deserved punishment according to sound German sentiment, "violates every concept of justice and fair play wherever enforced, but when applied against a Pole for an act done in his own country in time of peace, the proposition becomes a monument to Nazi arrogance and criminality. Such a Pole owed no duty of loyalty to any State except Poland and was subject to the criminal jurisdiction of no State but Poland. The prosecution of the Pole Golek would constitute a palpable violation of the laws of war (see : citations to the Hague Convention, *supra*), and any official participating in such a proceeding would be guilty of a war crime under Control Council Law No. 10." The evidence disclosed " that cases similar to that of Golek had been tried by the People's Court and that more prosecutions were expected in the future."

occupied territory without a trace. They were herded into concentration camps within and without Germany. Thousands of soldiers and members of the Gestapo and SS must have been instrumental in the processes of deportation, torture, and extermination. The mere task of disposal of mountainous piles of corpses (evidence of which we have seen) became a serious problem and the subject of disagreement between the various organisations involved. The thousands of Germans who took part in the atrocities must have returned from time to time to their homes in the Reich. The atrocities were of a magnitude unprecedented in the history of the world. Are we to believe that no whisper reached the ears of the public or of those officials who were most concerned ? Did the defendants think that the nation-wide pogrom of November, 1938, officially directed from Berlin, and Hitler's announcement to the Reichstag threatening the obliteration of the Jewish race in Europe were unrelated ? At least they cannot plead ignorance concerning the decrees which were published in their official organ, the *Reichsgesetzblatt*. Therefore, they knew that Jews were to be punished by the police in Germany and in Bohemia and Moravia. They knew that the property of Jews was confiscated on death of the owner. They knew that the law against Poles and Jews had been extended to occupied territories and they knew that the Chief of the Security Police was the official authorised to determine whether or not Jewish property was subject to confiscation. They could hardly be ignorant of the fact that the infamous law against Poles and Jews of 4th December, 1941, directed the Reich Minister of Justice himself, together with the Minister of the Interior, to issue legal and administrative regulations for ' implementation of the decree '. They read *Der Stürmer*. They listened to the radio. They received and sent directives. They heard and delivered lectures. This Tribunal is not so gullible as to believe these defendants so stupid that they did not know what was going on. One man can keep a secret, two men may, but thousands never.

" The evidence conclusively established the adoption and application of systematic governmentally organised and approved procedures amounting to atrocities and offences of the kind made punishable by Control Council Law 10 and committed against ' populations ' and amounting to persecution on racial grounds. These procedures when carried out in occupied territory constituted war crimes and crimes against humanity. When enforced in the Alt Reich against German nationals they constituted crimes against humanity.

" The pattern and plan of racial persecution has been made clear. General knowledge of the broad outlines thereof, in all its immensity, has been brought home to the defendants. The remaining question is whether or not the evidence proves beyond a reasonable doubt in the case of the individual defendants that they each consciously participated in the plan or took a consenting part therein."(1)

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(1) As previously stated, the Tribunal as well as delivering the legal opinions reproduced in these pages, summarised the evidence against each accused before delivering its findings and passing sentences.

(xiv) *Membership in Criminal Organisations*

On this point the Judgment reads as follows :

" Control Council Law 10 provides :

' (1) Each of the following acts is recognised as a crime :

* * *

' (*d*) Membership in categories of a criminal group or organisation declared criminal by the International Military Tribunal.' (Article II, Section I (*d*).)

" Article 9 of the Charter provides :

' At the trial of any individual member of any group or organisation the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organisation of which the individual was a member was a criminal organisation.'

" Article 10 is as follows :

' In cases where a group or organisation is declared criminal by the Tribunal, the competent national authority of any signatory shall have the right to bring individuals to trial for membership therein before national, military, or occupation courts. In any such case the criminal nature of the group or organisation is considered proved and shall not be questioned.' (*IMT Charter*, Articles 9 and 10.)

"' Concerning the effect of the last-quoted section, we quote from the opinion of the IMT in the case of the United States *et al. v.* Göring *et al.*, as follows :

' Article 10 of the Charter makes claim that the declaration of criminality against an accused organisation is final and cannot be challenged in any subsequent criminal proceeding against a member of the organisation '. (*IMT Trial of the Major War Criminals*, Vol. I, page 255.)

" We quote further from the opinion in that case :

' In effect, therefore, a member of an organisation which the Tribunal has declared to be criminal may be subsequently convicted of the crime of membership and be punished for that crime by death. This is not to assume that international or military courts which will try these individuals will not exercise appropriate standards of justice. This is a far-reaching and novel procedure. Its application, unless properly safeguarded, may produce great injustice. . . .

' A criminal organisation is analogous to a criminal conspiracy in that the essence of both is co-operation for criminal purposes. There must be a group bound together and organised for a common purpose. The group must be formed or used in connection with the commission of crimes denounced by the Charter. Since the declaration with respect to the organisations and groups will, as has been pointed out, fix the criminality of its members, that definition should exclude persons who had no knowledge of the criminal purposes or acts of the organisation and those who were drafted by the State for membership, unless they were personally implicated in the commission of acts declared criminal by Article 6 of the Charter as members of the organisation. Membership

alone is not enough to come within the scope of these declarations.' (*IMT Judgment*, Vol. I, pages 255–256.)

" The Tribunal in that case recommended uniformity of treatment so far as practicable in the administration of this law, recognising, however, that discretion in sentencing is vested in the courts. Certain groups of the Leadership Corps, the SS, the Gestapo, the SD, were declared to be criminal organisations by the Judgment of the first International Military Tribunal. The test to be applied in determining the guilt of individual members of a criminal organisation is repeatedly stated in the opinion of the first International Military Tribunal. The test is as follows: those members of an organisation which has been declared criminal ' who became or remained members of the organisation with knowledge that it was being used for the commission of acts declared criminal by Article 6 of the Charter, or who were personally implicated as members of the organisation in the commission of such crime ' are declared punishable.

" Certain categories of the Leadership Corps are defined in the first International Military Tribunal Judgment as criminal organisations. We quote:

' The Gauleiters, the Kreisleiters, and the Ortsgruppenleiters participated, to one degree or another, in these criminal programmes. The Reichsleitung as the staff organisation of the Party is also responsible for these criminal programmes as well as the heads of the various staff organisations of the Gauleiters and Kreisleiters. The decision of the Tribunal on these staff organisations includes only the Amtsleiters who were heads of offices on the staffs of the Reichsleitung, Gauleitung, and Kreisleitung. With respect to other staff officers and party organisations attached to the Leadership Corps other than the Amtsleiters referred to above, the Tribunal will follow the suggestion of the prosecution in excluding them from the declaration.' (*Trial of Major War Criminals*, Vol. I, page 261.)

" In like manner certain categories of the SD were defined as criminal organisations. Again, we quote:

' In dealing with the SD the Tribunal includes Amter III, VI, and VII of the RSHA, and all other members of the SD, including all local representatives and agents, honorary or otherwise, whether they were technically members of the SS or not, but not including honorary informers who were not members of the SS, and members of the Abwehr who were transferred to the SD.' (*Trial of the Major War Criminals*, Vol. I, pages 267–268.)

" In like manner certain categories of the SS were declared to constitute criminal organisations:

' In dealing with the SS the Tribunal includes all persons who had been officially accepted as members of the SS including the members of the Allgemeine SS, members of the Waffen SS, members of the SS Totenkopf Verbaende, and the members of any of the different police forces who were members of the SS. The Tribunal does not include the so-called SS riding units.' (*Trial of the Major War Criminals*, Vol. I, page 273.)

" Control Council Law 10 provides that we are bound by the findings as to the criminal nature of these groups or organisations. However, it should be added that the criminality of these groups and organisations is also established by the evidence which has been received in the pending case. Certain of the defendants are charged in the indictment with membership in the following groups or organisations which have been declared and are now found to be criminal, to wit : the Leadership Corps, the SD, and the SS. In passing upon these charges against the respective defendants, the Tribunal will apply the tests of criminality set forth above."

Accordingly, in finding Oeschey guilty under Count Four, the Tribunal said :

" The defendant Oeschey is charged under Count Four of the indictment with being a member of the Party Leadership Corps at Gau level within the definition of membership declared criminal according to the Judgment of the first International Military Tribunal in the case against Göring *et al.* . . . Oeschey was provisionally commissioned with the direction of the legal office of the NSDAP in the Franconia Gau and served in that official capacity for a long time. In his testimony he states that from 1940 to 1942 he was solely in charge of the Gau legal office as section chief. The evidence clearly establishes the defendant's voluntary membership as the chief of a Gau staff office subsequent to 1st September, 1939. The judgment of the first International Military Tribunal lists among the criminal activities of the Party Leadership Corps the following :

' The Leadership Corps played its part in the persecution of the Jews. It was involved in the economic and political discrimination against the Jews which was put into effect shortly after the Nazis came into power. The Gestapo and SD were instructed to co-ordinate with the Gauleiters and Kreisleiters the measures taken in the pogroms of 9th and 10th November, 1938. The Leadership Corps was also used to prevent German public opinion from reacting against the measures taken against the Jews in the East. On 9th October, 1942, a confidential information bulletin was sent to all Gauleiters and Kreisleiters entitled ' Preparatory Measures for the Final Solution of the Jewish Question in Europe—Rumours Concerning the Conditions of the Jews in the East '. This bulletin stated that rumours were being started by returning soldiers concerning the conditions of Jews in the East which some Germans might not understand, and outlined in detail the official explanation to be given. This bulletin contained no explicit statement that the Jews were being exterminated, but it did indicate they were going to labour camps, and spoke of their complete segregation and elimination and the necessity of ruthless severity. . . .

' The Leadership Corps played an important part in the administration of the slave labour programme. A Sauckel decree dated 6th April, 1942, appointed the Gauleiters as plenipotentiaries for labour mobilisation for their Gaue with authority to co-ordinate all agencies dealing with labour questions in their Gaue, with specific authority over the employment of foreign workers, including their conditions of work, feeding, and housing. Under this authority the

Gauleiters assumed control over the allocation of labour in their Gaue, including the forced labourers from foreign countries. In carrying out this task the Gauleiters used many Party offices within their Gaue, including subordinate political leaders. For example, Sauckel's decree of 8th September, 1942, relating to the allocation for household labour of 400,000 woman labourers brought in from the East, established a procedure under which applications filed for such workers should be passed on by Kreisleiters, whose judgment was final.

' Under Sauckel's directive the Leadership Corps was directly concerned with the treatment given foreign workers, and the Gauleiters were specifically instructed to prevent ' politically inept factory heads ' from giving ' too much consideration to the care of Eastern workers '. . . .

' The Leadership Corps was directly concerned with the treatment of prisoners of war. On 5th November, 1941, Bormann transmitted a directive down to the level of Kreisleiter instructing them to insure compliance by the army with the recent directives of the Department of the Interior ordering that dead Russian prisoners of war should be buried wrapped in tar paper in a remote place without any ceremony or any decorations of their graves. On 25th November, 1943, Bormann sent a circular instructing the Gauleiters to report any lenient treatment of prisoners of war. On 13th September, 1944, Bormann sent a directive down to the level of Kreisleiter ordering that liaison be established between the Kreisleiters and the guards of the prisoners of war in order " better to assimilate the commitment of the prisoners of war to the political and economic demands ".

' The machinery of the Leadership Corps was also utilised in attempts made to deprive Allied airmen of the protection to which they were entitled under the Geneva Convention. On 13th March, 1940, a directive of Hess transmitted instructions through the Leadership Corps down to the Blockleiter for the guidance of the civilian population in case of the landing of enemy planes or parachutists, which stated that enemy parachutists were to be immediately arrested or " made harmless ".'

" As to his knowledge, the defendant Oeschey joined the NSDAP on 1st December, 1931. He was head of the Lawyers' League for the Gau Franconia and a judicial officer of considerable importance within the Gaue. These offices would provide additional sources of information as to the crimes outlined. Furthermore, these crimes were of such wide scope and so intimately connected with the activities of the Gauleitung that it would be impossible for a man of the defendant's intelligence not to have known of the commission of these crimes, at least in part if not entirely."

On the other hand, of Rothaug it was said: " Under Count Four he is charged with being a member of the Party Leadership Corps. He is not charged with membership in the SD. The proof as to Count Four establishes that he was Gauleiter of the Lawyers' League. The Lawyers' League was a formation of the Party and not a part of the Leadership

Corps as determined by the International Military Tribunal in the case against Göring *et al.*"

Furthermore, Cuhorst was acquitted under Count Four, on the following grounds :

> " As to Count Four, the proof established that Cuhorst was a Gaustellenleiter and so a member of the Gau staff and a ' sponsoring ' member of the SS. His function as Gaustellenleiter was that of a public propaganda speaker.
>
> " In its Judgment the International Military Tribunal, in defining the members of the Party Leadership Corps who came under its decision as being members of a criminal organisation, states the following :
>
> > ' The decision of the Tribunal on these staff organisations includes only the Amtsleiters who were heads of offices on the staffs of the Reichsleitung, Gauleitung, and Kreisleitung. With respect to other staff officers and Party organisations attached to the Leadership Corps other than the Amtsleiters referred to above, the Tribunal will follow the suggestion of the prosecution in excluding them from the declaration.'
>
> " There is no evidence in this case which shows that the office of Gaustellenleiter was the head of any office on the staff of the Gauleitung.
>
> " With regard to the SS the Judgment of the International Military Tribunal is as follows :
>
> > ' The Tribunal declares to be criminal within the meaning of the Charter the group composed of those persons who had been officially accepted as members of the SS as enumerated in the preceding paragraph who became or remained members of the organisation with knowledge that it was being used for the commission of acts declared criminal by Article 6 of the Charter. . . . '
>
> " Referring back to the membership enumerated, the Judgment declares :
>
> > ' In dealing with the SS, the Tribunal includes all persons who had been officially accepted as members of the SS, including the members of the Allgemeine SS, members of the Waffen SS, members of the SS Totenkopf Verbaende, and the members of any of the different police forces who were members of the SS.'
>
> " It is not believed by this Tribunal that a sponsoring membership is included in this definition."

Finally, the findings of the Tribunal regarding Altstötter's guilt under Count Four are worth quoting at length, since they illustrate for instance the attitude taken by the Tribunal to the question of knowledge and assumed knowledge in respect of membership of criminal organisations :

> " The evidence in this case clearly established that the defendant joined and retained his membership in the SS on a voluntary basis. In fact it appears that he took considerable interest in his SS rank and honours. The remaining fact to be determined is whether he had knowledge of the criminal activities of the SS as defined in the London

Charter. In this connection we quote certain extracts from the Judgment of the International Military Tribunal in the case of Göring *et al.* as to the SS :

" ' Criminal activities : SS units were active participants in the steps leading up to aggressive war. The Verfuegungstruppe was used in the occupation of the Sudetenland, of Bohemia and Moravia, and in Memel. The Henlein Free Corps was under the jurisdiction of the Reichsführer SS for operations in the Sudetenland in 1938, and the Volksdeutsche Mittelstelle financed Fifth Column activities there.

' The SS was even a more general participant in the commission of war crimes and crimes against humanity. Through its control over the organisation of the police, particularly the Security Police and SD, the SS was involved in all the crimes which have been outlined in the section of this Judgment dealing with the Gestapo and SD. . . . The Race and Settlement Office of the SS, together with the Volksdeutsche Mittelstelle, were active in carrying out schemes for Germanisation of occupied territories according to the racial principles of the Nazi Party and were involved in the deportation of Jews and other foreign nationals. Units of the Waffen SS and Einsatzgruppen operating directly under the SS Main Office were used to carry out these plans. These units were also involved in the widespread murder and ill-treatment of the civilian population of occupied territories. . . .

' From 1934 onwards the SS was responsible for the guarding and administration of concentration camps. The evidence leaves no doubt that the consistently brutal treatment of the inmates of concentration camps was carried out as a result of the general policy of the SS, which was that the inmates were racial inferiors to be treated only with contempt. There is evidence that where manpower considerations permitted, Himmler wanted to rotate guard battalions so that all members of the SS would be instructed as to the proper attitude to take to inferior races. After 1942 when the concentration camps were placed under the control of the WVHA they were used as a source of slave labour. An agreement made with the Ministry of Justice on 18th September, 1942, provided that anti-social elements who had finished prison sentences were to be delivered to the SS to be worked to death. . . .

' The SS played a particularly significant role in the persecution of the Jews. The SS was directly involved in the demonstrations of 10th November, 1938. The evacuation of the Jews from occupied territories was carried out under the direction of the SS with the assistance of SS police units. The extermination of the Jews was carried out under the direction of the SS Central Organisations. It was actually put into effect by SS formations. . . .

' It is impossible to single out any one portion of the SS which was not involved in these criminal activities. The Allgemeine SS was an active participant in the persecution of the Jews and was used as a source of concentration camp guards. . . .

' The Tribunal finds that knowledge of these criminal activities was sufficiently general to justify declaring that the SS was a criminal

organisation to the extent hereinafter described. It does appear that an attempt was made to keep secret some phases of its activities, but its criminal programmes were so widespread, and involved slaughter on such a gigantic scale, that its criminal activities must have been widely known. It must be recognised, moreover, that the criminal activities of the SS followed quite logically from the principles on which it was organised. Every effort had been made to make the SS a highly disciplined organisation composed of the élite of National Socialism. Himmler had stated that there were people in Germany " who become sick when they see these black coats " and that he did not expect that " they should be loved by too many " . . . Himmler in a series of speeches made in 1943 indicated his pride in the ability of the SS to carry out these criminal acts. He encouraged his men to be " tough and ruthless " ; he spoke of shooting " thousands of leading Poles", and thanked them for their co-operation and lack of squeamishness at the sight of hundreds and thousands of corpses of their victims. He extolled ruthlessness in exterminating the Jewish race and later described this process as " delousing ". These speeches show that the general attitude prevailing in the SS was consistent with these criminal acts. . . .

' In dealing with the SS the Tribunal includes all persons who had been officially accepted as members of the SS, including the members of the Allgemeine SS, members of the Waffen SS, members of the SS Totenkopf Verbaende, and the members of any of the different police forces who were members of the SS. . . .

' The Tribunal declares to be criminal within the meaning of the Charter the group composed of those persons who had been officially accepted as members of the SS as enumerated in the preceding paragraph who became or remained members of the organisation with knowledge that it was being used for the commission of acts declared criminal by Article 6 of the Charter. . . . '

" In this regard the Tribunal is of the opinion that the activities of the SS and the crimes which it committed as pointed out by the Judgment of the International Military Tribunal above quoted are of so wide a scope that no person of the defendant's intelligence, and one who had achieved the rank of Oberführer in the SS, could have been unaware of its illegal activities, particularly a member of the organisation from 1937 until the surrender. According to his own statement, he joined the SS with misgivings, not only on religious grounds but also because of practices of the police as to protective custody in concentration camps.

" Altstötter not only had contacts with the high-ranking officials of the SS, as above stated, but was himself a high official in the Ministry of Justice stationed in Berlin from June, 1943, until the surrender. He attended conferences of the department chiefs in the Ministry of Justice and was associated with the officials of the Ministry, including those in charge of penal matters.

" The record in this case shows as part of the defence of many of those on trial here that they claim to have constantly resisted the

encroachment of the police under Himmler and the illegal acts of the police.

" Documentary evidence shows that the defendant knew of the evacuation of Jews in Austria and had correspondence with the Chief of the Security Police and Security Service regarding witnesses for the Hereditary Biological Courts. This correspondence states :

' If the Residents' Registration Office or another police office gives the information that a Jew has been deported, all other inquiries as to his place of abode as well as applications for his admission of hearing or examination are superfluous. On the contrary, it has to be assumed that the Jew is not attainable for the taking of evidence.'

" It also quotes this significant paragraph :

' If in an individual case it is to the interest of the public to make an exception and to render possible the taking of evidence by special provision of persons to accompany and means of transportation for the Jew, a report has to be submitted to me in which the importance of the case is explained. In all cases offices must refrain from direct application to the offices of the police, especially also to the Central Office for the Regulation of the Jewish Problem in Bohemia and Moravia at Prague, for information on the place of abode of deported Jews and their admission, hearing, or examination.' .

" He was a member of the SS at the time of the pogroms in November, 1938, ' Crystal Week ', in which the IMT found the SS to have had an important part. Surely, whether or not he took a part in such activities or approved of them, he must have known of that part which was played by an organisation of which he was an officer. As a lawyer he knew that in October of 1940 the SS was placed beyond reach of the law. As a lawyer he certainly knew that by the 13th Amendment to the Citizenship Law the Jews were turned over to the police and so finally deprived of the scanty legal protection they had theretofore had. He also knew, for it was part of the same law, of the sinister provisions for the confiscation of property upon death of the Jewish owners, by the police.

" Notwithstanding these facts, he maintained his friendly relations with the leaders of the SS, including Himmler, Kaltenbrunner, Gebhardt, and Berger. He refers to Himmler, one of the most sinister figures in the Third Reich, as his ' old and trusty friend'. He accepted and retained his membership in the SS, perhaps the major instrument of Himmler's power. Conceding that the defendant did not know of the ultimate mass murders in the concentration camps and by the Einsatzgruppen, he knew the policies of the SS and, in part, its crimes. Nevertheless he accepted its insignia, its rank, its honours, and its contacts with the high figures of the Nazi régime. These were of no small significance in Nazi Germany. For that price he gave his name as a soldier and a jurist of note and so helped to cloak the shameful deeds of that organisation from the eyes of the German people.

" Upon the evidence in this case it is the judgment of this Tribunal that the defendant Altstötter is guilty under Count Four of the Indictment."

(xv) *General Remarks Regarding the Responsibility of the Accused*

At an early point in its Judgment the Tribunal stated that:

> " The prosecution has introduced evidence concerning acts which occurred before the outbreak of the war in 1939. Some such acts are relevant upon the charges contained in Counts 2, 3 and 4, but as stated by the prosecution, ' None of these acts is charged as an independent offence in this particular indictment.' We direct our consideration to the issue of guilt or innocence after the outbreak of the war in accordance with the specific limitations of time set forth in Counts 2, 3 and 4 of the indictment. In measuring the conduct of the individual defendants by the standard of Control Council Law 10, we are also to be guided by Article 2, paragraph 2, of that law, which provides that a person is deemed to have committed a crime as defined in paragraph 1 of Article 2, if he was ' (*a*) a principal or (*b*) was an accessory to the commission of any such crime or ordered or abetted the same or (*c*) took a consenting part therein or (*d*) was connected with plans or enterprises involving its commission or (*e*) was a member of any organisation or group connected with the commission of any such crime . . . ' "

Immediately before reviewing the evidence relating to the changes to the German legal system made under Nazi rule from 1933 onwards, the Tribunal said:

> " The conduct of the defendants must be seen in a context of preparation for aggressive war, and must be interpreted as within the framework of the criminal law and judicial system of the Third Reich. We shal', therefore, next consider the legal and judicial process by which the entire judicial system was transformed into a tool for the propagation of the National Socialist ideology, the extermination of opposition thereto, and the advancement of plans for aggressive war and world conquest. Though the overt acts with which the defendants are charged occurred after September, 1939, the evidence now to be considered will make clear the conditions under which the defendants acted and will show knowledge, intent, and motive on their part, for in the period of preparation some of the defendants played a leading part in moulding the judicial system which they later employed."

Finally, before delivering sentence, the Tribunal added: " As we have said, the defendants are not charged with specific overt acts against named victims: They are charged with criminal participation in governmentally organised atrocities and persecutions unmatched in the annals of history. Our judgments are based upon a consideration of all of the evidence which tends to throw light upon the part which these defendants played in the entire tragic drama. We shall, in pronouncing sentence, give due consideration to circumstances of mitigation and to the proven character and motives of the respective defendants."

6. DISSENTING JUDGMENT BY JUDGE BLAIR

After the reading of the Judgment of the Tribunal, Judge Blair stated: " I wish to file a dissenting opinion with regard to one aspect of the source of authority of Control Council Law 10."

" In Judge Blair's opinion, ' No authority or jurisdiction to determine the question of the present status of belligerency as the occupation of Germany has been given this Tribunal. This question of present belligerency of occupation rests solely within the jurisdiction of the military occupants and the executives of the nations which the members of the Allied Control Council represent. The determination by this Tribunal that the present occupation of Germany by the Allied powers is not belligerent may possibly involve serious complications with respect to matters solely within the jurisdiction of the military and executive departments of the governments of the Allied Powers."

Judge Blair quoted a number of provisions from the United States Basic Field Manual (*Rules of Land Warfare*), and claimed that : " There has been no act or declaration of the Allied powers, either before or since their occupation of Germany under the terms of the unconditional surrender, which could possibly be construed as showing that they intend by the subjugation and occupation of Germany to transfer her sovereignty to themselves." His conclusion was as follows :

" The declaration made in the Judgment that Germany has been subjugated by military conquest and that therefore her sovereignty has been transferred to the successful belligerent Allied powers cannot be sustained either as a matter of fact or under any construction of the foregoing rules of land warfare. The control and operation of Germany under the Allied Powers' occupation is provisional. It does not transfer any sovereign power of Germany other than for the limited purpose of keeping the peace during occupancy, and for the ultimate rectification of the evils brought about by the Nazi régime and militarism, and in order to destroy such influences and to aid in the establishment of a government in and for Germany under which she may in the future earn her place in the comity of nations. ' In any event this Tribunal has no power or jurisdiction to determine such questions."

Judge Blair's dissenting opinion was elaborated at some length. He concluded by making some remarks regarding the findings of the Tribunal on Count One of the indictment.(1)

7. THE FINDINGS AND SENTENCES

Schlegelberger was found guilty of having committed war crimes and crimes against humanity. After finding that there was sufficient evidence to state that it was a draft of Schlegelberger's which constituted the basis of the law against Poles and Jews of 4th December, 1941, the Tribunal held that : " In this respect he was not only guilty of participation in the racial persecution of Poles and Jews ; he was also guilty of violation of the laws and customs of war by establishing that legislation in the occupied territories of the East. The extension of this type of law into occupied territories was in direct violation of the limitations imposed by the Hague Convention, which we have previously cited." The defendant was sentenced to imprisonment for life.

(1) See p. 110.

Klemm was also found guilty of having committed war crimes and crimes against humanity. The Tribunal added: " We find no evidence warranting mitigation of his punishment." Klemm also received a sentence of imprisonment for life.

Of Rothenberger the Tribunal concluded that: " The defendant Rothenberger is guilty of taking a minor but consenting part in the Night and Fog programme. He aided and abetted in the programme of racial persecution, and notwithstanding his many protestations to the contrary, he materially contributed toward the prostitution of the Ministry of Justice and the courts and their subordination to the arbitrary will of Hitler, the Party minions, and the police. He participated in the corruption and perversion of the judicial system. The defendant Rothenberger is guilty under Counts Two and Three of the indictment." He was sentenced to imprisonment for seven years.

Concerning Lautz's connection with the Nacht und Nebel Decree the Tribunal said that: " The Chief Public Prosecutor of the People's Court zealously enforced the provisions of this decree, and his conduct in so doing violated the laws and customs of war and the provisions of Control Council Law 10." The Tribunal also concluded that: " The defendant Lautz is guilty of participating in the national programme of racial extermination of Poles by means of the perversion of the law of high treason . . . We have cited a few cases which are typical of the activities of the prosecution before the People's Court in innumerable cases. The captured documents which are in evidence establish that the defendant Lautz was criminally implicated in enforcing the law against Poles and Jews which we deem to be a part of the established governmental plan for the extermination of those races. He was an accessory to and took a consenting part in the crime of genocide." The Tribunal added:

> " He is likewise guilty of a violation of the laws and customs of war in connection with prosecutions under the Nacht und Nebel Decree, and he participated in the perversion of the laws relating to treason and high treason under which Poles guilty of petty offences were executed. The proof of his guilt is not, however, dependent solely on captured documents or the testimony of prosecution witnesses. He is convicted on the basis of his own sworn statements. Defendant is entitled to respect for his honesty, but we cannot disregard his incriminating admissions merely because we respect him for making them.
>
> " There is much to be said in mitigation of punishment. Lautz was not active in Party matters. He resisted all efforts of Party officials to influence his conduct but yielded to influence and guidance from Hitler through the Reich Ministry of Justice, believing that to be required under German law. He was a stern man and a relentless prosecutor, but it may be said in his favour that if German law were a defence, which it is not, many of his acts would be excusable.
>
> " We find the defendant Lautz guilty as charged upon Counts Two and Three of the indictment."

Lautz received a sentence of ten years' imprisonment.

Of Mettgenberg it was said: " We find defendant Mettgenberg to be guilty under Counts Two and Three of the indictment. The evidence shows beyond a reasonable doubt that he acted as a principal, aided, abetted,

and was connected with the execution and carrying out of the Hitler Night and Fog Decree in violation of numerous principles of international law, as has been heretofore pointed out in this Judgment." This defendant was also awarded a sentence of ten years' imprisonment.

Von Ammon was also found guilty of having committed war crimes and crimes against humanity. His sentence was also one of imprisonment for ten years.

It was held that Joel " took an active part in the execution of the plan or scheme for the persecution and extermination of Jews and Poles ". The Tribunal added: " Concerning Joel's membership in the SS and SD, a consideration of all the evidence convinces us beyond a reasonable doubt that he retained such membership with full knowledge of the criminal character of those organisations. No man who had his intimate contacts with the Reich Security Main Office, the SS, the SD, and the Gestapo could possibly have been in ignorance of the general character of those organisations.

" We find defendant Joel guilty under Counts Two, Three and Four." Joel also received a sentence of ten years' imprisonment.

Rothaug was found not guilty of committing war crimes or of membership in criminal organisations, but guilty under Count Three (Crimes against Humanity). The Tribunal commented: " In his case we find no mitigating circumstances; no extenuation." Rothaug was sentenced to imprisonment for life.

The Tribunal found " the defendant Oeschey guilty under Counts Three and Four of the indictment. In view of the sadistic attitude and conduct of the defendant, we know of no just reason for any mitigation of punishment." Oeschey also received a life sentence.

Altstötter was found not guilty of committing war crimes and crimes against humanity but guilty of membership of a criminal organisation. He was sentenced to imprisonment for five years.

The defendants Barnickel, Petersen, Nebelung and Cuhorst were found not guilty under the counts charged against them.(1)

At the time when this volume went to press, the sentences had not yet been approved by the Military Governor.

B. NOTES ON THE CASE

1. The Limitations Placed Upon the Present Commentary

The Justice Trial is the first of the Nuremberg " Subsequent Proceedings " to be reported in these volumes.(2) While the trial is unique among these cases in so far as the defendants were all former officials of the Reich Ministry of Justice or otherwise directly concerned in the administration of justice in Germany, many of its features and of the problems discussed in the Judgment of the Tribunal before which it was conducted were common to several or most of the other trials held before United States Military Tribunals in Nuremberg. Since it is hoped to publish in the present series

(1) Regarding the reasons for Cuhorst's acquittal, see p. 69.
(2) See p. 2, footnote 1, and pp. 26-38.

reports on a majority of these trials, it has been thought desirable not to comment at length at this stage on certain points which also arise in other trials to be reported upon later.

Thus, for instance, it will suffice at this point to state, regarding the question of *Criminal Organisations*, first that the Tribunal found Altstötter guilty only under Count Four, which alleged membership of such organisations, and that the punishment awarded to the accused for such guilt was imprisonment for five years ; secondly that, in finding Rothaug and Cuhorst not guilty under Count Four the Tribunal ruled that neither a Gaustellenleiter nor a " sponsoring " member of the SS, nor a member of the German Lawyers' League could be regarded as a member of an organisation declared criminal by the International Military Tribunal ;([1]) and thirdly that in the course of its Judgment the United States Military Tribunal made some interesting observations relating to the requirement of knowledge which enters into the definition set out by the International Military Tribunal of responsibility on the grounds of membership of such organisations.([2]) The attitude taken by the Tribunal on this question of knowledge may be judged for instance from its statement that no man with Joel's intimate contacts with the Reich Security Main Office, the SS, the SD and the Gestapo " *could possibly have retained membership* of the second and third mentioned organisations *without knowledge* of their criminal character." ([3]) The crimes of the Leadership Corps of the Nazi Party, ruled the Tribunal at another point in its Judgment, were of such wide scope and were so intimately connected with the activities of the Gauleitung that " it *would be impossible* for a man of the defendant's (Oeschey's) intelligence *not to have known* of the commission of these crimes, at least in part if not entirely."([4]) Finally, of Altstötter's guilt under Count Four, the Tribunal said, *inter alia* : " that the activities of the SS and the crimes which it committed as pointed out by the Judgment of the International Military Tribunal above quoted are of so wide a scope that no person of the defendant's intelligence, and one who had achieved the rank of Oberführer in the SS, could have been unaware of its illegal activities, particularly a member of the organisation from 1937 until the surrender. According to his own statement, he joined the SS with misgivings, not only on religious grounds but also because of practices of the police as to protective custody in concentration camps. . . . He was a member of the SS at the time of the pogroms in November, 1938, ' Crystal Week ', in which the International Military Tribunal found the SS to have had an important part. Surely whether or not he took a part in such activities or approved of them, he *must have known* of that part which was played by an organisation of which he was an officer."([5]) These extracts from its Judgment are sufficient to show that the Tribunal was willing, in suitable instances, to assume knowledge on the part of defendants of the criminal purposes of the organisations referred to, though it should be added that Altstötter for instance was not found guilty on the basis of presumed knowledge alone.([6])

([1]) See pp. 68-9.
([2]) See pp. 66 and 69.
([3]) See p. 76. (Italics inserted.)
([4]) See p. 68. (Italics inserted.)
([5]) See pp. 71 and 72. (Italics inserted.)
([6]) See pp. 71-72.

The plea of *alleged legality or compulsion under municipal law* was raised during the *Justice Trial*(1) but it is not discussed at length here since it has already received treatment in a previous volume of this series, where a reference to the contribution made to the law on this point by the present Tribunal is included.(2)

If compliance with domestic law and superior orders does not automatically free from criminal responsibility administrative officials and members of military and para-military forces, it is certainly not possible to recognise such a defence in the case of judges whose position *vis-à-vis* their own governments and their statutes is certainly stronger and more independent than that of an administrative official or of a member of the forces, even taking into account the evidence produced during the present trial of the pressure brought to bear upon the German judges by the Nazi Party hierarchy. The statutes and regulations under which the defendants acted constituted superior orders of a less rigorous type than those applicable to military personnel, because, in general, judges are freer to resign from their positions or refuse a certain assignment than are military personnel ; military discipline, especially in time of war, is more severe and of a different type, military orders are stricter and less general than are statutory norms and allow less exercise of discretion, and disobedience to a military order may bring swifter and sterner punishment to military personnel than would the lenient interpretation of a statute by judicial personnel.

Counsel for Cuhorst claimed that a judge " enjoys a special position in penal law ", but added that : " All this does not, of course, preclude one from calling a judge to account for wilful miscarriage of justice." The Tribunal saw " no merit in the suggestion that Nazi judges are entitled to the benefit of the Anglo-American doctrine of judicial immunity "(3) and treated the accused according to the established principles relating to superior orders.

2. CRIMES AGAINST HUMANITY

It is not proposed to deal at any length with the difficult question of crimes against humanity in the present notes since it is prominent in many

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(1) See pp. 48-49. The prosecution quoted in argument not only paragraph 4 (b) of Article II of Law No. 10, but also paragraph 4 (a), which provides that :

" (a) The official position of any person, whether as Head of State or as responsible official in a Government Department, does not free him from responsibility for a crime or entitle him to mitigation of punishment."

The defence claimed that it was " doubtful whether a German judge can be regarded at all as a government official in the sense of the Control Council Law. The defence also maintained that Control Council Law No. 10, Article II, paragraph 4 (b) referred to orders of a government or superior but could not be taken to include within its scope " formal law " which a judge " was bound to take into consideration." These arguments were rejected by the Tribunal and, whatever the wording of Law No. 10, it is settled law that legality or compulsion under municipal law does not constitute a complete defence in war crime trials. As defence counsel pointed out, the Courts and legal authorities of various countries have declared that municipal law must prevail over international law ; but a Court administering the laws and customs of war, a part of international law, is not bound by such a rule. (See the reference contained in the next footnote.)

(2) See Volume V, pp. 22-4.

(3) See p. 50.

of the other Subsequent Proceedings trials which have not yet been reported and can profitably receive further treatment in a later volume.(1) All that will appear in these pages is a brief indication of some aspects of the attitude to the point taken by the Tribunal conducting the present trial, particularly regarding the difference between war crimes and crimes against humanity.

In the first place it is clear that war crimes may also constitute crimes against humanity; the same offences may amount to both types of crime. If war crimes are shown to have been committed in a widespread, systematic manner, on political, racial or religious grounds, they may amount also to crimes against humanity. The wording of the indictment shows that the prosecution regarded certain alleged acts as constituting both war crimes and crimes against humanity; the details set out under Count Two were incorporated under Count Three " by reference ",(2) and it seems that the Tribunal was willing to agree that acts taken in pursuance of the Nacht und Nebel plan constituted crimes against humanity as well as war crimes.(3) So also the prosecution on charges of high treason of Poles who attempted to escape from the Reich,(4) and other forms of racial persecution carried out in occupied territory.(5) In general the Tribunal pointed out that Article II, paragraph 1(*c*), Control Council Law No. 10, which defines crimes against humanity, prohibited " *not only war crimes*, but also acts not included within the preceding definition of war crimes."(6)

In the second place, it is established that the possible victims of crimes against humanity form a wider group than the possible victims of war crimes. The latter category comprises broadly speaking(7) the nationals or armed forces of belligerent countries or inhabitants of territories occupied after conquest against whom offences are committed by enemy nationals as long as peace has not been declared.

Crimes against humanity on the other hand may be committed also by German nationals against other German nationals or any stateless person.(8)

It must be noted, thirdly, that isolated offences do not constitute crimes against humanity; fourthly, that the Tribunal regarded the proof of systematic governmental organisation of the acts as a necessary element of crimes against humanity; and fifthly, that according to the Tribunal, if the offences are not " Atrocities and offences ", as defined in Law No. 10, and committed against civilian populations, but amount to persecutions, they must be

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(1) See, however, an exhaustive examination of the development of the concept of crimes against humanity up to the end of 1946 by Dr. Egon Schwelb in *British Yearbook of International Law*, 1946, pp. 178-226.

(2) See p. 4.

(3) See pp. 56 and 75-6.

(4) See p. 53.

(5) See p. 64.

(6) See p. 39. (Italics inserted.)

(7) As an illustration of the difficulty involved in an attempt to define shortly yet with complete accuracy and generality the possible victims of war crimes, compare Article 1 of the French Ordinance of 28th August, 1944, quoted on p. 93 of Volume III of this series, and also Article 1 of the Norwegian Law of 13th December, 1946, quoted on p. 83 of the same volume. See p. 39 of the present volume.

(8) See p. 40.

persecutions *on political, racial or religious grounds.* The Judgment stated that :

> " We hold that crimes against humanity as defined in Control Council Law 10 must be strictly construed to exclude isolated cases of atrocities or persecutions whether committed by private individuals or by a governmental authority. As we construe it, that section provides for the punishment of crimes committed against German nationals only where there is proof of conscious participation in systematic governmentally organised or approved procedures, amounting to atrocities and offences of that kind specified in the act and committed against populations or amounting to persecutions on political, racial, or religious grounds."(1)

It is clear that all three of the criteria contained in the last paragraph would prevent some war crimes from constituting also crimes against humanity, and lest the evidence set out previously in this volume,(2) relating to any individual accused found guilty of having committed crimes against humanity, should appear to bear out insufficiently the finding that more than isolated acts must be proved, it should be said that the summary of evidence provided in these pages relates only a fraction of the evidence which the Tribunal recalled in its Judgment, and that the Tribunal itself pointed out that " Concerning those defendants who have been found guilty, our conclusions are not based solely upon the facts which we have set forth in the separate discussions of the individual defendants. In the course of nine months devoted to the trial and consideration of this case, we have reached conclusions based upon evidence and observation of the defendants which cannot fully be documented within the limitations of time and space allotted to us."

The need for proof of systematic governmental organisation is of interest in connection with the plea of superior orders ; the Tribunal pointed out that : " It can scarcely be said that governmental participation, the proof of which is necessary for conviction [on a charge of committing crimes against humanity], can also be a defence to the charge."(3)

The Tribunal regarded Oeschey's decision condemning to death the accused Count as an act of political persecution constituting participation

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(1) See p. 47, and p. 40 where it is said that : " It is not the isolated crime by a private German individual which is condemned, nor is it the isolated crime perpetrated by the German Reich through its officers against a private individual ". In their closing speech the prosecution had claimed that, once the necessary knowledge and intent had been proved, " in order to establish the guilt of any of the foregoing defendants of a Crime Against Humanity, it is only necessary to establish by the evidence beyond a reasonable doubt, one further ultimate fact ; namely, that on *one* occasion, the defendant acted as a principal, or an accessory or aided or abetted a murder, an act of extermination, an enslavement, an imprisonment or an act of persecution on racial, political or religious grounds or that the defendant, on *one* occasion, took a consenting part in or was connected with a plan or enterprise which resulted in a murder, an act of extermination, an enslavement, an imprisonment or an act of persecution on racial, political or religious grounds."

(2) See pp. 10-26.

(3) See p. 49.

in crimes against humanity,(1) and on the other hand, it should be noted that, whereas the indictment charged the taking part in Hitler's programme of inciting the German civilian population to murder Allied airmen forced down within the Reich as both a war crime and a crime against humanity,(2) the Judgment, in dealing with Klemm's responsibility in this connection, spoke only of such participation as being in violation of the laws of war.

The Judgment contains some further interesting passages indicating the limits to which the Tribunal was willing to go in regarding as crimes against humanity injuries done by Germans to other Germans. The Tribunal indicated four types of law the enforcement of which it would not normally regard as being illegal,(3) but, it went on, " all of the laws to which we have referred could be and were applied in a discriminatory manner and in the case of many, the Ministry of Justice and the courts enforced them by arbitrary and brutal means, shocking the conscience of mankind *and punishable here.*"(4) At a later point, the Tribunal ruled that : " This was the situation in a number of cases tried by Rothaug and Oeschey " ; and proceeding to cite instances of the arbitrary behaviour of these two accused, and of their insulting attitude toward accused persons, while acting in a judicial capacity. On the other hand, of Cuhorst the Tribunal said : " There are many affidavits and much testimony in the record as to the defendant's character as a fanatical Nazi and a ruthless judge. There is also much evidence as to the arbitrary, unfair, and unjudicial manner in which he conducted his trials ", but " from the evidence available, this Tribunal does not consider that it can say beyond a reasonable doubt that the defendant was guilty of inflicting the punishments which he imposed on racial grounds or that it can say beyond a reasonable doubt that he used the discriminatory provisions of the Decree Against Poles and Jews to the prejudice of the Poles whom he tried."

In view of the Tribunal's findings regarding Cuhorst, it seems safe to say that Rothaug and Oeschey were found guilty of crimes against humanity not merely because arbitrary behaviour in court was proved but because it had been shown that such behaviour amounted to a participation in a persecution on political, racial or religious grounds.

It appears probable that the same approach explains the true meaning

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(1) See pp. 99-100. The Tribunal did not, however, attempt to define the word " political " or directly to answer the interesting point, raised implicitly in a passage in the Prosecutor's closing speech,—in whose mind must the act have appeared to have a political motive ? The passage reads as follows :

> " Coming into the category of cases upon political grounds, we must remember that ' political ' in Law No. 10, written to apply in the Third Reich, cannot be read in the sense of ' political ' as that is known in countries which enjoy a two or more party system. ' Political ' as all Nazi judges construed it—and the defendant Cuhorst construed it—meant any person who was opposed to the policies of the Third Reich, and being opposed to the policies of the Third Reich was in turn construed as meaning the doing of an act which was contrary to the successful conduct of the war.
>
> " Under this definition of ' political ', the prosecution contends that the death sentence against the 65 year old senile Schmidt for taking cigarettes from postal packages was an act of extermination on political grounds. Schmidt, in fact, was a rather useless eater, and for this reason, he would constitute a person in the community who should be exterminated by Cuhorst's standards, but in addition, his taking of cigarettes that were allegedly intended for soldiers certainly constituted political opposition to the aims of the Reich as Cuhorst saw it, and justified his death sentence on that ground."

