

Searching for Self: Realising the Right of Self-Determination for the Palestinian People

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This article explores the principle and right of self-determination, applies the international law concerning self-determination to the Palestinian context and identifies key limitations of scope, status and subject. Occupation of Palestinian territory by Israel raises the issue of whether the status of an occupying power can move from lawful to unlawful as a result of actions contrary to international law. The article discusses the applicability of international legal enforcement mechanisms available to the Palestinian people, including UN *Resolution 377 (Uniting for Peace)* and its potential application in the contemporary Palestinian context through the realisation of the latent potential of the General Assembly to maintain peace and security where the Security Council has failed to execute its responsibilities.

Introduction

Self-determination is a principle of international law, regarded as a *jus cogens* rule,¹ that grants all peoples the ability to freely determine their political status and pursue their economic, social and cultural development.² The development of this principle can be seen in a movement from nationalistic, state-sovereign origins towards the contemporary, collective right that is recognised today. A significant body of international law has also enshrined the principle as a fundamental right,³ which has been applied in a wide variety of contexts by the international community.⁴ The contemporary articulation of the right of self-determination states ‘all peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.’⁵ The right of the Palestinian people to self-determination has been recognized by the international community.⁶ This article will explore this contemporary understanding of the right of self-determination, apply the international law concerning self-determination to the Palestinian context and identify key limitations concerning the scope, status and subject of self-determination. The application of self-determination beyond a mere theoretical concept and into the reality of realpolitik considerations is one of significant complexity.

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¹ *Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 1514, UN Doc A/RES/1514 (14 December 1960) (*‘Granting of Independence Declaration’*).

² *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976), art 1(1) (*‘ICESCR’*); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 3 (entered into force 23 March 1976) art 1(1) (*‘ICCPR’*). Also see: *East Timor (Portugal v. Australia) (Judgement)* [1995] ICJ Rep 90, 93 (*‘Portugal v Australia’*); and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136 (*‘Wall Advisory Opinion’*).

³ *Charter of the United Nations*, art 1; *ICESCR* (n 2), art 1; *ICCPR* (n 2), art 1; *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd session, 183 plen mtg, UN Doc A/810 (10 December 1948), art 15 (*‘UDHR’*); *Granting of Independence Declaration* (n 1).

⁴ See, for example: Basque Country, Biafra, Catalonia, Crimea, Chechnya, Eastern Ukraine, Falkland Islands, Gibraltar, Hong Kong, Kashmir, Kosovo, Kurdistan, Northern Cyprus, Quebec, South Africa, West Papua, Western Sahara.

⁵ *ICCPR* (n 2), art 1; *ICESCR* (n 2), art 1.

⁶ *The right of the Palestinian people to self-determination*, GA Res 73/158, UN Doc A/RES/73/158 (17 December 2018).

Therefore, the discussion will be guided by two key challenges to the realisation of self-determination by the Palestinian people: occupation and statehood.

International human rights and humanitarian law extends to peoples under occupation and populations within conflict.⁷ Protected populations under occupation are therefore accorded a variety of rights, including social, economic, cultural, civil and political rights including a right of self-determination.⁸ The international community has affirmed the occupation of Palestine by Israel since 1967.⁹ As Israel is an occupying power, the Palestinian people are classified as protected people and are entitled to specific humanitarian protections as enshrined in international law.¹⁰ This article will analyse the occupation of Palestinian territory by Israel through a pertinent question in international law: whether an occupying power can move from lawful to unlawful occupation as a result of acting contrary to international law.¹¹ An occupying power can only act as temporary administrator of the territory until it is returned to the protected population in as short a time as reasonably possible, acting in the best interests of the protected people and controlling all occupied territory in good faith.¹² The occupying power bears responsibility to respect and preserve the fundamental rights of the protected population. To this end, three key responsibilities are enshrined within international law: administration, transfer of population and good governance. Analysing the occupation of Palestine by Israel, and whether these responsibilities have been upheld, a four-part test will be utilised.¹³ The four-part test includes criteria of annexation, temporariness, best interests and good faith.¹⁴ The determination of the status of occupation by Israel will also include a brief analysis of International Court of Justice ('ICJ') advisory opinions on *Namibia*¹⁵ and *Palestine*.¹⁶

Considering that a number of the enforcement mechanisms within international law are only open to states, the statehood status of Palestine remains a central impediment to freedom from occupation, self-determination and the realisation of genuine autonomy. Whilst the international community has recognised the right of the Palestinian people to exercise their right to self-determination in addition to pursuing national independence and sovereignty,¹⁷ the Palestinian people remain without the formal status of statehood. This discussion will articulate statehood requirements and the current status of the Palestinian people as an observer state; explore the impact of recognition by international bodies on the status of Palestine; and the relationship between recognition of statehood and the application of the right of self-determination. This will focus on the traditional criteria for statehood as outlined by the *Montevideo Convention*,¹⁸ including: permanent population; defined territory; government; and

⁷ *Wall Advisory Opinion* (n 2), 112.

⁸ *ICCPR* (n 2), art 1(1); *ICESCR* (n 2), art 1(1).

⁹ SC Res 237, UN Doc S/RES/237 (14 June 1967).

¹⁰ For example, see *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, opened for signature 12 August 1949, 75 UNTS 28 (entered into force 21 October 1950), art 4.

¹¹ The principal instruments of international humanitarian law, such as the *1907 Hague Regulations*, the *1949 Fourth Geneva Convention* and the *1977 Additional Protocol to the Geneva Conventions*, are silent on such issues concerning lawful to unlawful occupation.

¹² Michael Lynk, *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, UN Dec A/72/556 (23 October 2017).

¹³ *Ibid.*

¹⁴ *Ibid.* See also Ben-Naftali, O., Gross, A. M., & Michaeli, K. 'Illegal occupation: Framing the occupied Palestinian territory' (2005) *Berkeley J. Int'l L.*, 23, 55.

¹⁵ *Legal Consequences for States of the Continued Presence of South Africa in Namibia [1970]* ICJ Rep 16, para 16. ('*Namibia Advisory Opinion*')

¹⁶ *Wall Advisory Opinion* (n 2), 88.

¹⁷ *Question of Palestine*, GA Res 3236, UN Doc A/RES/3236 (22 November 1974).

¹⁸ *on Rights and Duties of States*, opened for signature 26 December 1933, 164 LNTS 19 (entered into force 26 December 1934), art 1 ('*Montevideo Convention*'). International law does not require the structure of a state to follow any particular pattern: *Western Sahara*

capacity to enter into relations with other states. It will also include the requirements of membership of, and recognition by, the United Nations under article 4(1) and article 4(2) of the *Charter of the United Nations*. The application of these requirements will draw to light two issues: defining the subject and authority of Palestinian statehood. A brief application of these requirements will also be made and critiqued in light of the potential impact of the geo-political agendas of permanent members of the Security Council on the outcome of statehood for peoples seeking to express self-determination.

Finally, the analysis of Palestinian attempts to enforce their right of self-determination, and associated rights, through international judicial mechanisms will include applications made before the International Criminal Court ('ICC') and the ICJ. Potential issues concerning jurisdiction of these courts will be explored, as well as the capacity for the enforcement of decisions of these courts. Of significance to this discussion is the recognition of Palestine as a 'non-member observer' state,¹⁹ which combined with its treaty practice engagement since the General Assembly resolution,²⁰ has resulted in a new prevailing understanding that the ICC can accept jurisdiction over crimes committed in Palestinian territory.²¹ This jurisdiction will be supported by a discussion based on collective recognition (including Palestinian membership of the UNESCO) by the international community, and the resultant capacity to engage with international legal instruments through the *Vienna Formula*.²² This discussion will culminate with an articulation of *Resolution 377 – Uniting for Peace*²³ – and its potential application in the contemporary Palestinian context. *Resolution 377* reveals the latent potential of the General Assembly that resides within the United Nations and constructs a procedural framework for this power to be exercised by the General Assembly in situations where the Security Council fails to execute its responsibilities to maintain international peace and security.

Research questions

This article explores the challenges associated with the application of the right of self-determination in a way that can promote genuine autonomy for the Palestinian people.

This will include discussion that will answer the following questions:

1. Does the current context of the Palestinian people have any impact on their ability to exercise the right of self-determination?
2. What is the relationship between the application of the right of self-determination and the recognition of statehood for the Palestinian people?
3. What issues arise in the formulation of the scope, subject and status of the right of self-determination in its application to Palestine?
4. How has the international community (including United Nations organs, international judicial mechanisms, regional bodies and international agencies) addressed the right of self-determination in the case of Palestine?
5. Are there any additional avenues available to the Palestinian people for enforcement of their right of self-determination and attainment of genuine autonomy?

(*Advisory Opinion*) [1975] ICJ Rep 12 ('*Western Sahara Advisory Opinion*').

¹⁹ *Status of Palestine in the United Nations*, GA Res 67/19, UN Doc A/RES/67/19 (4 December 2012), para 2.

²⁰ Party to over 15 international treaties since General Assembly recognition.

²¹ Yaël Ronen, 'Israel, Palestine and the ICC—territory uncharted but not unknown' (2014) 12 *Journal of International Criminal Justice* 1.

²² *Vienna Convention on the Law of Treaties*, opened for signature 23 Mat 1969, 1155 UNTS 331 (entered into force 27 January 1980) ('*VCLT*').

²³ *Uniting for Peace*, GA Res 377, UN Doc A/RES/377 (3 November 1950).

Scope

Due to practical and length limitations, the article will only focus on the right of self-determination as expressed in major international legal instruments²⁴ and interpreted by the international community.²⁵ The research will be limited in the depth of historical analysis in order to focus on the current impasse and challenges of occupation and statehood within the contemporary context of Palestine.

The discussion regarding the law of occupation will be limited to the occupation of Palestine by Israel. Whilst significant applicable case law and opinion exists, the exploration of the proposed four-part test to identify a potential threshold by which an occupying power can move from legal to illegal occupation will be limited to the *Namibia Advisory Opinion* and *Wall Advisory Opinion* of the ICJ.²⁶

The discussion on the statehood of Palestine will focus on the traditional criteria for statehood as outlined by the *Montevideo Convention*²⁷ as well as those required by the *Charter of the United Nations* under articles 4(1) and 4(2). A brief application of these articles will be made and critiqued in light of the potential impact of the geo-political agendas.²⁸ Further discussion could be made regarding the geo-political narrative concerning this issue.

Research Design

a. Methodology

The primary focus of this article is doctrinal research that provides an understanding of the law in its current context, whilst allowing for a systematic exposition of the current international humanitarian and human rights law as interpreted by the international community. The article provides a cross-disciplinary angle to research, incorporating sociological concepts, such as irresolvable conflict theory, within international law. This will occur through an evaluation of the right of self-determination through a qualitative research analysis, analysing contemporary literature on the case of Palestine. This analysis will then directly address two key challenges posed by the literature to the realization of self-determination for the Palestinian people: occupation and statehood. These challenges will be substantiated through a process of evaluation. First, focusing on the challenges and their application to the current impasse experienced by 'modern Palestine.' Then, the elimination of contradictory interpretations through an investigation into contemporary sources and findings found in the academic discourse. The findings obtained will be interpreted and coded in order to reiterate the applicability of the right of self-determination to the Palestinian people, before addressing avenues for Palestine to assert the right before the international community. To identify the issues that arise out of this conceptual framework, a multifaceted case study analysis of the right of self-determination as exercised by the Palestinian people will be explored. This case study will include a brief overview of the comprehensive and interrelated reasons for the current context, including a mapping of the context to present, including recent actions before the ICC and ICJ as well as resolutions made by the United Nations Security Council and General Assembly, to update the literature.

²⁴ ICCPR (n 2); ICESCR (n 2).