(2) See p. 4.
(3) See pp. 51-2.
(4) See p. 52. (Italics inserted.)

of those passages in the Judgment which seem at first glance to indicate that the Tribunal regarded the degradation of the German legal system as itself being criminal in character. Thus, the Tribunal devoted a considerable part of its Judgment to a preliminary account of the steps whereby, from 1933 onwards, this legal system was turned into an instrument of Nazi policy, whereby, for instance, the control of Hitler and his associates over the judicial machine was promoted, the degree of discretion left to the judges and the Ministry of Justice, and the severity of the criminal law was increased, and " a loose concept concerning the definition of crime " developed. The evidence which was cited by the Tribunal relating to individual accused included much of the same character ; such facts concerning Rothenberger and Lautz which appear earlier in these pages were set out at greater length in the Judgment.[1] The main provisions of a decree of 21st March, 1942, signed by Hitler, and those of a decree of 31st August, 1942, signed by Schlegelberger, were alike quoted in the Judgment ; each decree provided for the achievement of shorter legal proceedings, but neither was on its face obviously illegal. The Tribunal also related in its Judgment how Schlegelberger quashed a sentence passed on a German police officer who had obtained a confession by beating an accused named Bloeding.(2)

As a final example of the many passages in the Judgment devoted to a description of the degradation of the German legal system, it would be in place to quote one of three " case histories " by which the Tribunal sought to " illustrate three different methods by which Hitler, through the Ministry of Justice, imposed his will in disregard of judicial proceedings". It will be noted that the offence committed by the victim is not stated :

> " One Schlitt had been sentenced to a prison term, as a result of which Schlegelberger received a telephone call from Hitler protesting the sentence. In response the defendant Schlegelberger on 24th March, 1942, wrote in part as follows :
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> 'I entirely agree with your demand, my Führer, for very severe punishment for crime, and I assure you that the judges honestly wish to comply with your demand. Constant instructions in order to strengthen them in this intention, and the increase of threats of legal punishment, have resulted in a considerable decrease of the number of sentences to which objections have been made from this point of view, out of a total annual number of more than 300,000.
>
> ' I shall continue to try to reduce this number still more, and if necessary, I shall not shrink from personal measures, as before.
>
> ' In the criminal case against the building technician Ewald Schlitt from Wilhelmshaven, I have applied through the Public Prosecutor for an extraordinary plea for nullification against the sentence, at the Special Senate of the Reich Court. I will inform you of the verdict of the Special Senate immediately it has been given '."

It seems probable that the Tribunal set out the sets of facts referred to above not as evidence of crime *eis ipsis* but as examples of what would constitute crimes against humanity *if the necessary legal elements contained in the definition of crimes against humanity were also present*. In other words, it is probably true to say that the Tribunal regarded as constituting crimes against humanity not merely a series of changes made in the legal system

(1) See pp. 16 and 17. (2) See p. 11.

of Germany but a series of such alterations as involved or were pursuant to persecutions on political, racial or religious grounds, or (perhaps) such as led to the commission of " Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population ". The Tribunal did not attempt to throw light on the exact significance of the words just quoted, however, and it seems that it preferred to regard as its main criterion the words : " persecutions on political, racial or religious grounds ", which also appear in the definition of crimes against humanity in Article II (*c*) of Law No. 10. Had the Tribunal been willing to interpret widely the words " Atrocities and offences . . . ", etc., it seems likely that Cuhorst would have been found guilty of committing crimes against humanity since the " arbitrary, unfair and unjudicial manner in which he conducted his trials ", and the resulting penalties, were both proved, and what saved him from a finding of guilty was the fact that he did not take part in a persecution on racial grounds.(1)

The prosecution appears indeed to have regarded the whole of the definition of crimes against humanity contained in Law No. 10 as being governed by the words " on political, racial or religious grounds ", as can be seen from the following passage taken from their closing speech :

> " We contend, therefore, that Law 10, when properly construed, makes the crimes of murder, enslavement and imprisonment, normally national in character, international, when they follow a pattern of persecution on racial, political and religious grounds, or are performed, as they were in this case, in connection with a national plan or enterprise, shown in this case to be national in scope, to commit them on racial, political or religious grounds."

The Tribunal seems, however, to have treated the " Atrocities and offences . . . " committed against any civilian population as being in some way different from " persecutions on political, racial or religious grounds ".

One final point should be mentioned in connection with the notion of crimes against humanity as defined by the Tribunal. The latter pointed out that the words " in execution of or in connection with any crime within the jurisdiction of the Tribunal ", which appeared in Article 6 (*c*) of the Charter of the International Military Tribunal, were not contained in Law No. 10. The Tribunal did not attempt to elaborate upon the significance of this omission.(2)

Rothaug was found guilty of having committed crimes against humanity and on no other count. It will be recalled that his punishment was one of imprisonment for life.(3)

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(1) See p. 81. (2) See, however, Schwelb *loc. cit.*, pp. 218 and 203-6.

(3) The Tribunal also stated specifically that Rothaug had " participated in the crime of genocide ". See p. 99 and also pp. 48 and 75. The crime of genocide will be the subject of further examination in a later volume of these Reports. All that need be said here is that the concept of crimes against humanity is greater than that of genocide. The latter crime is aimed against groups, whereas crimes against humanity do not necessarily involve offences against or persecutions of groups. The inference may be justified that deeds are to be considered " persecutions " within the meaning of Law No. 10 if the political, racial or religious background of the wronged person is the main reason for the wrong done to him, and if the wrong done to him as an individual is done as part of a policy or trend directed against persons of his political, racial or religious background ; but that it is not necessary that the wronged person belong to an organised or well-defined group. In fact, it was the aim of such measures as, for instance, the hanging of a person for a trifling remark about the war, to *prevent* the formation of groups of dissenters against the continuation of the aggressive war.

3. THE NATURE AND SCOPE OF COMPLICITY AS SEEN BY THE TRIBUNAL

The Tribunal in its Judgment called for a recognition of the fact that, *inter alia*, the form of the indictment was " not governed by the familiar rules of American criminal law and procedure ". It was pointed out that no defendant was specifically charged with the murder or abuse of any particular person. The charge did not concern isolated offences, but was one of " conscious participation in a nation-wide governmentally organised system of cruelty and injustice, in violation of the laws of war and of humanity, and perpetrated in the name of law by the authority of the Ministry of Justice and through the instrumentality of the courts . . . Thus it is that apparent generality of the indictment was not only necessary but proper. No indictment couched in specific terms and in the manner of the common law could have encompassed within practicable limits the generality of the offence with which these defendants stand charged."(1)

A glance at the terms of the indictment reveals the characteristic to which the Tribunal made reference.(2) It will be seen, for instance, that the defendants were accused of committing war crimes and crimes against humanity in that " they were principals in, accessories to, ordered, abetted, took a consenting part in, *and were connected with* plans and enterprises involving the commission of offences against thousands of persons."(3) That the Tribunal approved this wording may be judged from the fact that it stated more than once that : " The essential elements to prove a defendant guilty under the indictment in this case are that a defendant had knowledge of an offence charged in the indictment and established by the evidence, and that *he was connected* with the commission of that offence ".(3)

In view of the nature of the offences alleged, as reflected by the indictment, it was not unnatural that a considerable proportion of the evidence placed before the Tribunal aimed at showing the general character of the degradation of the German judicial system after 1933, of the use made by that system, in pursuance of Nazi policy, of the Nacht und Nebel scheme and of the persecution of Jews and Poles ; and that the Tribunal devoted a considerable portion of its Judgment to a description of these features before passing on to ascertaining the extent to which each accused could be held liable for the many offences inevitably involved in their furtherance. Nor is it surprising that the Judgment contains some interesting illustrations of the ways in which an accused can be said to be sufficiently " connected with " the offences to make him guilty of complicity therein.(4)

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(1) See p. 50.

(2) See pp. 2-5.

(3) Italics inserted. Control Council Law No. 10, in its Article II, 2, uses language equally broad in scope :

" 2. Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this Article, if he was (a) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission or (e) was a member of any organisation or group connected with the commission of any such crime or (f) with reference to paragraph 1 (a), if he held a high political civil or military (including General Staff) position in Germany or in one of its Allies, co-belligerents or satellites or held high position in the financial, industrial or economic life of any such country."

(4) It may be said at the outset that the Tribunal would seem to have approved the following submission, made in the Prosecution's Opening Speech :

" The International Military Tribunal has given two persuasive interpretations of the meaning of the words ' being connected with ' which we cite.

continued on next page.

The capacities in which the various accused acted when committing the crimes of which they were found guilty were those of ministerial official, judge or prosecutor.(1)

In its summary statement on the capacities of the accused,(2) the Tribunal did not mention that of prosecutor, but it must be taken that this statement was not intended to be exhaustive, since Lautz and Joel were both found guilty of crimes committed by them when acting as such.(3)

Counsel for Lautz claimed that a German prosecutor was bound to obey the instructions of his hierarchical superior, provided they were legal, and he quoted the decision of the French Military Tribunal in the *Wagner Trial*(4) to acquit, on the ground that he had acted according to superior orders from Gauleiter Wagner, the accused Luger, who as Public Prosecutor at the Special Court at Strasbourg had secured the passing of the sentence of death (which was carried out) on thirteen Alsatians, the President of the Court being sentenced (in his absence) to death on the grounds that the death sentences which he passed on the thirteen victims, and one other, were unjustified. Counsel weakened his case, however, by claiming that the French Tribunal which tried Wagner, Luger and others derived its competence from Law No. 10, and the prosecutor was able to point out that this was not so, that the French Tribunal applied French law in acquitting Luger and that Law No. 10 disallowed the pleading of superior orders as a complete defence.

It will be recalled that a study of the *Wagner Trial* and of the trials reported upon in Volume V of the present series showed(5) that the courts and the confirming authorities have been less willing to punish persons accused

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continued from previous page.

" In the case of the defendant Streicher, who was found guilty of committing Crimes Against Humanity, the I.M.T. said :

" ' Streicher's incitement to murder and extermination at the time when Jews in the East were being killed under the most horrible conditions clearly constitutes persecution on political and racial grounds in connection with war crimes as defined in the Charter and constitutes a Crime Against Humanity.'

" The case of von Schirach is also most enlightening. Anschluss with Austria took place on 12th March, 1938. Von Schirach was appointed Gauleiter of Vienna in July, 1940. Von Schirach was found guilty of committing Crimes Against Humanity.

" The International Military Tribunal said :

" ' As has already been seen, Austria was occupied pursuant to a common plan of aggression. Its occupation is, therefore, a " crime within the jurisdiction of the Tribunal ", as that term is used in Article 6 (c) of the Charter. As a result, " murder, extermination, enslavement, deportation and other inhumane acts,and persecutions on political, racial or religious grounds " in connection with this occupation constitute a Crime Against Humanity under that Article.

" ' The Tribunal finds that von Schirach, while he did not originate the policy of deporting Jews from Vienna, knew that the best the Jews could hope for was a miserable existence in the Ghettoes of the East. Bulletins describing the Jewish extermination were in his office.'

" It seems clear from these cases that *there need not be pre-arrangement with or subsequent request by the person or persons who actually commits the crime and a defendant to make him guilty as the International Military Tribunal interpreted the words ' being connected with '*. It would appear to be sufficient that the defendant knew that a crime was being committed, and with that knowledge acted in relation to it in any of the relationships set out in paragraph 2 of Article II which we have heretofore been discussing." (Italics inserted.)

(1) Compare the analysis on pp. 77-81 of Volume V of the capacities in which the accused in the trials therein reported had acted in committing alleged offences.

(2) See p. 62.

(3) See pp. 17-18, 21, 75 and 76.

(4) See Volume III of this series, pp. 23-55 (especially 42 and 54-5) and page 93.

(5) See Volume V, p. 78.

of committing war crimes purely in the capacity of a prosecutor than they have been in the case of judges. This may arise out of a feeling that, while a judge has a duty to be impartial, a prosecutor is of course expected to do his best, within certain limits, to secure a conviction. It may also be the result of a feeling that the acts of a prosecutor are more remote from the carrying out of sentence than are those of a judge. Counsel for Lautz claimed that: " in no way was he sure what would be the actual consequences of this indictment, especially what would be the results of the evidence, how the court would appreciate this result, that is, whether and how the accused would be sentenced, and finally, what would be the result of the decision concerning the pardon ".

An offender cannot rely upon the fact that some intervening cause may upset his purposes, however, and, in finding Lautz and Joel guilty, the Tribunal clearly held that the argument based on lack of causation must fail. Its decision is an indication that public prosecutors can be found guilty of war crimes and crimes against humanity for acts performed by them when acting as such.

The approach of the Tribunal to the general question of responsibility and the proving thereof may be illustrated by its treatment of the case of the accused Joel.

Referring back to an earlier general discussion of the Night and Fog plan, the Tribunal stated that:

> " Under our discussion of the Night and Fog Decree, reference is made to several documents which show Joel as having aided, abetted, participated in, and having been connected with, the Night and Fog scheme or plan."

While it should be pointed out that the Tribunal, at other points in its judgment, referred to further evidence implicating Joel in the operation of the Night and Fog plan,(1) it is fair to assume from the sentence just quoted that the Tribunal regarded the evidence mentioned in the course of " our discussion of the Night and Fog Decree " as itself constituting sufficient proof of Joel's complicity. It is interesting therefore to examine the references made to Joel in that previous discussion.

In the first reference, it is simply related that Joel and others are charged with " special responsibility for and participation in " crimes arising out of the Nacht und Nebel plan. The other references, however, are to matters of evidence.

It is first stated that at a conference at Hamm between von Ammon and Mettgenberg and leading officials of the Court of Appeals at Hamm, held on 9th November, 1943, Joel " thought the housing of NN prisoners, also such of Dutch nationality, at Papenburg would be possible and unobjectionable ".

It is then added that: " A secret letter dated 29th December, 1943, addressed to defendant von Ammon from the Presiding Judge and Chief Prosecutor(2) of Hamm Court of Appeals notified von Ammon of an imminent conference concerning transfer of the NN trials to the NN Special Courts."

(1) See pp. 21-2 for the evidence concerning Joel.
(2) That is to say Joel.

It is next stated that, in response to a decree whereby Dutch, Belgian, and Northern French Nacht und Nebel cases were to be transferred to Silesia for trial, " von Ammon was personally notified that the defendant Joel (then General Public Prosecutor at Hamm) feared objections from the Wehrmacht because of the longer transportation involved in the transfer."

In the fourth place, the Judgment refers to a directive by the Reich Minister of Justice with respect to the treatment of Nacht und Nebel cases which has already been quoted(1) and which was sent to Joel, Lautz and others.

Finally, it is recorded that " A letter from Hamm (Westphalia), 26th January, 1944, to the Reich Minister Thierack, signed by defendant Joel, suggests the speeding up of proceedings to avoid delays in Nacht und Nebel cases, and suggests that :

> ' The Chief Public Prosecutor submits record to the Chief Reich Prosecutor only if, according to previous experience or according to directives laid down by the Chief Reich Prosecutor, it is to be expected that he will take over, or partly take over the case.
>
> ' As a rule, even now when the draft of the indictment is submitted for approval to the Reich Minister of Justice, the records are not enclosed. The decision rests with me, to whom the documents are brought by courier '."

Two aspects of these five items of evidence are to be noted. In the first place, it will be seen that Joel is not said to have been directly responsible for the death or ill-treatment of specific persons ; the aim instead is to show his relation to a scheme or system of which the final results were in fact criminal. In the second place, the Tribunal clearly regarded as important not only evidence of positive action on the part of Joel but also proof of knowledge of acts on the part of others which were done in furtherance of the Nacht und Nebel plan.

No official was protected by his high rank, and the wording of the Judgment suggests that the Tribunal was willing to hold persons who held the positions of overall responsibility in the Ministry of Justice responsible for the large-scale enterprises carried out by the Ministry, which were involved in the Nacht und Nebel scheme and the persecutions on political and racial grounds, provided that those accused could be said to have had knowledge of these schemes. Thus, for instance, Klemm's counsel claimed that Klemm's only connection with a journey made by von Ammon on Nacht und Nebel business was that " he merely approved the trip ", but the attitude of the Tribunal was expressed in the following significant words :

> " In view of the fact that Klemm was State Secretary when these matters were disposed of and nominally, at least, charged with supervision of Department IV where they were handled, this conclusion is not one which this Tribunal accepts."(2)

Since the defendants were accused of participation in certain illegal *enterprises*, however, it was naturally not necessary in every case to show that the illegal acts for which Ministry officials were alleged to be responsible

(1) See p. 21.

(2) Compare the attitude taken by war crime courts to the responsibility of commanders for offences committed by their subordinates, as reflected in the trials reported in Volume IV of this series. See especially pages 85-95 of that Volume.

were actually committed under the auspices of the Ministry of Justice. Thus, it has been seen(1) that the Tribunal, after holding that Rothenberger must have known that the inmates of Mauthausen concentration camp were illegally imprisoned, went on to state that: " We concede that the concentration camps were not under direct jurisdiction of the Reich Minister of Justice, but are unable to believe that an Under-Secretary in the Ministry, who makes an official tour of inspection, is so feeble a person that he could not even raise his voice against the evil of which he certainly knew."

The question of knowledge was treated by the Tribunal as one of the highest importance, and repeated reference was made in the Judgment to the fact that various accused had knowledge, or must be assumed to have had knowledge, of the use made of the German legal system by Hitler and his associates, of the Nacht und Nebel plan and of the schemes for racial persecution. It would seem inevitable that this stress should be placed upon evidence of knowledge in a trial where the main allegations made related not to individual offences but to complicity in carrying out large-scale schemes which involved at some point the commission of criminal acts.

The necessity for knowledge to be shown or to be legitimately assumed caused the Tribunal to refer very frequently in its Judgment to the fact that documents, reports and orders were not *issued* but *received* by various accused. For instance, the Tribunal described a conference in which decisions were reached as to the need for " special treatment " to be meted out to " Jews, Poles, gipsies, Russians and Ukranians ", and then pointed out that: " The defendant Rothenberger testified that he was not present when those agreements were made. However that may be, it is clear that they *came to his notice* shortly thereafter."(2)

Sometimes it appears at first sight that the Tribunal regarded mere knowledge as sufficient evidence of guilt. The Tribunal in its Judgment said that:

> " We have already quoted a note signed by von Ammon wherein he remarked that it was ' rather awkward ' that the defendants should learn the details of their charges only during the trial and commented on the insufficiency of the translation facilities in the trial of French NN prisoners. *Von Ammon is chargeable with actual knowledge concerning the systematic abuse of the judicial process in these cases.*"(3)

At another point the Judgment laid down that: " The defendant Joel *is chargeable with knowledge* that the Night and Fog programme from its inception to its final conclusion constituted a violation of the laws and customs of war."(3)

It seems safe to assume, however, that it was the intention of the Tribunal to signify that when the accused von Ammon and Joel took part in the Night and Fog programme it was not without knowledge of its criminal features that they did so.(4)

At a number of points in its Judgment the Tribunal presumed knowledge

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(1) See p. 17, footnote 1.
(2) Italics inserted. As another example, see p. 15 regarding evidence of von Ammon's reporting to Klemm on Nacht und Nebel matters.
(3) Italics inserted.
(4) Compare the Tribunal's words adopting the conclusion of the General Assembly of the United Nations set out on p. 48 which include the statement " They are *chargeable with knowledge* that such acts were wrong and were punishable when committed ".

on the part of an accused and in view of the nature of the facts of the case it was inevitable that the Tribunal should regard this course in certain instances as a necessary and a safe one to take. The words of the Judgment regarding knowledge and presumed knowledge of the anti-Jewish policy of the Nazi government have been quoted,(1) and as a further instance of the attitude of the Tribunal on this point reference can be made to the following passage from the Judgment :

> " The defendants contend that they were unaware of the atrocities committed by the Gestapo and in concentration camps. This contention is subject to serious question. Dr. Behl testified that he considered it impossible that anyone, particularly in Berlin, should have been ignorant of the brutalities of the SS and the Gestapo. He said : ' In Berlin it would have been hardly possible for anybody not to know about it, and certainly not for anybody who was a lawyer and who dealt with the administration of justice.' He testified specifically that he could not imagine that any person in the Ministry of Justice or in the Party Chancellery or as a practising attorney or a judge of a Special (or) People's Court could be in ignorance of the facts of common knowledge concerning the treatment of prisoners in concentration camps."

The novel difficulties arising from the need to show a relation between an accused and certain large-scale illegal enterprises carried out by many persons at many places and over a period of time may be thought to explain also the introduction of two further types of evidence (also summarised in the Judgment of the Tribunal)—first, evidence showing the support given by certain accused to Nazi doctrines, and secondly, evidence of acts of the accused before the outbreak of war in 1939.

The Judgment quotes evidence, for instance, to prove that : " The conception of Hitler as the Supreme Judge was supported by the defendant Rothenberger " and it is related that " on February, 1943, the defendant Under-Secretary Dr. Rothenberger summed up his legal philosophy with the words :

> ' The judge is on principle bound by the law. The laws are the orders of the Führer '."

Counts Two and Three of the indictment charged the commission of war crimes and crimes against humanity " between September, 1939 and April, 1945 ", and Count Four membership of criminal organisations by certain accused after 1st September, 1939.(2) Count One (*Common Design and Conspiracy*), however, made charges of acts committed " between January, 1933 and April, 1945 ", and in making its ruling as to the sufficiency of this Count,(3) the Tribunal stated that :

> " This ruling must not be construed as limiting the force or effect of Article 2, paragraph 2, of Control Council Law No. 10, or as denying to either prosecution or defence the right to offer in evidence any facts or circumstances occurring either before or after September, 1939, if

(1) See pp. 63-4. Compare also p. 15, footnote 3. The question of knowledge and presumed knowledge arises also in questions relating to membership of criminal organisations ; see p. 77.
(2) See pp. 3-4.
(3) See p. 5.

such facts or circumstances tend to prove or to disprove the commission by any defendant of war crimes or crimes against humanity as defined in Control Council Law No. 10."

Nevertheless, at an early point in its Judgment the Tribunal said: " We direct our consideration to the issue of guilt or innocence after the outbreak of the war in accordance with the specific limitations of time set forth in Counts 2, 3 and 4 of the indictment."(1) Immediately before reviewing the evidence relating to the changes to the German legal system made under Nazi rule from 1933 onwards, the Tribunal said: " . . . Though the overt acts with which the defendants are charged occurred after September, 1939, the evidence now to be considered will make clear the conditions under which the defendants acted *and will show knowledge, intent and motive* on their part, for in the period of preparation some of the defendants played a leading part in moulding the judicial system which they later employed."(2)

The evidence which the Tribunal then proceeded to summarise included considerable information on the acts of the accused between 1933 and 1939 and the Tribunal was also careful to set out the relevant official positions held in and after 1933 by all those accused who were found guilty of any of the charges against them.

4. THE APPLICATION OF THE HAGUE CONVENTION TO THE FACTS OF THE CASE

It has been seen(3) that the indictment charged the violation of certain specific articles of the Hague Convention,(4) including Articles 43, 45, 46 and 50 thereof, which fall within Section III—*Military Authority over the Territory of the Hostile State*. These Articles provide the following:

> " *Art.* 43. The authority of the power of the State having passed *de facto* into the hands of the occupant, the latter shall do all in his power to restore, and ensure, as far as possible, public order and safety, respecting at the same time, unless absolutely prevented, the laws in force in the country.
>
> " *Art.* 45. It is forbidden to force the inhabitants of occupied territory to swear allegiance to the hostile power.
>
> " *Art.* 46. Family honour and rights, individual life, and private property, as well as religious convictions and worship, must be respected.
>
> Private property may not be confiscated.
>
> " *Art.* 50. No collective penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which it cannot be regarded as collectively responsible."

The indictment also charged the violation of Article 23 of the Convention, which runs in part as follows:

> " *Art.* 23. In addition to the prohibitions provided by special conventions, it is particularly forbidden—
>
> " (*h*) to declare abolished, suspended or inadmissible, the right

(1) See p. 73.
(2) See p. 73. (Italics inserted.) Pages 6-8 set out some of the evidence to which the Tribunal referred.
(3) See p. 4.
(4) Offences against the Geneva Convention, Articles 2, 3 and 4, were also charged, but the protection of prisoners of war did not constitute a major issue in the present trial. The Articles were quoted in view of the allegation that Klemm and Lautz in particular had participated in a plan for instigating the lynching of captured Allied airmen.

of the subjects of the hostile party to institute legal proceedings."(1)

The defence claimed that parts of Poland and Czechoslovakia had been legally annexed to Germany; their aim in attempting to establish this point was to demonstrate that it was consequently not contrary to international law for the German State (i) to introduce new laws into these territories, despite Article 43 quoted above; (ii) to condemn to death inhabitants of these territories on charges of high treason, after trial.

The defence could not agree " that in international affairs an annexation never has occurred or never has been recognised while an army of one of the belligerent parties was still under arms " and added " It is generally recognised and never has been contested by anyone that there existed no regulation in international law until the latter half of the nineteenth century which made the annexation of militarily occupied territories dependent on the existence of certain prerequisites. The belligerents could annex the conquered enemy territories and demand the oath of allegiance from the subjects, irrespective of whether or not the enemy had been completely subjugated." Even the Hague Rules " do not contain clauses stipulating conditions in which a belligerent may proceed to annex conquered enemy territory ". Counsel proceeded to cite instances in recent times of annexations by one State of territories belonging to another while fighting between the two was still in progress.(2)

Counsel claimed that after the invasion of Poland in 1939 both Germany and the Soviet Union " expressed their opinion that they considered the Polish State non-existent ", and he went on:

> " That other States besides these two were also of the opinion that the former Polish State had ceased to exist is shown by the fact that parts of these territories were ceded to other countries; thus the Soviet Union gave the territory of the City of Wilna to Lithuania, by the agreement of 10th October, 1939 (Schlegelberger Exhibit 150) and Germany gave a strip of territory in the Carpathians to Slovakia, by the agreement of 21st October, 1939 (Schlegelberger Exhibit 151).
>
> " In summing up it can be stated that the actual facts justify the point of view which considers the former Polish State as dissolved and that thus the incorporation of parts of the Polish Republic into the German Reich did not contradict the practice of international law."

He added that: " As far as German laws have been introduced in the so-called Protectorate of Bohemia and Moravia, it would suffice to say that a state of war never existed between Czechoslovakia and Germany. This

(1) The remaining Articles from the Hague Convention which appear in the indictment refer to the protection of prisoners of war.

(2) Counsel wound up his interpretation of International Practice on this point by making the following claim:

> " The above-mentioned International Practice has been maintained even recently. The Potsdam Declaration of 2nd August, 1945, recognised the Soviet Union's annexation of the northern part of the German province of East Prussia including Koenigsberg. There can be no doubt that Germany was at that time completely subjugated. But Germany's ally, Japan, was then actually still fighting. If it is held that this annexation differs from Germany's and Russia's annexation of Poland in so far as the subjugation of Japan was only a matter of a short time when the Potsdam Declaration was drawn up, I can only reply that in 1939 and 1940 Germany and its ally at that time, the Soviet Union, were in undisputed mastery over the European continent and that according to the situation then existing—or at least the situation as it was justifiably looked upon by the defendants—a reconstitution of Poland through the landing of British troops on the Continent was beyond all possibilities based on realistic thought."

eliminates the prerequisite for a war crime ; namely, the violation of the customs and laws of war." A Protectorate over Bohemia and Moravia had been set up by treaty with Germany. " Apart from the new Slovakian State ", Czechoslovakia " had been merged into other States and had lost its sovereignty ".

Counsel concluded that the claim that " the introduction of new laws in the occupied Eastern territories and in the Protectorate was contrary to international law cannot be maintained for factual reasons ".

If, however, it was assumed that no valid annexation of part of Poland had taken place, counsel then continued, it should be recognised that Article 43 of the Hague Regulations " only regulates the normal case ' as far as no compelling obstacle exists '."(1) A compelling obstacle to the application of Polish law, claimed counsel, was presented by the " dissolution of the entire governmental administration " which " comprised the former Polish judicature ".

Counsel for the acquitted Nebelung also stressed the proviso implicit in Article 43 :

> " Occupation law is dominated by military necessity, even though it is of course always, at any time and in all occupied countries, resented by those concerned as being specially rigorous measures. Each member of the occupation authorities must and is entitled to demand, in particular during the time of battle, that the inhabitants of the occupied territories refrain from any action in any way directed against him, and if necessary enforce loyalty by means of severe punishment and security measures. . . . The Hague Convention governing War on Land and the Usages of War have taken the middle course between the sovereignty of the occupying forces and the human rights of the individual. They do not, however, protect any political rights of the inhabitants of the occupied territories."

Counsel for Lautz claimed that the latter was convinced " that the criminal prosecution of the resistance movements in the Protectorate and in the incorporated Eastern territories was justified by military necessity ".

The Tribunal, however, could not agree with the defence arguments regarding the non-applicability to certain of the facts of the case of the protection given by Section III of the Hague Convention. It held for instance that " the so-called annexed territories in Poland were in reality nothing more than territory under belligerent occupation of the military forces of Germany " ; which signifies that the acts of the occupying Power were subject to the provisions of the Convention, of which it then proceeded to quote Articles 23 (*h*), 43 and 46 and the following passage from the preamble :

> " Until a more complete code of the laws of war can be drawn up, the High Contracting Parties deem it expedient to declare that, in cases not covered by the rules adopted by them, the inhabitants and the belligerents remain under the protection and governance of the principles of the law of nations, derived from the usages established among civilised peoples, from the laws of humanity, and from the dictates of the public conscience."(2)

(1) See the text of Article 43, on p. 90.
(2) See p. 62 and pp. 28-29, 32 and 52.

All of these texts were here held to have been violated by the enforcement of the law of 4th December, 1941, against the Jews and Poles in the incorporated Eastern territories, and at another point in the Judgment it was stated that the " foregoing procedure under the N N Decree was clearly in violation of " Articles 23 (*h*), 43 and 46 of the Hague Convention.(1) The prosecution of a Pole on a charge of treason for an act committed in Poland before the war was also deemed to be a violation of the Convention.(2)

The law of 4th December, 1941, and the enforcement of the Nacht und Nebel Decree were, of course, not alone among German war-time legislative and administrative acts in this respect, but were outstanding examples of their type of illegality.

The International Military Tribunal at Nuremberg, in a passage already quoted in these volumes,(3) also rejected the submission that Germany was no longer bound by the rules of land warfare in many of the territories occupied during the war because Germany had completely subjugated those countries and incorporated them into the German Reich, a fact which allegedly gave Germany authority to deal with the occupied territories as though they were part of Germany. It may be added that even had the plea succeeded in the *Justice Trial* it would not have saved the accused from being found guilty, on production of adequate proof, of offences against inhabitants of other occupied territories than those claimed to have been annexed. This fact demonstrates one further defect of the plea put forward ; it would not be satisfactory to allow the rights under international law of inhabitants of one occupied territory to be rendered less than those of another by the mere stroke of a pen signing a decree ordering an " annexation ".

It has been seen that the indictment made reference to Article 45 of the Convention.(4) It seems to be implied by that Article that an inhabitant of occupied territory does not in fact owe allegiance to the occupying Power in the sense that a person owes allegiance to the State of which he is a national. In their closing speech the prosecution referred to the Article and went on to state that if no duty of allegiance existed between Poles and the German State the former could not legally be punished by the latter for high treason. Counsel for Klemm denied that it was necessary for a duty of loyalty to exist for a charge of treason to be valid.

The Tribunal did not enter into an analysis of the law regarding the duty of allegiance, but pointed out that certain Polish victims had not been guilty of high treason.(5) This conclusion would seem, however, to follow automatically from the finding that the " Eastern Incorporated Territories " had not in fact ceased to be under the protection of Section III of the Hague Convention, which includes Article 45.

To say that no duty of allegiance is owed by the inhabitant of an occupied territory to the occupant does not mean, however, that the former cannot be punished if his acts constituted war treason.(6) Counsel for Lautz

(1) See p. 59.
(2) See p. 63, footnote 1.
(3) See Volume II, p. 151.
(4) See p. 90.
(5) See p. 53.
(6) See Volume V of this series, pp. 27-30 and 56.

claimed that: "About the following no doubt was left by the Powers which were represented at the Hague Conference of 1907: As soon as an area is firmly occupied by the enemy, every resistance by its inhabitants must cease. . . . The revolutionary movements in the Polish and Czech territories aimed not only at the overthrow of the then Reich government, but also at the annexation of territories of the Altreich." The Tribunal conceded that " in territory under belligerent occupation the military authorities of the occupant may, under the laws and customs of war, punish local residents who engage in Fifth Column activities hostile to the occupant ", but stated that this rule would not justify punishment by death of Poles who attempted to escape from the Reich in order to join the Allied forces.(1)

The enforcement of such laws as that of 4th December, 1941, so clearly exceeded what was demanded by the needs of " public order and safety " that the Tribunal was not called upon to analyse Article 43 of the Hague Convention any more than it was Article 23 (*h*), yet as to the precise significance of Article 43 there is also a difference of opinion(2) and in this connection it is of interest to refer to an article entitled " War Crimes by Enemy Nationals Administering Justice in Occupied Territory " by Alwyn V. Freeman(3) in *American Journal of International Law*, Vol. 41, No. 3 (July, 1947), at page 579.

The author here demonstrates (on pages 581–608) the differences in the interpretations which have been placed on Article 43 both by text-book writers and by governments in their practice during the two World Wars, and he then claims (on pages 608–610) that: " In view of the uncertainties reflected above, therefore, it may be dangerous to rest a case against judicial or administrative officials solely upon the ground that every action of a tribunal illegally instituted under international law automatically entails the criminal liability of all persons concerned. Moreover, so to hold would inject the element of criminality into a class of cases in which, while a belligerent may have technically exceeded his powers under international law, the fundamental rights of an accused were at all times respected. It might involve the unreasonable proposition that, irrespective of the guilt of an accused, a judge who impartially presided at proceedings which provided adequate safeguards for the defendant's rights, and which terminated in a just sentence, was nevertheless a war criminal. The situation may be wholly hypothetical but it assumes greater significance when it is realised that the powers of an occupant in the domain of legislative and judicial action are extremely broad and that while, for policy reasons, he may refrain from interfering in local administration, he is not required to do so. The circumstances confronting military authorities (refusal of local judges to serve; breakdown of local justice, and so on) may leave no other alternative than to create new courts staffed with enemy personnel. Certainly the creation of military tribunals manned by enemy judges in occupied areas is an acknowledged right of every belligerent, as is the right to refer to them offences committed by his armed forces. While numerous text-writers,

(1) See p. 53.

(2) Cf. the remark of the Tribunal that " the authorities are not in accord as to the proper construction of Article 23 (h) . . . " on p. 63.

(3) Member of the Michigan Bar; formerly Assistant to the Legal Adviser, United States Department of State. The article was published before the delivery of judgment by the Tribunal which tried Altstötter and others.

interpreting Article 43, accept as a general rule that the organisation of the occupied country's courts should remain intact, the practice of belligerents even prior to World War II recognised that special tribunals could be established to deal with offences by the inhabitants against (*a*) the authority of the occupant, or (*b*) against persons belonging to his armed forces, or (*c*) in violation of the occupant's decrees and regulations. On the other hand, there may be cases in which the establishment of new courts or vesting of jurisdiction in enemy appointees is clearly unrelated to military necessity. But the limitations imposed upon a belligerent's conduct are not sharply defined by international law. It may not be easy to determine objectively whether an alleged ' usurpation ' was an excessive exercise of power. Similar observations apply with respect to modifications of the local criminal law and procedure. The general principle of respect for existing laws and institutions does not require a belligerent to retain such judicial *impedimenta* of the political system in the occupied area as might seriously threaten the security of the occupation. Accordingly Article 43 was not infringed by the abolition of such Nazi institutions as the People's Court (*Volksgerichtshof*) or by the abrogation of those civil and criminal laws whose retention might furnish an incitement to disorder and hamper the successful administration of the territory. As already intimated, the Hague injunctions with respect to lives and persons of all the inhabitants may compel the occupant to annul laws which contemplate the degradation and spoliation of individuals as a class.

" To sum up : action of a court itself, rather than any alleged illegality in its inception, should furnish the test of judicial criminality. The decisive consideration would seem to be whether trial of an accused by such a court deprived him of the protection to which he is entitled under international law, that is, whether judicial action produced either a violation of some specific prohibition in the regulations, or was in disregard of those fundamental principles of human justice recognised by civilised peoples and which are incorporated in the preamble of Hague Convention IV of 1907. Thus, for example, denial to an accused of the right to plead not guilty, to introduce evidence or to present witnesses ; application of principles of law condemned by the practice of civilised nations such as punishment by analogy ; imposition of an outrageously excessive penalty in relation to the offence alleged ; imposition of harsh penalties upon relatives of a person charged with acts in which their participation is not established ; and such Draconic action as execution of the relatives of one who is accused of violating curfew regulations, all are properly classed as war crimes subjecting every judicial or administrative official associated with the proceedings, the judgment, or execution of the sentence, to punishment as a war criminal. The summary execution of individuals without any judicial proceedings whatsoever likewise provides an unquestionable basis of guilt. Nor should any greater weight be given to the pleas of ' act of State ' and ' superior orders ' than is given in other cases of illegalities by members of enemy forces. Analogous principles should govern the problems raised by illegally constituted civil and commercial courts, whose action results in illegal condemnations, seizure or destruction of a litigant's property and judicial process in aid of the ' economic ' war crimes. In all cases the deceptive cloak of a formalistic legality may be pierced to determine whether substantive rights have been violated. And the reasonableness of a given

measure, in relation to the occupant's security and to public order and safety, defines its propriety under international law."

An examination of the Judgment and of the paragraphs appearing under the next heading shows that the Tribunal did not in fact rely so much upon a claim that German courts were illegally set up in occupied territories(1) as upon the illegality under international law of the law which they applied and upon the many departures from " fundamental principles of human justice recognised by civilised peoples and which are incorporated in the preamble of Hague Convention IV of 1907 " which occurred during trials held before such courts.

5. THE CRIMINAL ASPECTS OF THE DENIAL OF A FAIR TRIAL

It will be recalled that the main interest of the trials reported upon in Volume V of this series lay in the light which they threw upon the nature of the proceedings the proof of whose having taken place would turn an unlawful killing or imprisonment into a lawful one under international law. Just as in municipal law systems a hanging or imprisonment following upon a legal sentence pronounced in court does not involve the hangman or prison warder in subsequent criminal proceedings so under international law the proof that a prisoner of war or a civilian inhabitant of occupied territories has been imprisoned, killed or otherwise punished only after proceedings possessing certain characteristics will constitute a defence to a charge of war criminality brought against persons involved in the inflicting of that punishment, such as a prosecutor, a judge, a prison warder or an executioner. The characteristics referred to are those calculated to ensure the application of minimum principles of civilised justice and, in so far as their nature is indicated or suggested by the reports contained in Volume V, it has been set out on pages 73–7 of that volume.

The trial of Altstötter and others involved a number of issues, but one of the most important facets of the trial concerns the same topic as Volume V of this series as this has been described above.(2) In dealing with the Nacht und Nebel plan and the guilt particularly of Oeschey and Rothaug the Tribunal stressed the various ways in which the victims of that plan and of those accused had been denied the right to a fair trial before punishment. The Tribunal did not lay down a catalogue of minimum requirements of a fair trial, as did the Judge Advocate acting with the courts which conducted the three Australian trials reported upon in Volume V, and all that can be safely conjectured here is that the United States Military Tribunal regarded certain facts as evidence that such " trials " as were held under the Nacht und Nebel scheme and the proceedings with which Oeschey, Rothaug and Lautz were connected did not approximate to fair trials sufficiently to constitute a defence to a charge brought against those accused and others of

(1) This aspect was not entirely ignored. The indictment pointed out that " extraordinary irregular courts, superimposed upon the regular court system ", were used by the accused to suppress opposition in occupied territories to the Nazi régime, and the Judgment declared that " Germany violated during the recent war every principle of the law of military occupation. Not only under Nacht und Nebel proceedings but in all occupations she immediately, upon occupation of invaded areas and territories, set aside the laws and courts of the occupied territories. She abolished the courts of the occupied lands and set up courts manned by members of the Nazi totalitarian régime and system ". (See p. 59.)

(2) See also pp. 102-3 on the possibility of regarding the denial of a fair trial as itself constituting a positive offence.

taking part in certain governmentally organised plans having a criminal outcome.(1)

It should be added of course that, in Volume V, the victims of the crimes proved were captured military personnel or inhabitants of occupied territories, and the crimes therefore all constituted war crimes. The present trial, however, involved allegations of crimes against humanity as well as of war crimes, according partly to the nationality of the victims, but the differences between the two types of crimes, as defined by the Tribunal, lay in aspects other than that now under discussion.(2) There is nothing to indicate that the Tribunal, in judging whether proceedings constituted a fair trial so as to be a defence against charges of crimes against humanity, applied different tests from those applied when war crimes were alleged.

It will be recalled that such victims of the offences charged in the trials reported upon in Volume V as were inhabitants of occupied territories had been charged and found guilty by the Japanese occupying forces of war crimes. As has already been stated, however,(3) there can be no doubt that inhabitants of occupied territories are entitled to at least the same degree of protection under international law when accused of committing any other kind of offence. Many of the equivalent victims of offences charged in the *Justice Trial* reported upon in the present volume had certainly not been charged with offences which would have constituted war crimes even if the charges had been well founded ; a charge of " race defilement ", for instance, could in no instance have represented an allegation of the committing of a war crime. Yet the Tribunal made no distinction between the victims according to the offences charged, when elaborating the ways in which these persons had been denied their right to a fair trial, and this suggests that the inhabitants of occupied territories have indeed the same rights during proceedings taken against them, whatever the offence charged.

The following passage from the Judgment of the Tribunal indicates certain features of the Nacht und Nebel plan which it regarded as constituting evidence of its illegal character :

> " The trials of the accused NN persons did not approach even a semblance of fair trial or justice. The accused NN persons were arrested and secretly transported to Germany and other countries for trial. They were held incommunicado. In many instances they were denied the right to introduce evidence, to be confronted by witnesses against them, or to present witnesses in their own behalf. They were tried secretly and denied the right of counsel of their own choice, and occasionally denied the aid of any counsel. No indictment was served in many instances and the accused learned only a few moments before the trial of the nature of the alleged crime for which he was to be tried. The entire proceedings from beginning to end were secret and no public record was allowed to be made of them."

The Tribunal also reproduced in its Judgment a statement of von Ammon that foreign witnesses could be heard in Night and Fog " trials " only with the approval of the Public Prosecutor, since " it was to be avoided that the fate of NN prisoners became known outside Germany ".

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(1) See p. 84 regarding this characteristic of Counts Two and Three
(2) See pp. 79-80.
(3) See Volume V, p. 73, note 3.

The Tribunal made it clear that it was in no sense acting as an appeal court reviewing in every detail the facts of the cases tried by Rothaug and Oeschey or those in which Lautz was responsible for the prosecution. After describing a prosecution conducted by Lautz's deputy of a Pole who was sentenced to death for using violence against a German official and " depriving the German people of his labour ", the Tribunal said : " We are not here to retry the case." Of another case in which the indictment was " filed by authority of the defendant Lautz ", and in which three Poles were sentenced to death for high treason because they attempted to cross into Switzerland in order to join a Polish Legion supposed to exist there for the purpose of restoring the Polish State,(1) the Tribunal said : " The evidence of intent to join the interned Legion is paltry but, as before, we will not attempt to retry the case on the facts." Similarly, after describing the trial by Oeschey of a Pole and a Ukrainian,(2) the Tribunal said of the facts of the case that : " The very most that can possibly be said of the evidence, as stated by the defendant Oeschey himself, is that there was a good squabble with mutual recriminations and threats. It is to be understood that many of the statements heretofore made, as quoted from the opinion, were denied by the defendants in that case, but, as before stated, *we do not retry the case upon the facts.*"(3)

It appears from a study of the Judgment that the Tribunal was concerned with whether (*a*) the evidence concerning the applications of substantive law which were made in pronouncing sentences, and (*b*) the evidence concerning the departures made during the conduct of these trials from elementary principles of justice, constituted proof of war crimes or crimes against humanity.

(*a*) Of the first of the three trials conducted by Rothaug which have been described above,(4) the Tribunal said : " In the view of this Tribunal, based upon the evidence, these two young women did not have what amounted to a trial at all but were executed because they were Polish nationals in conformity with the Nazi policy of persecution and extermination."

The Tribunal pointed out that the Polish farmhand, who was the accused in another trial conducted by Rothaug,(5) had already been tried previously : " He first was tried in the District Court at Neumarkt. That court sentenced him to a term of two years in the penitentiary. A nullity plea was filed in this case before the Reich Supreme Court, and the Reich Supreme Court returned the case to the Special Court at Nuremberg for a new trial and a sentence. The Reich Supreme Court stated that the judgment of the lower court was defective, since it did not discuss in detail whether the Ordinance Against Public Enemies was applicable and stated that if such ordinance was applicable—a thing which seemed probable—a much more severe sentence was deemed necessary.

" The case was therefore again tried in violation of the *fundamental principle of justice that no man should be tried twice for the same offence.*"(6)

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(1) See p. 18.
(2) See p. 25.
(3) Italics inserted.
(4) See p. 23.
(5) See p. 23.
(6) Italics inserted.

Of the third set of proceedings conducted before Rothaug and described above,(1) the United States Tribunal expressed the following opinion: " One undisputed fact . . . is sufficient to establish this case as being an act in furtherance of the Nazi programme to persecute and exterminate Jews. The fact is that nobody but a Jew could have been tried for racial pollution. To this offence was added the charge that it was committed by [the victim] through exploiting war conditions and the blackout. This brought the offence under the Ordinance Against Public Enemies and made the offence capital. The victim was tried and executed only because he was a Jew. As stated by Elkar, Rothaug's assistant, in his testimony, Rothaug achieved the final result by interpretations of existing laws as he boasted to Elkar he was able to do.