²⁵ Including through the International Court of Justice as well as resolutions pass by the United Nations Security Council and General Assembly.

²⁶ Lynk (n 12); *Namibia Advisory Opinion* (n 15); *Wall Advisory Opinion* (n 2).

²⁷ *Montevideo Convention* (n 18), art 1.

²⁸ The discussion will focus on discourse of the United States. Jason Greenblatt, 'Remarks at a UN Security Council Open Debate on the Middle East,' (23 July 2019) United States Mission to the United Nations < <https://usun.usmission.gov/remarks-at-a-un-security-council-open-debate-on-the-middle-east-9/> >

Within the case study, the application of *Resolution 377* will be explored to determine the validity of the resolution in the Palestinian people's efforts of self-determination.

Research Utility

This article will make an original and worthy contribution to the literature concerning the application of the right of self-determination for the Palestinian people. Firstly, it will seek to articulate the underlining reasons for the perpetuation of the Israeli occupation of Palestine. In the discussion, it will update the literature on the current context of the Palestinian people so as to set the context for the legal discourse. To achieve this, the integration of sociological theory – irresolvable conflict theory – within the application of international humanitarian and human rights law will provide a unique insight of the challenges associated with perpetuation of the occupation and the escalation of the conflict.

Secondly, the article will provide an opportunity for a multifaceted analysis of issues in international law in the Palestinian context. Noting that the right of self-determination is a right of process and not outcome, the exploration of processes available to Palestine within international judicial mechanisms (the ICC and ICJ) and principal organs and agencies of the international community (the United Nations Security Council, General Assembly and UNESCO) will be explored in light of the contemporary challenges experienced by the Palestinian people (occupation and statehood). This article provides an opportunity to update the literature on recent actions taken on the situation in Palestine including initiating actions before the ICJ.²⁹

Finally, the article will explore issues concerning the creation, implementation and enforcement of international law. The origin and perpetuation of the challenges associated with the Palestinian application of the right of self-determination will be viewed in light of these broader issues of international humanitarian and human rights law. As a result, the contemporary application of *Resolution 377* to the Palestinian context will be made. This conceptual understanding may provide insight into areas of legal reform, including the framing of legislative instruments, the interpretation of the right of self-determination and the actions available to occupied peoples and those seeking to exercise this right. Considering that the challenges to self-determination outlined in the Palestinian context are not isolated to Palestine, the application of the analysis in this article may extend well beyond the Palestinian context.

The Unrepresented Nations and Peoples Organisation currently has 41 members, including members that have made attempts to self-determination such as Taiwan, Tibet and West Papua.³⁰ The contemporary application of *Resolution 377* to the Palestinian context, especially in the context of occupied states whose occupying power has failed the threshold test of legal occupation, could provide a unique avenue for these non-state entities seeking an outcome to their right of self-determination, and a new line of inquiry for further research.

²⁹ 'Application Instituting Proceedings', *Relocation of the United States Embassy to Jerusalem (Palestine v. United States of America)* (International Court of Justice, General List No 176, 28 September 2018), 2.

³⁰ Other members include: Abkhazia, Acheh, Afrikaners, Ahwazi, Ambazonia, Assyria, Balochistan, Barotseland, Batwa, Bellah people, Brittany, Chameria, Chittagong Hill Tracts, Crimean Tatars, District of Columbia, East Turkestan, Gilgit Baltistan, Haratin, Hmong, Iranian Kurdistan, Kabylia, Khmer-Krom, Lezghin, Madhesh, Nagalim, Ogaden, Ogoni, Oromo, Rehoboth Basters, Savoy, Sindh, Somaliland, South Moluccas, Southern Azerbaijan, Sulu, Southern Mongalioia, Talysh, West Balchistan, and Western Togoland. Unrepresented Nations and Peoples Organisation, *UNPO Members*, (accessed 8 October 2019) <<https://unpo.org/nations-peoples>>

The Palestinian Context: A Search for Self-Determination

a. The Emerging Reality of 'Modern Palestine'

This Part seeks to address the question: does the current context of the Palestinian people have any impact on their ability to exercise self-determination? In order to answer this question, the contemporary context of Palestine must be clarified. The territory of 'modern Palestine'³¹ has a significant history across religious, cultural, commercial and political domains. It is a place of immense significance to Judaism, Christianity and Islam and is geo-politically located between Europe, Asia and Africa. As a result, the tumultuous history of Palestine has included a series of geo-political contestations and changes in control over the region. A number of historical powers have controlled the area, including Ancient Egypt, Persia, the Roman Empire, Islamic and Christian powers and more recently, the Ottoman Empire and the United Kingdom.³² The contemporary context of Palestine has been significantly shaped by the Palestine – Israel (or Arab – Israel) conflict, which can be traced to the 19th century emergence of modern Zionism and Arab nationalism. This conflict has focussed primarily on territorial disputes and identity disparity between Jews and Arabs.

It has raised significant issues of international law especially in regard to the right of self-determination for both Israel and Palestine, occupation and annexation of Palestinian territory by Israel, and status of Palestinian statehood. Through a series of decisions taken by the international community in the early 20th Century,³³ Israel was established and recognised as a state. These actions provide a conceptual understanding of modern Palestine. The process of establishment and recognition of Israel as a state was arguably a progressive shift towards supporting self-determination. But as has been the reality ever since, new challenges have emerged concerning territorial claims over the region.³⁴ These challenges can be seen in a series of conflicts that, when tracked, identify significant territorial losses for Palestine since 1946.³⁵ Despite significant international efforts to support the Palestine – Israel peace process,³⁶ these agreements have not been successful in ending the occupation of Palestine by Israel or the active conflict between Palestine and Israel.

These challenges to self-determination, and factors involved in the continuance and escalation of the conflict, have been articulated in a variety of ways throughout the

³¹ Taken to be the geographic region in the Southern Levant between the Mediterranean Sea and the Jordan River.

³² Ilan Pappé, *A history of modern Palestine: One land, two peoples* (Cambridge University Press, 2004)

³³ International level including the *Sykes-Picot Agreement* (1916) and regional level including the *Hussein-McMahon Correspondence* (1916) and the *Balfour Declaration* (1926).

³⁴ Herbert, Kelman, 'The political psychology of the Israeli-Palestinian conflict: How can we overcome the barriers to a negotiated solution?' (1987) 347 *Political Psychology*, 363; Francis Boyle, and James Crawford, 'Algiers Declaration of Palestine' (1991) *The Austl. Int'l L. News*, 46.

³⁵ The Palestine – Israel conflict has been seen in wars beyond the contested territories and included other states, including: United Kingdom, France, Egypt, Jordan, Syria, Lebanon, Saudi Arabia, Yemen, Iraq, Iran and military groups such as the South Lebanon Army, Unified National Leadership of the Uprising, Palestinian Authority, Hamas. These can be seen across a number of specific conflicts including: the *War of Independence* (1947-49), *Sinai War* (1956), *Six Day War* (1967), the *Yom Kippur War* (1973), *Operation Litani* (1978), *First Lebanon War* (1982 – 1985), *First Intifada* (1987 - 1993), *Second Intifada* (2000 - 2005), *Operation Cast Lead* (2008 - 2009), *Operation Pillar of Defence* (2012), *Operation Protective Edge* (2014).

³⁶ Such as the *Camp David Accords* (1973), *Egypt-Israel Peace Treaty* (1979), *Madrid Conference* (1991), *Oslo Accords* (1993), *Camp David Summit* (2000), the *Hebron Agreement* (1997), *Wye River Memorandum* (1998), *Beirut Summit* (2002), *Road Map for Peace* (2003), *Israel – Palestine Peace Talks and Direct Negotiations* (2007, 2009, 2010 – 2011, 2013 – 2014), *Abbas Peace Plan* (2014) and the *Trump Peace Plan* (2019).

literature. Whilst an in-depth literature review is beyond the scope of this article, it is worth noting two key ways to categorise these factors. The first is the presence of both concrete and non-concrete factors in the Palestine–Israel conflict.³⁷ Concrete factors allow for the external representation of the conflict to occur, such as issues of territory and borders. Non-concrete factors often refer to the internal motivations of people in conflict, and include differences in identities, values, beliefs, historical narratives and collective memories. These two factors interact in that the escalation and perpetuation of the conflict is motivated by non-concrete factors and observed through concrete factors. In assessing the current context of Palestine in relation to the Israel and the broader international community, both factors must be considered. Much of the peace building efforts of the international community have focused on concrete factors, such as addressing territorial boundaries, enforcing restrictions on conflict-based actions and establishing forums for dialogue. However, the right of self-determination is also innately connected to non-concrete factors. The right provides that a group has the ability to determine their political status and pursue their economic, social and cultural development.³⁸ Such determination is driven by group identity and their motivations.

The factors may also be categorised in strategic, structural and *psychological* terms.³⁹ As delineated by Kelman,⁴⁰ the content of the right of self-determination remains a core feature across all three of these categories. Strategic factors encompass an inability of one group to make territorial concessions in the face of security risks from the other group. Structural factors can be seen in the ongoing political instability between Palestine and Israel, as well as between the two groups and the international community. Psychological factors include the cognitive and emotional beliefs and attitudes that come from entrenched ethno-cultural identities.

In the case of Palestine, these factors have been perpetuated by a failure to gain state recognition which has often been attributed to a lack of legitimate authority, territorial legitimacy,⁴¹ and failed diplomatic and peace-building efforts⁴² focused on the establishment of territorial borders.⁴³

An imbalance in status of international recognition has brought additional challenges for the Palestinian people.⁴⁴ These discussed factors are examples of how the ability of the Palestinian people to exercise self-determination is closely linked to the Palestine – Israel conflict. Therefore, the status of this conflict will be briefly examined.

³⁷ Eran Halperin, 'Emotional barriers to peace: Emotions and public opinion of Jewish Israelis about the peace process in the Middle East' (2011) 1 *Peace and Conflict* 17.

³⁸ ICESCR (n 2), art 1.

³⁹ Herbert Kelman, 'The political psychology of the Israeli-Palestinian conflict: How can we overcome the barriers to a negotiated solution?' (1987) *Political Psychology*, 347.

⁴⁰ Ibid.

⁴¹ This includes losing territory to other Arab nations including Israel, Egypt and Transjordan. See Virginia Held, 'Legitimate authority in non-state groups using violence' (2005) 36, *Journal of social philosophy*, 175.

⁴² For example, the *Madrid Conference* (1991), the *Oslo Accords* (1993-1995) and the *Roadmap for Peace* (2002).

⁴³ Oren Yiftachel, *Ethnocracy: Land and identity politics in Israel/Palestine*. (Universal, 2006)

⁴⁴ Bashir Bashir, 'The strengths and weaknesses of integrative solutions for the Israeli-Palestinian conflict.' (2016) 70(4) *The Middle East Journal*, 560.

The Current Impasse: Palestine and the Irresolvable Conflict

Throughout the literature, the Palestine – Israel conflict been defined as ‘irreconcilable and irresolvable.’⁴⁵ According to Snow⁴⁶ and Kelman,⁴⁷ irresolvable conflicts generally occur when groups who identify as ‘states,’⁴⁸ who are reinforced by a broader diaspora that share a common identity,⁴⁹ are engaged in a ‘zero-sum’ conflict: a type of conflict where one state’s gain is balanced by another state’s loss. Snow demonstrates seven key characteristics of these conflicts:⁵⁰

1. *Territory*: both groups claim sovereign control over shared territory. Often one group maintains recognised sovereign control at the expense of the other.⁵¹
2. *Culture and Emotion*: the internal motivation of the groups engaged in the conflict involves an emotional connection to key external factors (e.g. territory) that give rise to the group identity (such as the territory). Often rooted in historical, religious or ethnic significance, the other group does not understand the significance, resulting in cultural misunderstanding arising out of ‘inconsiderateness and insufficient familiarity.’⁵² It is in this context that the process of ‘othering’ can become a normalised practice against the people who do not share in this group identity.⁵³
3. *Exclusive*: the group’s positions become mutually exclusive and viewed as zero-sum in nature. This is as a result of the expression of distinct and fundamental values, often seen as sacred within the group identity, that cannot be compromised, abandoned or replaced.⁵⁴
4. *Intractable*: intractability is the predominant sentiment felt by both groups. A resolute position of group leaders in relation to external factors reinforces the impossibility of compromise.⁵⁵
5. *External Failure*: external efforts at mediation or negotiation fail, leading to an increasing sentiment of disillusionment amongst the group.⁵⁶ This can result in further challenges of negative perceptions concerning the motivations of the external parties upon failure of the negotiations.
6. *Geopolitical Failure*: the inability to reach a geopolitically viable or acceptable outcome or a physically decisive outcome.⁵⁷ This is essentially a characteristic of political failings, which can also be a consequence of an imbalance in political status.