> " This Tribunal is not concerned with the legal incontestability under German law of these cases above discussed."(2)

The Tribunal then added that the evidence had established beyond a reasonable doubt that the victims in the three cases tried before Rothaug and described above(3) were condemned and executed because they were Jews or Poles. " Their execution was in conformity with the policy of the Nazi State of persecution, torture, and extermination of these races. The defendant Rothaug was the knowing and willing instrument in that programme of persecution and extermination. From the evidence it is clear that these trials lacked the essential elements of legality. . . . The individual cases in which Rothaug applied the cruel and discriminatory law against Poles and Jews cannot be considered in isolation. It is of the essence of the charges against him that he participated in the national programme of racial persecution. It is of the essence of the proof that he identified himself with this national programme and gave himself utterly to its accomplishment. He participated in the crime of genocide. . . ."

Of the first of the three trials conducted before Oeschey in his judicial capacity and referred to in this volume,(4) the Tribunal said: " The fact that the discriminatory law against Poles was invoked in this case is established." The opinion signed by Oeschey showed this to be so. The Judgment added: " In this case Oeschey, with evil intent, participated in the governmentally organised system for the racial persecution of Poles. This is also a case of such a perversion of the judicial process as to shock the conscience of mankind."

Of the second trial the Tribunal stated:

> " Such a mock trial is not a judicial proceeding but a murder.
>
> " It is provided in Control Council Law 10 that persecutions on political as well as racial grounds are recognised as crimes. While the mere fact alone that [the Count] was prosecuted for remarks hostile to the Nazi régime may not constitute a violation of Control Council Law 10, the circumstances under which the defendant was brought to trial and the manner in which he was tried convince us that [the Count] was not convicted for undermining the already collapsed defensive strength of the defeated nation, but on the contrary, that the law was

(1) See pp. 23-4. These trials were of course examples only.
(2) In view of this ruling it has not been thought necessary to quote chapter and verse the German provisions applied against the victims.
(3) See pp. 23-4.
(4) See p. 25. These trials were, again, examples only.

deliberately invoked by Gauleiter Holz and enforced by Oeschey as a last vengeful act of political persecution. If the provisions of Control Council Law 10 do not cover this case, we do not know what kind of political persecution it would cover."

A reference has been made above to the way in which Rothaug made an offence capital by bringing it within the scope of the Ordinance Against Public Enemies; the Tribunal dismissed such interpretations as "legal sophistries" which did not save the accused from being regarded as "merely an instrument in the programme of the leaders of the Nazi State of persecution and extermination. In dealing with the trial of a Nuremberg Jew for "race pollution",(1) the Tribunal pointed out that in the indictment before the Special Court, which was drawn up "according to the order of Rothaug", the accused "was not charged only with race defilement . . . but there was also an additional charge under the Decree Against Public Enemies, which made the death sentence permissible. The new indictment also joined the Seiler woman on a charge of perjury.(2) The effect of joining Seiler in the charge against Katzenberger was to preclude her from being a witness for the defendant, and such a combination was contrary to established practice". Rothaug was not, apparently, alone, however, in this manipulation of laws already discriminatory to promote even further the persecution of racial and political minorities, for after describing one of the above-mentioned(3) trials conducted against Poles in which the prosecution was carried out under Lautz's authority, the Tribunal said: "In the Ledwon case the sinister subtlety of the Nazi procedure is laid bare. If the case had been brought only under the law against Poles and Jews, the People's Court would not have had jurisdiction, so the defendant was charged with high treason for attempting to separate from the Reich territory which did not belong to it. The proof of high treason failed. There remained only the charge that in attempting to escape from Germany and from forced labour there, the defendant assaulted a customs officer with his fist and that what he did was done as a Pole in violation of the law against Poles and Jews. It was under that discriminatory law that Ledwon was sentenced to death and executed. The defendant Lautz is guilty of participating in the national programme of racial extermination of Poles by means of the perversion of the law of high treason."

These remarks make it clear that the Tribunal, in deciding whether the acts of the accused constituted a participation in war crimes or in racial or political persecutions amounting to crimes against humanity, was willing

(i) to disregard the question whether or not the acts were legal under German law;

(ii) to regard the enforcement of certain laws as indeed constituting such participation;

(iii) to look upon a violation of the principle *non bis in idem* as evidence of guilt;

(iv) (apparently) to deem it further evidence of guilt that a forced manipulation of German laws was made so as to "legalise" a more severe sentence than would have been allowed otherwise under German law.

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(1) See pp. 23-4.
(2) This was the person with whom the male accused was said to have associated.
(3) See p. 18.

(*b*) It remains to analyse the aspects of these trials by Rothaug and Oeschey which the United States Tribunal thought fit to mention as representing departures from elementary standards of justice.

First there were examples of a refusal on the part of the two former judges to allow a full hearing of the evidence. For instance, the Tribunal pointed out that, in the third of Rothaug's trials, " both defendants were hardly heard by the court. Their statements were passed over or disregarded " and other witnesses had difficulty in being heard.(1) The following words taken from the Judgment in the same case were quoted by the Tribunal: " It does not matter whether during these visits extra-marital sexual relations took place or whether they only conversed as when the husband was present, as [the victim] claims. *The request to interrogate the husband was therefore overruled.*"(2) Dealing with the second of Rothaug's trials, the Tribunal said: " The Polish woman who was present at the time of this alleged assault is not listed as a witness. Rothaug has stated in his testimony before this court that he never had a Polish witness."(3) It will also be remembered that the lady who could and would have testified in defence of the Count who was tried by Oeschey was not heard by the German court.(4)

In the second place, there was evidence of Rothaug's proceeding with a trial irrespective of the fact that defence counsel had had no opportunity to prepare a defence(5) and of Oeschey's trying a case without a defence counsel, having told the prosecutor that he would do so because the " legal prerequisites for trial without defence counsel did exist ".(6)

Of the proceedings before Rothaug referred to in the last paragraph the Tribunal stated also that " the prosecutor in the case, Markl, was directed to draw up an indictment based upon the Gestapo interrogation. This was at eleven o'clock of the day they were tried ". While the Tribunal did not indicate to what extent it held the accused responsible for this summary procedure, he could certainly have ensured that the hearing was an adequate one, whereas, as the Tribunal related, the trial itself, according to Kern, lasted about half an hour, and according to the defendant approximately an hour ; while according to Markl it was conducted with the speed of a court martial.

There was much other evidence of the lack of an impartial approach by Rothaug and Oeschey to the cases which came before them. The Tribunal found that Rothaug " did not believe the statements of Polish defendants, according to the testimony in this case ", and of one such person he stated in a written judgment: " The whole inferiority of the defendant, I would say, lies in the sphere of character and is obviously based on his being a part of Polish sub-humanity, or in his belonging to Polish sub-humanity."(7) Before the end of the trial of a Jewish defendant, Rothaug told the prosecutor that he was prepared to condemn the defendant to death and suggested arguments which the latter might use, and even before the trial he said that the proceedings would be a mere formality, since the

(1) See p. 24.
(2) Italics inserted.
(3) See p. 23.
(4) See p. 25.
(5) See p. 23.
(6) See p. 25.
(7) See p. 23.

victim " would be beheaded anyhow ".(1) The Tribunal found that " despite protestations that his judgments were based solely upon evidence introduced in court, we are firmly convinced that in numberless cases Rothaug's opinions were formed and decisions made, and in many instances publicly or privately announced before the trial had even commenced and certainly before it was concluded ". Of Oeschey, apart from the facts set out above, there was much evidence of autocratic behaviour in court and of conduct insulting to the defendants.(2)

Finally it may be mentioned that having sentenced the Polish farmhand to death, Rothaug disapproved an application for clemency made by the condemned man and his action was mentioned in the United States Military Tribunal. There are no other references to such denials of applications for clemency in the passages of the Judgment dealing with Rothaug and Oeschey, but it is worth noting that the Tribunal drew attention to the fact that the defendant Klemm " admits passing upon clemency pleas in NN death cases and refusing all of them ", as Under-Secretary at the Ministry of Justice, and that the victims involved numbered eight.(3)

There are two alternative ways of regarding evidence of the denial of a fair trial. One could in the first place deem such denial a war crime or a crime against humanity in itself, so that the person responsible would be guilty of this offence quite apart from the subsequent suffering of the victim. On the other hand it could be said that proof of a fair trial having been accorded constitutes a defence to a charge of causing death or other harm to a prisoner of war or inhabitant of occupied territory, and that *proof of the denial of a fair trial nullifies the operation of that defence;* according to this approach, the onus of proof would rest upon the defence.

In the *Justice Trial* as in the relevant trials reported upon in Volume V, the prosecution was at pains to prove even in their own presentation of evidence those aspects of the proceedings taken against the victims which tended to show that a fair trial was not accorded them, and did not wait to cross-examine the defence witnesses on this point.

The major stress placed by the prosecution and by the Tribunal in the *Justice Trial* was upon the " murder, torture and illegal imprisonment of, and brutalities, atrocities, and other inhumane acts against thousands of persons ", to use the words of the indictment. Nevertheless there is a strong suggestion that the Tribunal regarded the denial of a fair trial as itself a possible criminal act. From the evidence, said the Judgment, it was clear that certain cases tried by Rothaug " lacked the essential elements of legality ".(4) Again, the Tribunal declared that " the trials of the accused Nacht und Nebel persons did not approach even a semblance of fair trial or justice ".(5)

Volume V also provided instances of the two approaches which may be adopted in dealing with evidence of the denial of a fair trial. Thus, in the trial of Shinohara and two others by an Australian court, the charge of which the accused were found guilty was that they " failed to ensure that

(1) See p. 24.
(2) See p. 26.
(3) See p. 15, footnote 1.
(4) See p. 99.
(5) See p. 97.

such natives were afforded a fair and proper trial ".(1) On the other hand, the confirming authority did not approve the findings and sentences in this case, and the charges in the other two Australian trials were charges of murder and the accused put forward the defence that the victim had been killed only after a trial or investigation of their acts.(2) The charge in the trial of Isayama and seven others by a United States Military Commission, however, mentioned " permitting and participating in an illegal and false trial *and* unlawful killing " of prisoners of war,(3) and the charge in the trial of Hisakasu and five others, also by a United States Military Commission, again indicated that an " illegal, unfair, false and null trial " was to be regarded as in some way separate from an unlawful " killing ".(4) The same can be said of the trial of Shigeru Sawada and three others.(5)

It may be argued that whatever approach is adopted the practical result is much the same ; on the other hand it is interesting from the point of view of legal analysis and classification that the denial of a fair trial has been recognised as a war crime and (almost certainly) a crime against humanity *eo ipso*.

It remains to arrive at some tentative conclusions on the attitude of the Tribunal which tried Altstötter and others regarding the nature of those aspects of purported trial proceedings which may be used as proof of the offence of denial of a fair trial or as evidence in rebutting the defence that execution or other injury was done in pursuance of a judicial sentence.(6) These aspects, which are in addition to those set out in the last section,(7) may be summarised as follows :

(i) the right of accused persons to know the charge against them,(8) and this a reasonable time before the opening of trial, was denied ;(9)

(ii) the right of accused to the full aid of counsel of their own choice was denied, and sometimes no counsel at all was allowed to defend the accused ;(10)

(iii) the right to be tried by an unprejudiced judge was denied to accused persons ;(11)

(iv) the right of accused to give or introduce evidence was wholly or partly denied ;(12)

(v) the right of accused to know the evidence against them was denied ;(13)

(vi) the general right to a hearing adequate for a full investigation of a case was denied.(14)

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(1) See Volume V, pp. 32 and 34.
(2) See Volume V, pp. 25-6 and 37.
(3) See Volume V, p. 60.
(4) See Volume V, p. 66.
(5) See Volume V, pp. 10-11.
(6) The following account should be compared with the summary contained on pages 73-77 of Volume V, which as already stated attempt to summarise the results of the trials reported upon in that volume on the same issue.
(7) See p. 100.
(8) See p. 97 ; and compare p. 119.
(9) Compare item (i) on p. 75 of Volume V.
(10) See pp. 97 and 101. Compare item (ii) on p. 74 of Volume V and the footnote thereto.
(11) See pp. 101-2 and 119. Compare the last complete paragraph on p. 75 of Volume V.
(12) See pp. 97 and 101. Compare item (iv) on pp. 74-5 of Volume V, and p. 119 of the present volume.
(13) See p. 97. Compare item (ii) on p. 75 of Volume V, and p. 119 of the present volume.
(14) See p. 101. Compare item (iii) on page 75 of Volume V.

In addition it is at least possible that the Tribunal regarded the persistent denial of clemency as a further incriminating factor.(1)

The footnote cross-references by which the points enumerated above have been related to the similar catalogue contained in Volume V of this series reveal a striking uniformity in the attitude of different courts to the characteristics of a fair trial under international law, or conversely to those characteristics which would brand purported judicial proceedings as a denial of a fair trial.(2) It can fairly be said that a body of rules is emerging or has emerged in this branch of international law. The analyses contained in these pages and in Volume V of the characteristics just mentioned have, it should be noted, been based on one or more of the following:

(i) The actual findings of United States Military Commissions in trials reported upon in Volume V;

(ii) The advice of the Judge Advocate in the Australian trials reported in the same volume. This source is less authoritative than the last; nevertheless while the Judge Advocate's advice need not have been taken by the court, such advice (as in British and Canadian trials) carries great weight;

(iii) The evidence which was at any rate admitted by the courts conducting trials reported on in Volume V, and which may have been taken into account by the courts in deciding on their verdicts and sentences; and

(iv) Passages from the Judgment in the *Justice Trial.*

Due to the construction of this last Judgment it is not always possible to state with certainty what the Tribunal regarded as criminal and what merely as evidence of knowledge, intent or motive. Again, the other three sources set out above are not all of equal authoritativeness. Nevertheless, it must be recognised that even the first, namely the findings of courts upon certain charges, are not of more than persuasive authority, and it is submitted that the analysis that has been attempted here and in Volume V of the nature of the denial of a fair trial, even though based on such differing categories of authority, is not without interest in the building up of a jurisprudence of war crimes law.

6. THE ATTITUDE TAKEN BY THE UNITED STATES MILITARY TRIBUNALS TO COUNTS ALLEGING CONSPIRACY

On 9th July, 1947, a joint session of five United States Military Tribunals was held in order to hear counsel argue regarding the sufficiency of counts which charged defendants with conspiracy to commit war crimes and crimes against humanity as a separate offence. Such counts had been brought not only against the accused in the *Justice Trial* but also against the defendants in the trial of Karl Brandt and others (*The Doctors' Trial*) and in the trial of Oswold Pohl and others, which were also being held before certain of the Military Tribunals mentioned above. Counsel for the defendants in these

(1) See p. 102.

(2) The denial of one of the rights enumerated above would not necessarily amount to the denial of a fair trial, however, and the courts have had to decide in each instance whether a sufficient number of the rights which they have regarded as forming part of the general right to a fair trial were sufficiently violated to warrant the making of one or other of the legal deductions discussed on pages 102-3.

three trials challenged the sufficiency of these counts while General Telford Taylor, who led the prosecution in these trials, upheld it.

The main arguments put forward by the defence were the following :

(i) neither the Charter of the International Military Tribunal nor Law No. 10, in dealing with war crimes and crimes against humanity, " speak of common planning as a punishable separate crime, whereas both laws have in common that in their respective figure (*a*), dealing with the crimes against peace, participation in a common plan or conspiracy for the accomplishment of one of the listed crimes against the peace, is expressly declared punishable " ;

(ii) the International Military Tribunal held that whereas the prosecution in the trial of the German Major War Criminals charged a conspiracy to commit not only aggressive war but also war crimes and crimes against humanity, the Charter did not in fact define as a crime any conspiracy except the one to commit acts of aggressive war ;(1)

(iii) the wording " was connected with plans or enterprises involving its commission " contained in Article II, 2 (*d*) of Law No. 10(2) could not be taken to admit charges of conspiracy to commit war crimes and crimes against humanity since " the system of Law No. 10 makes it clear beyond doubt that the facts of crimes are exhaustively defined in sub-paragraph 1, whereas in sub-paragraph 2 only the forms of complicity in these crimes are defined ;(3)

(iv) " The occupation of Germany was carried out together by the four victorious Powers, who according to the Berlin declaration have confirmed again and again that Germany is to be neither annexed nor divided up but on the contrary to be maintained as an entity of which the political form is to be determined. Consequently, Germany is subject to the united occupation Powers as represented in the control council, but not to the Russian, the English, the French, the American law as such." The introduction of the Anglo-American concept of conspiracy was not therefore admissible ;

(v) the words " including conspiracy to commit any such crimes ", contained in Article I of Ordinance No. 7,(4) must be taken to mean only conspiracy to commit crimes against peace, since Ordinance No. 7 did not set out to alter matters of substantive law contained in Law No. 10 ;

(vi) the concept of conspiracy is not found in modern continenta

(1) See British Command Paper, Cmd. 6964, p. 44.
(2) See p. 84, footnote 3.
(3) See pp. 38-9.
(4) Article I of Ordinance No. 7 provides that : " The purpose of this Ordinance is to provide for the establishment of military tribunals which shall have power to try and punish persons charged with offences recognised as crimes in Article II of Control Council Law No. 10, including conspiracies to commit any such crimes. Nothing herein shall prejudice the jurisdiction or the powers of other courts established or which may be established for the trial of any such offences." See p. 115 of Volume III of this series, and pp. 26-8 of the present volume.

codes, and is an Anglo-American notion.(1) It would therefore be a violation of the maxim *nullum crimen sine lege* to apply it to German accused.(2)

The principal prosecution arguments were the following:

(i) " The classical definition of conspiracy at English common law is that it is a confederation to effect an unlawful object, or to effect a lawful object by unlawful means. Within the scope of this definition, conspiracy is very little more than an elaboration of the law of attempts, in cases where the conspiracy was unsuccessful in attaining its object, or of the law of principals and accessories and accomplices, if the conspiracy succeeded in attaining an unlawful object. Within this sphere, the law of conspiracy is really just another manifestation of the very familiar problem in all legal systems of how closely or in what way an individual must be connected with a crime in order to attribute to him, in a judicial sense, guilt. . . . However, over the course of years there have occurred, both in English common law and in the continental law, a number of efforts to apply the doctrine of conspiracy to acts which, if committed by a single person, would not have been indictable or, in a judicial sense, unlawful . . . it is important to point out, therefore, that none of these questionable and perhaps dangerous developments of the law of conspiracy are in any way involved under the London Charter or under Law No. 10, or in any of the three cases before these tribunals in which this jurisdictional question is raised. Neither one, neither the London Charter nor these indictments, seeks to impose criminal liability for conspiring in pursuit of a lawful objective. On the contrary, the conspiracies involved in these cases are conspiracies to commit acts well established as crimes at international law, under the specific language of the London Charter and Law No. 10 and, in most cases, under the penal law system of all civilised countries." Moreover, these were

(1) In his reply, General Telford Taylor mentioned that: " Legal concepts, analogous to that of conspiracy, are by no means unknown in continental law ".

Thus, for instance, Article 265 of the French *Code Pénal* provides that " Any association formed, whatever its duration or the number of its members, and any undertaking arrived at for the purpose of preparing or committing crimes against persons or against property, constitutes a crime against the public peace ". This provision, *inter alia*, was relied upon in the trial of Henri Georges Stadelhofer by a French Military Tribunal at Marseilles, 15th April, 1948; in finding him guilty of the crime of *association de malfaiteurs*, among other offences, the Tribunal gave an affirmative answer to the question whether he, a German national, was guilty, during time of war, of " having formed with various members of the German Gestapo an association with the aim of preparing or committing crimes against persons or property, without justification under the laws and usages of war. Other accused war criminals have also been found guilty of *association de malfaiteurs* by French Military Tribunals.

(2) In his reply, General Taylor admitted that: " These and other internationally constituted Tribunals cannot work exclusively in the medium of German law, or American law, or even a combination of the two. That is not the genius of international law ". But, he added " if the objections of defence counsel to an infusion of legal principles from non-German legal systems were to be taken at face value, certain consequences would flow therefrom which, I am sure, they would find most unwelcome ". For instance, " Under German law, a defendant cannot testify under oath in his own behalf. It is because of an infusion of non-German legal principles that the defendants in these proceedings are entitled to take an oath and enter that box."

crimes which according to the claim of the prosecution had in fact been committed.

(ii) All systems of law had " concepts, such as accessories, accomplices, conspirators, etc.", whose purpose was to ensure that all connected with a crime should be punished, and in approaching the question of what degree of connection with these crimes must be established in order to attribute guilt to a defendant, we must not become enmeshed in the intricacies of the American or English law of principals and accessories, or of conspiracy, or indeed in the refinements or peculiar prejudices of any single judicial system. International law, with respect to these questions, must be derived and applied from a variety of sources and legal systems, including both civil and common law. And the notion of conspiracy, if sensibly and fairly confined, is, we submit, a useful body of doctrine to draw upon.(1)

(iii) " The law of war crimes is, fundamentally, an attempt to define the circumstances under which a state of belligerent hostilities makes lawful acts which would otherwise be clearly unlawful", acts such as " murder, torture, enslavement, rape, plunder, destruction, devastation, etc." The General continued: " It is well settled, and we think this is an important point, that a conspiracy to commit felonies of these types is an indictable offence at common law, and regardless of whether any statute expressly so provides. This has been settled in a multitude of English and American decisions over a number of years. It was, undoubtedly, for this reason that the draftsmen of the London Charter and Control Council Law No. 10 saw no need to include an express reference to conspiracy in the definition of war crimes and crimes against humanity, any more than they felt it necessary to make express reference to the liability of accessories and accomplices or to the law of attempts. All these things adhere to such crimes automatically.

" Why, then, did the draftsmen of the London Charter make specific reference to ' common plan or conspiracy ' in the definition of crimes against peace? Clearly, we submit, this was done out of abundance of caution because of certain differences between the nature of crimes against peace on the one hand and war crimes and crimes against humanity on the other hand. . . . But the crime of planning and waging an aggressive war is, in many respects, peculiarly an international law crime, and particularly subject to international jurisdiction. The acts condemned as criminal in the definition of crimes against peace are not acts which are declared to be criminal

(1) The defence replied that: " Participation, instigation, all such matters are, as a matter of course, punishable under continental law too; and, of course, no international penal law can be imagined without punishing those who in reality desired the perpetration and carried it into effect in some way.

" The great difference, however, between that and conspiracy, as we see it, is that many may be caught in the conspiracy charge who did not themselves desire such a deed but who got involved not through their own volition and then are brought into the conspiracy."

under the internal penal law of most States.(1) Furthermore, while war crimes and crimes against humanity can certainly be committed by a single individual, it is hard to think of any one man as committing the crime of waging an aggressive war as a solo venture. It is peculiarly a crime brought about by the confederation or conspiracy of a number of men acting pursuant to well-laid plans. It matures over a long period of time, and many steps are involved in its consummation. The interrelations between the confederates or conspirators are likely to be extremely complicated and far-flung. For all these reasons, and particularly because planning an aggressive war is not, like murder, a standard felony to which the orthodox paraphernalia of doctrine as to the liability of accomplices automatically applies, the draftsmen of the London Charter and Law No. 10 included an express reference to conspiracy in the definition of crimes against peace."

(iv) " I am sure that it never occurred to the Allied Control Council when it adopted Law No. 10 in December, 1945, during the proceedings before the International Military Tribunal, that by following the language of the London Charter they had excluded from the scope of Law No. 10 conspiracies to commit war crimes and crimes against humanity. And finally, so far as I am aware, such an idea never occurred to any of the defence counsel during the entire course of the international trial." General Taylor suggested that the International Military Tribunal came to the decision quoted above because of "an underlying hostility, particularly on the part of the continental members of the court, to the concept of conspiracy as such ", and the prosecutor urged that the Military Tribunal should refuse to follow this ruling, which seemed to be contrary to the express language of Article 6 of the Charter of the International Military Tribunal which stated that: " Leaders, organisers, instigators, and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan ". He claimed that " Ordinance No. 7, under which these Tribunals are constituted, does not make the decisions of the International Military Tribunal on points of law binding ".

(v) Article II, 2(2) of Law No. 10 was differently worded from the passage just quoted from the Charter, but " its purpose is fundamentally the same. . . . Indeed, the scope of paragraph 2 of Article II of Control Council Law No. 10 which I have just quoted is, we believe, broader than that of the doctrine of conspiracy."

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(1) It would be interesting, however, to find how far the provisions of many continental codes regarding " offences against the external security of the State " provide against acts which amount to planning or carrying out aggressive warfare. Compare, for instance, Articles 79-82 of the French *Code Pénal* and Articles 93, 96, 98 and 99 of the Polish Criminal Code which are treated in an Annex on Polish Law Concerning Trials of War Criminals to be contained in Volume VII of these Reports.

(2) See p. 84, note 3.

(vi) " In applying international penal law, just as in applying domestic penal law, we must determine the substantial degree or quality of participation in crimes upon the basis of which a fair judgment of guilt must be rendered. And in making these determinations under international law, it is surely not only appropriate but wise to draw upon such well-established bodies of legal doctrine in highly developed legal systems as will assist us in arriving at a result which commends itself to our sense of justice. The International Military Tribunal did not find that any considerations of general jurisprudence stood in the way of applying the doctrine of conspiracy in the case of crimes against peace."

(vii) " Conspiracy to achieve an unlawful objective or to use unlawful means to attain an objective is not, properly speaking, a separate subsequent crime at all, any more than being an accessory or an accomplice is a crime ; it is an adjunct of the crime ; "

(viii) " It is important, also, to bear in mind that neither the London Charter nor Law No. 10 purports to be a complete, or even a nearly complete codification of international penal law " . . . Particularly in respect to the necessary degree of connection with a crime, the provisions of the London Charter and Law No. 10 are illustrative rather than exhaustive attempts at statutory definition. Neither of them, for example, makes mention of attempts, yet it surely was not the intention in either case to eliminate attempts from international penal law."(1)

(ix) Ordinance No. 7 expressly makes conspiracy punishable.(2)

The Tribunals decided in favour of the defence submission, and the Tribunal conducting the Justice Trial ruled accordingly,(3) on the grounds that the Tribunal were bound by the provisions of Law No. 10 and of

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(1) Some recognition has been given to the possibility that a person may be guilty of a war crime even though he merely attempted to commit an offence and the offence was never completed. Thus, Article 4 of the Norwegian Law of 13th December, 1946, on the punishment of foreign war criminals, provides that :

" The attempted commission of any crime referred to in Article No. 1 of the present law is subject to the same punishment as an accomplished act. Complicity is likewise punishable."

For an application of this provision, reference should be made to p. 120 of this volume.

Again, Article 13 (1) of a Yugoslav Law of 25th August, 1945, which provides for the trial of war criminals and traitors, lays down that :

" An attempt to commit acts outlined in this Law shall be punishable as a complete criminal act."

Under the Dutch Extraordinary Penal Law Decree of 22nd December, 1943 (Statute Book D. 61), an attempt to commit a war crime is equally punishable with the crime itself.

Neither are convictions for attempts at war crimes unknown in French practice. Thus, Jean Georges Stucker was sentenced to imprisonment for two years, for the offence of having attempted to secure the arrest or detention of a French national, by a French Military Tribunal at Metz, 25th November, 1947. This case will receive further treatment in Volume VII of these reports. (In the notes to the trial of Becker and others.)

The relevant French provision is Article 2 of the *Code Pénal* which states that :

" Any attempted crime which is manifested by the commencement of its execution, if it has been stopped or has lost its effect only by virtue of circumstances independent of the will of its author, is considered to be the same as the completed crime ".

(2) See p. 105, note 4.

(3) See pp. 5-6.

the Charter of the International Military Tribunal(1) which do not define conspiracy to commit a war crime or a crime against humanity as a separate substantive crime. The Tribunal affirmed the right of prosecution and defence to introduce evidence, relating to events before September, 1939, " if such facts or circumstances tend to prove or to disprove the commission by any defendant of war crimes or crimes against humanity as defined in Control Council Law No. 10 ".(2)

In the course of his dissenting judgment, Judge Blair made some remarks concerning this decision of the Tribunal. His opinion was that: " Since the language of paragraph 2 of Law No. 10 expressly provides that any person connected with plans involving the commission of a war crime or crime against humanity is deemed to have committed such crimes, it is equivalent to providing that the crime is committed by acts constituting a conspiracy under the ordinary meaning of the term. Manifestly it was not necessary to place the label ' conspiracy ' upon acts which themselves define and constitute in fact and in law a conspiracy. Paragraph 2 was so interpreted by the Zone Commander when he issued Military Government Ordinance No. 7, which authorised the creation of this and similar military tribunals, and which provides in Article I that:

> ' The purpose of this Ordinance is to provide for the establishment of military tribunals which shall have power to try and punish persons charged with offences recognised as crimes in Article II of Control Council Law No. 10, including conspiracies to commit any such crimes '."

The Tribunal, he concluded, " should therefore declare that military tribunals as created by Ordinance No. 7 have jurisdiction over ' conspiracy to commit ' any and all crimes defined in Article II of Law No. 10 ".

(1) Which was incorporated into Law No. 10 by Article 1 thereof.
(2) See also p. 90.

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Assessing the Scope of the Palestinian Territorial Entitlement

Ariel Zemach*

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ARTICLE

ASSESSING THE SCOPE OF THE PALESTINIAN TERRITORIAL ENTITLEMENT

Ariel Zemach[*]

ABSTRACT

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

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

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

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

I. INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. HISTORICAL BACKGROUND TO THE ISRAELI-PALESTINIAN TERRITORIAL DISPUTE

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

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

14. League of Nations Covenant art. 22.

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

16. League of Nations Covenant art. 22.

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

18. League of Nations Covenant art. 22.

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

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

are currently under Israeli occupation, including those that are the object of the territorial dispute between Israel and the Palestinians.[21]

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

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

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

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

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

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

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

25. LEAGUE OF NATIONS, MANDATE FOR PALESTINE TOGETHER WITH A NOTE BY THE SECRETARY-GENERAL RELATING TO ITS APPLICATION TO THE TERRITORY KNOWN AS TRANS-JORDAN UNDER THE PROVISIONS OF ARTICLE 25 (1922), *available at* https://d3n8a8pro7vhmx.cloudfront.net/truthmustbetold/pages/93/attachments/original/1448574108/Mandate_of_Palestine_.pdf?1448574108 [https://perma.cc/T6UK-DFD3].

River flows, and a line stretching south from the Dead Sea to the town of Aqaba by the Red Sea.[26]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> the provisions of this Agreement being dictated exclusively by military considerations.[40]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. The Tripartite Rule

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. The Agreement Establishing the Mandate of Palestine

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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regard to Palestine, to the customary rule of 'the inadmissibility of the acquisition of territory by war'").

104. *Id.* at 182-84, ¶¶ 118-22.

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

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

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

108. League of Nations Covenant art. 22.

109. *Id.*

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

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

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

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

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

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

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

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

114. League of Nations Covenant art. 22.

115. *Id.*

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

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

C. The Doctrine of Uti Possidetis Juris

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

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

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

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

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

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

121. *Id.* at 566, ¶ 23.

122. *Id.* at 568, ¶ 30.

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

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

juris requires that the entire territory become the sovereign territory of the newly independent state."[125]

When the Mandate of Palestine ended, its territory formed a unitary administrative unit.[126] According to Bell and Kontorovich, the application of the principle of *uti possidetis* to the termination of the British Mandate of Palestine in 1948 "seems straightforward":[127]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

145. *See* HIGGINS, *supra* note 142.

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

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

148. League of Nations Covenant art. 22.

149. *Id.*

150. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

167. *Id.* at 316.

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

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

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

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

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

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

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

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

borders, or are self-determination interests implicated by border disputes merely a basis for a *political* argument?[172]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. State Practice

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. The Jurisprudence of the International Court of Justice

1. The Tripartite Rule and Equity Considerations

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

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

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

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

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

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

and history to be protected by any rule on border demarcation, either contradictory or residual to the tripartite rule.[202]

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

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

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

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

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

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

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

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

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

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

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

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

a. The Abyei Case

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

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

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

211. *Id.* at 568, ¶ 28.

212. *Id.* at 632-33, ¶¶ 148-50.

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

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

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

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

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

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

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

218. *Id.* ¶¶ 110, 118.

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

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

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

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

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

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

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

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

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

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

Saliternik suggested that "the emphasis that the PCA placed on the parties' desire to promote self-determination and peace . . . represented a clear departure from the adjudicatory approach adopted by international tribunals in earlier boundary dispute cases,"[235]

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226. Gov. of Sudan v. Sudan People's Liberation Movement/Army, 48 I.L.M. at ¶¶ 137, 168.
227. *Id.* ¶ 3.
228. *Id.* ¶ 571.
229. *Id.* ¶ 580.
230. *Id.* ¶ 582.
231. *Id.* ¶¶ 587, 588-89.
232. *Id.* ¶ 595.
233. *Id.* ¶ 596.
234. *Id.*
235. Saliternik, *supra* note 174, at 130-31.

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

b. Burkina Faso v. Niger

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

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

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

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

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

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

240. *Id*. at 85, ¶ 100.

241. *Id*. at 85, ¶ 101.

242. *Id*. at 50, ¶ 2.

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

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

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

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

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243. *Id*. at 85, ¶ 101.
244. *Id*.
245. *Id*. at 77, ¶ 70 (emphasis added).
246. *Id*. at 85, ¶ 101.
247. *Id*.
248. *Id*.
249. Saliternik, *supra* note 174, at 132-36.
250. In his Separate Opinion, Judge Daudet took the view that the border runs along the right bank of the river, contrary to the determination by the Court. *See* Frontier Dispute (Burk. Faso/Niger), Judgment, 2013 I.C.J. Rep. 44, 163 (Apr. 16) (separate opinion by Daudet, J.). Judge Daudet's conclusion regarding the location of the border resulted from a grammatical interpretation of the words "reaching the River Sirba at Bossébangou," which differs from that of the Court. *Id.* at 160-61. Saliternik relies on Judge Daudet's view to assert that "the court made a remarkable move" by adopting "a creative interpretation of the *Arrêté* that secured the water needs of local populations, even though it knew that the boundary line thus determined might be different from the historic colonial boundary." Saliternik, *supra* note 174, at 132. However, the disagreement between the majority opinion and Judge Daudet regarding the

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

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

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

3. The Wall Advisory Opinion

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

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

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

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

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

253. *Id.* at 132-33.

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

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

256. *Id*. at 182-84, ¶¶ 118-22.

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

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

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

257. *Id*. at 184, ¶ 122.
258. *Id*.
259. *Id*. ¶¶ 121-22.
260. *Id*. ¶ 121.
261. *Id*. ¶ 122.
262. Ronen, *supra* note 7, at 13 (citing the ICJ's conclusion that the construction of the Wall violates the right of the Palestinian people to self-determination, Ronen notes, "by implication, the area beyond the Green Line (the 1949 Armistice Lines) and the separation barrier, including the settlements, falls within the entitlement . . . of the Palestinian state").
263. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, 184, ¶ 121 (July 9).

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

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

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

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

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

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

267. *Id.*

268. *Id.*

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

C. The Territorial Dimension of the Right to Statehood

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

International recognition may have a probative value in the determination of title to territory.[303] This view finds support in the jurisprudence of the Permanent Court of International Justice ("PCIJ").

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

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

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

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

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

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

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

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

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

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

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

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

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

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

307. *Id.*

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

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

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

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

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

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

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

309. JENNINGS, *supra* note 303, at 38 (exploring this question).
310. JENNINGS, *supra* note 303, at 38.
311. *See supra* notes 87-88 and accompanying text.
312. SHAW, INTERNATIONAL LAW, *supra* note 71, at 373.

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

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

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

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

In 1977, the General Assembly pronounced on the question whether the Walvis Bay is a part of South Africa or of Namibia.[318] A General Assembly resolution declared that "Walvis Bay is an integral

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

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

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

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

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

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

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

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

319. *Id.* ¶ 7.

320. *Id.* ¶ 8.

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

322. *Id.* ¶ 1.

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

324. *Id.* at 1307.

325. *Id.* at 1308.

326. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> The novelty of the Mandate (and Trusteeship) systems was the extent of international supervision and control over the Mandatory, and in particular over the ultimate disposition of the territory . . . The crux of the non-sovereign position of the Mandatory or Administering Authority was that it could not unilaterally determine the status of the territory. That required international action, normally exercised through the competent League or United Nations body.
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> CRAWFORD, *supra* note 6, at 573.

advisory only,"[338] not extending to the adoption of resolutions that are legally binding on states.[339]

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

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

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

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

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

340. U.N. Charter art. 24.

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

342. U.N. Charter art. 39.

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

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

> the peace, not to change the world order, that the Security Council was set up.[345]

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

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

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

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

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

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

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

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

> Affirms that the fulfillment of Charter principles requires the establishment of a just and lasting peace in the Middle East which should include the application of both the following principles:
>
> (i) Withdrawal of Israel armed forces from territories occupied in the recent conflict;
>
> (ii) Termination of all claims or states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force.[351]

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

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

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

351. *Id.* at ¶ 1.

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

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

354. *Id.*

355. *Id.*

356. *Id.*

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

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

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

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

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

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

358. Lapidoth, *supra* note 352, at 311.
359. Goldberg, *supra* note 357, at 191.
360. S.C. Res. 2334, *supra* note 54; *see also supra* notes 299-302 and accompanying text.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

372. *See* discussion *infra* Part V.

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

IX. CONCLUSION

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

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

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

374. *Id*. at 182-84, ¶¶ 118-22.

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

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

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

How the International Criminal Court Threatens Treaty Norms

Michael A. Newton*

ABSTRACT

This Article demonstrates the disadvantages of permitting a supranational institution like the International Criminal Court (ICC) to aggrandize its authority by overriding agreements between sovereign states. The Court's constitutive power derives from a multilateral treaty designed to augment sovereign enforcement efforts rather than annul them. Treaty negotiators expressly rejected efforts to confer jurisdiction to the ICC based on its aspiration to advance universal values or a self-justifying teleological impulse to bring perpetrators to justice. Rather, its jurisdiction derives solely from the delegation by States Parties of their own sovereign prerogatives. In accordance with the ancient maxim nemo plus iuris transferre potest quam ipse habet, states cannot transfer jurisdictional authority to the supranational court that they themselves do not possess at the time of the alleged offenses. Upon ratification of the Rome Statute, both Afghanistan and Palestine conveyed jurisdiction to the Court, but the scope of that delegation is limited by their preexisting treaty-based constraints. American forces and Israelis remain subject to the exclusive criminal jurisdiction of their own states for criminal offenses committed on the territory covered by those binding bilateral agreements so long as those treaties remain applicable. Hence, the Rome Statute by its own terms does not automatically extend territorial jurisdiction over American forces in Afghanistan or over Israeli citizens suspected of offenses in the Occupied Territory of the West Bank or in the Gaza Strip. Yet, the Office of the Prosecutor uncritically accepts the premise that ratification of the multilateral treaty conveyed indivisible territorial jurisdiction. The ICC is not empowered to sweep aside binding bilateral agreements between sovereign states. By

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asserting that it has power to abrogate underlying bilateral treaties, the Court undermines ancient precepts of international law and harms the principles of treaty law. The ICC is not constructed as an omnipotent super-court with self-proclaimed universal jurisdiction based upon the presumption that the Rome Statute operates in isolation from other treaty-based constraints on sovereign prerogatives. This Article examines the conflicts between current Court assumptions and the tenets of the Rome Statute. Its final Parts dissect the foreseeable damage caused by the present policy. The conclusion asserts that the Court cannot unilaterally override the validity of existing jurisdictional treaties. The assertion of such powers would violate the Vienna Convention on the Law of Treaties and muddy the existing debates related to resolving conflicts between equally binding treaty norms.

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I. INTRODUCTION

The International Criminal Court (ICC) straddles a jurisdictional fault line that threatens to corrode first principles of international treaty law. The premise of this Article is that the current approach of the ICC Office of the Prosecutor (OTP) in two of its most sensitive jurisdictional dilemmas undermines international law even as it obfuscates the specific tenets found in the Rome Statute of the International Criminal Court (the Rome Statute or the Statute).[1] Upon entry into the ICC Assembly of States Parties (ASP), both Afghanistan and Palestine conveyed territorial jurisdiction to the Court within the meaning of Article 12 of the Rome Statute. But the quantum of that delegated jurisdiction is constrained by their preexisting treaty-based constraints. In both instances, Afghanistan and Palestine entered into binding agreements that ceded exclusive jurisdiction over Americans and Israelis, respectively, for crimes committed on the territory of the state. The subsequent transfer of territorial jurisdiction from the state to the ICC via ratification of the Rome Statute therefore could not have included Americans or Israelis.

This Article highlights the harm caused by unwarranted expansion of the Court's jurisdiction over American forces in Afghanistan and Israeli citizens suspected of offenses in the Occupied Territory[2] of the West Bank and on the Gaza Strip. The current OTP approach would reshape established international treaty norms in fundamental ways. To be precise, the Office of the Prosecutor presumes jurisdiction over American or Israeli nationals in these two controversial situations[3] based on assumptions that undermine the

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1. Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, 2187 U.N.T.S. 90 (July 17, 1998), *entered into force* July 1, 2002, *reprinted in* 37 I.L.M. 999 [hereinafter Rome Statute].

2. For the purposes of this Article, the phrase "Occupied Territory" refers to all the territory of the Occupied West Bank and the Gaza Strip as those areas are designated a single entity in the Oslo Accords. Land subject to the law of "belligerent occupation" as that term is understood in the laws and customs of war are called different names, such as "Yesha," "Yosh," and "Ahza"—Hebrew acronyms accepted in the Israeli Defense Force—or the "Occupied Territories," the "Administered Territories," the "Territories," and "Judea and Samaria"—names commonly used by the general public. Some scholars prefer to use the term "The Region" as reflected in early Israeli legislation. *See, e.g.*, Entry into Israel Law, 5712-1952, SH No. 111, § 12A. The original law was passed by the Knesset on the 5th Elul, 5712 (Aug. 26, 1952).

3. The term "situation" is a *sui generis* treaty term found in the Rome Statute to designate the overall context within which the Court is empowered to investigate cases and bring specific perpetrators to trial. The Final Report of the Preparatory Committee on the Establishment of the International Criminal Court postulated the parallel terms "matter" as well as "situation" in bracketed text. U.N. Diplomatic Conference on Plenipotentiaries on the Establishment of an International Criminal Court, *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, U.N. Doc. A/CONF.183/2 (Apr. 14, 1998), *reprinted in United Nations*

basic tenets of established treaty law. The maxim *nemo plus iuris transferre potest quam ipse habet* can be traced back more than two millennia.[4] Literally translated as "No one can transfer to another more rights (*plus iuris*) than he has himself,"[5] the concept is one of the bedrock principles of international law, just as it governs kindergarten playgrounds the world over. Surprisingly, there has been almost no recognition of the complex interrelationship between the rights and duties of states arising from entry into the Rome Statute, when such entry squarely conflicts with equally binding bilateral instruments. This Article seeks to fill that void.

Chief Justice John Marshall echoed perhaps the most foundational aspect of international law in *Schooner Exchange v. McFadden* by noting that "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute."[6] Territorial jurisdiction to make and enforce criminal law is indisputably one of the quintessential aspects of state sovereignty.[7] Any sovereign state retains "exclusive jurisdiction to punish offenses against its laws committed within its border, unless it expressly or impliedly consents to surrender its jurisdiction."[8] The Rome Statute revolutionized the landscape of international law by establishing a complex framework for a permanent supranational prosecutorial authority. Neverthelesss, the Court's authority is not independent or omnipotent. Treaty-based ICC jurisdiction flows exclusively from the

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Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome, 15 June–17 July 1998, Official Records, U.N. Doc. A/CONF.183/13 (Vol. III), at 22, http://legal.un.org/diplomaticconferences/icc-1998/vol/english/vol_III_e.pdf [perma.cc/7YKY-937N] (archived Jan. 22, 2016).

4. DIG. 50.17.54 (Ulpian, Ad Edictum 46). When Justinian became ruler of the Byzantine Empire, he ordered compilation of a comprehensive collection of Roman law that together formed the Corpus Juris Civilis. This resulted in the Code, which collected the legal pronouncements of the Roman emperors, the Institutes, an elementary student's textbook, and the Digest, by far the largest and most highly prized of the three compilations. The Digest was assembled by a team of sixteen academic lawyers commissioned by Justinian in 533 to cull everything of value from earlier Roman law. The citation reflects the fact that the maxim is attributed to the period 211 to 222 AD, during which the Roman jurist Ulpian (Domitius Ulpianus) wrote a well-respected 80+ book/scroll treatise LIBRI AD EDICTUM.

5. 1 ADOLF BERGER, ENCYCLOPEDIC DICTIONARY OF ROMAN LAW 740 (1953).

6. Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 136 (1812); *see also* Munaf v. Geren, 553 U.S. 674, 705 (2008) (declining unanimously to shield U.S. citizens who committed "hostile and warlike acts within the sovereign territory of Iraq" during ongoing military operations from prosecution before Iraqi courts because habeas corpus "does not require the United States to shelter such fugitives from the criminal justice system of the sovereign with authority to prosecute them").