⁴⁵ Donald Snow. *Cases in international relations* (Longman, 2012); Rafi Nets-Zehngut, and Daniel Bar-Tal, *The intractable Israeli-Palestinian conflict and possible pathways to peace. Beyond bullets and bombs: Grassroots peacebuilding between Palestinians and Israelis* (Greenwood, 2007)

⁴⁶ Ibid.

⁴⁷ Kelman, (n 34).

⁴⁸ Ibid, 363.

⁴⁹ Israel belongs to the Jewish community and Palestine to the Arab community. Yiftachel (n 43).

⁵⁰ Nets – Zehngut (n 45)

⁵¹ Snow (n 45).

⁵² Bar – Siman - Tov, *Barriers to Peace in the Israeli-Palestinian Conflict*. (Jerusalem Institute for Israel Studies, 2010).

⁵³ Dan Rabinowitz. ‘Oriental othering and national identity: A review of early Israeli anthropological studies of Palestinians.’ (2002) 3 *Identities: Global Studies in Culture and Power* 9.

⁵⁴ Bar – Siman – Tov (n 53).

⁵⁵ Nets – Zehngut (n 45).

⁵⁶ Howard Sachar, ‘Enforcing the Peace-How the Great Powers Can Resolve the Israeli-Palestinian Impasse.’ (2011) *Foreign Aff.*, 90.

⁵⁷ Bar – Siman – Tov (n 53).

7. *Duration*: the inverse correlation between the duration of the conflict and the desire for compromise. The longer the conflict endures, the more it hardens into an unacceptable solution for compromise.⁵⁸

Similarities exist between the criteria for irresolvable conflicts and the Palestine – Israel conflict: an extended geopolitical conflict, grounded in religious, ethnic and historical difference combined by an imbalance in status between Palestine and Israel and ongoing occupation of Palestine by Israeli forces. A chasm exists between the Palestinian people and their perception of significant components of the international community which, whilst having sought peaceful outcomes,⁵⁹ have failed.⁶⁰ This has perpetuated the non-concrete factors, seen in the narrative of the group identity of the Palestinian people.⁶¹ This preliminary understanding of the current context of the Palestinian people, including the articulation of factors present within the ‘irresolvable’ conflict with Israel, leads to an exploration of the right of self-determination as articulated in international law.

Self-determination in International Law

The right of a people to self-determination is a principle of international law, regarded as a *jus cogens* rule,⁶² that grants all peoples the ability to freely determine their political status and pursue their economic, social and cultural development.⁶³ The capacity to exercise this right allows all people to:

... freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.⁶⁴

As the principle of self-determination has become enshrined within international law, it has developed significantly. The emergence of the term across Europe, and specifically Germany, in the mid-19th Century originally focused on a context of sovereign independence, rather than an individual or group right.⁶⁵ The movement from the nationalistic, state-sovereign origins of self-determination towards the modern, collective right currently acknowledged can be seen in key changes in the international community in the early 20th century. The reaction to the impact of nationalism in the context of World War I provided world leaders with an opportunity to promote self-determination principles.⁶⁶ United States president, Woodrow Wilson, articulated this when he said ‘national aspirations must be respected; people may now be dominated and governed only by their own consent.

Self-determination is not a mere phrase; it is an imperative principle of action.’⁶⁷ Whilst not enshrined within international law, self-determination was becoming a necessity

⁵⁸ Snow (n 45).

⁵⁹ *Clinton Plan* (2000); *Bush Road Map* (2002), *Unofficial Geneva peace draft* (2003).

⁶⁰ Alan Downton, and Michelle Gawerc, ‘The Intifada: Revealing the Chasm.’ (2001) 3 *Middle East* 5, 39.

⁶¹ Arie Kacowicz, ‘Rashomon in the Middle East Clashing Narratives, Images, and Frames in the Israeli-Palestinian Conflict.’ (2005) 3 *Cooperation and Conflict* 40.

⁶² Matthew, Saul ‘The normative status of self-determination in international law: a formula for uncertainty in the scope and content of the Right?’ (2011) 11(4) *Human Rights Law Review* 609.

⁶³ *ICESCR* (n 2) art 1(1); *ICPCR* (n 2). See also: *Portugal v. Australia* (n 2), para 29; and *Wall Advisory Opinion* (n 2), para 88.

⁶⁴ *ICESCR* (n 2) art 1(2).

⁶⁵ John Collins, ‘Self-Determination in International Law: The Palestinians.’ (1980) 12 *Case W. Res. J. Int'l L.* 137.

⁶⁶ See, for example, the declaration of independence by both Poland and Czechoslovakia in 1918.

⁶⁷ Hurst Hannum, ‘Rethinking self-determination’ (1993) 34 *Va. J. int'l L.* 1.

in the context of the new, modern world.⁶⁸ This was advanced in the aftermath of World War II, with the recognition of self-determination central to the formation of the United Nations. The emergence of self-determination in international law has also seen a progression from principle to right. Whilst an accepted principle of international law does not necessarily confer a right under international law;⁶⁹ the principle of self-determination has given rise to a significant body of international law that has enshrined the principle as a fundamental right.⁷⁰ The right of self-determination has since been applied in a wide variety of contexts by the international community, including to the case of Palestine.⁷¹

The contemporary articulation of the right of self-determination can be found in the *International Covenant on Civil and Political Rights*⁷² and the *International Covenant on Economic, Social and Cultural Rights*, which states ‘all peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.’⁷³ The right has been subsequently incorporated within a variety of international and regional legal instruments⁷⁴ and interpreted by the ICJ.⁷⁵

The right of self-determination is a right of process – not outcome. It is the process that is accorded to a group of people who seek to determine their own identity.⁷⁶ The articulation of the right does not state how the right is to be enforced, nor the outcome of such an enforcement. Whilst the outcome expected by the party exercising their right is dependent on the context, the outcome often includes some form of recognition by the international community, which can also incorporate elements of independence, federation, protection, autonomy or assimilation.⁷⁷ It is in the application and enforcement of the process of self-determination that limitations concerning the scope, subject and status of the right arise.

Firstly, the scope of the right of self-determination is not necessarily an ‘absolute right’; although similar elements have been emphasised in cases of significant power imbalance situations over contested non-contiguous territory where the party exercising the right is an indigenous population.⁷⁸ It would be amiss not to note an obvious tension that arises in regards to the right of self-determination: the balance between self-determination and territorial integrity.⁷⁹ this limitation will be addressed

⁶⁸ *Covenant of the League of Nations* (1919), art 22.

⁶⁹ Frederic Kirgis, ‘The degrees of self-determination in the United Nations era.’ (1994) 88(2) *American Journal of International Law* 304.

⁷⁰ *ICCPR* (n 2), art 1; *ICESCR* (n 2) art 1.

⁷¹ For example: Basque Country, Biafra, Catalonia, Crimea, Chechnya, Eastern Ukraine, Falkland Islands, Gibraltar, Hong Kong, Kashmir, Kosovo, Kurdistan, Northern Cyprus, Quebec, South Africa, West Papua, Western Sahara.

⁷² *ICCPR* (n 2).

⁷³ *ICESCR* (n 2).

⁷⁴ *Declaration of Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, GA Res 2625, UN Doc A/RES/25/2625 (24 October 1970) (*Friendly Relations and Co-operation Declaration*); *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/195, UN Doc A/RES/61/295 (13 September 2007).

⁷⁵ *Namibia Advisory Opinion* (n 15); *Western Sahara Advisory Opinion* (n 18).

⁷⁶ *Charter of the United Nations*, art 1(2).

⁷⁷ This was the case with cases such as East Timor, Estonia, Georgia and Latvia. Such outcomes need not necessarily be two-state solutions, with successful recognition in single-state solutions cases also occurring.

⁷⁸ Hannum (n 68), 32.

⁷⁹ The literature supports the position that territorial integrity takes precedence over self-determination. For a recent discussions on this topic, see Theodore Christakis, ‘Self-determination, territorial integrity and fait accompli in the case of Crimea’ (2015) 75(1) *ZaöRV/Heidelberg JIL*, 75.

in a discussion concerning the capacity of the Palestinian people to realise genuine autonomy from Israeli occupation.

Secondly, the subject of the right of self-determination involves the internal and external conceptualisations of the party to whom the right is subject. The internal conceptualisation refers to the distinctive, subjective identity traits of the party, whilst the external conceptualisation refers to the objective characteristics as perceived by the international community. Friedlander identifies the subject of the right as: peoples that consist of a community of individuals bound together by mutual loyalties, an identifiable tradition, and a common cultural awareness, with historic ties to a given territory.⁸⁰ The definition of 'peoples' within international law still lacks clarity.⁸¹ In regard to self-determination, the identification of peoples is often self-evident (drawn from ethnicity, language, history or sharing some other form of mutuality).⁸² The ICJ attempted to clarify a definition for people having the right of self-determination as including: traditions, culture, ethnicity, historical ties and heritage, language, religion, sense of identity or kinship, the will to constitute a people and common suffering.⁸³ Whilst the application of these criteria to the Palestinian people extends beyond the scope of this article, *prima facie*, the Palestinian people share a significant number of these criteria. This is supported by the repetitive emphasis placed by the international community on the 'Palestinian people' as the 'principal party' to the question of their self-determination.⁸⁴ It is important to note that the definitional criteria for what constitutes belonging to the Palestinian people has not included a geographical distinction. As a result, the Palestinian people, and therefore those who can exercise their right of self-determination, is not limited to those residing within the Occupied Palestinian Territory. Rather, it is Palestine in the broadest sense which possess the right to self-determination and can seek to enforce it before the international community.

Given that the status of the right is one of process, not outcome, this entails the establishment of both internal and external conceptualisations of the right. As has been mentioned, a relationship exists between the exercise of self-determination and recognition of statehood. In such a scenario, the desire for the establishment of statehood by the defined population would be internal, whereas the recognition of statehood by the international community would be external.⁸⁵ This leads us to consider the ability of the Palestinian people to apply and enforce the right of self-determination.

Self-Determination for the Palestinian People

International human rights and humanitarian law extends to peoples under occupation and populations within conflict.⁸⁶ Both of these areas of law are complementary in

⁸⁰ Robert A. Friedlander, 'Proposed Criteria for Testing the Validity of Self-Determination As It Applies to Disaffected Minorities' (1977) 25 *Chitty's L.J.* 335.

⁸¹ Duncan French, *Statehood and Self-Determination Reconciling Tradition and Modernity in International Law* (Cambridge University Press, 2013), 97.

⁸² Jean Pictet, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff Publishers, 1987).

⁸³ *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Inst. of Self-Government of Kosovo (Advisory Opinion)* [2010] ICJ Rep 141.

⁸⁴ *Invitation to the Palestine Liberation Organization*, GA Res 3210, UN Doc A/RES/3210 (14 October 1974); *Question of Palestine* (n 17); *Invitation to the Palestine Liberation Organization to participate in the efforts for peace in the Middle East*, GA Res 3375, UN Doc A/RES/3375 (10 November 1975).

⁸⁵ *Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 e of the Charter*, GA Res 1541, UN Doc. A/4651 (15 December 1960).

⁸⁶ *Wall Advisory Opinion* (n 2), para 112.

nature and provide a broad protection of rights.⁸⁷ Considering the current context of the Palestinian people, a variety of rights are accessible. These include: social, economic, cultural, civil and political rights as articulated in international legal mechanisms. At the heart of this international legal framework is the right of self-determination.⁸⁸ The right of the Palestinian people to self-determination has been recognized by the international community.⁸⁹ The recognition of this right has also shaped the interaction between the international community and Palestine, seen in the titles granted to Palestine⁹⁰ through to the capacity to actively participate within the work of the United Nations.⁹¹ Furthermore, the international community is required to do all that it can to secure self-determination for peoples under illegal occupation,⁹² with an onus placed on states to 'refrain from any forcible action which deprives peoples ... of their right to self-determination and freedom and independence.'⁹³ As is evident, the right of self-determination belongs to the people, not any governmental institutions or structures. Occupying powers must therefore respect this right of the protected population, regardless of any contestation over the governing structures that exist. This duty to refrain from actions that could impact on the application of the right of self-determination extends to the actions of Israel. The international community has recognised that features of the Israeli occupation have 'impeded' the exercise of this right by the Palestinian people.⁹⁴ Drawing on this brief outline of the Palestinian context and the access of the Palestinian people to self-determination, two challenges will be explored: the occupation of Palestinian territory by Israel and the potentially corresponding right of return for displaced Palestinians; and, the recognition of sovereignty of the Palestinian people via recognition of statehood.⁹⁵

Challenges to Palestinian Self-Determination

a. Legal and Illegal Occupation in the International Law of Occupation

Any discussion concerning the impact of the occupation of Palestine by Israel requires a preliminary question to be answered: does Israel occupy Palestinian territory? The international community has affirmed the occupation of Palestine by Israel since 1967.⁹⁶ As Israel is an occupying power, the Palestinian people are classified as 'protected people' and are entitled to specific humanitarian protections as enshrined in international law.⁹⁷ This has been widely accepted by the international community,⁹⁸

⁸⁷ UN Committee on Economic, Social and Cultural Rights, *Concluding Observations, Israel*, 30th sess, UN Doc E/C.12/1/Add.90 (26 June 2003) para 31.

⁸⁸ ICESCR (n 2) art 1(1); ICPCR (n 2) art 1(1). Also see: *Portugal v. Australia* (n 2), para 29; *Wall Advisory Opinion* (n 2), para 88.

⁸⁹ *The right of the Palestinian people to self-determination* (n 6).

⁹⁰ The movement from the Palestinian Liberation Organisation (PLO) to the State of Palestine. *Question of Palestine : resolution / adopted by the General Assembly*, GA Res 43/177, UN Doc A/RES/43/177 (15 December 1988).

⁹¹ See *Participation of Palestine in the work of the United Nations*, GA Res 52/250, UN Doc A/RES/52/250 (7 July 1998).

⁹² *Wall Advisory Opinion* (n 2), para 88.

⁹³ *Friendly Relations and Co-operation Declaration* (n 75).

⁹⁴ *Wall, Advisory Opinion* (n 2), para 122.

⁹⁵ Such issues and the relationship with the right of self-determination were expressed in *Observer status for the Palestine Liberation Organization*, GA Res 3237, UN Doc A/RES/3237 (22 November 1974) ('*Observer status for the PLO*').

⁹⁶ SC Res 237, UN Doc S/RES/237 (14 June 1967).

⁹⁷ *Fourth Geneva Convention* (n 10).

⁹⁸ See *Applicability of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, to the Occupied Palestinian Territory, including East Jerusalem, and the other occupied Arab territories*, GA Res 71/96, UN Doc A/RES/71/96 (23 December 2016).

with such protections accorded through the law of occupation applying to the West Bank, East Jerusalem, and Gaza.⁹⁹

In regards to this international law of occupation, the situation of an occupying power moving from lawful to unlawful occupation as a result of acting contrary to international law is of particular relevance.¹⁰⁰ Under the international law of occupation, applied to the Palestinian context, Israel can only act as a temporary administrator of the territory until it is returned to the protected population in as short and reasonable time as possible.¹⁰¹ Israel would, therefore, not acquire a right of territorial sovereignty over the land and is prohibited from taking any action that could result in annexation.¹⁰² Rather, the occupying power, Israel, must act in the position of trustee; acting in the best interests of the protected people and controlling all occupied territory in good faith. The occupying power bears the responsibility to respect and preserve the fundamental rights of the protected population.¹⁰³ To this end, three key responsibilities enshrined within international law, are applicable to the Palestine–Israel context: administration, transfer of population and good governance.

Firstly, an occupying power can only act as administrator of the property of the occupied territory.¹⁰⁴ All resources must be safeguarded, with the occupying power maintaining no authority over these resources that would result in benefit to the occupying power.¹⁰⁵ This is a principle that seeks to discourage prolonged occupation and actions that would be to the detriment of the protected population.

Secondly, an occupying power cannot transfer its civilian population into the occupied territory; such an action could be considered a war crime.¹⁰⁶ Innately linked to the first responsibility, the transfer of a civilian population from the occupying power would result in the requisition of the resources of the occupied territories. This transfer of resources may be to the detriment of the protected population and, over a prolonged period of time, result in annexation of the territory.¹⁰⁷

Finally, the occupying power must adhere to principles of good governance in its actions regarding the protected population.¹⁰⁸ Principles of good governance extend to the use of the resources of the occupied territories and would prohibit discrimination in the administration of these resources.¹⁰⁹ It is on the basis of these three responsibilities that a determination can be made as to whether Israel has moved from a lawful to unlawful occupying power as a result of its actions.

⁹⁹ SC Res 2334, UN Doc S/RES/2334 (23 December 2016)

¹⁰⁰ The principal instruments of international humanitarian law, including the 1907 *Hague Regulations*, the 1949 *Fourth Geneva Convention* and the 1977 *Additional Protocol to the Geneva Conventions*, are silent on such issues concerning lawful to unlawful occupation.

¹⁰¹ Aeyal Gross, *The Writing on the Wall: Rethinking the International Law of Occupation* (Cambridge University Press, 2017).

¹⁰² Orna Ben-Naftali et al, *The ABC of the OPT: A Legal Lexicon of the Israeli Control over the Occupied Palestinian Territory* (Cambridge University Press, 2018).

¹⁰³ Lynk (n 12).

¹⁰⁴ *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, International Conferences (The Hague) (18 October 2907), art 55.

¹⁰⁵ M. Bothe, 'The Administration of Occupied Territory', in A. Clapham et al (eds), *The 1949 Geneva Conventions: A Commentary* (Oxford University Press, 2015).

¹⁰⁶ *Fourth Geneva Convention* (n 10), art 49(6); *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into for 1 July 2002), art 8(2)(b)(viii) ('*Rome Statute*').

¹⁰⁷ *Human Rights Council, Report of the independent international factfinding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem*, UN Doc A/HRC/22/63 (7 February 2013).

¹⁰⁸ SC Res 1483, UN Doc S/RES/1483 (22 May 2003).

¹⁰⁹ *Fourth Geneva Convention* (n 10), art 27.

Legal Occupation Test

In assessing the status of the occupation by Israel and whether the occupying power has exceeded its legal capacity, a four-part test has been identified by the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967.¹¹⁰ The four-part test includes criteria of annexation, temporariness, best interests and good faith.¹¹¹

Annexation: Has the occupying power annexed the occupied territory?

Firstly, an occupying power cannot acquire the right to annex (or otherwise gain title) over the occupied territory, also known as the principle of inadmissibility of the acquisition of territory.¹¹² This principle has been supported by the *Charter of the United Nations* that forbids members from the 'threat or use of force against the territorial integrity or political independence of any state.'¹¹³ This legal principle¹¹⁴ has been affirmed by the General Assembly¹¹⁵ and endorsed by the Security Council in specific regard to the case of Palestine.¹¹⁶ The ICJ in the *Wall Advisory Opinion* held that such annexation, or territorial acquisition from the threat or use of force, has acquired the status of customary law.¹¹⁷

Temporary: Has the occupying power sought to end the occupation as soon as possible?

Secondly, the occupying power remains an administrator of the territory, with any occupation deemed to be temporary until the territory can be returned to the protected population. Whilst timeframes of occupation are dependant on the varying contexts of the occupation, the core principle is that the occupying power is prohibited from governing the protected population, and over the occupied territory, on a permanent or indefinite basis.¹¹⁸ Rather, the occupying power must work in good faith to return the land to the protected population as soon as reasonable.¹¹⁹ The longer an occupying power occupies territory, the greater the justification is required for its ongoing presence in the territory.

Best interests: Has the occupying power acted in the best interests of the protected population?

Thirdly, the occupying power is to govern in the best interests of the protected population and, subject to legitimate security requirements of the occupying power, cannot act in a self-serving matter. The occupying power must always seek to protect the human rights of the people under occupation. The best interest principle can be found in international legal instruments that require an occupying power to restore and

¹¹⁰ Lynk (n 12).

¹¹¹ Ben – Naftali (n 14).

¹¹² SC Res 242, UN Doc S/RES/242 (22 November 1967).

¹¹³ *Charter of the United Nations*, art 2.

¹¹⁴ Seen by some international law scholars as a binding legal principle including Malcolm Shaw, *International Law*, (Cambridge University Press, 2017).

¹¹⁵ *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, GA Res 2625, UN Doc A/RES/2625(XXV) (24 October 1970).

¹¹⁶ SC Res 2334 (n 103); SC Res 497, UN Doc S/RES/497 (17 December 1981); SC Res 478, UN Doc S/RES/478 (20 August 1980); SC Res 476, UN Doc S/RES/476 (30 June 1980); SC Res 298, UN Doc S/RES/298 (September 25 1971); SC Res 267, UN Doc S/RES/258 (18 September 1968); SC Res 252, UN Doc S/RES/252 (21 May 1968).

¹¹⁷ *Wall Advisory Opinion* (n 2), para 87.

¹¹⁸ Amal Jamal, 'Conflict theory, temporality, and transformative temporariness: Lessons from Israel and Palestine' (2016) 23(3) *Constellations*, 365.

¹¹⁹ SC Res 1483 (n 12).

ensure public order and safety while respecting the laws of protected people. It is the combination of these protections and prohibitions that give rise to the best interest principle.

Good faith: Has the occupying power acted in good faith?

Finally, the occupying power must act in good faith;¹²⁰ this is a foundational principle that dictates a power to carry out its duties and obligations in an ‘honest, loyal, reasonable, diligent and fair manner,’ with the aim of fulfilling its legal responsibilities.¹²¹ The good faith principle also prohibits acts that would be an abuse of human rights, or be contrary to the nature of the relationship with the protected people.¹²² This principle can be measured by assessing adherence to the first three parts of this test, combined with a requirement to conform with the international law that is applicable to occupation as well as the directions given by international bodies.