7. *See* Islands of Palmas Case (Netherlands v. U.S.), Permanent Court of Arbitration, 2 U.N. Rep. International Arbitral Awards 829, 838–842 (1928) ("Spain could not transfer more rights than she herself possessed . . . . Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.").

8. Wilson v. Girard, 354 U.S. 524, 529 (1957).

delegation of a State Party's sovereign jurisdictional power. Except for the overarching authority of the United Nations Security Council to convey jurisdiction to the Court through binding resolutions under Chapter VII of the UN Charter, the jurisdiction of the ICC, as embodied in Article 12 of the Rome Statute, is based only on derivative jurisdiction granted by states at the time they ratify the multilateral treaty. To be more precise, affirmative Security Council referrals in the form of a Resolution passed under its Chapter VII authority are the only mechanism by which the ICC can exercise universal jurisdiction over offenses.

Properly understood and implemented, the jurisdictional relationship between the ICC and sovereign states represents a tiered allocation of authority to adjudicate because states retain the primacy of jurisdiction under the treaty. The principle that sovereignty can be subordinated when necessary to achieve accountability for crimes that most directly challenge the commonality of values and order shared among nations is the cornerstone of the ICC. Upon ratification of the Rome Statute, both Afghanistan and Palestine accepted the premise of Article 12 that empowers the ICC to exercise jurisdiction over any case where either (a) the *actus reus* for the alleged crime occurred on the territory of a State Party to the Rome Statute, or (b) the perpetrator is a national of a State Party. Article 12(3) also permits, but does not require, any state that is not party to the ICC to consensually transfer criminal jurisdiction to the ICC. Preceding Palestinian Authority (PA) ratification of the Rome Statute, Mahmoud Abbas purported to create ICC jurisdiction over Israeli citizens based on just such a declaration signed on December 31, 2014.[9] The incompatibility between the jurisdictional provisions of the Rome Statute and the preexisting bilateral treaties described in Part II that simultaneously bind Afghanistan and Palestine represents an important example of normative fragmentation. To date, neither State Party has offered any explanation for why the purported jurisdictional conveyance to the ICC is valid despite the parallel treaty-based constraints on territorial jurisdiction over Americans and Israeli nationals that remain in force.

Members of the ICC Assembly of States Parties[10] have conflicting duties to other sovereign states *vis-à-vis* those due the

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9. *See* Declaration from President of the State of Palestine to ICC (Dec. 31, 2014), http://www.icc-cpi.int/iccdocs/PIDS/press/Palestine_A_12-3.pdf [perma.cc/2KEQ-HRVK] (archived Jan. 22, 2016); *see also* Andreas Zimmerman, *Palestine and the International Criminal Court Quo Vadis? Reach and Limits of Declarations under Article12(3),* 11 J. INT'L CRIM. J. 304, 313 (2013).

10. *See* Rome Statute, *supra* note 1, art. 112. The ASP is the management oversight and legislative body of the International Criminal Court. It is composed of representatives of states that have ratified or acceded to the Rome Statute. Assembly of States Parties, ICC, http://www.icc-cpi.int/en_menus/asp/sessions/documentation/

Court. The fragmentation of duties is a side effect of the otherwise laudable growth of authoritative lawmakers within international law. The number of states represented in the United Nations, for example, has grown by more than 378 percent since its inception.[11] Further complicating prospects for linear development of norms through treaty provisions designed to resolve conflicts with other state obligations, international organizations are increasingly empowered to negotiate new instruments applicable to sovereign states.[12] In many instances, states consciously use multilateral conferences convened by international organizations as venues for "reaffirming, modifying, or elaborating codified custom."[13] International treaties became the dominant form of international lawmaking in a multipolar world order.[14] Robust academic efforts arose to analyze potential treaty conflicts and postulate solutions for preserving epistemic integrity and intellectual consistency.[15]

The complexity of interrelated legal obligations spawned by the dramatic growth in the number and reach of, *inter alia* human rights

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13th-session-resumption/Pages/default.aspx [perma.cc/8KBM-BMDN] (archived Jan. 22, 2016).

11. *See* Member States, http://www.un.org/en/members/growth.shtml [perma.cc/FNY4-2V8V] (archived Jan. 22, 2016) (documenting the growth from 51 states represented in the General Assembly to 193 with the formation of South Sudan in 2011).

12. *See generally*, JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS (2005) (discussing how international organizations, like the United Nations and the WTO, have changed the methods by which international law is created, implemented, and enforced).

13. *Id.* at 390. Examination of the many conflicts that originate from overlapping institutional authority is beyond the scope of this Article. The integrity and consistency of international law is increasingly eroded when states, international organizations, and the growing number of specialized courts and tribunals differ over the substantive meaning of a particular norm of international law. *See, e.g.*, YUVAL SHANY, THE COMPETING JURISDICTION OF INTERNATIONAL COURTS AND TRIBUNALS (2003); SHANE DARCY, JUDGES, LAW AND WAR: THE JUDICIAL DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW (2014); PHILIPPA WEBB, INTERNATIONAL JUDICIAL INTEGRATION AND FRAGMENTATION (2013).

14. Joel P. Trachtman, *The Growing Obsolescence of Customary International Law*, *in* CUSTOM'S FUTURE: INTERNATIONAL LAW IN A CHANGING WORLD (Curtis A. Bradley ed., forthcoming 2016); Julie M. Grimes, *Conflicts Between EC Law and International Treaty Obligations: A Case Study of the German Telecommunications Dispute*, 35 HARV. INT'L. L. J. 535 (1994).

15. *See, e.g.*, JOOST PAUWELYN CONFLICT OF NORMS IN INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW (2003); Christopher Borgen, *Resolving Treaty Conflicts*, 37 GEO. WASH. INT'L L. REV. 573 (2005); Benedetto Conforti, *Consistency among Treaty Obligations*, *in* THE LAW OF TREATIES: BEYOND THE VIENNA CONVENTION 187 (Enzo Cannazaro ed., 2011); Jan Klabbers, *Beyond the Vienna Convention: Conflicting Treaty Provisions*, *in* THE LAW OF TREATIES: BEYOND THE VIENNA CONVENTION, 192 (Enzo Cannazaro ed., 2011). For the minority view that fragmentation poses no serious challenge to the consistency of the overall fabric of international law, see Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT'L L. 553 (2002).

treaties, environmental treaties,[16] and overlapping trade regimes is sometimes shorthanded as the "Trade and . . . " phenomenon.[17] The International Law Commission (ILC) sought to provide comprehensive guidance to practitioners facing this "emergence of specialized and (relatively) autonomous rules or rule-complexes, legal institutions and spheres of legal practice."[18] The resulting Study on Fragmentation in International Law premised its conclusions on the finding that "[i]nternational law is a legal system. Its rules and principles (*i.e.* its norms) act in relation to and should be interpreted against the background of other rules and principles. As a legal system, international law is not a random collection of such norms. There are meaningful relationships between them."[19] The Study Group was nevertheless unable to propose comprehensive guidance to international organizations, practitioners, and state officials for resolving conflicts when multiple treaty-based norms are equally binding in a given situation. At the time of this writing, there is no definitive approach for addressing systematic tensions caused by the proliferation of treaty provisions that present actual or apparent conflicts with preexisting treaty provisions.

Without even acknowledging this legal ferment or the persisting debates in capitals over the most advisable resolution treaty conflicts, the OTP presumes jurisdiction over crimes committed by Americans in Afghanistan[20] and is rapidly moving towards making similar findings with respect to offenses alleged against Israeli citizens for

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16. For an example of this strand of this robust body of scholarship, see Annick Emmenegger Brunner, *Conflicts Between International Trade and Multilateral Environmental Agreements*, 4 ANN. SURV. INT'L & COMP. L. 74 (1997).

17. Christopher J. Borgen, *Treaty Conflicts and Normative Fragmentation*, *in* THE OXFORD GUIDE TO TREATIES 448, 449 (Duncan Hollis ed., 2012); *see, e.g.*, Adarsh Ramanujan, *Conflicts over "Conflict" Preventing Fragmentation of International Law*, 1(1) TRADE L. & DEV. 171 (2009).

18. Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Rep. of the Study Group of the Int'l Law Comm'n, U.N. Doc. A/CN.4/L.682, 10–11 (April 13, 2006) [hereinafter ILC Fragmentation Study], http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf [perma.cc/NM7D-GZWM] (archived Jan. 23, 2016). The ILC Study Group justified the need for comprehensive assessment and concrete guidance to the field because "What once appeared to be governed by 'general international law' has become the field of operation for such specialist systems as 'trade law,' 'human rights law,' 'environmental law,' 'law of the sea,' 'European law,' and even such highly specialized forms of knowledge as 'investment law' or 'international refugee law,' etc.—each possessing their own principles and institutions." *Id.* at 404.

19. *Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, ¶ 1 (2006), *reprinted in* Rep. of the Int'l Law Comm'n on Its Fifty-Eighth Session, U.N. Doc. A/61/10, 407, at 477–78 (Aug. 11, 2006), http://legal.un.org/docs/?path=../ilc/reports/2006/english/chp12.pdf&lang=EFSRAC [perma.cc/D82F-8UFD] (archived Jan. 23, 2016).

20. *See infra* notes 134–59 and accompanying text.

acts committed in the Occupied Territories or in the Gaza Strip.[21] In both situations, asserting ICC authority over cases alleged against American or Israeli nationals would effectively abrogate the preexisting treaty-based jurisdictional allocations made between the sovereign states. Some observers might describe such efforts to eliminate any potential hindrance to ICC authority as a healthy "expression of political pluralism."[22] In the best possible light, such decisions could represent "new institutions" using international law to "further new interests."[23] Indeed, the dominant narrative is that ICC is imbued from its creation with an inherently supreme legitimacy. For its most ardent supporters, the ICC is a necessary augmentation of the *erga omnes* duty that all states owe to all other states to prosecute the crimes "of most serious concern to the international community as a whole." As a logical extension, the Court might well be expected to discard binding treaties between sovereign states that hinder its powers in any way. The OTP appears at present to operate on the presumption that the overall object and purpose of the Rome Statute warrants a self-justifying teleological impulse to expand ICC jurisdiction as needed to bring potential perpetrators to justice.

From this perspective, the OTP extension of its authority over non-State Party nationals reflects the prioritization of its own institutional power at the expense of sovereign states' prosecutorial rights and interests. However, the foreseeable result of current OTP policy would discredit the role of the Court as only one of many authoritative actors in the international domain. It is neither designed nor intended by its framers to function as an omnipotent supranational institution; it must adhere to the textual limitations imposed by sovereign states woven into the text of the Rome Statute. The very treaty that energizes the ICC does not contain any provision that hints at preclusive effects over all other treaties. Hence, an ICC policy that discards bilateral treaties negotiated by states to protect their citizens from foreign jurisdictions would necessarily subvert the treaty-based due process rights of potential perpetrators.

No analysis has yet situated this assertion of jurisdiction within the larger context of the Rome Statute and its relation to overarching principles of international treaty law. Seeking to extend the Court's unqualified jurisdiction into those two situations, the OTP disregards underlying bilateral treaties that preclude personal jurisdiction on the territory of both Afghanistan and the territory claimed by a fully sovereign future state of Palestine. This Article argues that the Court cannot assert jurisdiction over Americans or Israelis in light of the Rome Statute's provisions on jurisdiction. The reasons are complex

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21. *See infra* notes 158–91 and accompanying text.
22. Koskenniemi & Leino, *supra* note 15, at 553.
23. *Id.*

but strike at the heart of our system of international justice and the commitments of the Rome Treaty, which provides a defined and limited constitutive power to the ICC. By extending its jurisdictional authority in a manner that simply discounts the authority of bilateral treaties, the ICC would be rewriting the Rome Statute to convey a universal scope of jurisdiction that is contrary to both the text of the treaty and the clear negotiating history. This Article demonstrates the disadvantages of permitting a supranational institution like the ICC to unilaterally expand its own power by overriding preexisting agreements between sovereign states.

Furthermore, the Court undermines international law to the extent that its jurisdictional determinations degrade the sovereign efforts of states to use treaties as a basis for making formal and binding commitments to other nations. At a minimum, if it became the accepted norm of transnational practice, the ICC assertion of jurisdiction undermines important aspects of the Vienna Convention on the Law of Treaties (VCLT).[24] All treaties embody extensive transactional costs due to the time, diplomatic effort, and policy exertion needed to bring them to successful fruition. States undertake negotiations in the hopes of achieving concrete rights and receiving reciprocal obligations from other states; current Court policy would introduce unwarranted uncertainty into those efforts.[25]

The remainder of this Article proceeds as follows. Part II illustrates the parameters within which OTP policy decisions have been made. The Rome Statute operates as a carefully constructed jurisdictional scheme that rejected a sweeping assertion of universal jurisdiction. The interactions between the bilateral treaties entered into by Afghanistan and the Palestinian Liberation Organization (which entered into the Oslo Accords inherited by the PA) and their subsequent entry into the ASP remain complex. Neither state invoked accession to the Statute as justifiable grounds for terminating the preexisting treaty-based jurisdictional limitations.[26] The OTP presumes an overarching scope of jurisdiction that disregards any preclusive effects of the earlier treaties described in Part II.

Part III analyzes the distinctive features of the Rome Statute. Close examination demonstrates that expanded ICC jurisdiction contravenes the object and purpose of the Rome Statute in significant ways. The Court is designed to augment domestic enforcement efforts

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24. Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 1969, 8 I.L.M. (entered into force Jan. 27, 1980) [hereinafter VCLT].

25. *See generally* JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2006).

26. Both the United States and Israel would presumably have proceeded under the law applicable to questions of treaty termination or suspension as well as the Law of State Responsibility. *See* VCLT, *supra* note 24, arts. 30(5), 41, 60.

rather than annul them. The current jurisdictional posture purports to supplant sovereign enforcement rather than operating on a cooperative model. In doing so, the Court paradoxically threatens to deprive perpetrators of their treaty-based due process rights. Indeed, the text implicitly contemplates the establishment of the ICC as a permanent supranational institution with a respected role based on an explicitly defined relationship with sovereign states. To reiterate, the ICC is not a court of sweeping universal jurisdiction. In fact, after the Rome Statute entered into force, the larger body of treaty norms that contrast with its defined scope of jurisdiction to convey some form of universal jurisdiction, such as the Torture Convention or the grave breach provisions of the Geneva Conventions, remain fully binding on sovereign states.

Part IV considers the effects of the OTP policy within the larger field of treaty conflicts. By usurping domestic jurisdiction, the Court's example could bring turmoil to the already murky waters of international treaty law. The OTP undermines important aspects of international treaty law because the Court cannot unilaterally abrogate other treaties in order to eliminate actual or apparent normative conflicts. Neither Afghanistan nor the PA can lawfully transfer jurisdiction to the ICC that they do not already exercise in their sovereign capacity. The Article concludes that the ICC should not rely on episodic and intuitive decision making that willfully disregards the other obligations incumbent on States Parties. Accepting the fact that the Court has no criminal jurisdiction over American forces in Afghanistan or over Israelis in the Occupied Territories and the Gaza Strip would represent good faith implementation of international norms as the hallmark of a maturing supranational institution.

II. HARMONIZING THE MULTILATERAL AND BILATERAL VISIONS

The Rome Statute combines a complex blend of civil law, common law, customary international law, and *sui generis* principles held together by the notion that the sovereign nations of the world are interdependent components of a larger global society in which the principles of justice are a common good.[27] This makes the Court the conceptual pinnacle of an interlocking system designed to achieve justice within which the core element is a set of shared, but

27. *See* Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L. J. 381, 386 (2000). For an excellent summary of the negotiating dynamic in Rome that resulted in the current Statute, see Ruth Wedgewood, *Fiddling in Rome: America and the International Criminal Court*, FOREIGN AFF. 20 (Nov.–Dec. 1998). *See generally* M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11 (1997).

delineated, rights and responsibilities.[28] The object and purpose of the Court nicely accords with the philosophical construct of the ancient Greeks for whom the pursuit of justice symbolized a quest for order and harmony.[29] Plato conceived of justice as "that highest class of good things" on both the personal and societal level. [30]

This deeply ingrained aspiration for justice propelled the development of the ICC for more than fifty years until the adoption of the Rome Statute in 1998. For Court proponents, it embodies a blend of appropriately balanced power, wisdom, and temperance, which in turn has great potential to generate societal stability at the international level. Thus, while it operates within the milieu of international politics, the very *raison d'être* of the Court is to seek justice for the most consequential crimes known to man in an apolitical and impartial manner. This effort to eradicate impunity for the most egregious categories of international criminality operates against the backdrop of interconnected and often interdependent relationships with domestic criminal systems. By extension, the Court should not function in ways that undermine the utility of treaties as vehicles for shaping and clarifying the prosecutorial reach of sovereign states over Rome Statute crimes. Neither should the Rome Statute be understood and implemented in ways that destabilize the desirable relationship between domestic jurisdictions and the permanent supranational Court.

The following section describes in greater detail the specific mechanisms designed to operate in conjunction with domestic jurisdictional arrangements. Those treaty-based limitations must be implemented against the backdrop of the bilateral treaties that restrict the ability of both Afghanistan and the PA to lawfully confer jurisdiction over some potential perpetrators to the Court upon their entry into the ASP. This Part ends by summarizing those agreements, which in turn necessitates consideration in Parts III and IV of the normative arguments that mitigate towards recognizing their residual authority.

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28. *See* Carsten Stahn, *Taking Complementarity Seriously: On the Sense and Sensibility of 'Classical,' 'Positive,' and 'Negative Complementarity*, *in* I THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE 233, 237 n.16 (Carsten Stahn & Mohammed M. El Zeidy eds., 2011) (noting the lengthy articulation of this well-established concept in early ICC jurisprudence).

29. *See* BRIAN R. NELSON, WESTERN POLITICAL THOUGHT FROM SOCRATES TO THE AGE OF IDEOLOGY 31 (1982).

30. THE REPUBLIC OF PLATO 52 (F. MacDonald Cornford trans. & ed., 1945).

A. *The Jurisdictional Design of the Rome Statue*

1. Limitations on the Court's Jurisdiction

The ICC was not created to impede viable domestic processes or impose dominance over the prosecutorial practices and priorities of states with developed systems and demonstrated adherence to the rule of law.[31] Hence, the ICC does not have authority to take a case to trial until the issues associated with domestic jurisdiction have been analyzed and resolved in accordance with the framework of the Rome Statute. From the prosecutor's point of view, jurisdiction under the provisions of Article 12 and admissibility under Article 17[32] are mandatory prerequisites for ICC authority. The creation of a vertical level of prosecutorial authority operating as a permanent backdrop to the horizontal relations between sovereign states in large part depended on clear delineation of the mechanism for prioritizing the domestic jurisdiction of responsible domestic states and preserving sovereign rights while simultaneously serving the ends of justice.

The Rome Statute scheme of limited and defined supranational jurisdiction embodied the rejection of earlier proposals that would have allowed an "inherent" ICC jurisdiction over some crimes.[33] The United States, for example, historically supported such an inherent jurisdictional scheme for the genocide offenses.[34] The 1994 ILC Draft

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31. The irony is that the actual prosecution of Saddam and other leading Ba'athists took place in an internationalized domestic forum precisely because, *inter alia*, Iraqis saw grave injustice arising from prosecuting only the subset of crimes within ICC jurisdiction. MICHAEL A. NEWTON & MICHAEL P. SCHARF, ENEMY OF THE STATE: THE TRIAL AND EXECUTION OF SADDAM HUSSEIN 76–80 (2008).

32. *See infra* notes 54–78 and accompanying text.

33. WILLIAM A. SCHABAS, THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE 278–83 (2010) (discussing the variety of proposals formally introduced and the expressions of support from, *inter alia*, Poland, Australia, Canada, Mexico, Khazakstan, Senegal, and Afghanistan and concluding that a "clear majority of States preferred an option based upon universal jurisdiction"); *see also* Bartram S. Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Tribunals*, 23 YALE J. INT'L L. 383, 417–28 (1998) [hereinafter Brown, *Primacy or Complementarity*] (describing the advantages and disadvantages of such an inherent supranational scheme).

34. *See* David J. Scheffer, *International Operations of the Senate Foreign Relations Committee*, S. Hrg. 105–724, at 13 (July 23, 1998) (testimony of Ambassador-at-Large for War Crimes Issues and Head of the U.S. Delegation for the UN Diplomatic Conference on the Establishment of a Permanent International Criminal Court, U.S. Department of State) (reproducing the statement of Ambassador Scheffer in which he referred to a regime of "automatic jurisdiction over the crime of genocide" in describing the inherent regime of the ILC Draft); *see also* Convention on the Prevention and Punishment of the Crime of Genocide, art. VI, Dec. 9, 1948, 78 U.N.T.S. 277, *entered into force* Jan 12, 1951 [hereinafter Genocide Convention] (providing that persons charged with genocide "shall be tried by a competent tribunal of the State in the territory in which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have

included a provision that allowed the ICC to have automatic jurisdiction over the crime of genocide, which would have created a truly concurrent jurisdiction, at least over those offenses.[35] Unlike the *ad hoc* tribunals that are grounded in the Chapter VII authority of the United Nations Security Council,[36] a system built on straightforward assertions of supranational primacy was not a "politically viable alternative for a permanent ICC."[37] Similarly, proposals by Germany and Korea for an extended supranational jurisdiction based on the universality principle were emphatically rejected by delegations in Rome.[38] Some scholars lament the fact that the "underlying disparity of wealth, power, and influence" resulted in a multilateral treaty that "was heavily influenced by the prevailing notions of state sovereignty and the views of the most powerful states."[39] Such is the nature of any multilateral negotiating dynamic, which inevitably produces what some states or treaty supporters see as suboptimal outcomes. The key issue for the purposes of pinpointing the precise basis of ICC jurisdiction on the territory of a State Party is that the Statute as adopted is founded on the bedrock of state consent.

Rather than a flawed system of concurrent jurisdiction, the existing jurisdictional scheme requires progressive judicial findings

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accepted its jurisdiction"). In the 1948 debates over the Genocide Convention, the United States actually made a proposal that sounded remarkably close to the modern formulation of complementarity in the ICC context. The proposal would have added an additional paragraph to Article VII of the Genocide Convention to read as follows: "Assumption of jurisdiction by the international tribunal shall be subject to a finding that the State in which the crime was committed has failed to take adequate measures to punish the crime." Rep. of the Ad Hoc Committee on Genocide, U.N. Doc. E/794 (1948), *reprinted in* U.N. Secretary General, *Historical Survey of the Question of International Criminal Jurisdiction 142*, U.N. Doc. A/CN.4/7Rev.1 (1949). The proposal was rejected by a vote of five votes to one with one abstention (the USSR) on the basis that such a paragraph would prejudice the question of the court's jurisdiction. *Id.*

35. Rep. of the Int'l Law Comm'n on the Work of its Forty-Sixth Session, U.N. GAOR, 49th Sess., Supp. No. 10, art 21(1)(a), 25(1), U.N. Doc A/49/10 (1994) [hereinafter *ILC Draft Statute*].

36. The innovative use of the Security Council Chapter VII authority to establish the Yugoslavia and Rwanda tribunals was so widely accepted by 1998 that the correlative provision in the Rome Statute that permits precisely the same extension of ICC jurisdiction even over the nationals and territory of non-States Parties was uncontroversial. *See* Rome Statute, *supra* note 1, art. 13(b); *infra* notes 113–30.

37. Brown, *Primacy or Complementarity*, *supra* note 33, at 431.

38. *See* Sharon A. Williams & William A. Schabas, *Article 12*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES ARTICLE BY ARTICLE 547, 550–56 (Otto Triffterer ed., 2d. ed. 2008) (describing the content and consequential politics of the German, Korean, British, and American proposals); *see also* Andreas Zimmermann, *The Creation of a Permanent International Criminal Court*, *in* 2 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 169, at 205ff (1998) (detailing the legal underpinnings of the then German proposal for such a universal jurisdiction-based Court).

39. Richard Dicker, *The International Criminal Court (ICC) and Double Standards of Justice*, *in* THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 3, 6 (Carsten Stahn ed., 2015).

that implement an appropriate balance of authority between the supranational court and domestic states. Supranational jurisdiction based on a straightforward scheme of concurrent jurisdiction would almost certainly have resulted in ever-present jurisdictional clashes between the ICC and one or more states with valid claims based on established principles such as nationality, territoriality, or passive personality.[40] In order to ensure the preservation of individual state sovereignty and fulfill the promises of complementarity, the Rome Statute contains specific restraints on the exercise of the Court's power.

Article 12 sets out the preconditions for exercise of the Court's jurisdiction. This is important because the OTP cannot initiate an investigation without first certifying that the "information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed."[41] Similarly, the Pre-Trial Chamber cannot issue a Warrant of Arrest without deciding on the jurisdictional sufficiency of the charges over the alleged perpetrator at the time of the charged offenses.[42] Article 19 of the Statute mandates that the Court satisfy itself that it has jurisdictional competency "in any case brought before it" and sets forth the range of parties that may contest jurisdiction.[43] The textual distinction between an overall "situation" and a specific "case" brought against a particular perpetrator is important because the scope of Court jurisdiction over particular perpetrators within a given situation is never monolithic and all encompassing.

The practical effects of Article 12 are significant as they embody the theory that the Court should not have jurisdiction where States involved have not so consented. On its face, Article 12 preserves the principle that ICC jurisdiction is grounded in the sovereign consent of states.[44] The preconditions under Article 12 serve as a limitation on the Court's power; at a minimum, one State that would normally be able to exercise jurisdiction over the case will have manifested consent to the jurisdiction of the Court. Should all States involved in a conflict refuse to consent to the power of the Court, then the conditions of Article 12 have not been met, and the ICC is powerless to hear the case in the absence of a Security Council referral of the

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40. *See* M. Cherif Bassiouni & Christopher L. Blakesly, *The Need for an International Criminal Court in the New International World Order*, 25 VAND. J. TRANSNAT'L L. 151, 170 (1992) ("The problem with concurrent jurisdiction, however, is that it inherently includes the potential for jurisdictional conflict between two or more states and the international criminal court.").

41. Rome Statute, *supra* note 1, art. 53(1).

42. *Id.* art. 58(1).

43. *Id.* art. 19.

44. Article 12 works in conjunction with the admissibility criteria of Article 17 to preserve state jurisdictional primacy. *See infra* notes 54–78 and accompanying text.

overall situation using its Chapter VII authority derived from the UN Charter.

The jurisdictional provisions of Article 12 were a make-or-break gamble that represented the most controversial aspect of the Rome Statute.[45] Its final form emerged as a take-it-or-leave-it "package" that had been cobbled together behind closed doors by the conference Bureau and completed at 2:00 am of the last day of the conference, Friday, July 17, 1998. The Rome Statute as adopted postulated solutions to some drafting questions that delegates had been unable to resolve and included a number of provisions that the Bureau selected and presented to the floor without open debate on either the text itself or its substantive merits.[46] Article 12 requires only that "one or more" States have accepted the jurisdiction of the Court. This distinction is important because treaties do not "create either obligations or rights for a third State without its consent."[47] Rather than violating the framework of international law, as some scholars argued at the time,[48] Article 12 reflects the reality that states possess an inherent right of territorial jurisdiction that they may dispose of in accordance with their sovereign prerogatives. In effect, if nationals of a state that is not a party to the treaty commit crimes on the territory of a State Party, then that state has agreed a priori that the ICC can exercise its jurisdiction as an extension of the uncontroverted right of the territorial state to punish all persons who have committed crimes on its soil, regardless of their nationality.

The vital point, particularly regarding the putative transfers from Afghanistan and Palestine to the ICC discussed below, is that the State Party must itself possess jurisdictional authority at the time of the alleged offense. Otherwise, there is no tangible right that can result in jurisdiction under Article 12. This concept, that I term "transferred territoriality," was a distinctive innovation. In effect,

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45. *See* David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12, 17–21 (1999).

46. *See* Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20, 21 (2001) (discussing the Rome Statute as a quietly put together take-it-or-leave-it package).

47. VCLT, *supra* note 24, art. 34.

48. *See* Madeleine Morris, *High Crimes and Misconceptions: The ICC and Non-Party States*, 64 LAW & CONTEMP. PROBS. 13, 27 (2001). The U.S. Department of Defense Law of War Manual echoes this inaccurate legal conclusion conception by restating that "the United States has a longstanding and continuing objection to any assertion of jurisdiction by the ICC with respect to nationals of States not Party to the Rome Statute in the absence of consent from such States or a referral by the Security Council." OFFICE OF GENERAL COUNSEL, UNITED STATES DEPARTMENT OF DEFENSE, LAW OF WAR MANUAL 1110, ¶18.20.3.1 (2015) [hereinafter DOD LAW OF WAR MANUAL]. *But see* Dapo Akande, *The Jurisdiction of the International Criminal Court over Nationals of Non-Party States: Legal Basis and Limits*, 1 J. INT'L CRIM. JUST. 618 (2003).

transferred territoriality created a legal superstructure over the aspirational seeds sown in Article 6 of the 1949 Genocide Convention.[49] The concept of transferred territoriality was sufficiently accepted that a U.S. proposal that would have required an affirmative manifestation of consent before the ICC could exercise any personal jurisdiction over nationals of a non-Party State was defeated by a no-action motion adopted 113 in favor, 17 opposed, with 25 abstentions.[50] States sought to assuage American fears by observing that the concept of complementarity described in the next subsection "best describes the nature of the International Criminal Court."[51] Delegates noted that deference to domestic jurisdictions of non-States Parties would be required by the conjunction of Articles 17 (the complementarity framework) and 98 (which sought to preserve the legal validity of jurisdictional Status of Forces Agreements between the United States and more than one hundred other nations). Such bland assurances were unwarranted, as present events have demonstrated.

2. The Admissibility Framework

The Rome Statute of the International Criminal Court was designed to address the "most serious crimes of international concern."[52] This mandate operates against the *gründnorm* that the Court at all times and in all cases "shall be complementary to national criminal jurisdictions."[53] The paradigmatic language of Article 17(1) sets out what is technically termed "issues of admissibility."[54] The article declares in full that:

> Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
>
> (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
>
> (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the

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49. *See* Genocide Convention, *supra* note 34, art. VI ("Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.").

50. Williams & Schabas, *supra* note 38, at 555.

51. Silvia A. Fernandez, *Foreword* to I THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE, at xviii (Carsten Stahn & Mohammed M. El Zeidy eds., 2011).

52. *See* Rome Statute, *supra* note 1, art. 1.

53. *Id.*

54. *Id.* art. 17.

> decision resulted from the unwillingness or inability of the State genuinely to prosecute;
>
> (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
>
> (d) The case is not of sufficient gravity to justify further action by the Court.[55]

The operative language in Article 17 mandates that "the Court shall determine that a case is inadmissible" where the criteria warranting exclusive domestic authority are met as specified in the Statute itself.[56] The formulation that a case is "inadmissible" unless the domestic state is "unwilling or unable genuinely" to carry out the investigation or prosecution is technically termed the admissibility criterion, but is almost universally referred to using the legal term of art "complementarity."[57] The admissibility requirements are important in part because they were so carefully negotiated by states in order to preserve the primacy of domestic jurisdictions, but they also represent some of the Court's most important pragmatic constraints by focusing its scarce resources on the cases where its role is most beneficial.

Though it is the fulcrum that prioritizes the authority of domestic forums, the precept of complementarity embedded in the Rome Statute does not of itself logically lead to a homogenized system of national and supranational concurrent jurisdiction despite its simple formulation. Complementarity is designed to serve as a pragmatic and limiting principle rather than an affirmative means for an aggressive prosecutor to target the nationals of states that are hesitant to embrace ICC jurisdiction and authority. The provisions of the Rome Statute preserve a careful balance between maintaining the integrity of domestic adjudications and authorizing a supranational court to exercise power where domestic systems are inadequate. Complementarity preserves this delicate balance by serving as a restrictive principle rather than an empowering one; while the ICC has affirmative powers as a supranational court, the textual predicates necessary to make a case admissible are designed to constrain the power of the Court.

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55. *Id.* art. 17(1).

56. *Id.*

57. *See, e.g.*, Michael A. Newton, *The Quest for Constructive Complementarity, in* THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE 304, 314 (Carsten Stahn & Mohammed El Zeidy eds., 2011); William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 HARVARD. INT. L.J. 53, 53 (2008).

Complementarity has been repeatedly reaffirmed as the most suitable formulation for interactions of an international adjudicatory institution with fully empowered domestic systems. John Holmes, a Canadian diplomat who was deeply involved in the negotiations that preceded the Rome Statute, noted that

> Throughout the negotiating process, States made clear that the most effective and viable system to bring perpetrators of serious crimes to justice was one which must be based on national procedures complemented by an international court . . . The success in Rome is due in no small measure to the delicate balance developed for the complementarity regime . . . [i]t remains clear to those most active throughout the negotiations that any shift in the balance struck in Rome would likely have unravelled [sic] support for the principle of complementarity and, by extension, the Statute itself. [58]

The complementarity principle was the motivating force behind a court built around a limited and defined scope of jurisdiction that operates only when needed to supplement domestic court systems. The initial limiting function of complementarity derives from the treaty basis of the ICC. As a fundamental premise of treaty law, States should be bound to a treaty only by voluntarily relinquishing part of their sovereign rights manifested through the signing and implementation of the treaty into domestic systems.[59] As a logical extension, States Parties delegate decision-making authority over proposed amendments to the Rome Statute to the ASP.[60] In other words, States Parties ceded some degree of future sovereign prerogative to the Court in the confidence that the constraints of the text were dispositive. States that elected not to ratify the Rome Statute have ceded none of their sovereign rights to the Court or its constituent organs.

Complementarity generated much debate over the best method for constraining the power of a potentially overreaching prosecutor. This was particularly important because the inherently subjective framework of Article 17 applies equally to all states. To that end, paragraphs 2 and 3 of Article 17 attempt to provide specific factors the Court shall consider in evaluating the effort of the domestic jurisdiction with respect to its unwillingness or inability to investigate or prosecute.[61] The factors enumerated for determining if a State is *unwilling* to prosecute include whether the proceedings

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58. John T. Holmes, *The Principle of Complementarity*, *in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS 41, 73–74 (Roy S. Lee ed., 1999).

59. Vienna Convention on the Law of Treaties art. 12, 14, May 23, 1969, 1155 U.N.T.S. 980, *reprinted in* 8 I.L.M. 679. This foundational truth is echoed in the provisions that a treaty does not create obligations for a third state without its consent. *Id.* art 34.

60. *See* Rome Statute, *supra* note 1, arts. 121–22.

61. *Id.* art. 17(2)–(3).

were undertaken for the purpose of shielding the person concerned from criminal responsibility,[62] whether there was an unjustified delay in the proceedings,[63] or whether the proceedings were not being conducted independently or impartially.[64] The determination of the *inability* of a domestic court to adjudicate the case is "whether due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings."[65]

In sharp contrast, the requirement "genuinely" in the formulation of Article 17, paragraph 1 is left for the Court to ascertain. This gap caused one of the most distinguished international scholars in the field to observe that this aspect of Article 17 is "enigmatic."[66] Accepting the reality that some external standard of review was needed to prevent illusory efforts by states, delegates rejected a series of proposed phrases such as "ineffective," "diligently," "apparently well founded," "good faith," "sufficient grounds," and "effectively" on the basis that such formulations remained overly subjective.[67] In the final analysis, the formulation "genuinely" was accepted by delegations as being the least subjective concept considered, while at the same time eliminating external considerations of domestic efficiency in the investigation or prosecution.[68] For the purposes of this Article, the essential conclusion is that the Rome Statute's very design contemplates the need for systematic cooperation between jurisdictions rather than capture by the supranational court.

The admissibility requirements, unlike the jurisdictional predicates, do not speak to the Court's power to hear a case. They serve as a mechanism to give State jurisdictions primacy because the supranational authority is the exception rather than the *de fault* norm. The prohibition on ICC authority in Article 17 results in a terminological shift by which the concept of complementarity is embedded into treaty provisions that articulate the considerations and criteria for the admissibility of a particular case. Domestic states have valid claims to jurisdiction without the possibility of ICC

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62. *Id.* art. 17(2)(a).
63. *Id.* art. 17(2)(b).
64. *Id.* art. 17(2)(c).
65. *Id.* art. 17(3).
66. WILLIAM SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 67 (2001).
67. Rod Jensen, *Complementarity, "Genuinely" and Article 17: Assessing the Boundaries of an Effective ICC, in* COMPLEMENTARY VIEWS ON COMPLEMENTARITY 147, 155 (Jann K. Kleffner & Gerben Kor eds., 2006).
68. John Holmes, *Complementarity: National Courts Versus the ICC, in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY (A. Cassesse et. al eds., 1st ed. 2001).

interference, whether or not they are members of the ASP. The carefully constructed textual balance between domestic and international power masks the complexity of the underlying debates over the appropriate resolution between the multilateral treaty and the underlying web of preexisting agreements. In fact, the former President of the Court, Judge Phillipe Kirsch, publicly acknowledged that the ICC "will really have to invent, create, and define the meaning of a state that is unable or unwilling to conduct genuine proceedings."[69]

ICC Judgements promulgating an automatic presumption of universal jurisdiction that overrides other applicable treaty-based jurisdiction would change the central character of the Rome Statute. A permanent shift to a judicially approved policy of automatic supranational jurisdiction at the expense of treaty-based domestic jurisdiction over the same types of offenses would represent an abandonment of the shared responsibility of states and the Court to seek justice.

3. The Intent of Article 98

As shown in the preceding subsections, the ICC was designed from the ground up to be additive to sovereign jurisdictions. Seeking to preserve sovereign prosecutorial prerogatives, U.S. negotiators decided as early as 1994 that the new Court could not eviscerate bilateral and multilateral[70] Status of Forces agreements (SOFAs)[71]

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69. Phillipe Kirsch, President, Int'l Criminal Court, The International Criminal Court, remarks John Tait Memorial Lecture in Law and Policy (Oct. 7, 2003), *cited in* Gregory S. McNeal, *ICC Inability Determinations in Light of the Dujail Case*, 39 CASE W. RES. J. INT'L L. 325, 325 (2007).

70. The text as adopted leaves *lacuna* with respect to the jurisdictional immunities that attach to personnel deployed pursuant to multinational agreements negotiated by international organizations such as the Military Technical Annex concluded in 2002 between the British military commander and Afghanistan to cover NATO forces inside the country. GEERT-JAN ALEXANDER KNOOPS, THE PROSECUTION AND DEFENSE OF PEACEKEEPERS UNDER INTERNATIONAL CRIMINAL LAW 245–247 (2004); *see also* U.N. Secretary-General, *Model Agreement Between the United Nations and Member States Contributing Personnel and Equipment to United Nations Peacekeeping Operations*, art. IV, U.N. Doc. A/46/185 (May 23, 1991); U.N. Secretary-General, *Model Status of Forces Agreement for Peace-Keeping Operations*, ¶ 47(b), U.N. Doc. A/45/594 (Oct. 9, 1990) (providing in ¶ 47(b) that members of the military component "shall be subject to the exclusive jurisdiction of their respective sending states in respect of any criminal offenses that may be committed by them" on the territory of the host nation).

71. U.S. Department of Defense doctrine defines this term as follows: "status-of-forces agreement—a bilateral or multilateral agreement that defines the legal position of a visiting military force deployed in the territory of a friendly state." DEP'T OF DEFENSE, JOINT PUBLICATION 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 229 (8 November 2010, as Amended Through 15 June 2015), http://www.dtic.mil/doctrine/new_pubs/jp1_02.pdf [https://perma.cc/P82R-FXXE] (archived Feb. 18, 2016). Other academics have adopted a more legalistic

by which the authority of American military and federal courts are safeguarded from interference by domestic courts in more than one hundred nations.[72] This became a "rock bottom" negotiating stance that was embraced by all of the delegations in Rome and incorporated into Article 98 of the Statute.[73] Thus, if nothing else, the Rome Statute stands for the proposition that accountability for the array of crimes detailed in Articles 6, 7, 8, and 8*bis* of the treaty must impinge upon sovereignty to some degree, but not at the expense of erasing the traditional jurisdictional arrangements between states.

Reflecting the early and strong consensus on its substance, the final text of Article 98 of the Rome Statute is identical to the proposed Draft Article submitted to the Committee of the Whole.[74] This example of a completely unmodified text in the wake of lengthy and contentious negotiations will strike any experienced treaty negotiator as very rare indeed. Article 98(2)[75] of the Statute provides that the ICC

> may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to

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approach focusing on the binding nature of SOFAs as treaties—"A SOFA is an arrangement, no matter in what form, delineating the legal status of servicemen from a sending State who stay with the consent of the host State on its territory, and that at the least includes rules on the exercise of criminal jurisdiction over the sending State's servicemen." JOOP VOETELINK, STATUS OF FORCES: CRIMINAL JURISDICTION OVER MILITARY PERSONNEL ABROAD 1.4.6, 17 (Marielle Matthee trans., 2015).

72. *See* DAVID J. SCHEFFER, ALL THE MISSING SOULS 171 (2012).

73. *See id.* at 175.

74. Draft Statute for an International Criminal Court, Report of the Drafting Committee, 15 June–17 July 1998, U.N. Doc. A/CONF.183/13, 177–78, *reprinted in* III United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome (Vol. III) (1998), http://legal.un.org/diplomaticconferences/icc-1998/vol/english/vol_III_e.pdf [https://perma.cc/G2C6-5LE5] (archived Feb. 5, 2016); *see also* M. CHERIF BASSIOUNI, II THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT: AN ARTICLE-BY-ARTICLE EVOLUTION OF THE STATUTE 703–04 (2005).

75. At the time of this writing, the application of Article 98(1) addressing the residual diplomatic immunities owed to non-States Parties remains a hotly contested jurisprudential issue because it has surfaced in the context of the transfer of Omar Bashir to the authority of the Court. *See* Paola Gaeta, *Does President Al Bashir Enjoy Immunity From Arrest?*, 7 J. INT. CRIM. J. 315, 316 (2009); Prosecutor v. Bashir, ICC-02/05-01/09, Decision Following the Prosecutor's Request for an Order Further Clarifying that the Republic of South Africa Is Under the Obligation to Immediately Arrest and Surrender Omar Al Bashir, ¶ 6 (June 13, 2015), http://www.icc-cpi.int/iccdocs/doc/doc1995566.pdf [https://perma.cc/X7HF-HFQC] (archived Feb. 18, 2016); Prosecutor v. Bashir, ICC-02/05-01/09-195, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, ¶¶ 28–31 (Apr 9, 2014), http://www.legal-tools.org/en/doc/89d30d [https://perma.cc/AT8Q-YH3Q] (archived Feb. 18, 2016); The South Africa Litigation Centre v. the Minister of Justice, et. al., Case No. 27740/2015, ¶ 21 (High Court of South Africa) (Gauteng Division, Pretorial) (June 23, 2015), http://constitutionally speaking.co.za/complete-high-court-al-bashir-judgment/ [https://perma.cc/T47U-UFYD] (archived Feb. 18, 2016).

> surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.[76]

The text itself is rather straightforward. It absorbed little negotiation time in Rome because it "was not considered to be of utmost political sensitivity by most participants in the negotiations."[77] One of the most eminent experts assessing the Rome Statute noted that the *travaux préparatoires* for Article 98 are "summary and uninformative."[78] On its face, Article 98(2) addresses only agreements between states, whether they are bilateral or multilateral. Neither does the text provide any express or implied limitation on the timing of such an agreement when measured against the accession of any state into the ASP. The universal understanding is that the use of the term "sending state" in contrast to the receiving state reflects the clear sense of negotiators that its principal area of application is to Status of Forces Agreements.[79] The United States made that connection clear from the beginning of the negotiations in 1995.[80]

The head of the U.S. delegation addressed the Ad Hoc Committee in 1995 with the admonition that "[i]t is also critical that the rights and responsibilities of states parties to applicable Status of Forces Agreements be fully preserved under the statute of the ICC . . . . Most SOFAs contain provisions governing the exercise of criminal jurisdiction over the armed forces stationed or posted abroad."[81] Most delegations understood the U.S. argument and "accepted without difficulty that status of forces agreements created a kind of immunity over nationals of a sending state who were on the territory of another nation analogous to diplomats which would be entitled to some recognition in the Statute."[82] In any event, the text is devoid of practical consequences for States Parties because Article 98(1), dealing with diplomatic or other immunities, is waived by

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76. Rome Statute, *supra* note 1, art. 98(2).

77. Claus Kreβ & Kimberly Prost, *Article 98, in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES ARTICLE BY ARTICLE 1601, 1604 (Otto Triffterer ed., 2d. ed. 2008) (describing the content and consequential politics that surrounded Article 98 after its uncontroversial adoption).

78. SCHABAS, *supra* note 33, at 1042.

79. BRUCE BROOMHALL, INTERNATIONAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT: BETWEEN SOVEREIGNTY AND THE RULE OF LAW 148, 167, 180 (2003).

80. *See* David J. Scheffer, *Article 98(2) of the Rome Statute: America's Original Intent*, 3 J. INT'L CRIM. JUST. 333, 339 (2005) ("The use of the term 'sending State' derives from the original American effort, very early in the ICC negotiations, to preserve the rights accorded to its official personnel covered by status of forces agreements (SOFAs) between the United States and scores of foreign governments.").

81. SCHABAS, *supra* note 33, at 1042.

82. *Id.* at 1043.

virtue of Article 27(2).[83] Requests from the Court to States Parties would bypass Article 98(2) due to the generalized duty to cooperate in the Statute[84] and the particularized duty to "comply with requests for arrest and surrender" of alleged perpetrators subject to the procedures under their national law.[85]

In sum, Article 98, when taken at face value, merely recognizes a limited right of non-surrender for citizens of non-States Parties. Its provisions nevertheless generated a storm of controversy as the George W. Bush administration began a worldwide campaign on May 6, 2002, to negotiate a web of bilateral agreements to insulate U.S. service members from transfer to the Court.[86] Commentators referred to these as "bilateral immunity agreements" or "bilateral impunity agreements" but overlooked the fact that the U.S. agreements purport only to create a reciprocal duty between nations not to transfer each other's citizens pursuant to a request from the Court (which in most agreements includes the obligation to refrain from transfer to another state for the purpose of eventual transfer to the Court "for any purpose"). Absent the pejorative presumption from ICC proponents that the Article 98 agreements are undesirable as a feature of ICC practice, there is nothing on the face of the bilateral agreements that hints at presumed or promised immunity from prosecution for substantive offenses found in the Rome Statute.

Beginning the campaign that would eventually negotiate more than one hundred such agreements,[87] the Undersecretary of State for

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83. Rome Statute, *supra* note 1, art. 27(2) ("Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.").

84. *Id.* art. 86 (**General Obligation to Cooperate:** "States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.").

85. *Id.* art. 89.

86. On that day, the State Department notified the Secretary General that despite President Clinton's signature the United States did not intend to ratify the treaty. Secretary of State Colin Powell simultaneously sent a demarche to every U.S. Ambassador to raise the issue with the host nation as follows, "We are interested in your view regarding bilateral agreements recognized under Article 98 of the Rome Statute that could be used to provide protection for nationals from both of our countries from the reach of the ICC. If a host government offers directly to undertake such an agreement, post can use the following point: We would be interested in discussing your offer further at the moment we are considering our next steps and should have a decision very soon. I will report our conversation to Washington and I expect we will have a response for you shortly." Colin Powell, Sec'y of State, Demarche on the U.S. Policy on the International Criminal Court from Secretary to Ambassadors 5 (May 2, 2006), http://www.amicc.org/docs/Demarche_US.pdf [perma.cc/ZPG4-4JKW] (archived Feb. 7, 2016).

87. For an updated listing and the text of the existing unclassified bilateral agreements, see Georgetown, *International Criminal Court—Article 98 Research Guide*, GEORGETOWN LAW LIBRARY, https://www.law.georgetown.edu/library/research/guides/article_98.cfm [perma.cc/75X8-YNZS] (archived Feb. 7, 2016).

Policy reassured the world that "the United States respects the decision of those nations who have chosen to join the ICC; but they in turn must respect our decision not to join the ICC or place our citizens under the jurisdiction of the Court."[88] U.S policy continued to emphasize mutual efforts to "promote real justice." In particular, the United States promised, *inter alia*, to "continue our longstanding role as an advocate for the principle that there must be accountability for war crimes and other serious violations of international humanitarian law" and to "discipline our own when appropriate."[89] Implicitly referencing the concerns of ICC supporters regarding this campaign, Professor William Schabas concluded that the "legal consequences" of Article 98(2) agreements "were much misunderstood" as they in no way sought to achieve immunity from investigation and prosecution where appropriate. His definitive Commentary noted that Article 98 agreements "do not affect the jurisdiction of the Court at all."[90]

The actual substance of the worldwide web of bilateral agreements in place at the time of this writing has little to do with jurisdictional conflicts caused by equally binding treaty obligations, as even a cursory reading of Article 98 and the agreements makes plain. However, the practice following the Rome Conference illustrates two powerful, but subtle, linkages between the debates over Article 98 and the present jurisdictional dilemmas faced by the Court. Firstly, the text itself sets up a powerful duality in that it preserves the ability of States Parties to transfer jurisdiction to the Court as an aspect of sovereign prerogative. The concept of transferred territoriality is buttressed by the duty of any State Party to cooperate with the Court, but only within the limits of lawful capacity as governed by "obligations under international agreements."[91] At the same time, the validity of the underlying bilateral obligations is implicitly preserved. In fact, Article 98(2) represents a definitive rejection of the argument by some ICC advocates that the object and purpose of the Rome Statute is to establish the authority of the supranational court as the transcendent institution empowered to bypass any hindrance to its punitive discretion. Of particular note, there is nothing in the Statute or in subsequent state practice that distinguishes between a SOFA presumed valid only for the purposes of transfers under Article 98 and one that addresses transfers as well as the allocation of

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88. Marc Grossman, Under Secretary for Political Affairs, Remarks to the Center for Strategic and International Studies Washington DC, *American Foreign Policy and the International Criminal Court* 5, May 6, 2002, http://www.amicc.org/docs/Grossman_5_6_02.pdf [https://perma.cc/ZZB7-QNV8] (archived Feb. 7, 2016).

89. *Id.*

90. SCHABAS, *supra* note 33, at 1045.

91. Rome Statute, *supra* note 1, art. 98(2).

jurisdiction between sovereigns. In fact, as the next section will demonstrate, most SOFAs combine jurisdictional allocation between States on the horizontal level along with a wide range of other issues. The broad phrase "international agreements" in Article 98 encompasses a wide array of SOFA arrangements to include those that allot jurisdictional authority even when one of the parties to the bilateral instrument subsequently accedes to the Rome Statute.

Secondly, to buttress this conclusion, the American campaign to achieve Article 98 Agreements generated intensive debate within the European Union, which in turn reinforced the binding nature of SOFA Agreements even as States Parties assumed new treaty-based duties under the Rome Statute. On September 30, 2002, the Council of the European Union issued its Conclusions and Guiding Principles concerning arrangements between the United States and States Parties regarding the surrender of persons to ICC authority. The European Union supported the concept of such agreements subject to three conditions: (1) that EU states take "existing international agreements" into account (presumably referring to the NATO Status of Forces Agreement that creates concurrent jurisdiction for most offenses),[92] (2) they should cover only persons sent in their official capacity to another territory by a non-State Party, and (3) "any solution should include appropriate operative provisions ensuring that persons who have committed crimes falling within the jurisdiction of the Court do not enjoy impunity."[93]

The EU policy guidance implicitly accepted the legality of an allocation of jurisdiction and investigative authority from a State Party to a non-State Party when the relevant international agreements "ensure appropriate investigation and—where there is sufficient evidence—prosecution by national jurisdictions concerning persons requested by the ICC."[94] Thus, subsequent state practice within the European Union is clear that international agreements that allocate jurisdiction between sovereigns remain legally binding even after entry into force of the Rome Statute. Notwithstanding the text of Articles 12 and 98, jurisdictional allocations between states are subject only to the limitation that the "object and purpose of the

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92. Agreement between the Parties to the North Atlantic Treaty Organization Regarding the Status of their Forces art VII.3, 4 U.S.T. 1792, T.I.A.S. No. 2846, (June 19, 1951) [hereinafter NATO Agreement], http://www.nato.int/cps/en/natohq/official_texts_17265.htm [perma.cc/9WVR-PC67] (archived Feb. 7, 2016).

93. Council Conclusions on the International Criminal Court ICC34EN (Sept. 30, 2002), http://www.consilium.europa.eu/uedocs/cmsUpload/ICC34EN.pdf [perma.cc/3K9A-Q8UC] (archived Feb. 7, 2016).

94. *Id.*; *see also* James Crawford, Phillippe Sands & Ralph Wild, Joint Opinion, *In the Matter of the Statute of the International Criminal Court and in the Matter of Bilateral Agreements Sought by the United States Under Article 98(2) of the Statute*, ¶¶ 47–52 (June 5, 2003), http://www.amicc.org/docs/Art98-14une03FINAL.pdf [perma.cc/H2TB-ZNPW] (archived Feb. 7, 2016).

ICC Statute precludes a State party from entering into an agreement the purpose or effect of which may lead to impunity."[95] The following section will examine the binding agreements entered into by Afghanistan and the PA that now present the Court with highly controversial and superficially conflicting treaty obligations *vis-à-vis* the ICC.

B. *The Pattern of Preexisting Jurisdictional Allocations*

The Rome Statute is expressly designed to be juxtaposed against an array of other treaty obligations incumbent on States Parties. The jurisdictional provisions of the Geneva Conventions,[96] for example, remain fully applicable. SOFAs remain a ubiquitous feature of modern military operations for both ICC States Parties and non-States Parties. They continue to be indispensable to United Nations peacekeeping efforts.[97] Most such agreements address ancillary matters such as customs constraints, wearing of uniforms, and the right of sending state nationals to carry weapons.

But the key provisions of any SOFA are those that address the legal protection from domestic prosecution that will be afforded to the nationals of the negotiating state present in a foreign country. [98] Department of Defense Directive 5525.1, for example, specifies that U.S. policy is "to protect, to the maximum extent possible, the rights of U.S. personnel who may be subject to criminal trial by foreign courts and imprisonment in foreign prisons."[99] Typical SOFA

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95. Crawford, Sands & Wild, *supra* note 94, ¶ 52.

96. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field arts. 1–11, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea art. 1, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 (replacing Hague Convention No. X of 18 October 1907, 36 Stat. 2371); Geneva Convention Relative to the Treatment of Prisoners of War art. 1, Aug.12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (replacing the Geneva Convention Relative to the Protection of Prisoners of War of 27 July 1929, 47 Stat. 2021); Geneva Convention Relative to the Protection of Civilians in Time of War art. 1, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims Of International Armed Conflicts art. 1.1, June 8, 1977, 125 U.N.T.S. 3.

97. *See, e.g.*, The Status of Forces Agreement Between the United Nations and the Government of the Republic of South Sudan Concerning the United Nations Mission in South Sudan, August 8, 2011, http://www.un.org/en/peacekeeping/missions/unmiss/documents/unmiss_sofa_08082011.pdf [perma.cc/5QZX-CQGF] (archived Feb. 7, 2016).

98. *See, e.g.*, CHUCK MASON, CONG. RESEARCH SERV., RL34531, STATUS OF FORCES AGREEMENT (SOFA): WHAT IS IT, AND HOW HAS IT BEEN UTILIZED? 5 (2012).

99. Department of Defense, DoDD 5525.1, Status of Forces Policy and Information, ¶ 3 (Aug. 7, 1979), http://www.dtic.mil/whs/directives/corres/pdf/552501p.pdf [perma.cc/GK5V-3KT8] (archived Feb. 7, 2016). The NATO SOFA guarantees arrested members of the Armed Forces and their civilian dependents, *inter alia*, an attorney, an interpreter, and a prompt and speedy trial, as well as the right to

provisions establish which party to the agreement is able to assert criminal and/or civil jurisdiction and specify procedures for the exercise of civil and criminal jurisdiction by the host nation over personnel of the sending state if at all. Military prosecutors would vehemently object to unsupported assumptions that treaty provisions related to jurisdictional immunity from foreign prosecution serve as the functional equivalent of grants of impunity for war crimes; they merely preserve the full panoply of prosecutorial prerogatives to the sending state. Both States Parties[100] and non-States Parties[101] have convened many war crimes prosecutions in recent years based on jurisdictional authorities of domestic law and SOFA provisions that

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confront witnesses, obtain favorable witnesses, and communicate with a representative of the United States. NATO Agreement, *supra* note 92, art. VII, ¶ 9.

100. *See generally* R.v. Sec'y of State for Def., (2007) 3 W.L.R. 33 (H.L.) (documenting a situation in which British soldiers were accused of committing war crimes and the case was brought to the attention of the ICC prosecutor; the UK stepped in and prosecuted the soldiers, which they were able to do since they had the proper domestic legislation; subsequently, the ICC prosecutor found the prosecution sufficient and did not try the soldiers under the ICC); MICHAEL A. NEWTON & LARRY MAY, PROPORTIONALITY IN INTERNATIONAL LAW 194–99 (2014) (discussing the investigation and ultimate acquittal of Polish forces for crimes alleged near a village called Nangar Khel, located in the Paktika province of Afghanistan; the case represents the danger of conflating the principles of distinction and proportionality and the common understanding on this issue of ICC States Parties such as Poland, Germany, Canada, the United Kingdom, and the Netherlands, among others).

101. *See, e.g.*, U.S. v. Bram, No. ARMY 20111032, 2014 WL 7236126 (Army Ct. Crim. App. Nov. 20, 2014) (convicting appellant of solicitation to commit murder in Afghanistan, sentencing appellant to a dishonorable discharge, confinement for five years, and reduction from the grade of E-5 to the grade of E–1, and subsequently denying appeal because there was no doubt that "this was anything but a criminal venture well outside the bounds of the rules of engagement or law of armed conflict"); U.S. v. Morlock, No. ARMY 20110230, 2014 WL 7227382 (Army Ct. Crim. App. Apr. 30, 2014) (upholding conviction of attempted murder for an agreement between appellant and other soldiers from his unit, while deployed to Afghanistan, to murder non-hostile Afghan males through the use of grenades and automatic weapons and then claim their victims had either committed a hostile act or exhibited hostile intent); United States v. Behenna, 71 M.J. 228, 229 (C.A.A.F. 2012) (resulting in a sentence of Dismissal from the service, twenty-five years confinement, forfeiture of all pay and allowances on charges of unpremeditated murder and assault); United States v. Girouard, 70 M.J. 5, 7 (C.A.A.F. 2011); United States v. Maynulet, 68 M.J. 374, 377 (C.A.A.F. 2011); United States v. Clagett, No. ARMY20070082, 2009 WL 6843560, at *1 (Army Ct. Crim. App. 2009); United States v. Green, 654 F.3d 637, 646–47 (6th Cir. 2011), *cert. denied* 132 S. Ct. 1056 (2012) (Green was convicted and sentenced to life in prison for participating in a sexual assault and multiple murders while stationed in Iraq as an infantryman in the United States Army. Green was discharged due to a personality disorder before senior Army officials became aware that he and three fellow soldiers were involved in these crimes. He was convicted in federal court and the three coconspirators were tried by courts-martial and each sentenced to between 90 and 110 years imprisonment); Kevin Vaughan, *Soldier Pleads Guilty to Killing Jailed Taliban Commander,* DENVER POST (May 26, 2011), http://www.denverpost.com/ci_18142186 [https://perma.cc/EA2A-79GZ] (archived Mar. 1, 2016) (chronicling the story of a soldier sentenced to life in prison, which was limited to a term of no more than twelve and a half years through an agreement between the Army and the soldier's lawyers, and who was dishonorably discharged, and had rank reduced to E-1 after soldier pleaded guilty to premeditated murder of a detainee committed during deployment in Afghanistan).

preserve in personam jurisdiction that might otherwise have been exercised by the territorial state. Such domestic prosecutions are fully consistent with the object and purpose of the Rome Statute as well as its plain text.

The sovereign act of a State Party in transferring its own territorial jurisdiction over the nationals of another state to the Court is perfectly consistent with the VCLT **if the territorial state has a colorable claim to jurisdiction at the time of the alleged offense.** *Nemo plus iuris transferre potest quam ipse habet* is millennia old and inarguably an accepted rule of international law.[102] The Court must respect its normative impact as part of "the principles and rules of international law."[103] ICC jurisdiction is merely derivative of sovereign domestic jurisdiction, and was intentionally designed to be so in the absence of a Chapter VII Resolution conferring jurisdiction. For much the same reason, an Occupying Power does not lawfully acquire title to personal or state property within the zone of occupation and thus cannot sell or otherwise dispose of such properties.[104] Jurisdictional allocations prescribed in the Rome Statute do not present intractable difficulties for States Parties with the caveat that no state can transfer more jurisdictional authority to the ICC than it possesses under "applicable treaties"[105] at the time of the alleged offense.

To date, the Court's disregard of underlying treaty-based jurisdictional allocations undermines its intellectual consistency. Under the tenets of Article 12, personal jurisdiction over a particular perpetrator attaches only on the basis of territoriality or nationality rather than as a necessary byproduct of functionalist treaty interpretation. The Court has no treaty basis under the Rome Statute for claiming a universal scope of punitive authority over **all** potential perpetrators in **all** circumstances. Even if the *actus reus* of a particular offense might have been committed, the OTP must make a legally defensible, objective, and apolitical assessment that "there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court."[106] Of course, the nationals of States Parties and non-States Parties are dissimilar in that the Rome Statute permits nationality-based jurisdiction in the Court over the citizens of 123 states,[107] even when the receiving state otherwise has no basis for asserting territorial jurisdiction.

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102. MAARTEN BOS, A METHODOLOGY OF INTERNATIONAL LAW 5 (1984).

103. Rome Statute, *supra* note 1, art. 21(1)(b).

104. RAPHAEL LEMKIN, 1 AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION, ANALYSIS OF GOVERNMENT, PROPOSALS FOR REDRESS 43 (1944).

105. Rome Statute, *supra* note 1, art. 21(1)(b).

106. *Id.* art. 58(1)(a).

107. *See* International Criminal Court, The State Parties to the Rome Statute, http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx [perma.cc/9WEN-LPGW] (archived Feb. 7, 2016).

To reiterate, the act of transferring territorial jurisdiction over a state that is not party to the Rome Statute can be done perfectly consistent with the VCLT **if the territorial state has a colorable claim to jurisdiction at the time of the alleged offense.**[108] In this sense, the territorial state transfers its own authority in the same manner that the co-owner of a house could choose to sell or to transfer his/her property right without the consent of the other co-owner. On the other hand, if the territorial state has no legally cognizable claim (i.e., possessory interest) to criminal jurisdiction over a particular class of perpetrators at the time of the alleged offense/s then it has nothing to transfer to the supranational court irrespective of ostensible obligations under the Rome Statute. The underlying web of binding jurisdictional treaties inevitably affects the Court in three important circumstances, which will be summarized in *seriatim* below: (1) when States Parties have established treaty-based concurrent jurisdiction with other states, (2) when the UN Security Council curtails ICC jurisdiction, and (3) when a State Party has voluntarily surrendered its prosecutorial prerogatives.

As Chief Justice Marshall explained in *Schooner Exchange*, allocations of jurisdiction between sovereigns remain "rather questions of policy than of law" and "are for diplomatic, rather than legal discussion."[109] There are no a priori rules under international criminal law nor drawn from customary international law that give preference to one jurisdictional basis when two or more states possess concurrent jurisdiction.[110] More than 40 percent of the States Parties to the ICC share concurrent jurisdiction with non-States Parties. The concurrent jurisdiction embodied in the NATO SOFA, for example, governs more than fifty States Parties as it binds all NATO members as well as the nations that participate in NATO Partnership for Peace (PfP) program.[111] In addition, Japan,[112] the Republic of Korea, and

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108. *But see* 22 U.S.C. § 7421(11) (2002) (reflecting the political posture of the United States Congress, notably without any legal analysis, that "[i]t is a fundamental principle of international law that a treaty is binding upon its parties only and that it does not create obligations for nonparties without their consent to be bound. The United States is not a party to the Rome Statute and will not be bound by any of its terms. The United States will not recognize the jurisdiction of the International Criminal Court over United States nationals").

109. Schooner Exchange, 7 Cranch at 143, 146.

110. ANTONIO CASSESSE, INTERNATIONAL CRIMINAL LAW 348 (2d ed. 2003).

111. *See* Signatures of Partnership for Peace Framework, NORTH ATLANTIC TREATY ORGANIZATION, http://www.nato.int/cps/en/natolive/topics_82584.htm [https://perma.cc/7BCA-BYZJ] (archived Jan. 22, 2016).

112. *See, e.g.*, Agreement Under Article VI of the Treaty of Mutual Cooperation and Security: Facilities and Areas and the Status of United States Armed Forces in Japan, U.S.–Japan, Jan. 19, 1960, 11 U.S.T. 1652 (SOFA in the form of an executive agreement pursuant to a treaty).

the Philippines[113] are all ICC States Parties that share concurrent jurisdiction with the United States pursuant to binding SOFA provisions. As a normal operating principle, where two states exercise concurrent jurisdiction, transfer of authority from the State Party to the Court does not vitiate the jurisdiction of the non-State Party insofar as jurisdiction technically remains intact but is effectively displaced by the sovereign act of the State Party.

Arguments of some academics that the VCLT prohibits transferred territoriality are misplaced because the Rome Statute does not impose obligations on non-States Parties beyond those exercised by any sovereign state through its exercise of treaty-based concurrent criminal jurisdiction.[114] The possibility that a State Party can be subject to seemingly inconsistent duties *vis-à-vis* another state based on one treaty obligation and a different duty to the ICC based on the Rome Statute could well present States Parties with excruciatingly delicate political decisions. Article 90 of the Rome Statute[115] appears to anticipate precisely this dilemma. It specifically addresses the process to be followed when a State Party receives competing requests for extradition of a particular perpetrator.[116] By its very terms, Article 90(4) requires States Parties to comply with their underlying "international obligation to extradite" a perpetrator back to a state that is not a member of the ICC (such as the United States or Israel) even when transfer of that same person has been requested by the ICC.[117] Instances of truly concurrent jurisdiction thus create the appearance of conflicting legal obligation rather than an intractable inconsistency with the Rome Statute.

The second common situation leads to the converse result yet is also in complete conformity with the Rome Statute.[118] Under Article 13 of the Statute, the Security Council may refer situations to the ICC based upon the finding that impunity threatens international

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113. Agreement regarding the treatment of the United States armed forces visiting the Phillipines, U.S.–Phil., April 2, June 11 and 21, 1993, Bilateral Treaties in Force as of Jan. 1, 2013.

114. The debate over the constitutionality of U.S. accession to the Rome Statute on the basis of its different due process standards mirrored earlier debates regarding the jurisdictional provisions of the Genocide Convention. Both arguments are inaccurate. Myres S. McDougal & Richard Arens, *The Genocide Convention and the Constitution,* 3 VAND. L. REV. 683 (1950).

115. Rome Statute, *supra* note 1, art. 90.

116. *Id.* Article 90 implicitly concedes the point of this Article in that there is no embedded presumption that ICC jurisdiction automatically preempts competing domestic jurisdictional authority.

117. *Id.* art. 90(4).

118. *But see* Deborah Ruiz Verduzzo, *The Relationship Between the ICC and the United Nations Security Council, in* THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 30, 36 (Carsten Stahn ed., 2015) (positing with no evidence or analysis that the position of the Security Council with respect to Resolutions 1593 and 1970 "goes against the Rome Statute").

peace and security.[119] Such referrals are not limited by the nationality or territoriality constraints derived from state consent under the normal provisions of Article 12.[120] The 2005 referral of ICC jurisdiction over Darfur was the first such constitutive act in the history of the Court.[121] As a more recent marquee example, UN Security Council Resolution 1973[122] empowered states to "use all necessary means" to protect civilians inside Libya and to enforce the no-fly zone over Libyan territory. This Chapter VII decision was implemented in the shadow of the previous referral of jurisdiction to the Court over the situation in Libya by virtue of Resolution 1970.[123] Resolution 1970 mirrored the language of the earlier Darfur Resolution by expressly providing that

> nationals, current or former officials or personnel from a State outside the Libyan Arab Jamahiriya which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that State for all alleged acts or omissions arising out of or related to operations in the Libyan Arab Jamahiriya established or authorized by the Council, unless such exclusive jurisdiction has been expressly waived by the State.[124]

Thus, every time it has created ICC jurisdictional authority, the Security Council has simultaneously constrained the reach of that authority over the nationals of non-States Parties to the Rome Statute. This is indistinguishable from the Security Council Resolutions creating the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, which gave each *ad hoc* tribunal legal authority, but

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119. Rome Statute, *supra* note 1, art. 13(b).

120. *See* The Prosecutor v. Al Bashir, ICC-02/05-01/09-3, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, ¶¶ 36–42 (Mar. 4, 2009), https://www.icc-cpi.int/iccdocs/doc/doc1759849.pdf [https://perma.cc/C68T-ZNB4] (archived Feb. 18, 2016).

121. *See* S.C. Res. 1593, ¶ 1 (Mar. 15, 2005), http://www.icc-cpi.int/nr/rdonlyres/85febd1a-29f8-4ec4-9566-48edf55cc587/283244/n0529273.pdf [perma.cc/85SA-GG6G] (archived Jan. 22, 2016) (stating simply that the Security Council Acting under Chapter VII "[d]ecides to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court").

122. S.C. Res. 1973 (Mar. 17, 2011), http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/268/39/PDF/N1126839.pdf?OpenElement [perma.cc/D2YA-6MMA] (archived Feb. 7, 2016).

123. S.C. Res. 1970, ¶ 4 (Feb. 26, 2011), http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/245/58/PDF/N1124558.pdf?OpenElement [perma.cc/K8NG-MS7A] (archived Feb. 7, 2016).

124. *Id.* ¶ 6; *see* S.C. Res. 1593, ¶ 6 (providing that "nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State.").

simultaneously constrained jurisdictional scope based on articulated geographic and temporal limits.[125]

Jurisdictional limitations prescribed by Security Council Resolutions do not represent amendments to the Rome Statute because they conform to the intent of Article 13(b) and well-established international practice.[126] To be clear, Resolution 1970 was unanimously adopted by the Security Council and received the affirmative votes of ten ICC States Parties, to include Germany, France, South Africa, the United Kingdom, and Portugal. The Secretary-General spoke in favor of the Resolution. The President of the Council voiced the only note of caution regarding the jurisdictional carve-out, speaking in his capacity as the representative of Brazil.[127]

States have therefore consented to the premise of the UN Charter that the Security Council may override otherwise binding treaty obligations within the scope of its Chapter VII powers.[128] It is

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125. *See* Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 45 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995), http://www.un.org/icty/tadic/appeal/decisione/51002.htm [https://perma.cc/W2LP-X4BF] (archived Feb. 18, 2016).

126. Though the Security Council failed to pass a Chapter VII resolution with respect to the situation in Syria because both China and Russia exercised their veto power based on other concerns, the draft Resolution S/2014/348 also contained the same jurisdictional limitation in paragraph 7. This language caused Argentina to voice its concerns as follows:

> The Security Council does not have the power to declare an amendment to the Statute in order to grant immunity to nationals of States non-Parties who commit crimes under the Statute in a situation referred to the Court. That is to say, nothing in the text of paragraph 7 would have given the power to amend the standard of the Statute with regard to the Court's jurisdiction in a given situation or the fact that if a decision is needed, the Court is ultimately the judge of its own jurisdiction.

The Situation in the Middle East (Syria), Record of Debates on draft Resolution, S/2014/348, ¶ 11 (May 22, 2014).

127. *See* Peace and Security in Africa, U.N. Doc. S/PV.6491 (February 26, 2011), http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.6491 [https://perma.cc/5HP6-M7GE] (archived Feb. 7, 2016) ("Brazil is a long-standing supporter of the integrity and universality of the Rome Statute. We oppose the exemption from jurisdiction of nationals of those countries not parties to the Rome Statute. In the face of the gravity of the situation in Libya and the urgent need for the Council to send a strong, unified message, my delegation supported this resolution. However, we express our strong reservation concerning paragraph 6. We reiterate our conviction that initiatives aimed at establishing exemptions of certain categories of individuals from the jurisdiction of the International Criminal Court are not helpful to advancing the cause of justice and accountability and will not contribute to strengthening the role of the Court.").

128. *See* U.N. CHARTER art. 103 (providing that Charter obligations "shall prevail" over inconsistent treaty obligations); Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.), 1992 I.C.J. Rep. 114, 126–27 (Provisional Measures Order of

of course true that the ICC exercises a *sui generis* scope of authority within its mandate as a supranational organization with an independent "international legal personality."[129] Some academics infer that Council-imposed jurisdictional limitations over non-States Parties "have no place"[130] in Article 13(b) referrals because the ICC is not similarly situated to a sovereign state obligated by the UN Charter to "accept and carry out the decisions of the Security Council."[131] This line of logic misapprehends the true nature of ICC jurisdiction. Jurisdiction under Article 13(b) actually *originates* by virtue of Security Council action, which itself manifests the intention of its members acting in their sovereign capacity.

The Court is a secondary subject of international law constituted by the common will of states through the act of transferring their powers. Both the jurisdictional scope of the Court and the range of substantive offenses it is empowered to investigate are limited by the authority conveyed from states. Thus, it cannot exercise more power than it has been granted by its creators.[132] With respect to the creation of ICC jurisdiction under Article 13(b), the limited scope of allocation is absolutely binding because the Court cannot simply create its own jurisdictional authority over non-States Parties.[133] The ICC, of course, exercises the full scope of its delegated jurisdiction with institutional independence and (theoretical) apolitical autonomy. As the International Court of Justice opined in *Congo v. Belgium*, "immunity from jurisdiction . . . does not mean that [alleged perpetrators] enjoy impunity."[134] There is accordingly no basis for sustaining a presumption that circumscribed ICC jurisdiction over citizens of non-States Parties violates international law in general or obviates the core object and purpose of the Rome Statute.

The situations in Afghanistan and Palestine illustrate the third strand of confluence, and for our purposes the most salient. At the same time, purported conflicts between the obligations of the Rome Statute and underlying but equally authoritative treaty norms can be resolved in an intellectually consistent manner. The ICC is not an all-

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Apr. 14) (holding that a Security Council resolution superseded whatever rights Libya may have enjoyed under a pre-existing treaty).

129. Rome Statute, *supra* note 1, art. 4(1).

130. Rod Rastan, *Jurisdiction*, *in* THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 141, 162–63 (Carsten Stahn ed., 2015).

131. U.N. Charter, art. 25.

132. *See* August Reinisch, *Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions*, 95 AM. J. INT'L L. 851, 858 (2001).

133. It must also be clearly understood that the limitation of Court jurisdiction in the Libya situation has no bearing whatever on other existing grounds for national jurisdiction derived from other sources, such as universal jurisdiction based on violations of the grave breach provisions of the Geneva Conventions or the Torture Convention or any other domestic statutory authority.

134. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 ICJ Rep. 1, ¶ 60 (Feb. 14).

encompassing judicial authority. Upon entry into the ASP, both Afghanistan and Palestine conveyed jurisdiction within the meaning of Article 12, but the quantum of that delegated jurisdiction is limited by their preexisting treaty-based constraints.[135]

Neither Afghanistan nor Palestine can convey juridical authority to the Court over all alleged offenses perpetrated by all persons on their territory because they do not enjoy exhaustive jurisdictional power. To be precise, no scholar or politician can authoritatively describe the territorial boundaries of a Palestinian state at the time of this writing. The ICC website implicitly concedes that the scope of territorial jurisdiction purportedly conveyed by the PA is legally indeterminate. On the top of the entry page to the ICC website, users can scroll over the listing of situations under investigation and those under preliminary examination; when a mouse cursor touches the name of each state its geographic contours pop up along with its name, except for Palestine.[136] As a necessary predicate to proceeding with any investigation based on territoriality, the Court must create its own template for the scope of legal authority conveyed by the Palestinian Authority under the Rome Statute.

In any event, there is nothing in the Rome Statute or in state practice that compels the conclusion that the States Parties have an unyielding obligation to confer all traces of sovereign prosecutorial authority to the Court. Nor can it acquire more authority than that bestowed by its creators in the text of the multilateral treaty. The Court is a "derivative" or "secondary" subject of international law in the sense that it does not possess any original powers or sovereign authority in its own right.[137] *Nemo plus iuris transferre potest quam ipse habet.* In the situations of Afghanistan and Palestine, the quantum of territorial jurisdiction is received by the Court "subject to all burdens resting upon it."[138] This section concludes by detailing the treaty-based limitations on the otherwise unfettered jurisdictional delegations of Afghanistan and Palestine at the time of their accession to the Rome Statute.

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135. Roman law distinguished between original ownership (in which the thing owned is created by a person that had no predecessor in title) and derivative (by which ownership is transferred). CARL SADOWSKI, INSTITUTES AND HISTORY OF ROMAN PRIVATE LAW WITH CATENA OF TEXTS 88 (E.E. Whitfield trans. & ed., 1886).

136. INTERNATIONAL CRIMINAL COURT (Jan. 24, 2016), https://www.icc-cpi.int/EN_Menus/icc/Pages/default.aspx [perma.cc/XK5Y-9X9F] (archived Jan. 24, 2016).

137. August Reinisch, *Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions*, 95 AM. J. INT'L L. 851, 858 (2001).

138. CHARLES PHINEAS SHERMAN, II ROMAN LAW IN THE MODERN WORLD 202 (2d. ed. 1924).

1. Afghanistan

As a non-State Party, even if one or more Americans[139] committed a prohibited *actus reus* within the temporal jurisdiction of the Court, there is no basis of territoriality nor of nationality to support an assertion of ICC prosecutorial prerogative for acts alleged in Afghanistan. Afghanistan deposited its instrument of ratification to the Rome Statute on February 10, 2003, which meant that the treaty entered into force for Afghanistan on May 1, 2003.[140] In its December 2014 Report on Preliminary Examination Activities, the OTP concluded that "[t]he ICC therefore has jurisdiction over Rome Statute crimes committed on the territory of Afghanistan or by its nationals from 1 May 2003 onwards."[141] The OTP publicly disclosed its investigation into possible detainee mistreatment and abuse committed by "international forces within the temporal jurisdiction of the Court" and singled out American armed forces for further examination based on allegations of misconduct against unnamed individuals from May 2003 to June 2004.[142] Article 12 conveys jurisdiction over crimes committed on the territory of Afghanistan, so

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139. On 31 December 2000, which was the last day permitted by the treaty, the United States signed the Rome Statute at the direction of President Clinton. *See* Rome Statute, *supra* note 1, art. 125(1). The White House statement clarified that President Clinton ordered the signature because the United States seeks to "remain engaged in making the ICC an instrument of impartial and effective justice in the years to come." *Statement on the Rome Treaty on the International Criminal Court* (Dec. 31, 2000), 37 WEEKLY COMP. PRES. DOC. 4 (2001), *reprinted in* DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 2000, 272 (Sally J. Cummins & David P. Stewart eds.), http://www.state.gov/documents/organization/139599.pdf [perma.cc/7ULW-6TEC] (archived Jan. 24, 2016). President Clinton made clear that he would "not recommend that my successor submit the Treaty to the Senate for [ratification] until our fundamental concerns are satisfied." In its operative paragraph, President Clinton, wrote that

> In signing, however, we are not abandoning our concerns about significant flaws in the Treaty. In particular, we are concerned that when the Court comes in existence, it will not only exercise authority over personnel of States that have ratified the treaty, but also claim jurisdiction over personnel of States that have not . . . . Signature will enhance our ability to further protect U.S. officials from unfounded charges and to achieve the human rights and accountability objectives of the ICC. In fact, in negotiations following the Rome Conference, we have worked effectively to develop procedures that limit the likelihood of politicized prosecutions. For example, U.S. civilian and military negotiators helped to ensure greater precision in the definitions of crimes within the Court's jurisdiction.

Id. at 273.

140. Rome Statute, *supra* note 1, art. 126(2).

141. The Office of the Prosecutor, International Criminal Court, *Report on Preliminary Examination Activities*, ¶ 76 (Dec. 2, 2014), http://www.icc-cpi.int/iccdocs/otp/OTP-Pre-Exam-2014.pdf [perma.cc/K2R8-UZWK] (archived Jan. 24, 2016).

142. *Id.* ¶¶ 94–96.

the OTP assumption appears to reflect a straightforward, if superficial, assessment of the Statute.

However, this view overlooks a series of jurisdictional agreements that curtailed the permissible scope of Afghani territorial jurisdiction. The Security Council authorized deployment of an Interim Security Force to Afghanistan in Resolution 1386, adopted in December 2001.[143] As early as January 4, 2002, the British force commander of the Interim Security Assistance Force (ISAF) negotiated and signed a comprehensive agreement with the interim government in Afghanistan.[144] The ISAF Agreement included an Annex entitled "Arrangements Regarding the Status of the International Security Assistance Force."[145] The Annex provided, *inter alia*, that "ISAF and supporting personnel, including associated liaison personnel, will under all circumstances and at all times be subject to the exclusive jurisdiction of their respective national elements in respect of any criminal or disciplinary offences which may be committed by them on the territory of Afghanistan."[146] The Annex implicitly relied on Article 98 as well by providing that all ISAF personnel are immune from arrest or detention by Afghan authorities and may not be turned over to any international tribunal or any other entity or State without the express consent of the contributing nation.[147] Notice the intent of the parties to make the preclusive jurisdictional effects as broad as possible by covering "all circumstances and at all times."

This early agreement comports with the intent of Article 98 insofar as it specifically prevents non-consensual transfer.[148] However, given that the agreement retained its legal force and effect following Afghan accession to the Rome Statute, it represents an indivisible whole with respect to territorial jurisdiction over the nationals of non-States Parties. In other words, the scope of Afghani

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143. S.C. Res. 1386 (Dec. 20, 2001), http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/708/55/PDF/N0170855.pdf?OpenElement [perma.cc/A6CP-BX9E] (archived Feb. 7, 2016).

144. *Letter dated 14 January 2002 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations Addressed to the President of the Security Council*, U.N. Doc. S/2002/117 (Jan. 25, 2002), http://reliefweb.int/sites/reliefweb.int/files/resources/9B11C79DE13BB700C1256B5300381E4F-unsc-afg-25jan.pdf [perma.cc/7HND-5T3K] (archived Jan. 24, 2016).

145. *Id.*

146. *Id.* ¶ 3.

147. *Id.* ¶ 4.

148. American officials later negotiated a stand-alone supplemental Article 98 agreement with Afghanistan that was signed in Washington on September 20, 2002. Agreement between the Government of the Transitional Islamic State of Afghanistan and the Government of the United States of America regarding the surrender of persons to the International Criminal Court, Transitional Islamic State-U.S., Sept. 20, 2002, https://www.law.georgetown.edu/library/research/guides/upload/Afghanistan03-119.pdf [perma.cc/YAP9-Q3QN] (archived Jan. 24, 2016).

territorial jurisdiction was voluntarily constrained effective January 4, 2002, and thus correspondingly curtailed when transferred to the ICC beginning in May 2003. As noted above, there is no basis in the Rome Statute for the ICC to assert that its authority over crimes committed by nationals of non-States Parties on the territory of a State Party derives from some independent or transcendent purpose that obviates the need to obtain the consent of the territorial state.

It is important to note in this context that the permanent agreement reached between Afghanistan and NATO on September 20, 2014, included nearly identical language revalidating exclusive jurisdiction to all NATO nations.[149] It also included explicit language noting that the permanent agreement does not "limit or prejudice the implementation" of any "bilateral Agreement or Arrangement" then in force for Afghanistan.[150] Many Americans deployed to Afghanistan did so under the auspices of ISAF, but many more deployed in distinctive operational lines of command and control as part of Operation Enduring Freedom (OEF).[151] The treaty[152] that applied to American personnel during OEF took the form of an exchange of diplomatic notes (thus conforming to the description above).

Afghanistan relinquished any claim to criminal jurisdiction over the nationals of the United States by accepting that they are accorded status equivalent to that accorded to the administrative and technical staff of the Embassy of the United States of America under the Vienna Convention on Diplomatic Relations of April 18, 1961.[153] By conveying full immunity from the criminal jurisdiction of the host nation for offenses alleged on its territory, such status (termed A&T P&I by military practitioners) is just one notch below full diplomatic

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149. Agreement between the North Atlantic Treaty Organization and the Islamic Republic of Afghanistan on the Status of NATO Forces and NATO personnel conducting mutually agreed NATO-led activities in Afghanistan, U.S.-Afg., art. 11(1), Sept. 30, 2014, http://www.nato.int/cps/en/natohq/official_texts_116072.htm [perma.cc/B98K-MA2E] (archived Jan. 24, 2016) ("Afghanistan, while retaining its sovereignty, recognizes the particular importance of disciplinary control, including judicial and non-judicial measures, by NATO Forces Authorities over Members of the Force and Members of the Civilian Component and NATO Personnel. Afghanistan therefore agrees that the State to which the Member of the Force or Members of the Civilian Component concerned belongs, or the State of which the person is a national, as appropriate, shall have the exclusive right to exercise jurisdiction over such persons in respect of any criminal or civil offenses committed in the territory of Afghanistan.").

150. *Id.* art. 24.

151. ISAF began its operations as a result of the Security Council decision, while the legal authority for coalition forces participating in Enduring Freedom originated with the sovereign right of individual and collective self-defense.

152. VCLT, *supra* note 24, art. 2(1) (defining a treaty as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation").

153. Vienna Convention on Diplomatic Relations and Optional Protocol on Disputes art. 37(2), April 18, 1961, 23 U.S.T. 3227, T.I.A.S. 7502.

immunity enjoyed by the Ambassador upon delivery of his full powers instrument[154] to the sovereign government. The Vienna Convention is absolutely clear that persons enjoying A&T P&I status are fully immune from host nation criminal law for all purposes at all times and subject to limited civil immunity only for acts undertaken in their official capacity. In its reply dated December 12, 2002, the Afghan Foreign Ministry declared "its concurrence" with the curtailed scope of sovereign criminal jurisdiction.[155] In a second demarche dated May 28, 2003, Afghanistan reiterated its concurrence and noted that the agreement entered into force on that date pursuant to the Foreign Minister's signature.[156]

The United States arguably had exclusive jurisdiction over any U.S. national alleged to have committed any cognizable criminal offense within Afghanistan as early as the December 12 "concurrence."[157] There is simply no credible argument that Afghanistan had any lawful authority to prosecute American forces for any acts committed on or after May 28, 2003. Acts that were literally committed "on the territory" of Afghanistan could therefore not lawfully be delegated to the ICC based on the principle of transferred territoriality that is the bedrock of Article 12 authority over the nationals of non-States Parties. Any other reading of Article 12 would warp its entire meaning within the larger context of the Rome Statute. The consequences for the larger body of treaty norms occasioned by the OTP assumption of such power will be considered in Part IV below.

2. The West Bank and Gaza

The legal situation in the Occupied Territories is more controversial and, it must be said, more straightforward based on the relevant treaty texts. Officials of the PA attempted to leverage the

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154. VCLT, *supra* note 24, art. 7(1) (providing the framework for assessing the legally binding authority of persons who purport to speak on behalf of states as either producing "appropriate full powers" or when the practice of the state or from other circumstances that the "intention was to consider that person as representing the State for such purposes").

155. Agreement regarding the Status of United States Military and Civilian Personnel of the U.S. Department of Defense Present in Afghanistan in connection with Cooperative Efforts in Response to Terrorism, Humanitarian and Civic Assistance, Military Training and Exercises, and Other Activities, U.S.-Afg., Exchange of notes September 26 and December 12, 2002 and May 28, 2003, T.I.A.S., State Dep't No. 03-67, 2003 WL 21754316, 6192 KAV i (entered into force May 28, 2003).

156. *Id.*

157. Arié E. David, *Faits Accomplis in Treaty Conflicts*, 6 INT'L L. 88, 98 n.13 (1972) (citing the example of the Soviet government that renounced the Treaty of Brest-Litovsk in 1918 through a radio proclamation "addressed to everybody" which was in due course regarded in 1925 by a German court as "sufficient expression" that the Soviet government regarded the treaty as abrogated and invalid).

threat of ICC accession to achieve diplomatic progress towards formalized international recognition as a state. The PA delegate participated in the thirteenth meeting of the ASP as an "invited observer state" for the first time in December 2014. He challenged the Court to use its power to prosecute Israelis for "war crimes and crimes against humanity" being perpetrated in the Occupied Territories.[158] On December 30, 2014, Jordan introduced a draft Security Council Resolution that would have mandated a "just, lasting, and comprehensive"[159] negotiated settlement between Israel and Palestine that recognized mutually agreed borders of both states and mandated an end to the Israeli occupation by the end of 2017.[160] The Resolution failed to achieve the requisite affirmative votes, thereby avoiding the necessity for any veto by a member of the P-5.[161]

In response to that diplomatic defeat, the PA submitted its third declaration under Article 12(3) of the Statute for "crimes . . . committed in the occupied . . . territory, including East Jerusalem, since June 13, 2014," on the following day.[162] The date chosen as the temporal beginning of ICC authority coincided with the beginning of the controversial military campaign known as Tzuk Eitan by which Israeli forces entered the Gaza Strip to root out the tunnel complexes from which Hamas continued to fire indiscriminate missiles against Israeli homes.[163] The PA later deposited its full instrument of ratification to the Rome Statute on January 2, 2015, which had the legal effect of transferring territorial and nationality-derived

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158. Dr. Riyad Mansour, Ambassador, Statement by the Permanent Observer Mission of the State of Palestine to the United Nations before the Assembly of State Parties to the Rome Statute of the International Criminal Court (thirteenth session) (Dec. 15, 2014), http://www.icc-cpi.int/iccdocs/asp_docs/ASP13/GenDeba/ICC-ASP13-GenDeba-Palestine-ENG.pdf [perma.cc/RT3S-DULQ] (archived Jan. 24, 2016).