Judicial Interpretations of the International Law of Occupation

To explore these responsibilities, and support the legal occupation test, a brief analysis of the international community’s attempts to interpret legal concerns raised in cases where an occupying power moves from lawful to unlawful occupation as a result of acting contrary to international humanitarian law will be examined. One such case was heard before the ICJ on the occupation of Namibia by South Africa.¹²³ The advisory opinion outlined that a number of protections and prohibitions within international law had been breached and that the occupation of Namibia was illegal. In its determination, the ICJ identified seven key findings and principles:

1. Annexation of occupied territory by an occupying power is forbidden. The actions of the occupying power must be for the benefit of the protected population, the end result of such actions must be the exercise of self-determination and independence;¹²⁴
2. Occupying powers must act in good faith. Actions that are contrary to the obligations outlined in the occupation mandate would qualify as failure to satisfy this obligation;¹²⁵
3. Protections of the protected population and prohibitions on the occupying power are imposed by the international community to ensure occupied territories do not become objects of cessions. The occupying power cannot unduly prolong the occupation, nor make a claim to annexation of the occupied territory by virtue of prolonged occupation;¹²⁶
4. Interpretation of international law can be influenced by subsequent developments. Where a right exists as a general principle of law, it can be implied to be an integral part to the law governing the occupation;¹²⁷
5. Violation of human rights or humanitarian obligations contradicts the object and purpose of occupation. Where protections are not met, the occupying

¹²⁰ *Charter of the United Nations*, art 2(2); *VCLT* (n 22), art 26. See also *Nuclear Tests (Australia v. France)*, [1974] ICJ Rep 99, para 46, where the ICJ recognized that: ‘one of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith.’

¹²¹ Markus Kotzur, ‘Good faith (bona fide)’ in Rüdiger Wolfrum, ed., *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2009).

¹²² Steven Reinhold, ‘Good faith in international law’ (2013) 2 *UCL Journal of Law and Jurisprudence*.

¹²³ *Namibia Advisory Opinion* (n 15), para 16.

¹²⁴ *Ibid*, paras 45–47, 50, 53 and 83.

¹²⁵ *Ibid*, paras 53, 84, 90, 115, 116 and 128.

¹²⁶ *Namibia Advisory Opinion* (n 15), paras 54, 55, 66, 82 and 83.

¹²⁷ *Ibid*, paras 52, 53, 96–98, 100 and 133.

power cannot claim any of the rights over the territory accorded in legal occupation;¹²⁸

6. If an occupying power breaches its fundamental obligations under international law, then the continuing presence of the power in the occupied territory can be deemed illegal. An illegal occupation must end as soon as reasonable. The international community must recognize the illegality and invalidity of the occupation including upholding the duty of non-recognition;¹²⁹
7. Finally, the determination of illegal occupation does not affect the ongoing application of international human rights law applicable to the protected people, including any rights accorded by an occupation agreement. The occupying power remains accountable for any breaches of such rights.¹³⁰

The ICJ drew upon the *Namibia Advisory Opinion* in its application of the right of self-determination on occupied territories including Palestine in the *Wall Advisory Opinion*.¹³¹ In both the Namibia and Palestine situations, an occupying power allegedly extended its control over the occupied territory. In both cases, the occupying power: had to respect the right of self-determination; was prohibited from annexation; was subject to supervision and determinations made by the international community; and must bring the occupation to a successful conclusion. Drawing on the legality test of occupation and both the *Namibia Advisory Opinion* and *Wall Advisory Opinion*, a determination can be made regarding the legality of the occupation of Palestinian territory by Israel.

Application of 'Annexation' Principle

Firstly, any actions that mount to annexation of East Jerusalem and the West Bank by Israel that would solidify an Israeli claim over the territory would violate the non-annexation principle. The international community has articulated that such annexation activities have taken place and directed Israel to rescind these actions.¹³² Despite this, annexation efforts have continued, including extending into parts of the West Bank.¹³³ Israeli settlers continue to live in occupied East Jerusalem, and Israel has stated that it has no intention of leaving.¹³⁴

In the area of the West Bank, the ICJ warned that actions, including the construction of a wall and establishment of settlements, constituted annexation.¹³⁵ Of significance in the West Bank is the investment made by Israel in defending and expanding the settlements. Such actions result in significant benefit to the Israeli population, at the expense of the Palestinian protected population. The continued entrenchment of the occupation, coupled with a political narrative that seeks to enhance, not lessen, annexation efforts,¹³⁶ indicate the ongoing annexation of the West Bank and aim of permanent occupation over the occupied Palestinian territory.

¹²⁸ Ibid, paras 84, 91, 95, 96, 98, 100 and 102.

¹²⁹ Ibid, paras 108, 109, 111, 115, 117, 122 and 123.

¹³⁰ Ibid, paras 118 and 125.

¹³¹ *Wall Advisory Opinion* (n 2), para 88.

¹³² SC Res 2253, UN Doc S/2015/2253 (17 December 2015); SC Res 2254, UN Doc S/2015/2254 (18 December 2015).

¹³³ *Wall Advisory Opinion* (n 2), para 121.

¹³⁴ Prime Minister of Israel, Benjamin Netanyahu, said in 2015: 'Forty-eight years ago, the division of Jerusalem was ended and we returned to be united ... We will keep Jerusalem united under Israeli authority.' Reported by Oren Liebermann, Benjamin Netanyahu, 'Jerusalem will remain a united city,' *CNN* (online), 18 May 2015 <www.cnn.com/2015/05/17/middleeast/israel-netanyahu-united-jerusalem>

¹³⁵ *Wall Advisory Opinion* (n 2), para 121.

¹³⁶ Prime Minister of Israel, Benjamin Netanyahu, said in 2017: 'We are here to stay forever. There will be no further uprooting of settlements in the Land of Israel ... This is our land.' Reported by Noga Tarnopolsky, 'Netanyahu says Israel wont retreat on Jewish settlements:

Application of ‘Temporariness’ Principle

Secondly, the duration of the occupation of Palestinian territory by Israel is without equivalent amongst the modern international community. For context, international legal theorists propose an occupation beyond five years in a period of peacetime would count as prolonged occupation; most legal, modern occupations do not exceed 10 years.¹³⁷ In contrast, the occupation of Palestinian territory by Israel has lasted over 50 years. As has been stated, the longer the occupation, the greater onus is placed on the occupying power to justify their occupation. In the case of Israel, the continued occupation has resulted in a strengthened sovereign claim over Palestinian territory. The commitment of resources to the settlement enterprise has increased its permanency since initial occupation in 1967. The resoluteness of the political narrative over the past 50 years can be seen in Israeli Government’s maintenance, or the increase, in the number of Israelis living within the settlements. This has resulted in a ‘permanent temporariness’ to the occupation, that challenges the application of the right of self-determination and impedes the genuine autonomy of the Palestinian people.

Prima facie, the Israeli occupation has exceeded the temporariness principle, with Israel taking significant actions that are contrary to the international law requirements that instruct an occupying power to bring the occupation to a close in a reasonable time. The breach of this principle is compounded by lacking a justification (that supports the *best interest* principle) for such prolonged occupation.

Application of ‘Best Interest’ Principle

Thirdly, the best interest principle requires that an occupying power to act in the best interests of the protected population. Actions taken by the occupying power that are deemed to be in the interests of the occupying power are prohibited. Actions taken by Israel have had a significant social and economic impact on the Palestinian people. In the West Bank, the settlement enterprise has resulted in worsening legal, civil and economic conditions imposed on the Palestinian people.¹³⁸ This can be seen in restrictions on freedom of movement and forcible transfer of people;¹³⁹ access to natural resources including water;¹⁴⁰ and access to housing and commercial development which includes land confiscation and home demolition.¹⁴¹ The establishment of physical barriers, Israeli settlements, permit regimes and military enforced checkpoints have disconnected East Jerusalem from the West Bank. This has resulted in detachment of the East Jerusalem population from economic and cultural connections, lack of access to services and infrastructure and reduced territory for housing.¹⁴² The influence of Israel over the Palestinian population in Gaza, whilst formally vacating the territory in

“We are here to stay forever”, *LA Times* (Online), 28 August 2017, <www.latimes.com/world/middleeast/la-fg-israel-netanyahu-settlements-20170828-story.html>

¹³⁷ Adam Roberts, ‘Prolonged military occupation: the Israeli Occupied Territories since 1967’, 84 *American Journal of International Law*, 1 (1990).

¹³⁸ World Bank, ‘West Bank and Gaza: Area C and the future of the Palestinian economy’ (2013) <<http://documents.worldbank.org/curated/en/137111468329419171/West-Bank-and-Gaza-Area-C-and-the-future-of-the-Palestinian-economy>>.

¹³⁹ Human Rights Watch, *World Report 2017: Events of 2016*. (2017) <www.hrw.org/world-report/2017/country-chapters/israel/palestine>

¹⁴⁰ Amnesty International, *Troubled waters: Palestinians denied fair access to water* (2009). <<https://www.amnesty.org/download/Documents/48000/mde150272009en.pdf>>

¹⁴¹ Human Rights Watch, *Separate and unequal: Israel’s discriminatory treatment of Palestinians in the Occupied Palestinian Territories* (19 December 2010) <www.hrw.org/report/2010/12/19/separate-and-unequal/israels-discriminatory-treatment-palestinians-occupied>

¹⁴² United Nations Conference on Trade and Development, *The Palestinian economy in East Jerusalem: enduring annexation, isolation and disintegration* (2013).

2005, remains significant. Control of movement of people and resources via land, sea and air have resulted in restriction on access to fundamental human rights. A recent United Nations report indicated that the majority of the population in Gaza are reliant on humanitarian aid. Further, that Palestine is unable to secure the electricity required for the population, will exhaust its access to safe drinking water and has decreased its gross domestic product over the past decade.¹⁴³

Prima facie, actions taken by Israel as an occupying power over Palestinian territory have not upheld the best interest principle. Restrictions and barriers have resulted in detrimental impacts on the economic and civil sustainability of the Palestinian people in both civil and commercial life,¹⁴⁴ resulting in active discrimination through the provision of inferior civil, legal and social conditions. These actions have involved exploiting the territory and resources for the benefit of Israel, and are therefore in breach of its responsibilities under the internal law of occupation.

Application of ‘Good Faith’ Principle

Finally, an occupying power must act in accordance with the directions issued by authoritative and representative bodies of the international community as well as comply with international law applicable to occupation. The Security Council has adopted more than 40 resolutions that are relevant to the occupation of Palestinian territory. The Security Council has clearly expressed that settlements ‘have no legal validity’ and are a ‘flagrant violation under international law’ and has directed Israel to ‘immediately and completely cease’ all activities associated with the settlement enterprise.¹⁴⁵ Finally, the Security Council has affirmed the illegality of the acquisition of territory,¹⁴⁶ and censured the activity of annexation by Israel in the ‘strongest terms’ stating that these actions violate the *Fourth Geneva Convention* (which applies to the Palestinian territory¹⁴⁷) and must be therefore rescinded.¹⁴⁸ The failure of Israel to act in compliance with resolutions of the Security Council and General Assembly has also been identified by the Security Council;¹⁴⁹ the disregard of these resolutions by Israeli political leaders has been blatant.¹⁵⁰ Further, a number of actions by Israel on the Palestinian population could violate the good faith principle and contribute to the undermining of self-determination. Such actions include the use of collective punishment via the demolition of Palestinian properties and the forcible transfer of Palestinian people by the occupying power;¹⁵¹ the right not to be subject to arbitrary

¹⁴³ United Nations, *UN country team in the Occupied Palestinian Territory, ‘Gaza ten years later’* (July 2017) <https://unsco.unmissions.org/sites/default/files/gaza_10_years_later_-_11_july_2017.pdf>

¹⁴⁴ *The Palestinian economy in East Jerusalem: enduring annexation, isolation and disintegration* (n 144); United Nations Office for the Coordination of Humanitarian Affairs, *Fragmented Lives: Humanitarian Overview 2016*, (31 May 2017) <<https://www.ochaopt.org/content/fragmented-lives-humanitarian-overview-2016>>

¹⁴⁵ SC Res 2334 (n 103); SC Res 465, UN Doc S/RES/465 (1 March 1980).