159. S.C. draft Res. 916, ¶ 11 (Dec. 30, 2014), http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2014/916 [perma.cc/J964-9FHL] (archived Jan. 24, 2016).

160. *See* U.N. SCOR, 69th Sess., 7354th mtg., U.N. Doc. S/PV.7354, The Situation in the Middle East including the Palestinian question (Dec. 30, 2014), http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.7354 [perma.cc/NMF3-LQXB] (archived Jan. 24, 2016).

161. *Id.*

162. Declaration Accepting the Jurisdiction of the International Criminal Court, President Abbas of Palestine, (Dec. 31, 2014), http://www.icc-cpi.int/iccdocs/PIDS/press/Palestine_A_12-3.pdf [perma.cc/QW2S-7LGL] (archived Jan. 24, 2016).

163. *See, e.g*, SPECIAL REPORT: OPERATION PROTECTIVE EDGE, https://www.idfblog.com/operationgaza2014/#Home [perma.cc/7YBS-JULH] (archived Jan. 24, 2016); Rep. of the Detailed Findings of the Independent Comm'n of Inquiry Established Pursuant to H.R.C. res. S-21/1, U.N. Doc. A/HRC/29/52 (Jun. 24, 2015), http://www.ohchr.org/EN/HRBodies/HRC/CoIGazaConflict/Pages/ReportCoIGaza.aspx [perma.cc/D7G9-CM8N] (archived Jan. 24, 2016).

jurisdiction in accordance with Article 12 of the Statute, effective on the date the treaty entered into force for Palestine.[164]

There has been a tremendous amount of academic literature dedicated to considering the validity of previous PA attempts to convey jurisdiction to the Court under Article 12(3)[165] and the corollary question whether it qualifies as a "state" within the meaning of that Article for the purposes of ICC accession.[166] It is widely known that the first ICC Prosecutor declined to accept the previous PA proffers,[167] but did so on a dubious legal basis. Depending upon the Court's ultimate decision regarding the previous efforts to instantiate Court jurisdiction, ICC authority may be limited to acts committed on or after April 1, 2015,[168] which is the date that the Statue entered into force for Palestine.[169]

In any event, there are at least three evident conclusions at the time of this writing. Firstly, the General Assembly Resolution granting Palestine "non-member observer status"[170] paired with the acceptance of Palestine into the ASP is dispositive in interpreting the breadth of Article 12 for the purposes of its *sui generis* meaning within the Rome Statute.[171] Secondly, Professor Schabas is correct that there is no requirement that the territorial jurisdiction conferred

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164. State of Palestine: Accession, C.N.13.2015.Treaties-XVIII.10 (Depositary Notification, Jan. 6, 2015), https://treaties.un.org/doc/Publication/CN/2015/CN.13.2015-Eng.pdf [perma.cc/V64R-WW7C] (archived Jan. 24, 2016).

165. *See, e.g.*, Eugene Kontorovich, *Israel/Palestine: The ICC's Uncharted Territory*, 11 J. INT'L CRIM. JUST. 979 (2013) (discussing the challenge of the legality of Israeli settlement on the West Bank under ICC jurisdiction); Malcolm N. Shaw, *The Article 12(3) Declaration of the Palestinian Authority, the International Criminal Court, and International Law*, 9 J. INT. CRIM. JUST. 301, 321 (2011); William Thomas Worster, *The Exercise of Jurisdiction by the International Criminal Court over Palestine*, 26 AM. U. INT'L L. REV. 1153 (2012).

166. JOHN QUIGLEY, THE STATEHOOD OF PALESTINE: INTERNATIONAL LAW IN THE MIDDLE EAST CONFLICT (2010); Yael Ronen, *ICC Jurisdiction over Acts Committed in the Gaza Strip*, 8 J. INT'L CRIM. JUST. 3, 6 (2010); Yuval Shany, *In Defense of Functional Interpretation of Article 12(3) of the Rome Statute*, 8 J. INT'L CRIM. JUST. 329, 338 (2010) (noting that "the Palestinian territories (with the exception of East Jerusalem) are not the object of a competing sovereignty claim by Israel or any other state, means that by accepting the PNA declaration and relying on it to investigate the situation in Gaza, the Prosecutor or the Court would not be required to decide a contentious sovereignty claim.").

167. Situation in Palestine, ICC (April 3, 2012), http://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf [perma.cc/FWL4-HQLY] (archived Jan. 24, 2016).

168. *See* Mohamed M. El Zeidy, *Ad Hoc Declarations of Acceptance of Jurisdiction: The Palestinian Situation under Scrutiny*, *in* THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 179, 1999 (Carsten Stahn ed., 2015).

169. Rome Statute, *supra* note 1, art. 126(2).

170. G.A. Res. 52/164 (Nov. 29, 2012).

171. VCLT, *supra* note 24, art. 31(3)(b) (stating that the text of the treaty can be interpreted in light of "[a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation").

upon the Court by ratification or accession is limited to territory over which a State exercises effective control at the time of accession.[172] The key issue is sovereignty along with its correlative power to enforce criminal law or to delegate that enforcement to another state or entity. The precise boundaries of Palestine are indeterminate at the time of this writing. It follows that even if the PA possessed the authority to transfer territorial jurisdiction to the ICC the scope of that authority is opaque. Indeed, in the wake of the Oslo Accords, both parties involved and the International Court of Justice have avoided resolution of "permanent status issues such as borders."[173] The OTP cannot possibly ascertain the precise geographic boundaries of authoritative territorial jurisdiction transferred to the Court under Article 12. Finally, and most importantly, the transferred territorial jurisdiction of the ICC cannot be extended over Israeli citizens because the PA has neither de facto nor de jure authority to claim such criminal jurisdiction in its own right.

The law of occupation under the Fourth Geneva Convention and the plain text of the Oslo Accords provide incontrovertible grounds for denying Palestinian sovereignty over Israeli nationals in the Occupied Territories of the West Bank and the Gaza Strip. Israel has treated the Occupied Territory within the mandates of the laws and customs of occupation since 1967. The 1949 Geneva Conventions marked a definitive rejection of the concept of *debellatio*, under which the occupier assumed full sovereignty over the civilians in the occupied territory.[174] A state of occupation does not "affect the legal status of the territory in question,"[175] hence its cornerstone is the broad obligation that the foreign power must "take *all* the measures in his power to restore, and ensure, as far as possible, public order

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172. SCHABAS, *supra* note 33, at 285 (noting the theoretical possibility that Syrian accession to the Rome Statute could convey territorial jurisdiction over the Golan Heights because overall sovereignty is merely displaced by Israeli occupation).

173. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 177–81 (July 9), *reprinted in* 43 I.L.M. 1009, 1038–39 (2004), http://www.icj-cij.org/docket/index.php?p1=3& [perma.cc/8X2S-WJRJ] (archived on Jan. 24, 2016).

174. MORRIS GREENSPAN, THE MODERN LAW OF LAND WARFARE 600–01 (1959). *Debellatio* "refers to a situation in which a party to a conflict has been totally defeated in war, its national institutions have disintegrated, and none of its allies continue militarily to challenge the enemy on its behalf." EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 59 (1993).

175. Protocol I Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, U.N. Doc. A/32/144 Annex I, art. 4, (entered into force Dec. 7, 1978), *reprinted in* 16 I.L.M. 1391 (1977). U.S. policy in this regard is clear that "the fact of occupation gives the Occupying Power the right to govern enemy territory temporarily, but does not transfer sovereignty of occupied territory to the Occupying Power." DOD LAW OF WAR MANUAL, *supra* note 48, 752, ¶11.4.

and safety."[176] While the Supreme Court of the Netherlands has noted that Israel does not have sovereign authority over the Occupied Territory, it has upheld Israeli criminal jurisdiction over offenses committed therein.[177] In the authoritative French text, the occupier must preserve "*l'ordre et la vie publique*" (i.e., public order and life).[178] The corresponding duty found in Article 43 of the 1907 Hague Regulations to respect local laws unless "absolutely prevented" ("*empêchement absolu*") imposes a seemingly categorical imperative. However, rather than being literal, "*empêchement absolu*" has been widely interpreted as the equivalent of "*necessité*."[179] Israeli law applies to Israeli public servants, both civilian and military, for acts committed within the Occupied Territories.[180]

From the outset of the occupation, Israeli military authorities exercised full authority over the criminal system in the Occupied Territories [181] and have updated guidance to local commanders as needed.[182] The Oslo Accords recognize the full "legislative, executive, and judicial" authority of the Israeli military government "in accordance with international law."[183] The Israeli Supreme Court sitting as the High Court of Justice held that "[a]s is well known, Article 43 has been acknowledged in our rulings as a quasi-constitutional framework maxim of the belligerent occupation laws, which sets a general framework for the manner by which the military commander exercises its duties and powers in the occupied territory."[184] The law of occupation "sets out the duty and power of the military commander to maintain order and security in the territory under his control. There is no doubt that one of the main

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176. Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex, art. 43, Oct. 18, 1907 (emphasis added).

177. HR 9 juni 2015, ECLI: NL: PHR: 2015: 967 (Neth.), http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:PHR:2015:967 [perma.cc/2S2W-7T9Q] (archived Feb. 7, 2016).

178. The authoritative French text reads: "L'autorité du poivoir legal ayant passé de fait entre les mains de l'occupant, celui-ci prendra toutes les mesures qui dependent de lui en vue de rétablir et d'assurer, autant qu'l est possible, l'order et la vie publique end respectant, sauf empechement absolu les lois en virueur dans le pays."

179. Yoram Dinstein, Legislation under Article 43 of the Hague Regulations: Belligerent Occupation and Peacebuilding, No. 1, *Program on Humanitarian Policy and Conflict Research*, Harvard University Occasional Paper Series 4 (Fall 2004).

180. DAVID KRETZMER, THE OCCUPATION OF JUSTICE 20–29 (2002).

181. Order Concerning Security Provisions (Judea and Samaria) 5727–1967.

182. Order regarding Security Provisions [Consolidated Version] (Judea and Samaria) (No. 1651), 5770–2009, May 2, 2010, http://nolegalfrontiers.org/en/military-orders/mil01 [perma.cc/TP8H-KCAH] (archived Jan. 24, 2016).

183. Interim Agreement on the West Bank and the Gaza Strip, Isr.-Palestine, art. XVII 4(b), Sept. 28, 1995, 36 I.L.M. 551 (1997) [hereinafter Oslo II], http://www.refworld.org/docid/3de5ebbc0.html [perma.cc/3P7F-D28F] (archived Jan. 24, 2016).

184. HCJ 2164/09, Yesh Din v. Commander of IDF Forces in Judaea and Samaria, et. al (Dec. 26, 2011) (Isr.).

duties for which the military commander is responsible within this framework is the duty to ensure that the law is upheld in the territories."[185] Palestinian criminal jurisdiction thus does not include Israeli citizens in the Occupied Territories under the laws and customs of warfare.[186]

While the Geneva Conventions preempt Palestinian jurisdiction over Israelis as a general matter, the plain text of the Oslo Accords does so with unmistakable precision. Under the 1995 Accords, "Israel has sole criminal jurisdiction over . . . offenses committed in the Territory by Israelis."[187] The Accords specify that the West Bank and Gaza Strip constitute a "single territorial unit."[188] Israeli citizens cannot be arrested or detained by Palestinian authorities.[189] Neither Israel nor the PA has abrogated the Accords, and Palestinian judges that have attempted to exercise criminal authority over Israelis following the General Assembly's acceptance of Palestine as a "non-member observer state" have been removed from office by PA orders. Security cooperation also continues in accordance with the terms of Oslo II. The language of Article XVII, para. 2(a) is particularly relevant in the context of a purported transfer of territorial jurisdiction to the ICC: "The territorial jurisdiction of the Council shall encompass Gaza Strip territory, except for the Settlements and the Military Installation Area shown on map No. 2, and West Bank territory, except for Area C which, except for the issues that will be negotiated in the permanent status negotiations will be gradually transferred to Palestinian jurisdiction in three phases . . . ."[190] Annex IV of the Accords reiterates this division of jurisdiction on the West

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185. HCJ 9593/04, Rashed Morar, Head of Yanun Village Council v. IDF Commander in Judaea and Samaria, 2 Isr. L. Rep. 56, ¶ 30 (June, 26 2006); *see also* HCJ 9132/07, Jaber Al-Bassiouni Ahmed et. al. v. Prime Minister et.al. ¶ 12 (Jan. 27, 2008) (Isr.) (holding that Israeli officials must comply with human rights imperatives).

186. UK MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT 275, ¶ 11.3 (2004).

187. Oslo II, *supra* note 183, Annex IV, Art. 1(2)(b), http://www.mfa.gov.il/MFA/ForeignPolicy/Peace/Guide/Pages/THE%20ISRAELI-PALESTINIAN%20INTERIM%20AGREEMENT%20-%20Annex%20IV.aspx#article1 [perma.cc/8RCH-6TFF] (archived Jan. 24, 2016) (Article 7b of the Annex also specifies that Israel has jurisdiction in the Occupied Territory over crimes committed against Israel or against Israeli citizens); GEOFFREY R. WATSON, THE OSLO ACCORDS: INTERNATIONAL LAW AND THE ISRAELI-PALESTINIAN PEACE AGREEMENTS (2000).

188. Oslo II, *supra* note 183, Article XVII, ¶ 1.

189. This provision alone arguably makes the textual mandate of Article 98 binding upon the Court, as no Palestinian official has authority to hold or detain any Israeli, much less authority to transfer non-existent criminal jurisdiction to any other state or entity. As noted above, however, jurisdiction under Article 12 is a distinctive issue from the limitation on the right of a State Party to transfer a particular perpetrator envisioned under Article 98.

190. West Bank: Area C Map, UN OFFICE FOR THE COORDINATION OF HUMANITARIAN AFFAIRS, https://www.ochaopt.org/documents/ocha_opt_area_c_map_2011_02_22.pdf [perma.cc/9CW6-RN4X] (archived Jan. 24, 2016).

Bank as follows: Areas A (full Palestinian control), B (Palestinian civil control and joint Palestinian-Israeli security control), and C (full Israeli civil and security control, except over Palestinians). Area C includes the settlements, their environs, and roadways.

Crimes committed by Israelis in Occupied West Bank or the Gaza Strip are, under Oslo, solely Israel's to investigate and try. Every treaty imposes binding obligations only upon the "parties to it," and accordingly it imposes obligations and bestows rights that "must be performed by them in good faith."[191] Notwithstanding the import of the *pacta sunt servanda* principle noted above, no Palestinian official has proffered a public explanation justifying the authority of the PA to delegate territorial authority over Israeli citizens in the Occupied Territory to the ICC.

III. THE PROSECUTOR'S APPROACH UNDERMINES THE ROME STATUTE ITSELF

This Article has thus far demonstrated the intellectual dissonance between the derivative nature of ICC jurisdiction and the assumption that it can disregard treaties by which both Afghanistan and Palestine limited the quantum of their territorial jurisdiction. The balance of the adjudicative authority between the supranational Court and states is the bridge that bears the entire weight of the enterprise. The Court's long-term viability, and its fidelity to the object and purpose of the Statute, depends upon sustaining a cooperative synergy with domestic jurisdictions, whether or not they are States Parties.

The Court has no articulable basis for asserting an independent claim to jurisdiction outside the scope of the Rome Statute. If the Court is properly seized with jurisdiction, the intentions of states are irrelevant to the disposition of any particular case.[192] Conversely, States Parties cannot unilaterally empower the Court to disregard grants of exclusive jurisdiction to another state absent a waiver of jurisdiction by that state. Neither Afghanistan nor Palestine had any right to assert jurisdiction over Americans or Israelis respectively; neither had an ability to transfer territorial jurisdiction over all perpetrators on their territory.

States Parties cannot modify their jurisdictional treaties through a multilateral treaty that operates to disadvantage other states that

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191. VCLT, *supra* note 24, art. 26.

192. *See* Right of Passage over Indian Territory (Port. v. India), Preliminary Objection, 1957 I.C.J. Rep. 125 (Nov. 26); Fisheries Jurisdiction Case (U.K. v. Ice.), 1973 I.C.J. Rep. 3 (Feb. 2).

are not direct parties to that treaty.[193] International law embeds a long-standing premise that violations by one party do not ipso facto invalidate the underlying treaties.[194] Afghanistan and Palestine subverted the sovereign right to exercise exclusive personal jurisdiction by purportedly transferring territoriality to the Court. The United States or Israel could theoretically cite the act of accession as the basis for exiting the earlier treaties based on the breach by the other party. However, Afghanistan did not treat its ratification of the Rome Statute as a repudiation of its SOFA agreements, nor has Palestine in any way indicated its withdrawal from the Oslo Accords. All of the relevant entities continue to regard the jurisdictional allocations as binding.

The preceding raises the obvious question: Why should transferred territoriality operate to defeat the diplomatic desires of all the parties to the earlier agreements? The language of Article 12 is not literal because the territorial jurisdiction asserted by the Court is constrained by the actual legal authority transferred from States Parties rather than all-encompassing. As noted above, the transfer of territorial jurisdiction does not necessarily imply an indivisible scope of authority for the supranational court. The ICC does have territorial jurisdiction over perpetrators on the soil of Afghanistan and Palestine (assuming there is concrete agreement on the borders subject to such jurisdiction). However, the purported conveyance of territorial jurisdiction over nationals of those non-States Parties covered by the relevant treaties was *ultra vires* and therefore without legal effect. It follows that, for the purposes of military deployments, when receiving states routinely allocate exclusive jurisdiction over nationals of sending states, the Court cannot unilaterally assert that "there are reasonable grounds to believe that a person has committed a crime within the jurisdiction of the Court" over the nationals of non-States Parties covered by those SOFAs.

The situations in Afghanistan and Palestine will transform the Court's institutional arc. The paradox is that the very claims of authority and prosecutorial power in principle may well lead to decreased Court authority and prosecutorial effectiveness in practice. It is appropriate to speak of the "Court" because jurisdictional decisions by the OTP will be reviewed by the Pre-Trial[195] and Appeals Chambers.[196] The appropriate power of the OTP will be

193. Quincy Wright, *Conflicts Between International Law and Treaties*, 11 AM. J. INT'L L. 566, 568 (1917).

194. LASSA FRANCIS LAWRENCE OPPENHEIM, I OPPENHEIM'S INTERNATIONAL LAW § 165, at 547 (H. Lauterpacht ed., 6th ed. 1947).

195. Rome Statute, *supra* note 1, art. 19(1) ("The Court shall satisfy itself that it has jurisdiction in any case brought before it."); Prosecutor v. Kony et. al., ICC-02/04-01/05-377, Decision on the admissibility of the case under article 19(1) of the Statute (Mar. 9, 2009) (asserting that the Court will have the "last say" over its jurisdiction).

196. Rome Statute, *supra* note 1, art. 82.

sustainable only with relationships grounded in authentic partnership with sovereign authorities. When a supranational Court attempts to unilaterally repudiate the agreements of sovereign states, it may well generate noncooperation by many states. Former UN Secretary General Dag Hammarskjöld wrote, "There is a point at which everything becomes simple and there is no longer any question of choice, because all you have staked will be lost if you look back. Life's point of no return."[197] The controversies sure to arise over the situations in Palestine and Afghanistan will be emblematic data points for all other cases and controversies.

It would also be ironic if the quintessential function of a Court (in this instance, interpreting and applying the scope of its lawful jurisdiction) reignites the undercurrent of contention over this supranational Court's legitimacy. The Court does not have a "completely free hand" in interpreting its jurisdictional scope because it cannot "acquire a law-making capacity through its *compétence de la compétence*."[198] The Court will no doubt be under intense political pressures to assert jurisdiction over Americans in Afghanistan and over Israelis. The tension is between the politicized exploitation of the jurisdictional boundaries enunciated in Article 12 and the need to disprove the lingering undercurrent of distrust amongst the political classes of non-States Parties. The residual ambiguity in Article 12 epitomizes what President Clinton termed "significant flaws in the Treaty."[199] At the same time, Court supporters vehemently fought for an independent *propio motu* power in a Prosecutor designed to operate above the fray of international politics.[200] Limiting the likelihood of politicized prosecutions was a core American negotiating objective. The desire to prevent "unfounded charges" and "achieve the human rights and accountability objectives of the ICC" while limiting the "likelihood of politicized prosecutions" ought to be shared by every nation.[201] Apart from the very design of the treaty discussed in detail above, this Part closes with two additional considerations that should prevent supranational re-invention of territorial jurisdiction where none actually exists.

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197. DAG HAMMARSKJÖLD, MARKINGS 66 (Leif Sjöberg & W.H. Auden trans., 1965).

198. MICHAIL VAGIAS, THE TERRITORIAL JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT 88 (2014).

199. Statement on the Rome Treaty on the International Criminal Court (Dec. 31, 2000), 37 WEEKLY. COMP. PRES. DOC. 4 (Jan. 8, 2001), *reprinted in* DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 2000, *supra* note 139, at 272.

200. SCHABAS, *supra* note 33, AT 315–20; Morten Bergsmo & Jelena Pejić, *Article 15*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES ARTICLE BY ARTICLE 581–85 (Otto Triffterer ed., 2d. 2008).

201. Statement on the Rome Treaty on the International Criminal Court, *supra* note 199, at 273.

A. *Protecting a Perpetrator's Human Rights*

The Court is designed from the ground up to respect the human rights of potential perpetrators. The due process rights of perpetrators are protected throughout the Statute in ways that often tilt the interpretive balance away from the Chambers and the Prosecutor. In the event of a change in the law applicable to a given case prior to a final judgment, the law "more favourable to the person being investigated, prosecuted or convicted shall apply."[202] Moreover, the precept *nullem crimen sine lege* prevents jurisdiction absent judicial determinations that "the conduct in question constitutes, **at the time it takes place**, a crime within the jurisdiction of the Court" (emphasis added).[203] The corollary to this foundational human rights tenet requires the presumption that conflicting interpretations of any rule arising in the context of trial must be resolved *favor rei*.[204] In the *Bashir* case, Pre-Trial Chamber I recognized that the substantive scope of the Rome Statute "fully embraces the general principle of interpretation *in dubio pro reo*."[205] Phrased another way, if the evidence at trial must be evaluated in the light most favorable to the defendant, as must the specific substantive content of the charges,[206] why would jurisdiction be any different from a human rights perspective? The idea that a perpetrator can be charged for acts that are subject to prosecution in a forum that deprives the rightful sovereign entity of jurisdiction and substitutes differing legal standards and procedures than at the time of commission should be anathema from a human rights perspective.

In this light, it is worth recalling that the centrality of treaty agreements to deprive a host state of territorial jurisdiction springs from the desire to protect the due process rights of accused persons.[207] This principle is ubiquitous in military operations, to

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202. Rome Statute, *supra* note 1, art. 24(2).

203. *Id.* art. 22(1) (emphasis added).

204. *Nullum Crimen Sine Lege*, *in* THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE 438, 440 (Antonio Cassese ed., 2009).

205. *See* The Prosecutor v. Al Bashir, ICC-02/05-01/09-3, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, ¶ 156 (Mar. 4, 2009), https://www.icc-cpi.int/iccdocs/doc/doc1759849.pdf [https://perma.cc/C68T-ZNB4] (archived Feb. 18, 2016).

206. Rome Statute, *supra* note 1, art. 22(2) ("The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.").

207. John D. Negroponte, Remarks at Stakeout Following UN Security Council Vote on Resolution 1422 (July 12, 2002), http://2001-2009.state.gov/p/io/rls/rm/2002/11846.htm [perma.cc/KZA2-J9D7] (archived Feb. 7, 2016) ("The American system of justice can be trusted to punish crimes, including war crimes or crimes against humanity, committed by an American—and we pledge to do so. But we do not believe the International Criminal Court contains sufficient safeguards to protect our

include UN peacekeeping and peace enforcement operations. Deployed forces should enjoy the liberty to focus on their mission rather than fear politicized prosecution in the domestic forums of other nations using unfamiliar procedures and foreign tongues. Treaty provisions that confer exclusive jurisdiction on a sending state also prevent the receiving state from transferring jurisdictional authority to a third state, which in turn necessarily precludes transfer to a supranational jurisdiction. Such proceedings in other forums that go beyond the lawful authority of the receiving state could well represent judicial extension of hostilities, akin to asymmetric warfare.

For much the same reason, all ICC personnel are accorded "immunity from legal process of every kind" from the territorial jurisdiction of States Parties "in respect of words spoken or written and acts performed by them in their official capacity."[208] Imagine the protestations that would arise from the Court if a State Party entered into a subsequent agreement to transfer jurisdiction over Court personnel despite the textual preclusion in the Rome Statute. Similarly, the principle of *ne bis in idem* included in Article 20 does not permit the Court to try a person "who has been tried by another court for conduct also proscribed" unless it was not a genuine trial.[209] In sum, these provisions mean that when the due process rights of perpetrators are preserved by treaty arrangements specifically accepted by two states to preserve the domestic jurisdiction of one state over crimes committed by its nationals on the territory of another state, the Court interposes its limited authority only at the expense of the due process protections negotiated by the sending states.

B. *Intentional Integration in lieu of Creating a Special (Self-Contained) Regime*

The object and purpose of the Statute models shared rights and responsibilities by which the Court synergizes with domestic prosecutors. Decisions by the OTP that invalidate jurisdictional arrangements between sovereign states and operate to deprive states of their criminal jurisdiction undermine the very *raison d'etré* of the institution. The field of international criminal law is emphatically not the exclusive province of supranational tribunals like the ICC because domestic courts are "formally distinct, but substantively intertwined mechanisms that pursue a common goal: the

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nationals, and therefore we can never in good conscience permit Americans to become subject to its authority.").

208. Rome Statute, *supra* note 1, art. 48(2).

209. *Id.* art. 20.

enforcement" of crimes defined under international law.[210] The Statute Preamble notes that "the most serious crimes of concern to the international community must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level."[211] It amplifies the argument with the admonition in Preambular paragraph 6 that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes."[212]

Roger Clark once observed that this paragraph operates as a "sort of Martens clause,"[213] which "insists that just because" some crimes are not dealt with by the ICC "does not mean that there is now impunity for them."[214] The Statute recognizes and respects healthy interfaces between the Court and sovereign jurisdictions that are obligated to prosecute offenses when those crimes fall outside the jurisdiction of the Court. The entire fabric of the Statute compels the conclusion the Court was not intended to subsume all other forms of jurisdiction by virtue of its exclusivity as a regime within international law. Hence, a jurisdictional finding under Article 12(2)(a) that relies upon the premise that the ICC has inherent authority to negate domestic jurisdiction would undermine the actual object and purpose of the Rome Statute.

To conclude this Part, the Rome Statute does not create such an isolated (or self-contained) regime based on its text or its relationship to the general principles of international law. The ILC Study on Fragmentation highlighted the reality that "whole fields of functional specialization . . . are described as self-contained . . . in the sense that special rules and techniques of interpretation are thought to apply."[215] Quite apart from the complementarity framework as

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210. Florian Jessberger, *International v. National Prosecution of International Crimes*, *in* THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE 208 (Antonio Cassese ed., 2009).

211. Rome Statute, *supra* note 1, Preamble ¶ 4.

212. *Id.* Preamble ¶ 6.

213. *See, e.g.*, Preamble to The Hague Regulations Concerning the Laws and Customs of War on Land, July 29, 1899 [hereinafter Martens Clause]. The so-called Martens Clause appeared in the Preamble to the 1899 Hague Regulations and is substantially replicated in the Preamble to the 1907 Hague Regulations, the 1949 Geneva Conventions, the Preamble of Additional Protocol II, and Article 1(2) of Additional Protocol I. It states: "[u]ntil a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience."

214. OTTO TRIFFTERER, COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES ARTICLE BY ARTICLE 13 (2008).

215 ILC Fragmentation Study, *supra* note 18, ¶ 129 (including examples in investment law, the law of the sea, human rights law, WTO law, EU law, humanitarian law, space law, energy law, etc.).

augmented by Article 98, the Statute incorporates the notion of distributed domestic enforcement with a textual "Rule of specialty."[216] Article 101 provides that anyone "surrendered to the Court under this Statute shall not be proceeded against, punished or detained for any conduct committed prior to surrender, other than the conduct or course of conduct which forms the basis of the crimes for which that person has been surrendered."[217] This is one reason why the Prosecutor must "notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned" before proceeding with an investigation based on her/his own authority.[218]

States have the opportunity both to challenge the Court's jurisdiction[219] and to validate their own right to extradition[220] in particular cases. The predominate role of consent-based jurisdiction, combined with the power of complementarity, mean that the Court does not have discretion to invent its own *sui generis* jurisdictional principles. The object and purpose of the Rome Statute is to create and sustain a supranational institution that operates in conjunction with the domestic judicial systems of states around the world to minimize or (ideally) eliminate the ability of perpetrators to commit acts of genocide, war crimes, and crimes against humanity with no fear of criminal sanction. Framed another way, nothing in the text of the Statute or the negotiating history compels the conclusion that the Court operates as a specialized judicial mechanism whose institutional interests trump any competing domestic domain.

Secondly, as a natural extension of the foregoing, when any expert thinks of the field of "international criminal law," the Court is a necessary component, but not the exhaustive exemplar. The ILC noted that "no self-contained regime is a 'closed legal circuit.'"[221] "While a special/treaty regime has (as *lex specialis*) priority in its sphere of application, that sphere should normally be interpreted in the way exceptions are, that is, in a limited way."[222] The ILC specifically noted that general rules of international law supplement any treaty-based regime "to the extent that no special derogation is provided or can be inferred from the instrument(s) constituting the regime."[223] Article 21 of the Rome Statute mirrors this tenet by specifically requiring the Court to apply "where appropriate, applicable treaties and the principles and rules of international law"

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216. Rome Statute, *supra* note 1, art. 101.
217. *Id.* art. 101(1).
218. *Id.* art. 18(1).
219. *Id.* art. 19(2).
220. *Id.* art. 90.
221. ILC Fragmentation Study, *supra* note 18, ¶ 142.
222. *Id.* ¶ 152(3).
223. *Id.* ¶ 152(2).

as well as "general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute."[224]

Nothing in the Rome Statute provides for derogation from the principle *nemo plus iuris transferre potest quam ipse habet.* Neither is there a textual basis for requiring ICC prosecution of perpetrators that fall within domestic jurisdictions. Multinational corporations cannot improve their actual jurisdictional position by leveraging corporate subsidiaries based abroad to capitalize upon otherwise non-applicable conventions.[225] In like manner, no State Party can transfer territorial jurisdiction to the Court that it has already surrendered by other agreements. Absent a finding that the exclusive jurisdiction of a sending state guarantees impunity in violation of *jus cogens* norms, the Court must respect the underlying treaty-based jurisdictional allocation.

IV. ADVERSE IMPLICATIONS FOR THE LARGER LAW OF TREATIES

Normative shifts in the legal structures for regulating interstate conduct never develop as a *tabula rasa,* nor do they march with the linear certainty of mathematical extrapolation or algebraic formulae. Law does not appear in a vacuum. The attempt by the OTP to disregard treaty-based jurisdictional arrangements between states will provide an important barometer for the developing law of treaty conflicts. If international law functions as an integrated system in accordance with the ILC view, treaty norms adapt to shifting contexts and emerging challenges. Nevertheless, states do not construct treaty obligations in isolation because treaty norms establish state expectations and shape correlative rights. Parties to treaties therefore normally express their intentions regarding actual or perceived conflicts between treaty provisions precisely because of shifting valuations and the inevitable tide of technological innovation and political interaction. The Rome Statute expressly acknowledges the duty of the Court to interpret the Statute in conformity with the larger body of treaty norms.

Expansion of ICC authority under Article 12 would strike a discordant chord in the larger dance of international treaty design.

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224. Rome Statute, *supra* note 1, art. 21(1).

225. Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka, Award, 41 I.L.M. 867 ¶ 24 (2002) ("[I]f Mihaly (Canada) had a claim which was procedurally defective against Sri Lanka before ICSID because of Mihaly (Canada)'s inability to invoke the ICSID Convention, Canada not being a Party thereto, this defect could not be perfected *vis-a-vis* ICSID by its assignment to Mihaly (USA).").

The relationship between the Rome Statute and other treaties needs to be clarified because the Rome Statute is silent on any preclusive effect. Unlike the Terrorist Bombing Convention, for example, the Rome Statute contains no express clause that modifies the substantive content or legal effect of bilateral extradition treaties.[226] Neither does it contain any presumption of automatic superiority akin to Article 103 of the UN Charter by which the obligations of states under the UN Charter "prevail" over "any other international agreement" that conflicts with the Charter.[227] Nor have States Parties concluded any agreements to modify the effects of earlier jurisdictional allocations either between themselves or *vis-à-vis* non-States Parties.[228] Absent any hint that Afghanistan or Palestine intended to abrogate earlier jurisdictional treaties or suspend their operation, the *default* approach across divergent fields of international law is to seek interpretations that harmonize the two sets of treaties.[229] An imposed abrogation of the underlying treaties by the OTP or the Pre-Trial Chambers would represent a definitive rejection of the precept that the Rome Statute should "be interpreted as producing, and intended to produce effects in accordance with existing law and not in violation of it."[230] This is, after all, precisely what Article 21 of the Rome Statute purports to require. As a matter of transnational treaty practice, it would be extraordinary for a supranational court to simply infer the intent of parties to abrogate earlier agreements by virtue of accession to the subsequent multilateral treaty.

At a minimum, if it became the accepted norm of transnational practice, the OTP policy would contravene key provisions of the VCLT.[231] The Court has been clear to date that the "interpretation of treaties, and the Rome Statute is no exception, is governed by the VCLT, specifically the provisions of Articles 31 and 32."[232] The VCLT

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226. International Convention for the Suppression of Terrorist Bombings, art. 9, 2149 U.N.T.S. 256, G.A. Res. 52/164, U.N. Doc. A/RES/52/164 (Dec. 15, 1997) (noting that the provisions of all extradition treaties and arrangements between States Parties with regard to offenses set forth in article 2 shall be deemed to be modified as between State Parties to the extent that they are incompatible with this Convention).

227. U.N. Charter, art. 103.

228. VCLT, *supra* note 24, art. 41.

229. *See* P. Kadi and Al Barakaat International Foundation v. Council and Commission, Case C–402/05 P & C–415/05 ECR I–6351 (2008); SD Myers Inc. v. Canada (US-Canada), 40 I.L.M. 1408 (2000) (NAFTA/UNCITRAL tribunal); SPP (ME) v. Egypt, Case No. ARB/84/3, 19 Y'Book Commercial Arbitration 51 (1994).

230. Case Concerning the Right of Passage over Indian Territories (Portugal v. India), Preliminary Objection, ICJ Rep. 52 (1952).

231. VCLT, *supra* note 24.

232. *See* Situation in the Democratic Republic of the Congo, ICC-01/04, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ¶ 33 (July 13,

contains few genuine treaty innovations and largely refines extant customary international law.[233] The vast majority of its precepts are grounded in widely accepted international practice.[234] In submitting the VCLT to the U.S. Senate for its advice and consent, President Nixon noted the treaty's benefits in providing "clear, well defined, and readily accessible rules of international law applicable to treaties."[235] The general rules of treaty interpretation prescribed by VCLT Article 31 mean that the phrase "on the territory of which the conduct occurred" found in Article 12(2)(a) of the Rome Statute must be interpreted by the Court in light of the "object and purpose" of the Rome Statute. ICC case law indicates that the "purpose" should be gleaned from "the wider aims of the law as may be gathered from its preamble and the general tenor of the treaty."[236] Similarly, the Appeals Chamber has made plain that "supplementary means of interpretation," to include the *travaux préparatoires* may well provide the dispositive meaning to guide ICC practice under the Rome Statute in accordance with VCLT Article 32.[237]

There are no indications in either the text or negotiating history of the Rome Statute that its provisions should be interpreted in a manner that would impede accountability of perpetrators under domestic law when merited (as exemplified in the Admissibility regime); predictably undermine international peace and security (by dissuading states from entering into Peacekeeping Operations

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2006), https://www.icc-cpi.int/iccdocs/doc/doc183558.pdf [https://perma.cc/L5AZ-WDQ4] (archived Feb. 27, 2016).

233. In particular Article 66, by which certain disputes may be transferred to the authority of the International Court of Justice was the subject of many state reservations and is not declaratory of established customary international law.

234. *See, e.g.*, RICHARD K. GARDINER, TREATY INTERPRETATION 5–50 (2008) (describing the acceptance of the Vienna Convention Rules on treaty interpretation as "virtually axiomatic" and detailing the wide range of courts and tribunals that have applied them as reflective of the customary international law norm); Jeremy Telman, *Medellin and Originalism,* 68 MD. L. REV. 377, 417–18 (2009) (describing the Vienna Convention on the Law of Treaties and the degree to which it has been recognized as embodying principles of customary international law, both internationally and in U.S. courts). *But see* Evan Criddle, *The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation,* 44 VA. J. IN'L L. 431, 474–75 (2004) (raising independent concerns about the ability of the Vienna Convention to bind American judges).

235. Letter of Transmittal of the Vienna Convention on the Law of Treaties from the White House to the United States Senate (Nov. 22, 1971) 11 I.L.M. 234 (1972). The State Department specifically noted that the Vienna Convention would contribute significantly to the "stability of treaty relationships" because it was (and largely remains) "the authoritative guide to current treaty law and practice." *Id.*

236. *See Situation in the Democratic Republic of the Congo*, ICC-01/04, at ¶33.

237. *See* Prosecutor v. Katanga, ICC-01/04-01/07-522, Judgment on the appeal of Mr. Germain Katanga Against the Decision of Pre-Trial Chamber I Entitled "Decision on the Defense Request Concerning Languages", ¶¶ 37, 50, 51–55 (May 27, 2008) (holding that the Pre-Trial Chamber erred as it "did not comprehensively consider the importance of the fact that the word "fully" is included in the text, and the article's full legislative history" and "The fact that this standard is high is confirmed and further clarified by the preparatory work of the Statute, to which the Appeals Chamber turns under article 32 of the Vienna Convention on the Law of Treaties").

because the UN Standard Agreement is invalid in the ICC); or undermine the due process rights of perpetrators (by preventing states from negotiating SOFA provisions designed to protect those rights). Thus, the text of Article 12(2)(a), when read in light of the tenets of VCLT Articles 31 and 32, should lead the Court to preserve the binding nature of SOFA provisions because the intent of the parties, subsequent state practice, and the relevant rules of international law are all aligned.

Because States have the "primary responsibility for investigating and prosecuting" ICC crimes, Pre-Trial Chamber I held that the "Statute cannot be interpreted as permitting a State to permanently abdicate its responsibilities by referring a wholesale of present and future criminal activities comprising the whole of its territory, without any limitation whether in context or duration. Such an interpretation would be inconsistent with the proper functioning of the principle of complementarity."[238] In other words, ICC precedent already indicates that the best interpretation of Article 12(2)(a) is one that best preserves a healthy synergy between domestic jurisdictions and the territorial scope of ICC power.

Furthermore, there is nothing whatsoever in the negotiating history of the Rome Statute or its accepted text that indicates any intention to upend the established precepts of the VCLT. Of particular relevance to the OTP action, Article 30(4)(b) expressly provides the default rule for situations such as the attempt to impose multilateral treaty obligations to non-States Parties.[239] The Convention specifies that "When the parties to the later treaty do not include all the parties to the earlier one . . . as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations."[240] In other words, the Court cannot unilaterally extend the Rome Statute to cover nationals of the United States or Israel in violation of prior bilateral treaties because they are not States Parties to the Rome Statute. In both instances, the default rule of Article 30 requires that the legal duties owed by the states to each other flow from their binding bilateral treaties that specifically allocate personal jurisdiction. Framed slightly differently, under the Vienna Convention framework, the *lex specialis* of the bilateral jurisdictional arrangements takes precedence over the broader

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238. *See* Prosecutor v. Mbarushimana, ICC-01/04-01/10-451, Decision on the "Defense Challenge to the Jurisdiction of the Court", ¶ 21 (Oct. 26, 2011), https://www.icc-cpi.int/iccdocs/doc/doc1252321.pdf [https://perma.cc/KH6Q-XXRS] (archived Feb. 27, 2016).

239. VCLT, *supra* note 24, art. 30(4)(b).

240. *Id.* art. 30(4). As one commentator has noted, Article 30 only applies to specifically delineated circumstances, which makes it "a necessary, but incomplete, response to treaty conflicts." Borgen, *supra* note 17, at 450.

obligation of only one state arising from the more general multilateral treaty that also allots criminal jurisdiction.[241]

Similarly, Article 54(b) of the Convention requires that states cannot simply release themselves at will from binding legal obligations.[242] As Emer de Vattel noted in 1758, it is a

> settled point of natural law, that he who has made a promise to any one, has conferred upon him a real right to require the thing promised, -- and consequently, that the breach of a perfect promise is a violation of another's rights, and as evidently an act of injustice, as it would be to rob a man of his property. The tranquility, the happiness, the security of the human race, wholly depend on justice – on the obligation of paying a regard to the rights of others.[243]

Article 54 was adopted by a vote of 105 votes to none and reflects a commonsense extension of the *pacta sunt servanda* principle that preserves the "principle of the sovereignty of States which remain masters of their treaties."[244] The ICC ought not lightly cast aside such well-established tenets of treaty law. The current OTP policy reflects institutional tunnel vision that damages the larger debates over treaty-based rights and duties.

This Part concludes with two pragmatic warnings if the Court invalidates the underlying jurisdictional treaties on its own authority by superimposing the Rome Statute as the pinnacle of a newly created treaty hierarchy.

A. *Disadvantages of a Purely Formalist Approach*

Experts have noted that "no set of black letter rules can fully respond to the multitude of potential treaty conflicts."[245] The formulae for describing precise interrelationships between multilateral treaties and the plethora of other agreements is complex because there is no definitive hierarchy that governs in the absence of clear expressions of intent by the parties. As the ILC noted, the

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241. *Id.* art. 30(1) (noting that Article 30 applies by its very terms to "successive treaties relating to the same subject matter").

242. *Id.* art. 54.

243. EMER DE VATTEL, LE DROIT DES GENS, OU PRINCIPES DE LA LOI NATURELLE, APPLIQUÉ À LA CONDUIT ET AUX AFFAIRES DES NATIONS ET DES SOUVERAINS (THE LAW OF NATIONS, OR PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS), Bk. II. Ch. XXXI § 163 (1758) (Charles G. Fenwick trans., 1916).

244. MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 689 (Martinus Nijhof ed., 2009) (noting that the termination of treaties as provided by the parties is a "self-evident proposition rather than a rule," while Article 54(b) "appears codificatory").

245. Borgen, *supra* note 17, at 463.

> concurrent pragmatic validity of both the *lex posterior* and the *lex prior* maxims may follow from the way the two derive from different domestic analogies. Where *lex posterior* projects international rules as analogous to domestic legislation (later laws regularly overruling earlier ones), the *lex prior* suggests an analogy to domestic contracts.[246]

There is no definitive state practice establishing authoritative sequencing of treaty conflicts, and the Rome Statute does not fit neatly into either a legislative or contractual straitjacket.

The ICC is caught on the horns of a dilemma because either of the traditional formalist approaches deprives it of authoritative jurisdiction over Americans or Israelis. The *lex prior* principle, by which the earlier treaty remains binding, is most commonly applicable where there is divergence between the parties to the respective treaties.[247] By definition, any Court interaction with non-States Parties would be governed by this principle insofar as existing agreements establishing the exclusive jurisdiction of sending states would preclude jurisdiction under the Rome Statute.

On the other hand, imposing a flat *lex posterior* rule would undermine the basic concept of *pacta sunt servanda*, by which the consent of all the parties to the bilateral treaties would be required for their termination.[248] The Court cannot impose the Rome Statute in toto onto non-States Parties because it would require alternative findings that plainly undermine assertion of ICC jurisdiction. Either "all the parties" to the earlier jurisdictional treaties must manifest an intention that the Rome Statute supersedes the bilateral jurisdictional arrangements, or the Court must decide that Article 12 by its nature is "so far incompatible with the [earlier jurisdictional arrangements] that the two treaties are not capable of being applied at the same time."[249] As shown above, the provisions of the Rome Statute itself leave little room for a Court finding that it is always "incompatible" with other treaties.

No lawyer, politician, or prosecutor can demonstrate definitive positive authority that either Palestine or Afghanistan can lawfully convey unqualified territorial jurisdiction to the Court in violation of earlier agreements. Similarly, there is no express or implied agreement by any of the four states (Afghanistan/United States and Israel/Palestine) by which the earlier treaties can be authoritatively deemed irrelevant. Circumstances on the ground indicate that all four states would strongly oppose the presumption of the Court that they assent to invalidating the earlier treaties.

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246. ILC Fragmentation Study, *supra* note 18, ¶ 296.

247. W. Karl, *Conflicts Between Treaties*, *in* ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 468 (R. Bernhardt ed., Oxford Public International Law 1984).