¹⁴⁶ SC Res 2334 (n 103); SC Res 497 (n 120), SC Res 478 (n 120); SC Res 476 (n 120); SC Res 267(n 120); SC Res 252 (n 120); and SC Res 242, UN Doc S/RES/242 (22 November 1967).

¹⁴⁷ *Fourth Geneva Convention* (n 10); SC Res 2334 (n 103); SC Res 478 (n 120); SC Res 476 (n 120); SC Res 465 (n 153); SC Res 452, UN Doc S/RES/452 (20 July 1979) and SC Res 446, UN Doc S/RES/446 (22 March 1979).

¹⁴⁸ SC Res 2334 (n 103); SC Res 478 (n 120); SC Res 476 (n 120).

¹⁴⁹ SC Res 478 (n 120); SC Res 476 (n 120); SC Res 446 (n 155).

¹⁵⁰ Isabel Kershner, ‘Netanyahu promises retribution for ‘biased’ U.N. resolution’, *New York Times* (online), 24 December 2016 <www.nytimes.com/2016/12/24/world/middleeast/israel-benjamin-netanyahu-united-nations.html>

¹⁵¹ Office for the Coordination of Humanitarian Affairs, *Demolition and seizure of service infrastructure in Palestinian communities in Area C exacerbates risk of forcible transfer* (11 October 2017) <www.ochaopt.org/content/demolition-and-seizure-service-infrastructure-palestinian-communities-area-c-exacerbates>

arrest has been violated through arbitrary detention;¹⁵² and, the prohibition concerning freedom of movement for Palestinian people through barriers and constraints impacts civil and commercial life.¹⁵³ Failure to act in accordance with the directions issued by the United Nations and failure to comply with international humanitarian and human rights law both indicate that Israel has not fulfilled the good faith principle.

This discussion has addressed the movement of an occupying power from lawful to unlawful occupation as a result of actions that are contrary to the international law. Such actions include the failure to uphold key principles including annexation, temporariness, best interest and good faith. In the case of the Israeli occupation of Palestinian territory, it is clear that actions taken by Israel contravene these principles. These actions also result in a clear restriction on the ability of the Palestinian people to exercise self-determination and place barriers to the promotion of their genuine autonomy. To enforce the international law of occupation, Palestinians face another barrier: the status of statehood. Considering that a number of the enforcement mechanisms for international law are only open to states, the lack of state recognition of Palestine is a major challenge to their self-determination.

Realising ‘Statehood’

One of the most discussed – and divisive – questions concerning the self-determination of the Palestinian people concerns the recognition of Palestinian statehood. Despite the international community recognizing the right of the Palestinian people to exercise their right to self-determination in addition to pursuing national independence and sovereignty,¹⁵⁴ the Palestinian people lack the formal status of statehood. This discussion seeks to articulate statehood requirements and the current status of the Palestinian people as an observer state; explore the impact of recognition by international bodies on the status of Palestine; and discuss explore the relationship between recognition of statehood and the application of the right of self-determination.

The Statehood Criteria: The Montevideo Convention

To understand the pursuit of recognition of statehood by the Palestinian people, the contemporary understanding of a state must first be explored. The international community draws its understanding of statehood from the *Montevideo Convention*¹⁵⁵ which establishes four clear criteria:

1. permanent population;
2. defined territory;
3. government; and,
4. capacity to enter into relations with other states.

These criteria provide a foundation for the international legal recognition of statehood. Self-determination has also been included as a criterion as has international recognition.¹⁵⁶ This international recognition includes membership of the United Nations which is ‘open to all peace-loving States that accept the obligations contained

¹⁵² Human Rights Watch, *Israel: 50 years of occupation abuses* (4 June 2017). <www.hrw.org/news/2017/06/04/israel-50-years-occupation-abuses>

¹⁵³ Human Rights Council, *Freedom of movement: human rights situation in the Occupied Palestinian Territory, including East Jerusalem*, UN Doc A/HRC/31/44 (20 January 2016).

¹⁵⁴ GA Res 3236 (n 17).

¹⁵⁵ *Montevideo Convention* (n 18), art 1. International law does not require the structure of a state to follow any particular pattern: *Western Sahara Advisory Opinion* (n 18).

¹⁵⁶ John Dugard, *Recognition and the United Nations* (Grotius Publications, 1987) 78.

in the UN Charter and which, in the judgment of the United Nations, are able to carry out these obligations.¹⁵⁷

International Recognition: The United Nations

The determination for recognition by the United Nations occurs by admittance to the General Assembly and by recommendation of the Security Council. Article 4(1) of the Charter of the United Nations includes five necessary conditions for the admittance of membership to the United Nations, which include:¹⁵⁸

1. a state;
2. peace-loving;
3. accept the obligations of the Charter;
4. able to carry out these obligations;
5. willing to do so.

Additional factors such as political recognition of the obligations as required by the international community in a formal instrument may be factored into the determination of the United Nations.¹⁵⁹ An obvious issue in these criteria is that a state must be 'a state' before it is granted membership. Considering that international recognition has become of increasing significance to statehood recognition, the circular nature of this first criteria remains of significance to the accessibility of statehood recognition and the human rights and humanitarian benefits it accords. The second, and arguably more important, judgement by the United Nations is by the Security Council. Even if the General Assembly criteria as outlined above are fulfilled, article 4(2) also requires that a positive Security Council recommendation,¹⁶⁰ which results in unconditional membership and automatic admission.¹⁶¹ As a result, positive affirmation by the members of Security Council is required for the recognition of statehood. Considering these requirements, what are the barriers to Palestine achieving genuine autonomy as a state?

The Status of Palestinian Statehood

Following the proclamation of the *Palestinian Declaration of Independence* by the Palestinian Liberation Organisation (PLO) in 1988, Palestine was recognised by a significant portion of the international community, including by the *Arab League* and the *Organisation of the Islamic Conference*.¹⁶² In 1989, it was acknowledged at the United Nations Security Council that 94 states had recognised Palestine as a state, and the PLO sought membership of the United Nations and associated international agencies.

The challenges to realising this desire for statehood have had a direct impact on the ability of the Palestinian people to exercise their right of self-determination. Such challenges are often the result of significant states within the international community, including the United States acting against Palestinian statehood. Whilst issues do remain regarding the fulfilment of the *Montevideo criteria*,¹⁶³ the international recognition of statehood remains a central issue to the realisation of the right of

¹⁵⁷ *Charter of the United Nations*, art 4(1).

¹⁵⁸ *Admission of a State to the United Nations (Advisory Opinion)* [1948] ICJ Rep 57.

¹⁵⁹ United Nations Security Council, *Provisional Rules of Procedure of the Security Council*, UN Doc S/96/Rev.7, 58 (1 January 1983).

¹⁶⁰ In addition to a decision by the General Assembly which is to be made by a two-thirds majority. *Charter of the United Nations*, art 18(2).

¹⁶¹ John Dugard, *Recognition and the United Nations* (Grotius Publications, Cambridge 1987).

¹⁶² John Quigley, *The statehood of Palestine: international law in the Middle East conflict*. (Cambridge University Press, 2010).

¹⁶³ These include a fluctuating population, undefined borders, restrictions on the capacity of the Palestinian people to effectively govern their determined population.

Palestinian self-determination. The mechanisms available to states, as opposed to non-state entities, for the enforcement of human rights through international mechanisms is one such reason for the significance of statehood recognition. Considering that the enforcement of the right of self-determination is an underlying justification for statehood, two questions become apparent: who is the subject of the right and how will it be exercised?

Defining the Subject and Authority of Palestinian Statehood

These two questions are highlighted in the Universal Declaration of Human Rights, which states ‘the will of the people shall be the basis of the authority of government...’.¹⁶⁴ The right of self-determination itself implies that ‘the people’ should be free to choose how ‘the authority’ is exercised, that is the model of internal and external governance that promotes genuine human rights freedoms and responsibilities. In the case of Palestine, the ‘who’ – or the subject of the right, known as the ‘principal party’ that is recognised by the international community – is the Palestinian people.¹⁶⁵ It is the Palestinian people that will ultimately express their right of self-determination. In this context, the international community has not drawn geographical distinctions when saying ‘the Palestinian people [are] the principal party to the question of Palestine.’¹⁶⁶ The exercise of the right of self-determination, and associated rights, therefore extend to the displaced Palestinian population.¹⁶⁷

The ‘how’ – or the authority that will enable the processes by which the expression of self-determination can take place – is through the PLO.¹⁶⁸ The mandate by which the PLO can represent the Palestinian people in both internal and external capacities incorporates efforts to realise the right of self-determination; this capacity extends to addressing issues of continuing displacement and the return of displaced people, taking action against human rights violations and establishing territorial boundaries.¹⁶⁹ The relationship between the who and the how – the representation of the Palestinian people by the PLO – raises new issues.

Of significance is who is actually represented within the international community under the ‘State of Palestine.’¹⁷⁰ The risk of partial representation for part of the Palestinians is significant, for partial representation will not allow for the genuine fulfilment of the right of self-determination. For the international community, the primacy of the will of all the Palestinian people remains fundamental.¹⁷¹ A clearer articulation of the role of the PLO within the international community, including its representation of the entire Palestinian people as well as internal constitutional reform to enable adequate representation of the people within the PLO, could address these risks.¹⁷²

The right of self-determination, and the ensuing issues of representation, have elements that imply a requirement of a democratic system of governance. Democracy promotes equality between men and women, encourages political competition, supports non-discriminatory participation and exercises the rule of law.¹⁷³ This goes to the question of ‘how’; articulating an effective method of governance that legitimizes the avenue of

¹⁶⁴ art 21(3).

¹⁶⁵ GA Res 3210 (n 88); GA Res 3236 (n 17); GA Res 3375 (n 88).

¹⁶⁶ Ibid.

¹⁶⁷ *Observer status for the PLO* (n 99).

¹⁶⁸ GA Res 3236 (n 17).

¹⁶⁹ *Palestine - Progress Report of the United Nations Mediator*, GA Res 194, UN Doc A/RES/194 (11 December 1948); SC Res 242 (n 154)

¹⁷⁰ Jerome Segal, ‘Creating the Palestinian State, Revisited’ (2015) 20 *Palestine-Israel Journal of Politics, Economics, and Culture* 72.

¹⁷¹ *Palestine - Progress Report of the United Nations Mediator* (n 179)

¹⁷² Any reform to the internal governance structures of Palestine needs to be wary of the encroachment of external ideologies that do not represent the will of the people.

¹⁷³ Inter – Parliamentary Union, *Universal Declaration on Democracy*, (16 September 1997).

broader participation in representation before the international community. The *Montevideo* criteria seek a clearly defined territory, population, governance and capacity to enter into international relations. It may even be that the international community is moving to add representative government as a key precondition to statehood. *How* the international community recognises and engages with states is changing, as is *who* is recognising these states on behalf of the international community.

To explore this in context of Palestine, requires an examination of the means by which Palestine has sought to realise its right of self-determination, and the resulting impact it has had in its ability to engage with the international community and achieve genuine autonomy.