248. VILLIGER, *supra* note 244, at 686.

249. VCLT, *supra* note 24, art. 59.

At the same time, imposition of a *lex posterior* principle would impose a seemingly intractable practical problem for the Court. The Palestinian acceptance of the Rome Statute in January 2015 might be deemed by the Court as suitable *lex posterior* to override the conflicting jurisdictional provisions of the Oslo Accords. However, the entry into force of the U.S./ Afghanistan agreement that provides for exclusive jurisdiction by American authorities effective May 28, 2003, came subsequent to Rome Statute accession by Afghanistan on May 1, 2003. In other words, applying a *lex posterior* principle cannot lead to ICC jurisdiction over both situations in an intellectually consistent manner. The Court would quickly find itself amidst a bog of contradictory explanations of its treaty-based authority under the Rome Statute. This would inevitably produce the prospect of widespread backlash over its perceived reformation of treaty practices.

B. *The Danger of Subjective Functionalism*

On the other hand, despite the danger of strengthening perceptions that its decisions are driven by raw politics and narrow institutional interests, the Court might well be willing to impose jurisdiction over Americans and Israelis based upon its faith in the larger purpose of the Rome Statute. After all, both Israel and the United States have been staunch supporters of universal jurisdiction in contexts where domestic fora are demonstrably inadequate to address the grievous crimes within the subject matter jurisdiction of the ICC. For some scholars, the absence of an official negotiating history of the ICC could be framed as a blessing in disguise. From this perspective, the Court is arguably free to innovate international law by stressing that its constitutive document is unshackled from expectations rooted from the historic record. Court proponents hope that the interpretation of the Statute will shift over time akin to a national constitution that is flexible enough to meet changing needs of States Parties and the ceaseless flow of world events. It is true that there is nothing in the Statute that expressly addresses the relationship between the treaty text and previous SOFA agreements that limit the jurisdictional authority of the territorial state. However, the aspiration that the overarching imperative of strengthening the supranational Court warrants evisceration of every treaty barrier seems to represent a facile functionalism. Neither is there any evidence that States Parties themselves intended to empower the Court to override bilateral SOFA provisions.

In the first place, accepting the premise that the tenet *nemo plus iuris transferre potest quam ipse habet* has become a rule of desuetude would defeat the object and purpose of an entire class of binding agreements that remain vital to community efforts to build international peace and security. Roman jurists maintained that

pactum (as in *pacta sunt servanda*) emanated from the same etymological roots as *pax*.[250] ICC efforts to invalidate SOFA provisions could paradoxically threaten to undermine international peace and security because they would without doubt disincentivize UN peacekeeping and peace-enforcement operations. Even when states have an overwhelming right to exercise collective self-defense, institutionalized doubt over the utility of SOFAs could prevent formation of coalitions. Thus, the ICC could undermine one of its most aspirational objectives—to benefit international order and buttress the role of law as a bulwark against unlawful aggression. The challenge is to formulate principles for treaty interrelationships that support the "community interest in both stability and change" in order to "identify destructive practices for future regulation, so that international agreements can be relied on as effective factors in international behavior and, in the longer run, precipitate fundamental constitutive changes."[251] By invalidating SOFAs and other jurisdictional allocations, the ICC would undermine the sanctity of binding agreements between states by elevating multilateral agreements not intended to create rights and obligations for non-Parties.[252]

Secondly, a newly promulgated doctrine of multilateral treaty superiority that automatically invalidates earlier bilateral treaties would fly in the face of strong precedents. Article 54 of the VCLT accepts the premise that the termination of a treaty "necessarily [deprives] all the parties of all their rights and, in consequence, the consent of all of them [was] necessary."[253] Given its unanimous adoption, Article 54 represents *l'expression du droit coutumier*. This echoes the premise of the International Court of Justice in the *Case of the Monetary Gold Removed from Rome in 1943*, whereby whenever a third party State's interests "form the very subject matter of the decision" the Court "cannot . . . give a decision on that issue."[254] Other tribunals have reinforced the notion that "it is only in the most compelling circumstances that a tribunal charged with the application of international law and governed by that law should depart from a principle laid down [by] the International Court of Justice."[255] Fidelity to these established treaty norms denies the supranational forum of power to impose its treaty-based jurisdiction

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250. Kirsten Schmalenback, *Article 26, Pacta sunt Servanda*, *in* VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY 427, 429 (Oliver Dörr & Kirsten Schmalenback eds., 2012).

251. Arié E. David, *Faits Accomplis in Treaty Controversies*, 6 INT'L LAWYER 88, 98 (1972).

252. *Id.*

253. ILC Report 1966, YBILC 1966 II 249, ¶ 3, and 252, ¶ 1.

254. I.C.J. Rep. 19 (1954).

255. Larsen v. Hawaiian Kingdom, 119 I.L.R. 556 (2001) (Permanent Court of Arbitration).

as a matter of supranational prerogative when such assertion abrogates a clear manifestation of prior state consent to surrender exclusive jurisdiction over the nationals of another state.[256]

The Court would be hard pressed to persuade states that its jurisdictional decisions do not address the "very subject" addressed by specific treaty provisions that preserve the affirmative right to exercise criminal jurisdiction over their citizens. The SOFA provisions and the jurisdictional aspects of the Oslo Accords are *lex specialis* with respect to the permissible scope of territorial jurisdiction. Thus, the territorial states (Afghanistan and Palestine) face the reality of clearly contradictory treaties. There is no principle of international law to permit subordination of explicit treaty rights of non-States Parties through ratification of a multilateral treaty by another State. Similarly, processes for resolving treaty conflicts disputes on the intra-state level remain inadequate to resolving the precise conflict. They provide scant guidance for practitioners or judges even though they represent "the highest measure of common ground that could be found among governments as well as in the Commission on this question."[257] It is true that the ICC is not a sovereign state, so there might be some basis to assert that it is free to experiment in its relations with sovereign states. Imbuing the ICC with a robust entrepreneurial independence might be portrayed as a manifestation of its importance as a symbol of global interdependence in confronting the enduring problem of criminal impunity.

However, the ICC is inescapably a creature of its constitutive treaty. The default principle that States should resolve treaty conflicts by mutual consent remains paramount, so why should the same premise evaporate in the context of a supranational court created via a multilateral treaty? States that surrender their sovereign authority to exercise territorial jurisdiction over a defined class of person or under certain conditions may act to reclaim that sovereign authority. Even if it is seen as an organ created by states to implement their duty to prosecute egregious violations of international norms, the fact remains that the ICC has no adjudicative power that does not originate from the consent of sovereign states.

Because the entire authority of the Court derives from the consent of states as manifested in adoption or accession to the Rome Statute, there is no definitive basis for presuming that the Court is at liberty to expand its own jurisdictional authority. As noted above, states expressly rejected the formulation of the ICC as an embodiment of universal jurisdiction. It logically follows that the ICC

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256. East Timor (Port. v. Austl.), Judgment, 1995 I.C.J. Rep. 1995 (June 30, 1995).

257. Int'l L. Comm'n., Draft Rep. on the Work of Its Eighteenth Session, U.N. Doc. A/CN, 4/L. 116/Add. 6, at 4(4) (1966).

has no independent authority apart from that delegated by sovereign states. Inventing a rule that multilateral treaties, even one of great import such as the Rome Statute, take precedence over binding bilateral mechanisms would transform international treaty law, despite the reality that there is "no significant practice on the matter."[258] Such fundamental reforms ought to be the province of states rather than a supranational tribunal that seeks to impose its vision over non-consenting states. The ICC is the object of the Rome Statute and not its signatory; thus, sovereign states are properly positioned to determine its place within the larger constellation of international treaties.

V. CONCLUSIONS

Some discerning readers will have been troubled throughout their reading by the use of the word "aggrandize" in the abstract of this Article. That word implies an intentional exploitation of legal authorities and might be perceived to impute ill will and excess politicization into every act of the ICC. Rather than disparaging the Court or its aspirations, this Article is intended to represent a dispassionate explication of the linkage between the highly controversial situations that the Court faces and the larger first-principles of treaty law and international practice. While an invalid assertion of jurisdiction by the ICC is important in its own right, these assertions have a greater significance for the international law of treaties, and the project of international criminal law in particular. The maturation of the ICC as the culmination of supranational institution building need not necessarily mark the end of the line for the field of international criminal law. On the contrary, rather than facing the unending prospect of politicized justice at the whims of a permanent Court,[259] processes within the ICC should serve to strengthen the Court's legitimacy.

Squarely addressing the reality that the Rome Statute presents states with a specific form of treaty conflict in the areas that are most central to their national security interests might mark a whole new phase of qualitative growth for the Court that deepens its institutional breadth and justifies the faith of States Parties. The danger is that the Court will pursue its narrow vision of jurisdiction in "disregard of founding principles of international law as well as general principles of law that are common to the main legal systems

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258. Benedetto Conforti, *Consistency among Treaty Obligations, in* THE LAW OF TREATIES: BEYOND THE VIENNA CONVENTION 187, 189 (Enzo Cannazaro ed., 2011).

259. William A. Shabas, *The Banality of International Justice*, 11 J. INT'L CRIM. JUST. 545 (2013).

of the world."[260] In the words of Pre-Trial Chamber I "Such an interpretation would be inconsistent with the proper functioning of the principle of complementarity."[261] Readers will be hard-pressed to discover any legal system in the world that would ignore the basic precept of law and morality that is preserved by the ancient Roman tenet *nemo plus iuris transferre potest quam ipse habet.* Overlooking that foundational principle would represent a radical reshaping of the Court's intended jurisdictional competence.

This conclusion has been heretofore unacknowledged by the Court. It will doubtless be unpleasant for Court proponents to confront; it is nonetheless unavoidable given a good faith reading of the Statute in light of the larger precepts of international treaty law. In perhaps his most famous observation, Justice Oliver Wendell Holmes noted that the

> life of the law has never been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do with the syllogism in determining the rules by which men should be governed.[262]

Amidst a world of legal and political uncertainty, the ICC should not settle for long-term reliance on intuitive fine-tuning that pretends that the Rome Statute operates in isolation from other treaty-based constraints on sovereign prerogatives.[263] Rather than being a hallmark of its demise, then, the role of the Court as one component of a healthy transnational system would be enhanced by good faith judgments that the Court has no lawful basis of jurisdiction over crimes committed by Americans in Afghanistan, or over offenses alleged against Israeli citizens for acts committed in the Occupied Territories or in the Gaza Strip.

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260. Flavia Lattanzi, *Introduction*, *in* THE DIVERSIFICATION AND FRAGMENTATION OF INTERNATIONAL CRIMINAL LAW 3 (Larissa van den Herik & Carsten Stahn eds., 2012).

261. *See* Prosecutor v. Mbarushimana, ICC-01/04-01/10-451, Decision on the "Defense Challenge to the Jurisdiction of the Court", ¶ 21 (Oct. 26, 2011), https://www.icc-cpi.int/iccdocs/doc/doc1252321.pdf [https://perma.cc/KH6Q-XXRS] (archived Feb. 27, 2016).

262. OLIVER WENDELL HOLMES, THE COMMON LAW 1 (1881).

263. Elies van Sliedregt & Sergey Vasiliev, *Pluralism: A New Framework for International Criminal Justice*, *in* PLURALISM IN INTERNATIONAL CRIMINAL LAW 4, 5 (Elies van Sliedregt and Sergey Vasiliev eds., 2014).

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Universal Jurisdiction

Clarifying the Basic Concept

Roger O'Keefe*

Abstract

Academic analysis of the Arrest Warrant *case in the International Court of Justice has tended to focus to date on the Court's judgment on immunity. Comparatively little attention has been paid to the question of universal jurisdiction, as discussed in detail in most of the separate and dissenting opinions and declarations. The following article focuses less on the various judges' conclusions as to the international lawfulness of universal jurisdiction than on their treatment of the basic concept. The article argues that this treatment is open to question, reflecting, as it does, both a conceptual conflation of states' jurisdiction to prescribe their criminal law with the manner of that law's enforcement and an inattention to crucial temporal considerations. As well as fostering dubious terminology, these factors lead some judges to an unsatisfying conclusion regarding the permissibility of the enforcement* in absentia *of universal jurisdiction, and cause others to underestimate the degree of state practice in favour of universal jurisdiction over crimes under general international law.*

1. Introduction

The separate and dissenting opinions and declarations of the judges of the International Court of Justice (ICJ) in *Arrest Warrant*[1] invite discussion of what is meant by 'universal jurisdiction'. This article suggests that the respective judges' understanding of the concept is debatable, since underlying it is a tendency, when dealing with states' criminal jurisdiction, to elide prescription and enforcement, as

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1 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, International Court of Justice, 14 February 2002, available online at *http://www.icj-cij.org/icjwww/idocket/iCOBE/iCOBEframe.htm* (visited 5 May 2004). The case's discussion of jurisdiction is limited to the separate and dissenting opinions and declarations.

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well as an inattention to the question of when the requisite prescriptive jurisdictional nexus must be present. A number of the resulting judicial statements – eagerly looked to as the first by the World Court on national criminal jurisdiction since the *Lotus* case,[2] over 70 years before – serve, it is argued, as questionable guides to one of international law's more controversial topics. The various judgments promote regrettable terminology. Moreover, the elision and inattention cited above lead some judges to a contestable finding on the lawfulness of the enforcement *in absentia* of universal jurisdiction, and causes others to underestimate the degree of state practice that exists in support of universal jurisdiction over crimes under general international law.

This article first outlines the basic principles of public international law governing national criminal jurisdiction and then, in this light, highlights and comments on the treatment of jurisdictional issues, especially universal jurisdiction, in the separate and dissenting opinions and declarations in *Arrest Warrant*.

2. International Principles Governing National Criminal Jurisdiction

A state's 'jurisdiction', in the present context, refers to its authority under international law to regulate the conduct of persons, natural and legal, and to regulate property in accordance with its municipal law. Jurisdiction can be civil or criminal. Only criminal jurisdiction will be discussed here and, as such, only the regulation of the conduct of persons will be considered.

Jurisdiction is not a unitary concept. On the contrary, both the longstanding practice of states and doctrinal writings make it clear that jurisdiction must be considered in its two distinct aspects, viz. jurisdiction to prescribe and jurisdiction to enforce. Jurisdiction to prescribe or prescriptive jurisdiction – sometimes called 'legislative' jurisdiction – refers, in the criminal context, to a state's authority under international law to assert the applicability of its criminal law to given conduct, whether by primary or subordinate legislation, executive decree or, in certain circumstances, judicial ruling.[3] Jurisdiction to enforce or enforcement jurisdiction – sometimes called 'executive' jurisdiction – refers to a state's authority under international law actually to apply its criminal law, through police and other executive action, and through the courts. More simply, jurisdiction to prescribe refers to a state's authority to criminalize given conduct, jurisdiction to enforce the authority, inter alia, to arrest and detain, to prosecute, try and sentence, and to punish

2 *The S. S. Lotus (France v Turkey)*, 1928 PCIJ Series A, No. 10.

3 Prescription by judicial ruling occurs most commonly when a court interprets the scope of a statutory offence in such a manner as to extend that scope. In addition, in some common-law countries, certain crimes and their jurisdictional scope are still the creatures of the judge-made law alone. See *infra* note 23 for more.

persons for the commission of acts so criminalized.[4] Universal jurisdiction, it should be stressed from the outset, is a species of jurisdiction to prescribe.

Separate reference is sometimes made, especially in the civil context, to 'jurisdiction to adjudicate',[5] or 'judicial'[6] or 'curial'[7] jurisdiction, referring specifically to a municipal court's competence under international law to adjudge certain matters. But, in the criminal context, the distinction is generally unnecessary. The application of a state's criminal law by its criminal courts is simply the exercise or actualization of prescription: both amount to an assertion that the law in question is applicable to the relevant conduct.[8] As a result, a state's criminal courts have no greater authority under international law to adjudge conduct by reference to that state's criminal law[9] than has the legislature of the state to prohibit the conduct in the first place. Equally, the trial and, in the event, conviction and sentencing of an individual for conduct prohibited by a state's criminal law is as much a means of executing or enforcing that law as is the police's investigation, arrest, charging and prosecution of the individual under it. As such, a state's criminal courts have no greater authority under international law to execute the state's criminal law than have the police or other coercive organs and agents of that state: as will be seen below, neither can operate as of right in the territory of another state. In apparent recognition of the foregoing, the respective judges of the ICJ in *Arrest Warrant*, the Court and dissenting judges of the Permanent Court of International Justice (PCIJ) in the *Lotus* case before it, and the

4 See, similarly, P. Daillier and A. Pellet, *Droit International Public (Nguyen Quoc Dinh)* (6th edn, Paris: LGDJ, 1999), §§ 334 and 336, respectively, drawing a distinction between 'compétence normative' and 'compétence d'exécution', i.e. 'une distinction entre l'édiction d'une règlementation (au sens large) . . . et son application': 'Par contraste avec la compétence normative, qui consiste en l'édiction de normes générales et impersonelles ou décisions individuelles par les organs investis de la function législative ou règlementaire, la compétence d'exécution "s'etend généralement comme le pouvoir d'accomplir des actes matériels tels la détention, l'instruction ou le redressement de la violation d'une règle de droit"'.

5 See, e.g. *Restatement (Third) of the Foreign Relations Law of the United States* (1987), §§ 401 and 421–433; Council of Europe, Recommendation R (97) 11 on the amended model plan for the classification of documents concerning state practice in the field of public international law, 12 June 1997, Appendix, Part Eight (II); O. Schachter, 'International Law in Theory and Practice. General Course in Public International Law', 178 *Hague Recueil (HR)* (1982–V) 9, at 244–249; Y. Dinstein, 'The Universality Principle and War Crimes', in M.N. Schmitt and L.C. Green (eds), *The Law of Armed Conflict: Into the Next Millenium* (Newport, RI: Naval War College, 1998) vol. 17, at 30–32.

6 See, e.g. M. Akehurst, 'Jurisdiction in International Law', 46 *British Yearbook of International Law* (1972–1973) 145; B. Oxman, 'Jurisdiction of States', 3 *Encyclopedia of Public International Law* (1997) 55, at 55; A. Cassese, 'When May Senior State Officials Be Tried for International Crimes? Some Comments on the *Congo v Belgium* Case', 13 *European Journal of International Law* (2002) 853, at 858.

7 See, e.g. R. Jennings and A. Watts (eds), *Oppenheim's International Law. Volume I. Peace* (9th edn, Harlow: Longman, 1992), § 137.

8 See Akehurst, *supra* note 6, at 179: 'In criminal law legislative jurisdiction and judicial jurisdiction are one and the same.' See similarly Oxman, *supra* note 6, at 55; F. Berman, 'Jurisdiction: The State', in P. Capps, M. Evans and S. Konstadinidis (eds), *Asserting Jurisdiction. International and European Legal Perspectives* (Oxford; Portland OR: Hart, 2003) 3, at 5.

9 Note, in this regard, the seemingly universal practice whereby a state's criminal courts – in contrast usually to its civil courts – apply the law of that state and no other.

bulk of the mainstream European academic literature[10] premise their respective treatments of national criminal jurisdiction on the simple binary distinction between what are, here, termed jurisdiction to prescribe and jurisdiction to enforce.

As specifically regards jurisdiction to prescribe, state practice reveals a number of accepted bases or 'heads' of jurisdiction,[11] pursuant to which, as a matter of general international law, states may[12] assert the applicability of their criminal law, each of these heads being thought to evidence a sufficient link between the impugned conduct and the interests of the prescribing state. The two heads of jurisdiction unquestionably

10 See, e.g. the approach adopted by F.A. Mann, although Mann (along with others) refers to 'legislative', rather than 'prescriptive' jurisdiction: see F.A. Mann, 'The Doctrine of Jurisdiction in International Law', 111 *HR* (1964–I) 1, reproduced in F.A. Mann, *Studies in International Law* (Oxford: Clarendon Press, 1973) 1; and F.A. Mann, 'The Doctrine of International Jurisdiction Revisited After 20 Years', 186 *HR* (1984–II) 9, reproduced in F.A. Mann, *Further Studies in International Law* (Oxford: Clarendon Press, 1990) 1. See, similarly, D.W. Bowett, 'Jurisdiction: Changing Patterns of Authority over Activities and Resources', 53 *British Yearbook of International Law* (1982) 1, at 1; V. Lowe, 'Jurisdiction', in M.D. Evans (ed.), *International Law* (Oxford: Oxford University Press, 2003) 329, at 332–333. Combacau and Sur, likewise, distinguish between 'compétence normative' or 'compétence législative', on the one hand, and 'compétence opérationnelle', on the other: see J. Combacau and S. Sur, *Droit International Public* (4th edn, Paris: Montchrestien, 1999), 342 and 351, respectively. Recall also, from *supra* note 4, Daillier and Pellet's analogous distinction between 'compétence normative' and 'compétence d'exécution'. A simple binary distinction between what are here called jurisdiction to prescribe and jurisdiction to enforce is also maintained by Kelsen: see H. Kelsen, *Principles of International Law* (2nd edn, New York: Holt, Rinehart and Winston, 1966) (revised and edited by R.W. Tucker), 307–310.

11 These heads are alternatives: a state need only point to one of them as the basis for its assertion of jurisdiction. In this regard, note that a state's criminal jurisdiction to prescribe in relation to any given conduct is not necessarily exclusive. It is very commonly the case that two or more states enjoy concurrent jurisdiction – that is, prescriptive jurisdiction over the same conduct – each under a different head.

12 This is not the place to discuss the meaning and present status of the PCIJ's famous dictum in *Lotus*, at 19, although cf. the rider added by the Court, *ibid.*, at 20, as well as *ibid.*, diss. op. Loder, at 34, and diss. op. Nyholm, at 60–61, along with the approach taken in Harvard Law School Research in International Law, 'Jurisdiction with Respect to Crime', 29 *American Journal of International Law Supp.* (1935) 435. See also, far more recently, *Arrest Warrant*, sep. op. Guillaume at § 14, sep. op. Higgins, Kooijmans and Buergenthal at §§ 50–51, and diss. op. Van den Wyngaert at § 51. In the final analysis, it arguably does not matter whether the so-called '*Lotus* presumption', in general or in the specific context of criminal jurisdiction, is correct or accepted in principle, since, in practice, its application need not run counter to the observable situation whereby state assertions of prescriptive criminal jurisdiction are tolerated only if they fall under specific acceptable heads: all that is required is that, instead of characterizing the accepted heads of prescriptive jurisdiction as permissive rules set against a backdrop of a general prohibition, we think of them as pockets of residual presumptive permission in the interstices of specific prohibitions. The only difference – and this might not, in the event, be that great – is the burden of proof. As it is, the Court in *Lotus* summarized its position very generally, stating that 'all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty': *Lotus*, at 19. This simple statement is unimpeachable and '[w]hatever the underlying conceptual approach, a State must be able to identify a sufficient nexus between itself and the object of its assertion of jurisdiction': Oxman, *supra* note 6, at 56. On a different note, it is worth stating that, as a matter of general international law (cf. certain treaty obligations), jurisdiction to prescribe is permissive or facultative, not mandatory. Whether or not a state actually asserts a jurisdiction allowed it by international law is a matter for that state.

available to states in respect of all offences are territoriality and, in relation to extraterritorial offences, nationality: that is, a state may criminalize conduct performed on its territory, as well as conduct performed abroad by one of its nationals. In addition, extraterritorial prescriptive jurisdiction over the conduct of non-nationals on the basis of so-called 'passive personality' – viz. where the victim of the offence is a national of the prescribing state[13] – now appears generally permissible.[14] Extraterritorial prescriptive jurisdiction over the conduct of non-nationals is also permitted, although only in relation to certain offences, under what is known as the 'protective' principle (or *compétence réelle*): that is, states may assert criminal jurisdiction over offences committed abroad by aliens where the offence is deemed to constitute a threat to some fundamental national interest.[15] The assertion of criminal jurisdiction over extraterritorial conduct by aliens on the basis of the 'effects' doctrine – viz. where the offence is deemed to exert some deleterious effect within the territory of the prescribing state – remains controversial, if apparently not objectionable in all cases.[16] Many states also assert prescriptive criminal jurisdiction over the extraterritorial conduct of non-nationals on a range of other bases thought to evidence a sufficient link with the prescribing state's interests, e.g. on the basis of the offender's residency in that state or his or her service in that state's armed forces. Such assertions have seemingly excited no adverse reaction. Finally, even if the range of such offences is contested, criminal jurisdiction over the extraterritorial conduct of non-nationals also attaches to certain

13 In the past, passive personality was sometimes subsumed terminologically into the protective principle: see, e.g. *Lotus*, diss. op. Finlay, at 55–58 and diss. op. Moore, at 91–92.

14 Such jurisdiction was disputed in the past: see, e.g. *Lotus*, diss. op. Loder, at 36, diss. op. Finlay, at 55–58, diss. op. Nyholm, at 62 and diss. op. Moore, at 91–93; see also Harvard Law School Research in International Law, *supra* note 12, at 445 and 579. The Court in *Lotus* reserved its opinion on the existence of the principle: see *Lotus*, at 22–23. But, as noted by Judges Higgins, Kooijmans and Buergenthal, in their joint separate opinion in *Arrest Warrant*, at § 47, '[p]assive personality jurisdiction, for so long regarded as controversial, is now reflected ... in the legislation of various countries ... and today meets with relatively little opposition, at least so far as a particular category of offences is concerned'. For his part, Judge Rezek asserts that a 'majority of countries' give effect to the principle: *Arrest Warrant*, sep. op. Rezek, at § 5. President Guillaume goes so far as to treat passive personality as part of 'the law as classically formulated': *Arrest Warrant*, sep. op. Guillaume, at § 4.

15 See, e.g. *Lotus*, at 20 and *ibid*, diss. op. Loder at 35–36; *Arrest Warrant*, sep. op. Guillaume at § 4 and sep. op. Rezek at § 4. In the past, at least, this principle has been less a general rule than the basis on which a few, specific exercises of extraterritorial jurisdiction over non-nationals have been tolerated by states, e.g. the offence of counterfeiting currency or an inchoate conspiracy to assassinate the head of state.

16 The effects doctrine proper is to be distinguished from prescriptive jurisdiction on the basis of so-called 'objective' territoriality, out of which it seems to have grown: we speak of the former rather than the latter when no constituent element of the offence takes place within the territory of the prescribing state. The Court in *Lotus* was content simply to note the occasional assertion of such jurisdiction: see *Lotus*, at 23. In the event, extraterritorial prescriptive jurisdiction on the basis of the effects doctrine has proved uncontroversial in relation to certain offences, e.g. inchoate conspiracies to commit murder, to import prohibited drugs, etc. But, to cut a long story short, it has proved highly controversial in other areas, notably in the field of antitrust or competition law, even if today '"[e]ffects" or "impact" jurisdiction is embraced both by the United States and, with certain qualifications, by the European Union' in this area: *Arrest Warrant*, sep. op. Higgins, Kooijmans and Buergenthal, at § 47.

specific offences on the basis of universality – that is, in the absence of any other acceptable prescriptive jurisdictional nexus.[17]

While jurisdiction to prescribe can be extraterritorial, jurisdiction to enforce is, by way of contrast, strictly territorial. A state may not enforce its criminal law in the territory of another state without that state's consent.[18] The territorial character of jurisdiction to enforce is seen most clearly in the impermissibility, as of right, of extraterritorial police powers: the police of one state may not investigate crimes and arrest suspects in the territory of another state without that other state's consent.[19] It is also reflected in the judicial sphere: the criminal courts of one state may not, as of right, sit in the territory of another,[20] or subpoena witnesses or documents, or take sworn affidavit evidence abroad. The upshot of this is that a state's jurisdiction to prescribe its criminal law and its jurisdiction to enforce it do not always go hand in hand. It is often the case that international law permits a state to assert the applicability of its criminal law to given conduct but, because the author of the conduct is abroad, not to enforce it. At the same time, general international law does not prohibit the issuance of an arrest warrant for a suspect or the trial of an accused *in*

17 See, e.g. *Arrest Warrant*, sep. op. Guillaume, at §§ 12 and 16 (piracy), sep. op. Koroma, at § 9 (at least piracy, war crimes and crimes against humanity, including the slave trade and genocide), sep. op. Higgins, Kooijmans and Buergenthal, at §§ 61–65 (at least piracy, war crimes and crimes against humanity), and diss. op. Van den Wyngaert, at § 59 (at least war crimes and crimes against humanity, including genocide).

18 See, e.g. *Lotus*, at 18–19; *Arrest Warrant*, sep. op. Guillaume, at § 4, sep. op. Higgins, Kooijmans and Buergenthal, at § 54, and diss. op. Van den Wyngaert, at § 49. General international law admits of only rare exceptions to the territoriality of criminal jurisdiction to enforce, all of them pertaining to armed conflict. First, military forces engaged in armed conflict in the territory of a foreign state are permitted to capture or otherwise take into custody and detain hostile combatants, as well as civilians accompanying regular armed forces, when such persons fall into their power in the course of hostilities. Secondly, a state in belligerent occupation of all or part of the territory of a hostile state is permitted to exercise certain extraterritorial powers of criminal (prescription and) enforcement over the occupied territory, in accordance with rules now codified in Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, 75 UNTS 287, Arts 64–77. Finally, an occupying power is permitted, under certain conditions, to resort to preventive detention, in accordance with Geneva IV, Art. 78.

19 Examples of consent to the extraterritorial exercise of police powers are Arts 40 and 41, providing for limited and conditional cross-border powers of police investigation and of 'hot pursuit', respectively, of the Convention implementing the Schengen Agreement of 14 June 1985 between the governments of the states of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, 22 September 2000, OJ 2000 L239, 0019–0062; see also the provisions typical of status of forces agreements (SOFAs), e.g. Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces, 19 June 1951, UKTS No. 3 (1955), Cmd 9363, Art. VII.

20 An example of consent to the extraterritorial sitting of a criminal court is the Agreement between the Government of the Kingdom of the Netherlands and the Government of the United Kingdom of Great Britain and Northern Ireland concerning a Scottish Trial in the Netherlands, 24 August 1998, UKTS No. 43 (1999). See also, more recently, the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of New Zealand concerning Trials under Pitcairn Law in New Zealand and Related Matters, 11 October 2002, Cmd 5745.

absentia, the legality of both being a question for the municipal law of each state.[21] Nor does the territorial character of criminal enforcement jurisdiction prevent the prescribing state from requesting the extradition of a suspect, accused or convict from the territory of a state in which he or she is present, or from requesting other police or judicial assistance from another state.

Jurisdiction to prescribe and jurisdiction to enforce are logically independent of each other. The lawfulness of a state's enforcement of its criminal law in any given case has no bearing on the lawfulness of that law's asserted scope of application in the first place, and vice versa. For example, imagine that a criminal court in the state of Hernia tries and convicts a national of the state of Dyspepsia under a Hernian statute outlawing whistling in Dyspepsia, the accused having been arrested while on holiday in Hernia. Hernia is exercising an exorbitant prescriptive jurisdiction, but no rule of international law governing jurisdiction to enforce has been breached. Conversely, imagine that Dyspepsian police arrest, in Hernian territory, a Dyspepsian national, charged with murder in Dyspepsia. This constitutes an exorbitant exercise by Dyspepsia of jurisdiction to enforce, even if it enjoys jurisdiction under international law to criminalize the conduct in question.

At the same time, while *jurisdiction* to prescribe and *jurisdiction* to enforce are mutually distinct, the act of prescription and the act of enforcement are, in practice, intertwined. A state's assertion of the applicability of its criminal law to given conduct is actualized, as it were, when it is sought to be enforced in a given case. Nonetheless, the act of prescription can still be said to take place when the prohibition in question is promulgated, the conduct prohibited being, at that point, hypothetical (that is, paradigmatic murder, paradigmatic robbery and so on). It might well be that the question of when prescription occurs is distinct from the question of when state responsibility for the arrogation of exorbitant prescriptive jurisdiction can be said to be engaged, although the latter might, in turn, depend upon the way in which responsibility is invoked.[22] But, as far as prescription itself is concerned, this must be

21 See, e.g. *Arrest Warrant*, sep. op. Higgins, Kooijmans and Buergenthal, at § 56. As regards the trial of the accused, the jurisdiction of the criminal courts in the common-law tradition is, as a matter of municipal law, generally *in personam*: with a few exceptions, the presence of the accused in the court is a precondition to his or her trial. By contrast, many civil-law states permit trial *in absentia* under certain conditions.

22 It would seem that, vis-à-vis an injured state within the meaning of Art. 42 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, annexed to GA Res. 56/83, 12 December 2001, responsibility arises only when prescriptive jurisdiction is exercised, i.e. when it is enforced, e.g. when the Dyspepsian national is arrested by the Hernian authorities on suspicion of having violated Hernian law by whistling in Dyspepsia. See also L. Reydams, *Universal Jurisdiction. International and Municipal Legal Perspectives* (Oxford, New York: Oxford University Press, 2003) 25. On the other hand, it might be the case that a so-called 'interested' state acting under Art. 48 of the ILC's Articles could invoke the responsibility of Hernia for its mere promulgation of the offensive law, and would be entitled to demand its repeal, even if it were never enforced. Such questions are beyond the scope of this article.

said to occur when jurisdiction is asserted, rather than exercised.[23] If this were not the case, then the prescription of the prohibition in question – in other words, the proscription of the relevant conduct – would take place after the commission of the prohibited conduct and, as such, would amount to *ex post facto* criminalization – a phenomenon abhorred by the world's major legal traditions and contrary to international human-rights law.[24]

This last point helps to answer the question of when the relevant prescriptive jurisdictional nexus – be it territoriality, the nationality or residency of the offender, the nationality of the victim, or the offender's service in the armed forces of the prescribing state – must exist in a given case; and the answer is that the nexus relied on to ground prescriptive jurisdiction over given conduct must exist at the time at which the conduct is performed. This is obvious in relation to territoriality. The assertion of prescriptive jurisdiction over an offence that takes place abroad cannot be founded on territoriality simply because the offender subsequently enters the territory of the prescribing state: regardless of how it is enforced, an assertion of prescriptive jurisdiction over conduct taking place outside the territory of the prescribing state is an assertion of extraterritorial jurisdiction, for which an alternative legal justification must be found. As Judge Loder noted in his dissenting opinion in *Lotus*, speaking specifically of jurisdiction to prescribe on the basis of territoriality:

> ... a law [cannot] extend in the territory of the State enacting it to an offence committed by a foreigner abroad should the foreigner happen to be in this territory after the commission of the offence, because the guilty act has not been committed within the area subject to the jurisdiction of that State and the *subsequent presence of the guilty person* cannot have the effect of *extending the jurisdiction of the State*.[25]

Similarly, in respect of nationality, the offender must be a national of the prescribing

23 The situation is more complex when a state's assertion of the applicability of its criminal law to given conduct takes place by way of judicial ruling. As mentioned *supra* note 3, this can happen in one of two ways. In the vast majority of cases in both civilian and common-law systems, such a ruling will take the form of an expansive interpretation by the court of the ambiguous jurisdictional scope of a given statute. While the practical effect of such a ruling is that prescription occurs only at the moment of its exercise, the formal legal characterization of the situation is that the statute in question has always had the jurisdictional scope ascribed to it by the court; as such, prescription can still be said, at least in formal terms, to have occurred when the statute came into force. In some common-law countries, however, the jurisdictional scope of at least certain crimes is still the creation solely of the judge-made law, the upshot being that a judicial ruling can (leaving aside certain objections) extend the jurisdictional scope of a crime without reference to statute. Here, recourse must be had to the traditional common-law fiction that a judicial ruling merely 'discovers' what the common law has always been, the result being that, again at least formally, prescription takes place not at the moment of enforcement but when the common law is said, by historical fiction, to have emerged. In both instances, the reality is that serious questions of retroactivity arise: although the prohibition itself might have existed at the time of the accused's conduct, the application of the prohibition to the accused might not have been ascertainable.

24 See Universal Declaration of Human Rights, GA Res. 217A (III), 10 December 1948, Art. 11(2); International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, Art. 15(1); European Convention on Human Rights, 4 November 1950, ETS No. 5, Art. 7(1); American Convention on Human Rights, 22 November 1969, OASTS No. 36, Art. 9; African Charter on Human and Peoples' Rights, 27 June 1981, OAU Doc. CAB/LEG/67/3/Rev.5, Art. 7(2).

25 *Lotus*, diss. op. Loder, at 35 (original emphasis).

state at the moment at which he or she commits the offence. The same applies, *mutatis mutandis*, to prescriptive jurisdiction on the basis of residency, passive personality and service in the armed forces of the prescribing state.[26] The reason for this, as alluded to above, is the cardinal principle of the rule of law expressed in the maxim *nullum crimen nulla poena sine lege*. The exercise of prescriptive jurisdiction on the basis of a jurisdictional nexus established subsequent to the commission of the offence is a form of *ex post facto* criminalization and, therefore, repugnant, in that a substantive national criminal prohibition and its attendant punishment – and not merely a national procedural competence – become applicable to the accused only after the performance of the impugned conduct.[27]

This last point is worth emphasizing: the exercise by a state of prescriptive jurisdiction in reliance on a jurisdictional nexus not satisfied until after the commission of the 'offence' means that, at the moment of commission, the 'offender' is not prohibited by the law of that state from performing the relevant act; as such, his or her subsequent conviction and punishment for that act under the law of the state in question are violations of the principle of legality. This is especially significant in relation to prescriptive jurisdiction asserted on the basis of a nationality (or, equally, residency) acquired after the impugned act. True, a number of states provide for jurisdiction over certain strictly municipal offences[28] on the basis of nationality acquired by the offender subsequent to the commission of the offence.[29] But, this,

26 The question has less chance of arising in relation to the protective principle and the effects doctrine, where the requisite prescriptive jurisdictional nexus – respectively, the threat posed by the relevant conduct to a fundamental interest of the prescribing state and the effect of the relevant conduct within its territory – is, in practice, simply deemed to exist in relation to certain offences such as counterfeiting. But consider the situation where the prescribing state itself did not exist at the time of the commission of the offence; and query the statements in this regard in *Attorney-General of Israel v Eichmann*, 36 *International Law Reports* (*ILR*) 5, at 49–57, especially §§ 36–38 (1961, Dist. Ct Jerusalem) and 36 *ILR* 5, at 304 (1962, Sup. Ct Israel).

27 That said, it might be countered that the considerations of natural justice underpinning the principle of legality are less compelling in circumstances where individuals have the choice of whether to render themselves liable to punishment for past conduct by subsequently adopting a given nationality or residency, or by subsequently joining the armed forces of a given state. This rebuttal, however, is unsatisfactory when it comes to jurisdiction on the basis of passive personality in cases where the victim acquires the relevant nationality after the commission of the offence. In such cases, the offender is obviously denied fair warning.

28 It is crucial to note that different considerations apply to crimes under general international law, as specifically considered *infra*. In short, the principle of legality is not violated in cases of municipal retroactivity where the impugned conduct constituted an offence under international law at the time of its commission: see, e.g. Universal Declaration, Art. 11(2); ICCPR, Art. 15(1); ECHR, Art. 7(1), as consonant with customary international law. This is highly relevant to the exercise of universal jurisdiction over crimes under general international law, especially by means of subsequent nationality or subsequent residency jurisdiction, as also discussed *infra*.

29 See, e.g. Penal Code (France), Art. 113–6. See also the sources cited in Z. Deen-Racsmány, 'The Nationality of the Offender and the Jurisdiction of the International Criminal Court', 95 *American Journal of International Law* (*AJIL*) (2001) 606, at 614.

nonetheless, violates the prohibition on the retroactive application of criminal laws,[30] and cannot be said to be a valid exercise of nationality jurisdiction in the eyes of public international law,[31] even if it has elicited no great reaction from states who do not assert it. The lack of adverse response does not necessarily denote acquiescence. For one thing, while such provisions are on the books, it seems that they have only very rarely formed the basis of prosecutions; as such, there has been little opportunity for the occasioning of injury to other states,[32] and, hence, for protest. Moreover, there is no indication of the *opinio juris* accompanying the apparent silence, and the most likely explanation for it relates to the admissibility of claims under the law of diplomatic protection: the offender's change of nationality after the commission of the offence implicates the rule on the continuous nationality of claims; alternatively, the offender's later assumption of an additional nationality implicates questions of dual nationality. Whatever other subjective belief as might exist is just as likely political as legal.[33]

3. Clarifying Universal Jurisdiction

A. Basic Definition

It comes as something of a surprise that none of the judges in *Arrest Warrant* explicitly posits a definition of universal jurisdiction, despite the concept's centrality to the case. In fact, Judge ad hoc Van den Wyngaert suggests, in her dissenting opinion, that '[t]here is no generally accepted definition of universal jurisdiction in conventional or customary international law',[34] stating that '[m]any views exist as to its legal meaning'[35] and that 'uncertainties ... may exist concerning the definition [of the concept]'.[36]

In response to Judge ad hoc Van den Wyngaert, one might fairly question whether treaty or custom could be expected to provide such a definition, rather than just permissive or prohibitive rules regarding a phenomenon defined doctrinally. One might query, also, the genuineness or seriousness of the alleged debate over the meaning of universal jurisdiction. And, one might, with reason, point out that the absence of a customary or conventional definition and the supposed plurality of

30 See also L. Sarkar, 'The Proper Law of Crime in International Law', 11 *International and Comparative Law Quarterly (ICLQ)* (1962) 446, at 459. The question is floated but left open by Deen-Racsmány, *supra* note 29, at 614–615, especially note 61, although she does suggest *contra* that '[n]ationality either at the time of prosecution or at the time of the commission of the crime should be sufficient for jurisdiction' (*ibid.*, at 615).

31 Cf., *contra*, Harvard Law School Research in International Law, *supra* note 12, at 531–532, and the sources referred to therein, even if the authors concede that such jurisdiction is 'possibly a little difficult to justify theoretically' (*ibid.*, at 532).

32 Recall *supra* note 22.

33 See, e.g. *Lotus*, diss. op. Altamira, at 98.

34 *Arrest Warrant*, diss. op. Van den Wyngaert, at § 44.

35 *Ibid.*, at § 45.

36 *Ibid.*, at § 46.

doctrinal definitions do not mean that no single soundest definition of universal jurisdiction cannot be given.

It would seem sufficiently well agreed that universal jurisdiction amounts to the assertion of jurisdiction to prescribe in the absence of any other accepted jurisdictional nexus at the time of the relevant conduct. (It should again be stressed, in this light, that the term 'universal jurisdiction' is shorthand for 'universal jurisdiction *to prescribe*' or 'universal *prescriptive* jurisdiction' and that the point by reference to which one characterizes the head of prescriptive jurisdiction relied on in a given case is the moment of commission of the putative offence.) In positive and slightly pedantic terms, universal jurisdiction can be defined as prescriptive jurisdiction over offences committed abroad by persons who, at the time of commission, are non-resident aliens, where such offences are not deemed to constitute threats to the fundamental interests of the prescribing state or, in appropriate cases, to give rise to effects within its territory.[37] This positive definition is, needless to say, a mouthful, and universal jurisdiction is probably more usefully defined in opposition to what it is not. Indeed, Ascensio observes that universal jurisdiction 'is usually defined negatively, as a ground of jurisdiction which does not require any link or *nexus* with the elected *forum*'.[38] As stated by de la Pradelle:

> La compétence pénale d'une juridiction nationale est dite 'universelle' quand ... un tribunal que ne désigne aucun des critères ordinairement retenus – ni la nationalité d'une victime ou d'un auteur présumé, ni la localisation d'un élément constitutif d'une infraction, ni l'atteinte portée aux intérêts fondamentaux de l'État – peut, cependant, connaître d'actes accomplis par des étrangers, à l'étranger ou dans un espace échappant à toute souvereineté.[39]

Similarly, Reydams states:

> Negatively defined, [universal jurisdiction] means that there is no link of territoriality or nationality between the State and the conduct or offender, nor is the State seeking to protect its security or credit.[40]

(By 'nationality', Reydams means both 'the nationality of the perpetrator, and the nationality of the victim'.[41]) Meron, likewise, defines universal jurisdiction as existing when 'states that have no territorial or nationality (active or passive) or "protective principle" links' are permitted, by international law, 'to prosecute those who commit

37 See, similarly, Reydams, *supra* note 22, at 5: 'Positively defined, a State exercises universal jurisdiction when it seeks to punish conduct that is totally foreign, ie conduct by and against foreigners, outside its territory and its extensions, and not justified by the need to protect a narrow self-interest.'

38 H. Ascensio, 'Are Spanish Courts Backing Down on Universality? The Supreme Tribunal's Decision in *Guatemalan Generals*', 1 *Journal of International Criminal Justice (JICJ)* (2003) 690, at 699. See also, in a similarly negative formulation, M. Henzelin, *Le principe de l'universalité en droit pénal international* (Basel/Geneva/Munich: Helbing and Lichtenhahn; Bruxelles: Bruylant, 2000) 1 and 29, § 72.