Achieving Palestinian Self-Determination through International Fora

A core aspiration in the pursuit of statehood is the capacity for accountability and enforcement of rights before the international community. This question of enforceability invokes legal theory and the nature of rights as ‘subjective’ or ‘objective.’¹⁷⁴ Subjective rights entail a set of powers and obligations local to a particular subject.¹⁷⁵ In contrast, objective rights articulate forms of social interaction that are the object of approval, to be enjoyed by either anyone indeterminately or anyone who fulfils the necessary conditions of the right. The enforceability of these rights is left to others to ensure. The issue becomes apparent when determining the nature of the right in question: the assignor of that right, the structures that confine that right, the validity of that right as a way to structure society and, of significance to this discussion, the mechanisms for the enforcement of that right. Whilst an in-depth analysis of legal theory underpinning the right of self-determination falls outside the scope of this article, the following discussion will focus on this final issue: achieving self-determination through international judicial enforcement mechanisms. Whilst a number of regional and international judicial bodies exist, two are of relevance for this discussion: the ICC and ICJ.

a. International Criminal Court

The ICC has been an important forum for the international community to address the right of self-determination in the Palestinian context. Governed by the *Rome Statute*, the ICC investigates and, where warranted, tries individuals charged with crimes of concern to the international community.¹⁷⁶ As noted elsewhere, Palestine is seeking to exercise its right of self-determination, which could include the realisation of genuine autonomy and freedom from occupation. Palestine has made declarations to the ICC that have clearly accepted ICC jurisdiction, accession to the *Rome Statute*, and articulated territorial boundaries in relation to which it is requesting that the ICC jurisdiction be enacted. Article 12(2) of the *Rome Statute* outlines the necessary preconditions for the ICC to exercise its jurisdiction, including conditions of nationality or territoriality. Necessary satisfaction of these preconditions must occur for the ICC to open an investigation on any alleged criminal acts.¹⁷⁷ Therefore, without satisfaction of these preconditions, the ICC does not have jurisdiction. The question remains, has Palestine satisfied these preconditions in order for the ICC to exercise its jurisdiction?

¹⁷⁴ Richard Dragger, ‘Rights’ in T. Ball, J. Farr, and R. Hanson (eds), *Political Innovation and Conceptual Change* (Cambridge University Press, 1989).

¹⁷⁵ Geuss, R. *Philosophy and real politics*. (Princeton University Press, 2008), 42.

¹⁷⁶ Genocide, war crimes, crimes against humanity and the crime of aggression.

¹⁷⁷ *Rome Statute* (n 106), art 19(1).

The declaration lodged by the Palestinian National Authority in 2009¹⁷⁸ will first be analysed to determine satisfaction of jurisdiction. This declaration recognized the jurisdiction of the ICC ‘for the purpose of identifying, prosecuting and judging acts committed on the territory of Palestine since 1 July 2002.’ In 2012, the ICC determined that the preconditions were not met with the capacity of Palestine to exercise jurisdiction over the identified territory brought into question. The issue raised by the court was one of Palestinian statehood status, only enjoying ‘observer’ status by the United Nations. In its conclusions, the ICC said that if ‘competent organs’ of the United Nations resolved the issue of state recognition, then the jurisdiction of the court could apply to acts committed in Palestine.¹⁷⁹ Subsequent to this decision, the recognition of Palestine as having non-member observer State status by the General Assembly in 2012,¹⁸⁰ combined with its treaty practice engagement since the General Assembly resolution,¹⁸¹ has resulted in a new prevailing understanding that Palestine now seems to fulfil the statehood criteria required by the ICC.¹⁸² This was recognised in 2015 by the ICC which accepted jurisdiction over crimes committed in Palestinian territory.¹⁸³ With this recognition, Palestine was able to accede to the *Rome Statute* in 2015.¹⁸⁴ As a result, Palestine is able to refer a situation to the ICC under the declaration of article 12(3). In 2018, Palestine submitted a referral to the court, calling on prosecutors to open an immediate investigation. Whilst the ICC may have declared jurisdiction, questions concerning the validity of this declaration may still remain.

To explore these jurisdictional concerns, this article must first address the understanding of article 12(3) as a delegation-based theory of jurisdiction. This theory holds that a state delegates part of its existing jurisdiction to the ICC. For such a delegation to occur, the state must first possess the jurisdiction to delegate. The Palestinian territory in question, including the West Bank and the Gaza Strip (including East Jerusalem),¹⁸⁵ is considered a single territorial unit.¹⁸⁶ Within this territorial unit are competing claims made by Israel, especially over East Jerusalem and the occupation of Area C in the West Bank. A valid question can be raised regarding the ability of Palestine to cede partial jurisdiction over these contested territories, over which a recognised state (Israel) already claims sovereignty, to the ICC.¹⁸⁷ The lack of a conclusive resolution to title over defined territory has been evident in major instruments, including the 1949 armistice agreements between Israel and Jordan and Israel and Egypt¹⁸⁸ as well as the lack of a defined territorial scope within key General

¹⁷⁸ Palestinian National Authority, *Declaration recognizing the Jurisdiction of the International Criminal Court*, (1 January 2015).

¹⁷⁹ International Criminal Court, *Report on Preliminary Examination Activities 2012*, (November 2012) <<https://www.icc-cpi.int/NR/rdonlyres/C433C462-7C4E-4358-8A72-8D99FD00E8CD/285209/OTP2012ReportonPreliminaryExaminations22Nov2012.pdf>>

¹⁸⁰ *Status of Palestine in the United Nations* (n 19).

¹⁸¹ Party to over 15 international treaties since General Assembly recognition.

¹⁸² Andreas Zimmerman, ‘Palestine and the International Criminal Court Quo Vadis.’ (2013) 11 *Journal of International Criminal Justice*, 303; Ronen (n 21).

¹⁸³ International Criminal Court, *Preliminary Examination on alleged crimes committed in the occupied Palestinian Territory, including East Jerusalem, since 13 June 2014* (1 January 2015).

¹⁸⁴ State of Palestine, *Declaration Accepting the Jurisdiction of the International Criminal Court*, (31 December 2014). See also, International Criminal Court, *The State of Palestine accedes to the Rome Statute* (7 January 2015).

¹⁸⁵ Peace Agreements & Related, *Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (Oslo II)*, 28 September 1995.

¹⁸⁶ Peace Agreements & Related, *Declaration of Principles on Interim Self-Government Arrangements (Oslo I)*, 13 September 1993.

¹⁸⁷ This is compounded by the lack of a definition for the term ‘state’ in the *Rome Statute*, or lack of clarity regarding the extension of the scope of the *Rome Statute* to non-state entities.

¹⁸⁸ Israel and Jordan General Armistice Agreement, (3 April 1949) and Israel and Egypt General Armistice Agreement, (24 February 1949) as recognised by SC Res 89, UN Doc S/RES/89 (17 November 1950).

Assembly Resolutions¹⁸⁹ and Security Council Resolutions.¹⁹⁰ The Oslo II Accords determined the exercise of criminal jurisdiction by Palestinian authorities over Palestinian territory, with special restrictions made for actions made by Israeli citizens. These agreements clearly recognised Palestinian jurisdiction over defined Palestinian territory, albeit limited in how Palestine can exercise this jurisdiction. It is this jurisdiction which Palestine may delegate to the ICC. If a jurisdictional authority does exist, which the Oslo II Accords assert, another question is raised concerning the retrospectivity of this jurisdiction. Previous declarations before the ICC articulate a retrospective jurisdiction.¹⁹¹ In the case of Palestine, such retrospectivity would be limited to the point of recognition of statehood by the General Assembly, since the authority of the court is based on the existence of a State of Palestine. Palestine could at the least, bring an action before the ICC for actions committed on the defined territory of the Oslo II Accords since 2012. Extensions in time and territory could be explored from this starting position.

These issues highlight the significance of clarifying the scope and extent of Palestinian sovereign title, including clearly defined territorial borders. Whilst key aspects of genuine autonomy for the Palestinian people fall beyond the jurisdiction of the ICC to grant (such as the demarcation of territorial borders), it remains an important mechanism for the enforcement of the right of self-determination and the broader array of rights enshrined in international humanitarian and human rights law. Such rights also extend to the previously identified challenge to self-determination – occupation. Particular actions associated with occupation, including the transfer of a civilian population by an occupying power, may amount to a war crime that can be taken before the ICC.¹⁹² In conclusion, there seems to be no evident obstacle to adjudication by the ICC on actions taken by Israel on clearly defined Palestinian territory, and after the recognition of statehood by the General Assembly in 2012, including actions of an occupying power.

International Court of Justice

The ICJ is the second international judicial mechanism available to Palestine. It acts under the *Charter of the United Nations* and remains the principal judicial organ of the United Nations. It has the primary function of settling legal disputes in accordance with international law, that have been submitted by states. It is also able to give advisory opinions on legal issues referred by United Nations specialized agencies or organs (including the Security Council).

Recently, Palestine has sought to access the ICJ via a declaration against the United States of America made on 28 September 2018.¹⁹³ This declaration is governed by article 35(2) of the *Charter of the United Nations*. Considering that this declaration, *prima facie*, fulfils the procedural requirements for consideration by the ICJ,¹⁹⁴ the remaining is that only ‘states may be parties in cases before the court.’¹⁹⁵ If Palestine is determined a ‘state’ before the ICJ, then it could be considered by the court under the *Vienna Convention on Diplomatic Relations*¹⁹⁶ to which both the United States and

¹⁸⁹ *Status of Palestine in the United Nations* (n 19).

¹⁹⁰ SC Res 2334 (n 103).

¹⁹¹ The *Declaration of Ivory Coast* (18 April 2003) referred to events since 19 September 2002, and the *Declaration of Ukraine* (17 April 2014) referred to events from 21 November 2013 to 22 February 2014.

¹⁹² *Rome Statute* (n 106), art 8(2)(b)(viii).

¹⁹³ *Palestine v. United States of America* (n 30).

¹⁹⁴ Unlike other similar cases, such as the declaration made by the former *Federal Republic of Yugoslavia* which did not reference the SC Res 9 or the *Rules of Court*.

¹⁹⁵ *Statute of International Court of Justice* art 34(1).

¹⁹⁶ *Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes*, opened for signature 24 April 1963, (entered into force 19 March 1967), art 1.

Palestine are contracting parties, and thus provide the jurisdictional basis for hearing the dispute. The reasoning concerning the capacity of the ICJ to recognise the statehood of Palestine is similar to that explored in the context of the ICC. The recognition of non-member observer State status by the General Assembly gives clear indication that Palestine can ratify the ICJ Statute. This is also something which could have been done prior to this recognition, considering a state can become a party to the ICJ Statute without become a party to the *Charter of the United Nations*.¹⁹⁷ Furthermore, article 35(2) of the ICJ Statute provides that the ICJ is open to states not party to the statute under conditions laid down by the Security Council.¹⁹⁸ These conditions include a declaration that accepts the jurisdiction of the court in accordance with the *Charter of the United Nations* and the *Rules of the Court*; undertakes to comply in good faith with the decisions of the ICJ; and accepts all obligations of a Member of the UN under article 94 of the UN Charter.¹⁹⁹ This declaration may be particular (concerning particular disputes), or general (dealing with all or a class of disputes). A declaration made under article 36(2) of the ICJ Statute is comparable with a declaration made under article 12(3) of the ICC Statute. Further support for the achievement of self-determination through international fora may be found in the relationship between collective recognition as a basis of satisfaction of the statehood requirement of jurisdiction.

The recognition of Palestine by the United Nations Educational, Scientific and Cultural Organization (UNESCO) may impact on Palestine's capacity to function as a 'state' before the ICJ. The recognition of Palestine by UNESCO, and the resultant capacities to engage with the international community, raises the theoretical distinction between the declaratory theory and constitutive theory of recognition.²⁰⁰ The declaratory theory asserts recognition does not constitute statehood, but declares an existing statehood that is satisfied by legal criteria.²⁰¹ The constitutive theory draws a closer relationship between recognition as a key element in constituting statehood.²⁰² Within the constitutive theory, a distinction should be drawn between individual recognition and collective recognition.²⁰³ Collective recognition may allow an entity to be *treated* as a state within international institutions. The value of collective recognition is highlighted in cases of self-determination. When the fulfilment of particular requirements of statehood are not met, protected populations are not denied an ability to exercise their human rights. As the impact of this recognition by UNESCO will be of increasing significance as the case before the ICJ develops, a brief examination of the requirements of statehood within the ICJ will be discussed.