39 G. de la Pradelle, 'La compétence universelle', in H. Ascensio, E. Decaux and A. Pellet (eds), *Droit International Pénal* (Paris: Pédone, 2000) 905, at § 1. See also B. Stern, 'À Propos de la Compétence Universelle ...', in E. Yakpo and T. Boumedra (eds), *Liber Amicorum Judge Mohammed Bedjaoui* (The Hague: Kluwer, 1999) 735, at 737 ('une compétence universelle ... signifie que l'Etat a le droit d'exercer une compétence pour certains actes qui ne sont pas produits sur son territoire, et à l'égard desquels il ne serait pas normalement compétent').

40 Reydams, *supra* note 22, at 5.

41 *Ibid.*

[offences]'.[42] Paragraph 404 of the *Restatement (Third) of the Foreign Relations Law of the United States* provides an analogous definition.[43] Other definitions commonly offered are essentially identical, even if they often omit reference to less common heads of prescriptive jurisdiction, such as the protective principle and passive personality.[44] All conceive of universal jurisdiction as permitting a state to deem given conduct an offence against its law, 'regardless of any nexus the state may have with the offen[c]e, the offender, or the victim'.[45]

By way of aside, note that universal jurisdiction is often said to mean that 'any' state or 'every' state is permitted to criminalize the conduct in question.[46] While the gist of such statements is clear and obviously correct, the use of words like 'any' and 'every' can be unintentionally misleading, in so far as it might be mistaken to suggest that universal jurisdiction can never be grounded in treaty law, circumscribed as it is by the *pacta tertiis* principle. Such a misapprehension would seem to underpin Higgins' heterodox characterization (in a non-judicial capacity) of a certain provision common to many international criminal conventions and generally considered to mandate universal jurisdiction.[47] She is not, it must be said, alone. Cameron takes a similar line[48] and Cassese states:

> [A]s rightly pointed out by R. Higgins, these treaties do not provide for universal jurisdiction proper, for only the contracting states are entitled to exercise extraterritorial jurisdiction over offenders on their territory. In addition, it may be contended that such jurisdiction does not extend to offences committed by nationals of states *not parties*, unless the crime (1) is

42 T. Meron, 'International Criminalization of Internal Atrocities', 89 *AJIL* (1995) 554, at 568. See, similarly, Schachter, *supra* note 5, at 262.

43 See also comment *(a)* to § 404 of the *Restatement (Third)*, *supra* note 5.

44 See, e.g. L.C. Green, 'International Crimes and the Legal Process', 29 *ICLQ* (1980) 567, at 568, as endorsed by Brennan J. of the High Court of Australia in *Polyukhovich v Commonwealth of Australia* (1991) 91 *ILR* 1, at 40; G. Triggs, 'Australia's War Crimes Trials: A Moral Necessity or Legal Minefield?', 16 *Melbourne University Law Review* (1987) 382, at 389, as endorsed by Cory J. of the Supreme Court of Canada in *R. v Finta* (1994) 104 *ILR* 284, at 353; K.C. Randall, 'Universal Jurisdiction Under International Law', 66 *Texas Law Review* (1988) 785, at 788; R. Higgins, *Problems and Process. International Law and How We Use It* (Oxford: Clarendon Press, 1994) 57; Combacau and Sur, *supra* note 10, at 350; A. Cassese, *International Law* (Oxford: Oxford University Press, 2001) 261; W.A. Schabas, *An Introduction to the International Criminal Court* (Cambridge: Cambridge University Press, 2001) 60; G. Danilenko, 'ICC Statute and Third States', in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary. Volume II* (Oxford: Oxford University Press, 2002) 1871, at 1878; G.P. Fletcher, 'Against Universal Jurisdiction', 1 *JICJ* (2003) 580, at 582.

45 S.R. Ratner and J.S. Abrams, *Accountability for Human Rights Atrocities in International Law* (2nd edn, Oxford: Oxford University Press, 2001) 161. See, similarly, Princeton Principles on Universal Jurisdiction, available online at *http://www.princeton.edu/~lapa/unive_jur.pdf*, Principle 1(1) (visited 18 May 2004).

46 See, e.g. Green, *supra* note 44, at 568; Bowett, *supra* note 10, at 11; Randall, *supra* note 44, at 788; Oxman, *supra* note 6, at 58; Dinstein, *supra* note 5, at 18; Combacau and Sur, *supra* note 10, at 350; Stern, *supra* note 39, at 735; Cassese, *supra* note 44, at 261; Schabas, *supra* note 44, at 60; Danilenko, *supra* note 44, at 1878; B. Conforti, *Diritto Internazionale* (6th edn, Naples: Editoriale Scientifica, 2002), § 24.2.

47 See Higgins, *supra* note 44, at 63–65, referring to some of the provisions cited *infra*, note 51.

48 See I. Cameron, *The Protective Principle of International Criminal Jurisdiction* (Aldershot: Dartmouth, 1994), 80.

> indisputably prohibited by customary international law ... or (2) the national of the non-contracting state engages in prohibited conduct in the territory of a state party, or against nationals of that state.[49]

Cassese's substantive points are sound, but his (and the others') implicit definition of 'universal jurisdiction proper' is open to question. The jurisdiction mandated by the relevant treaty provision is, in fact, universal jurisdiction – that is, prescriptive jurisdiction in the absence of any other recognized jurisdictional nexus.

B. 'Universal Jurisdiction In Absentia'

1. President Guillaume, Judge Ranjeva and Judge Rezek in Arrest Warrant

The relevant aspect of *Arrest Warrant* that is most open to question is several judges' treatment of what they call 'universal jurisdiction *in absentia*', which they posit as some sort of undisaggregated jurisdictional category. For example, President Guillaume – speaking of the jurisdictional provision common to many international criminal conventions, whereby each State Party is obliged to 'take such measures as may be necessary to establish its jurisdiction over the offence in the case where the alleged offender is present in its territory ... ',[50] without any requirement that the offence should take place on the territory of that state or that the alleged offender or victim should be one of its nationals – notes:

> [N]one of these texts has contemplated establishing jurisdiction over offences committed abroad by foreigners against foreigners when the perpetrator is not present in the territory of

49 A. Cassese, 'Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction', 1 *JICJ* (2003) 589, at 594 (original emphasis, citation omitted). On the exercise of treaty-based universal jurisdiction over the nationals of non-party states, cf. *contra* M.P. Scharf, 'Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States', 35 *New England Law Review* (2001) 363.

50 *Arrest Warrant*, sep. op. Guillaume, at §§ 7–8. Provisions to this effect are found in Convention for the Suppression of Unlawful Seizure of Aircraft, 16 December 1970 ('Hague Convention'), 860 UNTS 1971, Art. 4(2); Convention for the Suppression of Unlawful Acts against the Safety of Civilian Aircraft, 23 September 1971 ('Montreal Convention'), 974 UNTS 177, Art. 5(2); Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 14 December 1973, 1035 UNTS 167, Art. 3(2); Convention against the Taking of Hostages, 17 December 1979, 1316 UNTS 205, Art. 5(2); Convention on the Physical Protection of Nuclear Material, 3 March 1980, 1456 UNTS 124, Art. 8(2); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 112, Art. 5(2); Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 10 March 1988 ('Rome Convention'), 1678 UNTS 221, Art. 6(4); Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, 10 March 1988 ('Rome Protocol'), 1678 UNTS 304, Art. 3(4); Convention against the Recruitment, Use, Financing and Training of Mercenaries, 4 December 1989, UN Treaty Reg. No. 37789, Art. 9(2); Convention on the Safety of United Nations and Associated Personnel, 9 December 1994, 2051 UNTS 363, Art. 10(4); Convention for the Suppression of Terrorist Bombings, 15 December 1997, UN Treaty Reg. No. 37517, Art. 6(4); Second Protocol to the Hague Convention of 14 May 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 26 March 1999, reproduced in 38 *ILM* (1999) 769, Art. 16(1)(c); Convention for the Suppression of the Financing of Terrorism, 9 December 1999, UN Treaty Reg. No. 38349, Art. 7(4); Convention against Transnational Organized Crime, 15 November 2000, UN Treaty Reg. No. 39574, Art. 15(4).

> the State in question. Universal jurisdiction *in absentia* is unknown to international conventional law.[51]

Judge Ranjeva's use of the term and his reasoning are markedly similar.[52] What is more, both judges, along with Judge Rezek, talk consistently of so-called universal jurisdiction *in absentia* as if it were even less tolerable than universal jurisdiction per se.[53] President Guillaume, after observing that states 'may exercise jurisdiction in cases of piracy and in the situations of subsidiary universal jurisdiction provided for by various conventions if the offender is present on their territory', concludes:

> But apart from these cases, international law does not accept universal jurisdiction; still less does it accept universal jurisdiction *in absentia*.[54]

Judge Ranjeva, noting by way of introduction that 'la présente déclaration portera-t-elle sur l'interprétation que la Belgique donne de la compétence universelle',[55] states:

> 5. La législation belge qui institue la compétence universelle *in absentia* pour les violations graves du droit international humanitaire a consacré l'interprétation la plus extensive de cette compétence .... L'innovation de la loi belge réside dans la possibilité de l'exercice de la compétence universelle en l'absence de tout lien de la Belgique avec l'objet de l'infraction, la personne de l'auteur présumé de l'infraction ou enfin le territoire pertinent. Mais après les tragiques événements survenus en Yougoslavie et au Rwanda, plusieurs Etats ont invoqué la compétence universelle pour engager des poursuites contre des auteurs présumés de crimes de droit humanitaire; cependant, à la différence du cas de M. Yerodia Ndombasi, les personnes impliquées avaient auparavant fait l'objet d'une procédure ou d'un acte d'arrestation, c'est-à-dire qu'un lien de connexion territoriale existait au préalable.
> 6. En droit international, la même considération liée au lien de connexité *ratione loci* est également exigée pour l'exercice de la compétence universelle ....

Judge Rezek declares:

> L'activisme qui pourrait mener un Etat à rechercher hors de son territoire, par la voie d'une demande d'extradition ou d'un mandat d'arrêt international, une personne qui aurait été accusée de crimes définis en termes de droit des gens, mais *sans aucune circonstance de rattachement au for*, n'est aucunement autorisé par le droit international en son état actuel ....[56]

He concludes:

51 *Arrest Warrant*, sep. op. Guillaume, at § 9; see also *ibid.*, at § 12.

52 See *Arrest Warrant*, dec. Ranjeva, at § 7.

53 As regards universal jurisdiction per se, President Guillaume states explicitly that it is not recognized by general international law except in relation to piracy: *Arrest Warrant*, sep. op. Guillaume, at § 16. Judge Ranjeva, while taking the view that 'universal jurisdiction *in absentia*' is impermissible (*Arrest Warrant*, dec. Ranjeva, at §§ 8–12), is silent on the status under general international law of universal jurisdiction over offenders subsequently present in the territory of the prescribing state. Judge Rezek rejects, as a matter of general international law, the attachment of universal jurisdiction to the war crimes and crimes against humanity at issue in the case before the Court, both in principle as well as when enforced *in absentia*: *Arrest Warrant*, sep. op. Rezek, at § 10.

54 *Arrest Warrant*, sep. op. Guillaume, at § 16. Reference by President Guillaume to 'universal jurisdiction *in absentia*' is also found *ibid.*, at §§ 13 and 17.

55 *Arrest Warrant*, dec. Ranjeva, at § 3.

56 *Arrest Warrant*, sep. op. Rezek, at § 6 (original emphasis).

> [L]e for interne de la Belgique n'est pas compétent, dans les circonstances de l'espèce, pour l'action pénale, faute d'une base de compétence autre que le seul principe de la compétence universelle et faute, à l'appui de celui-ci, de la présence de la personne accusée sur le territoire belge, qu'il ne serait pas légitime de forcer à comparaître.[57]

For her part, Judge ad hoc Van den Wyngaert, while holding *contra* that 'universal jurisdiction *in absentia*' is not prohibited by conventional or customary international law,[58] also tends to treat it as a distinct head of jurisdiction, the lawfulness of which is to be proved in its own right;[59] but close reading suggests that this is probably just a function of misplaced emphasis.

It should be noted that the approach taken by President Guillaume and Judges Ranjeva and Rezek is not without resonance in the academic literature. Reydams uses the term 'universal jurisdiction *in absentia*',[60] and treats it as a form of jurisdiction whose lawfulness is to be considered in its own right – that is, as distinct from universal jurisdiction per se.[61] In a related vein are the various doctrinal writings summarized by Reydams,[62] where what the author terms the 'co-operative general universality principle' and the 'co-operative limited universality principle' are predicated on the presence of the offender, while the so-called 'unilateral limited universality principle' states that '*any* State may unilaterally launch an investigation, even *in absentia*'.[63] Similarly, Cassese states that the principle of universality:

> ... has been upheld in two different versions. According to the most widespread version, only the State where the accused is in custody can prosecute him or her (so-called *forum deprehensionis*, or jurisdiction of the place where the accused is apprehended) .... Under a different version of the universality principle, a State may prosecute persons accused of international crimes regardless ... of whether or not the accused is in custody in the forum State.[64]

Elsewhere, he distinguishes between 'conditional' universal jurisdiction and 'absolute' universal jurisdiction.[65]

2. *Discussion*

The practice of states in this regard – sparse and ambivalent, to date – does not point conclusively to the general recognition of so-called universal jurisdiction *in absentia* as a distinct category of jurisdiction whose lawfulness is to be established in its own right. As such, the question can only be approached from first principles. In this light, the approach adopted by President Guillaume and Judges Ranjeva and Rezek is not logically compelling. It conflates a state's jurisdiction to prescribe its criminal law with the manner of that law's enforcement.

57 *Ibid.*, at § 10.
58 See *Arrest Warrant*, diss. op. Van den Wyngaert, at §§ 54–55 and 58.
59 See *ibid.*, at §§ 52–58.
60 See Reydams, *supra* note 22, at 55, 74, 88–89, 156, 177, 222, 224, 225 and 227.
61 See, e.g. *ibid.*, at 224.
62 See *ibid.*, at 29–42.
63 *Ibid.*, at 38 (original emphasis).
64 Cassese, *supra* note 44, at 261.
65 See A. Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2003), at 284–291.

As a manifestation of 'jurisdiction' in some wholly notional unitary sense, there can be no such thing as 'universal jurisdiction *in absentia*'. Universal jurisdiction is a manifestation of jurisdiction to prescribe. Like all heads of jurisdiction to prescribe, it might be that it is exercised in a given case with the accused present in the court, consequent upon his or her arrest in the territory of the prosecuting state, pursuant to a warrant issued while he or she was present in that territory. Or, it might be exercised *in personam*, but consequent upon the accused's arrest in and extradition from a foreign state, pursuant to a warrant issued while he or she was abroad or, equally, while he or she was in the territory of the prosecuting state, having since absconded. Alternatively, it might be that it is exercised without the accused present in the court, pursuant to an outstanding warrant, issued while he or she was abroad. Or, it might be exercised *in absentia* but pursuant to an outstanding warrant, issued while a subsequently absconding accused was present in the prosecuting state. The fact is that prescription is logically independent of enforcement. On the one hand, there is universal jurisdiction, a head of prescriptive jurisdiction alongside territoriality, nationality, passive personality and so on. On the other hand, there is enforcement *in absentia*, just as there is enforcement *in personam*.

In turn, since prescription is logically distinct from enforcement, the legality of the latter can in no way affect the legality of the former, at least as a matter of reason. Universal jurisdiction to prescribe is either lawful or it is not. The issuance of a warrant *in absentia* and trial *in absentia* is either lawful or it is not. And, as far as international law goes, these last two *are*, in fact, lawful, in a reflection of the position classically adopted by the civil-law tradition. As rightly noted by Judges Higgins, Kooijmans and Buergenthal:

> ... [s]ome jurisdictions provide for trial *in absentia*; others do not. If it is said that a person must be within the jurisdiction at the time of the trial itself, that may be a prudent guarantee for the right of fair trial but has little to do with bases of jurisdiction recognized under international law.[66]

In short, as a matter of international law, if universal jurisdiction is permissible, then its exercise *in absentia* is logically permissible also. Whether it is desirable is, needless to say, a separate question.

Of course, logic and the *opinio juris* of states do not always go hand in hand, and it is always open to states to indicate unambiguously that the international lawfulness of universal jurisdiction does, in fact, depend upon the presence of the offender. But, 'the great majority of the interested states'[67] have not done so, to date.

If the novel term 'universal jurisdiction *in absentia*' must be used at all, it can surely only be as shorthand (and potentially confusing shorthand, at that) for the combined manifestation in a given case of two distinct aspects of national criminal jurisdiction, namely the enforcement *in absentia* of universal prescriptive jurisdiction. If one is to talk, however, of 'universal jurisdiction *in absentia*', then one might as well talk also of

66 See *Arrest Warrant*, sep. op. Higgins, Kooijmans and Buergenthal, at § 56.

67 *North Sea Continental Shelf Cases* (FRG/Denmark; FRG/Netherlands), *ICJ Reports* (1969) 3, at 229 (diss. op. Lachs).

territorial jurisdiction *in absentia*, nationality jurisdiction *in absentia*, passive personality jurisdiction *in absentia*, and so on. But no one does.

As for President Guillaume's more specific conclusion – based on the classic treaty undertaking by each state party to 'take such measures as may be necessary to establish its jurisdiction over the offences [in question] in cases where the alleged offender is present in its territory ...' – that the exercise *in absentia* of universal jurisdiction 'is unknown to international conventional law'[68] (a view echoed by Judge Ranjeva[69]), this confuses what is mandatory with what is permissible, as pointed out by Judges Higgins, Kooijmans and Buergenthal.[70] It is clear that the territorial precondition to the exercise of the mandatory universal jurisdiction envisaged in such treaty provisions is designed to take account of the general unavailability of trial *in absentia* among states of the common-law tradition. A conventional *obligation* to provide for the exercise of universal jurisdiction *in absentia* would prevent these states from being able to ratify the conventions in question. In this light, the territorial precondition serves as a universally acceptable lowest common denominator, designed to encourage maximum participation in these treaties.[71] Moreover, as observed by Judge ad hoc Van den Wyngaert, most of the international criminal conventions which contain this provision also embody a provision to the effect that the convention 'does not exclude any criminal jurisdiction exercised in accordance with national law'.[72] It is also worth recalling that the mandatory universal jurisdiction provision in question is accompanied, in every single instance, by an *aut dedere aut judicare* provision;[73] and, as remarked by Judges Higgins, Kooijmans and Buergenthal:

> ... [t]here cannot be an obligation to extradite someone you choose not to try unless that person is within your reach. National legislation, enacted to give effect to these treaties, quite naturally also may make mention of the necessity of the presence of the accused. These sensible

68 *Arrest Warrant*, sep. op. Guillaume, at § 9.

69 *Arrest Warrant*, dec. Ranjeva, at § 7.

70 *Arrest Warrant*, sep. op. Higgins, Kooijmans and Buergenthal, at § 57.

71 See also Ascensio, *supra* note 38, at 700 (original emphasis): 'The presence of the accused on the territory of the prosecuting state, a prerequisite for the implementation of the universal jurisdiction doctrine in many domestic legal systems, is not a link in the sense of a basis of jurisdiction, but only *a procedural condition for the exercise* of universal jurisdiction, usually required for practical reasons. ... Some international conventions do mention it, in order to set up a minimum obligation for states to implement universal jurisdiction.'

72 *Arrest Warrant*, diss. op. Van den Wyngaert, at § 61. See, in this regard, Hague Convention, Art. 4(3); Montreal Convention, Art. 5(3); Internationally Protected Persons Convention, Art. 3(3); Hostages Convention, Art. 5(3); Nuclear Material Convention, Art. 8(3); Torture Convention, Art. 5(3); Rome Convention, Art. 6(4); Rome Protocol, Art. 3(5); Illicit Trafficking Convention, Art. 4(3); Mercenaries Convention, Art. 9(3); UN and Associated Personnel Convention, Art. 10(5); Terrorist Bombings Convention, Art. 6(5); Second Hague Protocol, Art. 16(2); Financing of Terrorism Convention, Art. 7(6); Organized Crime Convention, Art. 15(6).

73 See Hague Convention, Art. 7; Montreal Convention, Art. 7; Internationally Protected Persons Convention, Art. 7; Hostages Convention, Art. 8(1); Nuclear Material Convention, Art. 10; Torture Convention, Art. 7(1) and (2); Rome Convention, Art. 10(1); Mercenaries Convention, Art. 12; UN and Associated Personnel Convention, Art. 14; Terrorist Bombings Convention, Art. 8; Second Hague Protocol, Art. 17(1); Financing of Terrorism Convention, Art. 10(1); Organised Crime Convention, Art. 16 (10).

> realities are critical for the obligatory exercise of *aut dedere aut prosequi* jurisdiction, but cannot be interpreted *a contrario so as to exclude* a voluntary exercise of a universal jurisdiction.[74]

In addition, it is not clear how these treaty provisions could have a bearing either way on the position of 'universal jurisdiction *in absentia*' under *general* international law.

There is an intriguing postscript to all of this. In the version of *Arrest Warrant* originally made available on the ICJ website,[75] the dissenting opinion of Judge Rezek contained an additional paragraph (a paragraph 8) when compared with the version now available electronically. In this excised paragraph, Judge Rezek distinguishes the case before the Court from the request made by Spain '*in absentia*', as it were, for the extradition by the United Kingdom of Senator Augusto Pinochet for crimes committed in Chile against Spanish nationals – a request that Judge Rezek considers internationally lawful. In a further conflation of jurisdiction to prescribe and jurisdiction to enforce, Judge Rezek concludes:

> ... et surtout ... la compétence de la justice espagnole avait pour fondement le principe de la nationalité passive, qui peut justifier – bien que ce ne soit pas le cas de la totalité, peut-être même pas d'une majorité d'Etats – l'engagement de l'action pénale *in absentia*, donnant lieu de ce chef à l'émission d'un mandat d'arrêt international et à la demande d'extradition.

The reason for the paragraph's excision is a matter of surmise.

C. *'Classical' Universal Jurisdiction, 'True Universality', Universal Jurisdiction 'Properly So Called', 'Pure' Universal Jurisdiction, etc.*

1. *Judges Higgins, Kooijmans and Buergenthal in* Arrest Warrant

Although recognizing that the legality of universal jurisdiction is unaffected by the method of its enforcement, the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal is inconsistent in its use of the term 'universal jurisdiction' and seemingly unclear as to what it encompasses. This opacity, again, reflects a certain elision of prescription and enforcement, which is, in turn, a function of the judges' inattention to the moment at which the requisite prescriptive jurisdictional nexus must be present.

The three judges observe at the outset:

> As Mr Yerodia was a non-national of Belgium and the alleged offences described in the arrest warrant occurred outside of the territory over which Belgium has jurisdiction, the victims being non-Belgians, the arrest warrant was necessarily predicated on a universal jurisdiction.[76]

They then 'turn to the question whether States are entitled to exercise jurisdiction over persons having no connection with the forum State when the accused is not

74 *Arrest Warrant*, sep. op. Higgins, Kooijmans and Buergenthal, at § 57 (original emphasis).

75 Copy on file with author.

76 *Arrest Warrant*, sep. op. Higgins, Kooijmans and Buergenthal, at § 6.

present in the State's territory',[77] and note, by way of preface, that, with the exception of the Belgian legislation in issue, 'national legislation, whether in fulfilment of international treaty obligations to make certain international crimes offences also in national law, or otherwise, does not suggest a universal jurisdiction over these offences'.[78] The national legislation examined by Judges Higgins, Kooijmans and Buergenthal includes the Australian War Crimes Act 1945, as amended by the War Crimes (Amendment) Act 1988, which provides for the prosecution in Australia of war crimes committed during the Second World War by persons who, at the time of prosecution, are Australian citizens or residents; the United Kingdom's War Crimes Act 1991, which allows for the prosecution in the United Kingdom of certain war crimes committed in Europe during the Second World War by persons who, inter alia, have subsequently become nationals or residents of the United Kingdom; and the Criminal Code of Canada 1985, which establishes Canadian jurisdiction over offences in circumstances, inter alia, where 'at the time of the act or omission Canada could, in conformity with international law, exercise jurisdiction over the person on the basis of the person's presence in Canada'.[79] Judges Higgins, Kooijmans and Buergenthal then conclude:

> All of these illustrate the trend to provide for the trial and punishment under international law of certain crimes that have been committed extraterritorially. But none of them, nor the many others that have been studied by the Court, represent a classical assertion of a universal jurisdiction over particular offences committed elsewhere by persons having no relationship or connection with the forum State.[80]

Turning to national case law, the judges point to Dutch and German prosecutions:

> 23. In the *Bouterse* case the Amsterdam Court of Appeal concluded that torture was a crime against humanity, and as such an 'extraterritorial jurisdiction' could be exercised over a non-national. However, in the *Hoge Raad*, the Dutch Supreme Court attached conditions to this exercise of extraterritorial jurisdiction (nationality, or presence within the Netherlands at the moment of arrest) on the basis of national legislation.
>
> 24. By contrast, a universal jurisdiction has been asserted by the Bavarian Higher Regional Court in respect of a prosecution for genocide (the accused in this case being arrested in Germany) ....

Next, Judges Higgins, Kooijmans and Buergenthal survey the treaty law. They draw attention to the first 'grave breaches' provision, common to the four Geneva Conventions of 1949, and incorporated by reference into Additional Protocol I of 1977, which provides that 'Each High Contracting Party shall be under the obligation to search for persons alleged to have committed ... grave breaches, and shall bring such persons, regardless of their nationality, before its own courts',[81] and they comment:

> No territorial or nationality linkage is envisaged, suggesting a true universality principle ....

77 *Ibid.*, at § 19.
78 *Ibid.*, at § 20.
79 See *ibid.*
80 *Ibid.*, at § 21.
81 See *ibid.*, at § 28.

> But a different interpretation is given in the authoritative Pictet Commentary ..., which contends that this obligation was understood as being an obligation upon States parties to search for offenders who may be on their territory. Is it a true example of universality, if the obligation to search is restricted to their own territory? Does the obligation to search imply a permission to prosecute in absentia, if the search had no result?[82]

They also note the provision common to most international criminal conventions, discussed by President Guillaume and Judge Ranjeva, which requires each State Party to 'take such measures as may be necessary to establish its jurisdiction over the offences [in question] in cases where the alleged offender is present in its territory ...', or like formulation.[83] They state:

> By the loose use of language [this] has come to be referred to as 'universal jurisdiction', though [it] is really an obligatory territorial jurisdiction over persons, albeit in relation to acts committed elsewhere.[84]

The judges make subsequent reference to 'this obligation (whether described as the duty to establish universal jurisdiction, or, more accurately, the jurisdiction to establish a territorial jurisdiction over persons for extraterritorial events)'[85] and to 'the inaccurately termed "universal jurisdiction principle" in these treaties'.[86] Turning to academic writings, Judges Higgins, Kooijmans and Buergenthal refer to '[t]he assertion that certain treaties and court decisions rely on universal jurisdiction, which in fact they do not'.[87] Finally, summing up their findings, the judges declare:

> That there is no established practice in which States exercise universal jurisdiction, properly so called, is undeniable. As we have seen, virtually all national legislation envisages links of some sort to the forum State; and no case law exists in which pure universal jurisdiction has formed the basis of jurisdiction.[88]

They even make passing reference to 'universal criminal jurisdiction *in absentia*'.[89]

2. *Discussion*

The marked terminological inconsistency of Judge Higgins, Kooijmans and Buergenthal is frustrating, and leaves the reader scarcely able to tell whether reference to 'universal jurisdiction' at any given point is to universal prescriptive jurisdiction, as such, or to universal prescriptive jurisdiction enforced without the offender's being present within the territory of the prescribing state. Perhaps even more to the point, the terminological distinctions drawn by the judges are less than sound. 'Universal jurisdiction', as emphasized already, is shorthand for universal jurisdiction *to prescribe*, and refers to the assertion of jurisdiction to prescribe in circumstances where

82 *Ibid.*, at § 31.
83 See *ibid.*, at §§ 33–41.
84 *Ibid.*, at § 41.
85 *Ibid.*, at § 42.
86 *Ibid.*, at § 44.
87 *Ibid.*
88 *Ibid.*, at § 45.
89 *Ibid.*, at § 49.

no other lawful head of prescriptive jurisdiction is applicable to the impugned conduct *at the time of its commission*. The term applies irrespective of whether this prescriptive jurisdiction is exercised *in personam* or *in absentia*: just as prescription and enforcement are logically and legally distinct, so too are they terminologically independent of each other. Judges Higgins, Kooijmans and Buergenthal's references to 'classical' universal jurisdiction, 'true universality', universal jurisdiction 'properly so called' and 'pure' universal jurisdiction, when what they are in fact referring to is universal prescriptive jurisdiction exercised *in absentia*, are misplaced. Indeed, universal jurisdiction 'properly so called' is universal prescriptive jurisdiction *tout court*.

Similarly, Judges Higgins, Kooijmans and Buergenthal characterize the common treaty provision obliging each State Party to 'take such measures as may be necessary to establish its jurisdiction over the offences [in question] in cases where the alleged offender is present in its territory ...' as a manifestation of 'the inaccurately termed "universal jurisdiction principle"' – also including under this rubric, by way of necessary implication, the Canadian Criminal Code's provision for jurisdiction in circumstances where 'at the time of the act or omission Canada could, in conformity with international law, exercise jurisdiction over the person on the basis of the person's presence in Canada',[90] as well as the exercise by the Dutch courts of jurisdiction in circumstances where the only link to the Netherlands is the arrest of the accused in Dutch territory. Such exercises of criminal jurisdiction are, the judges assert, really examples of 'territorial jurisdiction over persons, albeit in relation to acts committed elsewhere' or, equally, of 'a territorial jurisdiction over persons for extraterritorial events'. This terminology is unhelpful and, with respect, a trifle silly.[91] In reality, these three exercises of jurisdiction are all manifestations of 'universal jurisdiction', viz. universal jurisdiction to prescribe: that is, at the time of the commission of the offence, no other accepted head of prescriptive jurisdiction need link the prescribing state to the offender. All that is required is that the offender subsequently be present (or, in the Dutch case, be arrested) in the territory of the prescribing state – and this is a limitation strictly as to enforcement. As such, the three

90 Note that the provision in question, s. 7(3.71–3.77) of the Canadian Criminal Code, has been repealed by the subsequent Crimes Against Humanity and War Crimes Act 2000.

91 Consider also *Arrest Warrant*, sep. op. Higgins, Kooijmans and Buergenthal, at §§ 53–54 (emphasis added):

> 53. This brings us once more to the particular point that divides the Parties in this case: is it a precondition of the assertion of universal jurisdiction that the accused be within the territory?
>
> 54. Considerable confusion surrounds this topic, not helped by the fact that legislators, courts and writers alike frequently fail to specify the precise temporal moment at which any such requirement is said to be in play. *Is the presence of the accused within the jurisdiction said to be required at the time the offence was committed?* At the time the arrest warrant is issued? Or at the time of the trial itself? An examination of national legislation, cases and writings reveals a wide variety of temporal linkages to the assertion of jurisdiction. This incoherent practice cannot be said to evidence a precondition to any exercise of universal criminal jurisdiction. ...
>
> It might be observed that if, as a precondition to the assertion of universal jurisdiction, the presence of the accused were required at the time the offence was committed, it would not be an assertion of universal jurisdiction at all, but a straightforward assertion of jurisdiction to prescribe on the basis of territoriality.

examples all constitute exercises *in personam* of universal jurisdiction. To call them 'territorial jurisdiction' is to confuse the terminology of prescriptive jurisdiction with the separate concept of enforcement.

Similarly, Judges Higgins, Kooijmans and Buergenthal do not characterize as assertions of universal jurisdiction the Australian War Crimes Act (as amended) and the United Kingdom's War Crimes Act, both of which grant the courts jurisdiction over persons accused of certain crimes committed during the Second World War where those persons have subsequently become nationals or residents of Australia and the United Kingdom, respectively. But both Acts do, in fact, represent assertions of universal jurisdiction in that, at the time of the commission of the offence, no other accepted head of prescriptive jurisdiction need have existed. The criterion of subsequent nationality or subsequent residency is a criterion only as to the scope of permissible enforcement. In other words, these Acts are examples of universal jurisdiction, albeit enforced only as against perpetrators who, at the time of enforcement, are nationals or residents of the prescribing state. These Acts are not examples of prescriptive jurisdiction on the basis of nationality or residency. Indeed, the Australian government explicitly stated that it was providing for universal jurisdiction through the subsequent nationality and subsequent residency provisions of the War Crimes (Amendment) Act 1988 – a statement accepted in principle in the High Court of Australia.[92] Scholarly opinion has also characterized such provisions as manifestations of universal jurisdiction.[93]

In turn, neither the requirement of the offender's subsequent presence in the territory of the prescribing state nor the limitation as to his or her subsequent nationality or subsequent residency undermines the cogency of the above legislative and judicial examples – where not pursuant to a treaty obligation – as state practice in favour of the permissibility under general law of universal jurisdiction to prescribe in relation to the offences in question. In each case, the state in question clearly considers it permissible to assert criminal jurisdiction over offences committed abroad by persons who, at the time of commission, are non-resident aliens, in circumstances where such offences are not deemed to constitute threats to the fundamental interests

92 For both the Australian government's view and its acceptance, in principle, in the High Court, see *Polyukhovich v Commonwealth of Australia* (1991) 91 *ILR* 1, at 116, 118, 138 and 144 (Toohey J.), and – even if he held the legislation in question to have exceeded the bounds of international law – at 39 (Brennan J., dissenting).

93 As regards Australia's War Crimes Act 1945, as amended by the War Crimes (Amendment) Act 1988, see J.M. Wagner, 'US Prosecution of Past and Future War Criminals and Criminals Against Humanity: Proposals for Reform Based on the Canadian and Australian Experience', 29 *Virginia Journal of International Law* (1989) 887, at 926; M.P. Scharf, 'The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position', 64 *Law and Contemporary Problems* (2001) 67, at 82, note 83, cited with apparent approval by Deen-Racsmány, *supra* note 29, at 614–615, note 54. See also Reydams, *supra* note 22, at 87; but cf. *ibid.*, at 91, where Reydams states contradictorily that 'the proceedings against Polyukhovitch [sic.] were *not* an exercise of universal jurisdiction' (original emphasis). As regards the UK's War Crimes Act 1991, see A.T. Richardson, 'War Crimes Act 1991', 55 *Modern Law Review* (1992) 73, at 76, 77 and 78; Meron, *supra* note 42, at 573; Reydams, *supra* note 22, at 205.

of the prescribing state (nor even to give rise to effects within its territory). Indeed, it is no coincidence that, in each example, the jurisdiction in question was exercised or is provided for in respect of offences widely considered to give rise to universal jurisdiction under general international law – in the Dutch prosecution, in respect of a crime against humanity; in the Bavarian prosecution, genocide; and in the Australian, UK and Canadian legislation, customary war crimes.[94]

In each of these examples, the restriction on the enforceability of the offence would seem to be largely political. As Judge ad hoc Van den Wyngaert remarks, speaking specifically of the requirement of the offender's subsequent presence in the territory:

> ... [i]t may be *politically* inconvenient to have such a wide jurisdiction because it is not conducive to international relations and national public opinion may not approve of trials against foreigners for crimes committed abroad. This does not, however, make such trials illegal under international law.[95]

The same political considerations could be seen equally to underpin the requirement of subsequent nationality or subsequent residency. Given the Pinochet experience in relation to its more expansive enforcement of universal jurisdiction over torture,[96] such considerations almost certainly helped motivate the United Kingdom, when enacting the International Criminal Court Act 2001, to restrict the enforcement of the offences of genocide, crimes against humanity and war crimes, when committed outside the United Kingdom by persons not, at that time, UK nationals, UK residents or persons subject to UK service jurisdiction, to the prosecution of those persons who

94 See also now s. 68, in combination with s. 51, of the International Criminal Court Act 2001 (UK), providing for jurisdiction in respect of genocide, crimes against humanity and war crimes over an accused 'who commits [the relevant] acts outside the United Kingdom at a time when he is not a United Kingdom national, a United Kingdom resident or a person subject to UK service jurisdiction and who subsequently becomes resident in the United Kingdom', in the words of s. 68(1). See, also, to identical effect, s. 6 of the International Criminal Court (Scotland) Act 2001 (UK), in combination with s. 1(1). For the characterization of these provisions as manifestations of universal prescriptive jurisdiction, see R. Cryer, 'Implementation of the International Criminal Court Statute in England and Wales', 51 *ICLQ* (2002) 733, at 742; Reydams, *supra* note 22, at 206. For its part, however, the UK's Foreign and Commonwealth Office (FCO) made no reference to the international legal basis for the subsequent nationality and subsequent residency provisions of the International Criminal Court Act in the Explanatory Notes to the Act which it prepared: see *Explanatory Notes. International Criminal Court Act 2001. Chapter 17* (2001), at § 109; and the relevant government ministers did not characterize the Act as providing for universal jurisdiction: see 620 *HL Deb* (5s) 928–929 (Parliamentary Under-Secretary of State for the FCO), 620 *HL Deb* (5s) 999–1000 (Attorney-General) and 366 *HC Deb* (6s) 278 (Minister of State for the FCO). In the Scottish Parliament (which, under constitutional devolution arrangements with Westminster, enjoys competence to pass criminal laws), an amendment proposed by one of the smaller opposition parties, but defeated, sought to replace what was termed the 'partial universal jurisdiction' of the International Criminal Court (Scotland) Act – i.e. what was referred to as 'the residence test' – with so-called 'absolute universal jurisdiction', i.e. jurisdiction based merely on the subsequent presence of the offender in the territory: see Scottish Parliament Official Report, Thursday 13 September 2001, Session 1, col. 2418.

95 *Arrest Warrant*, diss. op. Van den Wyngaert, at § 56 (original emphasis). See similarly Ratner and Abrams, *supra* note 45, at 185.

96 See Criminal Justice Act 1998 (UK), s. 134, at issue in *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)* (1999) 119 *ILR* 135.

subsequently become resident in the United Kingdom.[97] Indeed, the point about international relations was made in the devolved Scottish Parliament during the passage of the analogous International Criminal Court (Scotland) Act 2001, where the spectre of 'political repercussions for Scotland' was raised.[98] Other compelling reasons for the restrictive enforcement of universal prescriptive jurisdiction would appear to be practical. As Judge ad hoc Van den Wyngaert again observes, referring once more specifically to the requirement of the offender's subsequent presence in the territory:

> ... [a] *practical* consideration may be the difficulty in obtaining the evidence in trials of extraterritorial crimes. Another practical reason may be that States are afraid of overburdening their court system .... The concern for a linkage with the national order ... seems to be more of a pragmatic than of a juridical nature. It is not, therefore, necessarily the expression of an *opinio juris* ....[99]

The need to avoid overburdening the courts was one explicit motivation behind the subsequent nationality and subsequent residency restrictions in the United Kingdom's War Crimes Act 1991;[100] and a similar desire not to become a 'global prosecutor',[101] along with reservations as to the practicability of evidence gathering,[102] were cited in debate in the Scottish Parliament over the jurisdictional provisions of the International Criminal Court (Scotland) Act. It should also be kept in mind when considering the requirement of the offender's subsequent presence in the territory that municipal law might stipulate this as a precondition for the criminal courts' exercise of jurisdiction. In sum, the circumscribed enforcement of universal prescriptive jurisdiction is not, without more, cogent evidence for an ambivalence on the part of states over the permissibility under general international law of the assertion of such jurisdiction *in limine*.

One important upshot of all this is that, when the assertion by states of so-called subsequent presence, subsequent nationality and subsequent residency jurisdiction over crimes under general international law is taken into account, there is more state practice to support the permissibility of universal jurisdiction over such offences than Judges Higgins, Kooijmans and Buergenthal – and, *a fortiori*, President Guillaume and

97 See *supra* note 94.

98 Scottish Parliament Official Report, *supra* note 94, col. 2423.

99 *Arrest Warrant*, diss. op. Van den Wyngaert, at § 56 (original emphasis, citations omitted). Recall also Ascensio, *supra* note 38, at 700 ('The presence of the accused on the territory of the prosecuting state, a prerequisite for the implementation of the universal jurisdiction doctrine in many domestic legal systems, is not a link in the sense of a basis of jurisdiction, but only *a procedural condition for the exercise* of universal jurisdiction, usually required for practical reasons.'). See, also, Ratner and Abrams, *supra* note 45, at 185; D. Turns, 'Aspects of National Implementation of the Rome Statute: The United Kingdom and Selected Other States', in D. McGoldrick, P. Rowe and E. Donnelly (eds), *The Permanent International Criminal Court. Legal and Policy Issues* (Oxford: Hart, 2004) 337, at 347–348.

100 See *HC Stand. Comm. 1989–1990*, Vol. I, Standing Committee A. War Crimes Bill. 29 March–3 April 1990, cols 45–46 (Minister of State for the Home Office).

101 Scottish Parliament Official Report, *supra* note 94, cols 2422 and 2424.

102 *Ibid.*, cols 2422, 2423, 2425 and 2427.

Judges Ranjeva and Rezek – credit.[103] This is potentially significant, given the latter three's respective findings that general international law does not recognize universal jurisdiction over war crimes and crimes against humanity. Just how significant it is depends, of course, upon how many states assert subsequent presence, subsequent nationality and subsequent residency jurisdiction over such offences. This is something which calls for empirical research. The point to be made here is that these three manifestations of jurisdiction are rightly to be counted as exercises of universal jurisdiction to prescribe.

Finally, it should be added, *ex abundante cautela*, that because the above examples of subsequent nationality and subsequent residency jurisdiction are actually, and merely, exercises of national criminal jurisdiction on the basis of universality over crimes under general international law – and, critically, over crimes that existed under general international law at the moment of their commission – they do not in any way infringe the prohibition on *ex post facto* criminalization embodied in international human-rights law.[104] In accordance with the major international human-rights instruments, which are consonant to this extent with customary international law, the principle of legality is not violated in cases of municipal retroactivity if the impugned conduct constituted an offence under international law at the time of its commission.[105] In such cases, all that has happened is that a municipal procedural competence has later been extended to encompass conduct that was substantively criminal, under international law, when performed. At the same time, if a state's municipal law defines such crimes in a manner that is broader than the international definition that prevailed at the time of their commission, then its exercise of subsequent nationality or subsequent residency jurisdiction in relation to them is, to the extent of the overbreadth, exorbitant in the eyes of international law.[106]

103 In this light, it should be noted that three prosecutions were initiated under the 1988 amendments to Australia's War Crimes Act 1945 and two under the UK's War Crimes Act 1991: see Reydams, *supra* note 22, at 87 and 205 respectively. None of these apparently drew protest from the state of nationality of the accused.

104 It is for this reason that Cassese, restricting his discussion to international crimes, is correct when he states that 'nationality may be possessed at either moment', viz. either 'when the crime is perpetrated, or when criminal proceedings are instituted': Cassese, *supra* note 65, at 282. The international criminality of the relevant war crimes at the time at which they were committed (i.e. during the Second World War) was the explicit justification, in the face of concern over offensive retroactivity, for the subsequent nationality and subsequent residency jurisdiction asserted by the War Crimes Act 1991 (UK): see *War Crimes. Report of the War Crimes Inquiry*, Cmd 744 (1989), §§ 6.41–6.44 and 9.27; 513 *HL Deb* (5s) 604 and 607 (Minister of State for the Home Department); 169 *HC Deb* (6s) 928 (Attorney-General); 519 *HL Deb* (5s) 1083 (Minister of State for the Home Department); 188 *HC Deb* (6s) 24 (Secretary of State for the Home Department).

105 See Universal Declaration, Art. 11(2); ICCPR, Art. 15(1); ECHR, Art. 7(1). By way of aside, it is interesting to note that none of these international guarantees requires that the relevant crime under international law must also, at the time of its commission, have been subject to universal jurisdiction on the part of states, and it is worth speculating whether the drafters simply considered the latter to be an inherent incident of the former. For a discussion of the relationship between the concept of a crime under international law and the concept of universal jurisdiction in the specific context of the prohibition on retroactive criminal laws, see *Polyukhovich*, *supra* note 92, at 120–121 (Toohey J.).

106 See, generally, *Polyukhovich*, *supra* note 92, at 41–51 (Brennan J., dissenting).

4. Conclusion

Governments, academics and students were looking to the ICJ's judgment in *Arrest Warrant* for a limpid elaboration of the international legal principles governing national criminal jurisdiction, in particular of universal jurisdiction. But the various judges ended up muddying the waters. It can only be hoped they take the second chance provided by *Certain Criminal Proceedings in France*[107] to clarify the law.[108]

107 *Certain Criminal Proceedings in France* (Republic of the Congo v. France), International Court of Justice, General List No. 129.

108 But cf., on a less optimistic concluding note, M. Henzelin, 'La Compétence Pénale Universelle. Une Question non Résolue par l'Arrêt Yerodia', 106 *Revue Générale de Droit International Public* (2002) 819, at 852: '[F]orce est d'admettre que les opinions [dans l'affaire du *Mandat d'arrêt du 11 avril 2000*] divergent du tout au tout, ce qui ne manque pas de faire craindre qu'un prochain litige soumis à la Cour internationale de Justice ne soit tranché que par la force des majorités, alors que les conséquences d'une décision, quelle qu'elle soit, ne sont pas faciles à prévoir (impunité ou chaos).'