Proceedings before the ICJ are open to states; therefore, if a non-state entity is heard before the court, does that imply statehood? The ICJ cannot confer statehood status on a state by virtue of exercising its jurisdiction over a case involving the entity.²⁰⁴ References to 'statehood' within the context of international legal instruments and relevant procedural mechanisms are not necessarily made with the intention of conferring statehood. In such cases, the application of the *Vienna Formula*²⁰⁵ can be

¹⁹⁷ See for example Switzerland, Nauru and Italy.

¹⁹⁸ SC Res 9, UN Doc S/RES/9 (15 October 1946).

¹⁹⁹ SC Res 9, UN Doc S/RES/6 (17 May 1946).

²⁰⁰ Stefan Talmon, 'The constitutive versus the declaratory theory of recognition: Tertium non datur?' (2005) 75 *The British Year Book of International Law* 101.

²⁰¹ Such as the *Montevideo Convention* (n 18).

²⁰² Collective recognition can be by formal UN structures such as those enshrined within the *Charter of the United Nations*, art 4(1) and art 4(2) that identifies the recognition by the General Assembly and Security Council respectively.

²⁰³ Jure Vidmar, 'Explaining the legal effects of recognition' (2012) 61(2) *International & Comparative Law Quarterly* 361.

²⁰⁴ This would be an implicit reading of the requirement prescribing statehood. An implicit reading would result in the court failing to have jurisdiction over the case as per the *Monetary Gold* principle. See Ronen (n 21) for a brief discussion on the *Monetary Gold* principle and its application in the Palestinian context.

²⁰⁵ Based on the *VCLT* (n 22).

made. The *Vienna Formula* identifies the functional purpose of statehood in international legal instruments that allows for participation.²⁰⁶ The court is not required to be satisfied of the traditional elements of statehood, but is provided a functional approach to supporting valid participation in a treaty that is open to states, without consideration of an entity's territorial legal status and where the term statehood is not defined.²⁰⁷ The *Vienna Formula* is the default definition for treaties that refer to statehood participation. This provides the legal framework within which Palestine might participate in international legal mechanisms that are open to states, without fulfilling the necessary requirements for statehood. The proceeding brought by Palestine before the ICJ extends the nature of the *Vienna Formula* beyond joining a treaty to participating in consequential procedures established by the treaty. The determination of the ICJ to allow Palestine to participate in the procedural mechanisms granted by an international treaty is one of procedural law; the determination would not be substantive law, and therefore has no substantive implications on the status of Palestinian statehood. Considering UNESCO is a specialized agency of the United Nations, UNESCO membership provides the legal capacity to participate in international treaty regimes via the *Vienna Formula*. For Palestine, this membership is the gateway to international treaties, and the procedural mechanisms of the treaties, that constructs a legal framework to enforce their right of self-determination and protect the fundamental human rights of the Palestinian people. Whilst not constitutive of statehood, the functional capacity of a state can be accorded to Palestine for addressing the key barriers to statehood, such as the enforcement of the law of occupation. In addition to the enforcement of the right of self-determination, and related human rights, within international judicial mechanisms, another avenue may be provided to the Palestinian people through the General Assembly via *Resolution 377*.²⁰⁸

Enacting General Assembly 'Resolution 377'

Commonly known as the '*Uniting for Peace*' resolution, *Resolution 377* provides a power that resides within the General Assembly to act in response to threats to peace, breaches of peace, or acts of aggression, and when other mechanisms (including the Security Council) have failed to exercise their primary responsibility of international peace and security.²⁰⁹ The resolution was initially proposed by the United States and was passed by the General Assembly in 1950 in response to the Soviet Union's veto against intervention in North Korea.

In order for the General Assembly to act under *Resolution 377*, four necessary pre-conditions must be met:

1. Failure of the Security Council to exercise its primary responsibility for the maintenance of international peace and security;²¹⁰
2. The failure is resultant from lack of unanimity of permanent members;
3. A threat to peace, breach of peace or act of aggression is present; and
4. The Security Council must have assessed the situation prior to General Assembly.

The foundation for *Resolution 377* can be found in articles 10 and 11 of the *Charter of the United Nations*. These articles provide a sufficient international legal basis for the General Assembly to recommend collective measures, including the use of force against states, whilst not affecting the power balance between the two principal organs of the

²⁰⁶ VCLT (n 22), art 81.

²⁰⁷ Ronen (n 21).

²⁰⁸ *Uniting for Peace* (n 23).

²⁰⁹ Ibid (n 219).

²¹⁰ Primary responsibilities conferred by *Charter of the United Nations*, art 24.

United Nations – the Security Council and General Assembly.²¹¹ Rather, *Resolution 377* reveals the latent potential of the General Assembly that resides within the *Charter of the United Nations* and assembles a procedural framework for this power to be exercised. In other words, *Resolution 377* protects against the situation of a single state preventing the Security Council, and the broader international community, from discharging its responsibility to act promptly and effectively in accordance with the *Charter of the United Nations*. In its contemporary application, the use of *Resolution 377*, viewed within the ambit of the current context of the Palestinian people, may provide an opportunity for the international community to answer this question.²¹² The triggering of *Resolution 377* must balance the values of sovereignty and the guarantee of the protections of human rights. Such a claim is founded on a number of occasions where the United States has vetoed resolutions placed before the Security Council on the Palestinian situation.²¹³ Such resolutions often fulfil the majority required by the Security Council, but fail due to the United States utilising its veto power to vote against the resolution.²¹⁴ The significant power that the United States wields as a permanent member of the Security Council, begs the question whether its decisions have been made in good faith and with the best interests of the international community in mind – or whether there are ulterior motivations. Of concern is the articulated repudiation of tenets of international law that underpin self-determination. Recent claims made by the United States provide an insight into two of these issues: that international law is inconclusive and ambiguous; and pursuing the end of occupation and the promotion of autonomy for Palestine is futile.²¹⁵

Firstly, as has been established in this article, international humanitarian law is clear on the prohibition of territorial acquisition by force. This is a norm of customary international law which stops Israel from acquiring sovereign title over occupied Palestinian territories.²¹⁶ The law of occupation, and prohibition of establishing settlement, is also a norm of international law which prevents Israel from the forceful transfer or deportation of the protected Palestinian population from, or the transfer of the Israeli population to, the occupied territory.²¹⁷ In addition, the right of self-determination has clearly been established within the *Charter of the United Nations*, the *ICCPR* and the *ICESCR* as well as been enshrined within international customary law.²¹⁸ Concerning the claim of ambiguity of international law, which need not reflect the international consensus, the international community has reiterated the relationship between lasting and comprehensive peace and the respect and implementation of international law. It is on this basis that the international community has passed resolutions on the Palestinian question, including the

²¹¹ Harry Reicher, 'The Uniting for Peace Resolution on the thirtieth anniversary of its passage.' (1981) 20 *Colum. J. Transnat'l L.* 1; Juraj Andrassy, 'Uniting for peace' (1956) 50(3) *American Journal of International Law* 563.

²¹² Jean Krasno & Mitushi Das, 'The Uniting for Peace Resolution and Other Ways of Circumventing the Authority of the Security Council' in B Cronin and I Jurd (eds), *The UN Security Council and the Politics of International Authority* (Routledge 2008), 189.

²¹³ See at least 13 occasions that the United States has been used its veto as a permanent member on the Palestinian question since March 2001. See United Nations, *Security Council – Veto List*, < https://www.un.org/depts/dhl/resguide/scact_veto_table_en.htm >

²¹⁴ See for example the recent, sole, vote of the United States against the resolution calling for the condemnation of Israel and protection of Palestinians on 1 June 2018.

²¹⁵ Jason Greenblatt, 'Remarks at a UN Security Council Open Debate on the Middle East,' (23 July 2019) United States Mission to the United Nations < <https://usun.usmission.gov/remarks-at-a-un-security-council-open-debate-on-the-middle-east-9/> >

²¹⁶ *Wall Advisory Opinion* (n 2), para 87; SC Res 478 (n 120); SC Res 497 (n 120).

²¹⁷ *Wall Advisory Opinion* (n 2), paras. 119 – 120; SC Res 2334 (n 103), para 1.

²¹⁸ Which has clearly been accorded to the Palestinian people. See *Wall Advisory Opinion* (n 2), paras. 119 – 120; *Legal Consequences of the Separations of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion)* [2019] ICJ Rep 58, para 150–153.

withdrawal of the Israeli occupation,²¹⁹ the ending of West Bank settlement activities,²²⁰ and the end of measures to change the character and status of Jerusalem.²²¹ On this final point, it has been Israel which has sought to change the status of Jerusalem, a series of actions that have been condemned by the international community. The original intention of the international community on sovereignty of Jerusalem was meant to be a '*corpus separatum*' that operated under an international regime.²²² Such a status has not happened. Instead, Israel has taken actions, including the declaration of Jerusalem as the capital of Israel, to expand its jurisdiction over Jerusalem. These actions have been deemed invalid, with the international community calling for their immediate rescission.²²³

Secondly, the legality of Israeli occupation of the West Bank, including East Jerusalem, has been decided upon by the international community.²²⁴ It has called for the enforcement of international law of occupation and for Israel to 'immediately and completely cease' all activities associated with settlement-motivated exercises.²²⁵ Independence, impartiality, objectivity and universality underpin the procedures that grant international peace. It is in such cases where these fundamental tenets of international law are not present, that the four criteria of *Resolution 377* can be invoked. A case where the veto power of a permanent member of the Security Council is being used on the basis of an erroneous understanding of international law, which denies access to human rights at the expense of perpetuating the acquisition of land by an illegal occupying power, cannot be seen as an action for the maintenance of international peace and security. Fulfilling the requirements of *Resolution 377*, such as prevention of peace and security is as a direct result of a lack of unanimity of permanent members which could result in a threat to, and ongoing breach of, peace in this context.

A final point concerns the jurisdiction of the General Assembly to take such action. The United Nations has granted the Security Council primary, as opposed to exclusive, responsibility for the maintenance of international peace and security. An implicit authority rests outside of the Security Council – residing within the General Assembly – for the enforcement of the responsibilities enshrined within the *Charter of the United Nations*. If the Security Council fails to exercise its responsibilities, this 'does not relieve Member States of their obligations or the United Nations of its responsibility' or 'deprive the General Assembly of its rights or relieve it of its responsibilities under the Charter to maintain international peace and security.'²²⁶ Whilst claims of genocide, war crimes, ethnic cleansing and crimes against humanity demand a response under the Responsibility to Protect that could form a basis for the triggering of *Resolution 377*,²²⁷ this article has established that key aspects of the realisation of the right to self-determination, as highlighted in the case of the Palestinian people, could also form a basis for action under *Resolution 377*. Noting that the will of the international community as articulated in decisions of the ICC and resolutions passed by both the General Assembly and the Security Council has not been enforced, may found a challenge based on the self-determination and genuine autonomy of the Palestinian people.

²¹⁹ SC Res 242 (n 154).

²²⁰ SC Res 2334 (n 103).

²²¹ SC Res 476 (n 120); SC Res 478 (n 120).

²²² *Question of Palestine*, GA Res 181, UN Doc A/Res/181 (29 November 1947).

²²³ SC Res 2253 (n 134); SC Res 2254 (n 134); SC Res 252 (n 120); SC Res 476 (n 120); SC Res 478 (n 120).

²²⁴ *Wall Advisory Opinion* (n 2), para 101; SC Res 904, UN Doc S/RES/904 (18 March 1994); SC Res 2334 (n 103), para 12.

²²⁵ SC Res 2334 (n 103), SC Res 465 (n 153); SC Res 452 (n 155).

²²⁶ *Uniting for Peace* (n 22).

²²⁷ Andreas Kolb, 'The Responsibility to Protect (R2P) and the Responsibility While Protecting (RwP): Friends or Foes?' (2012) *Global Governance Institute*.

Conclusion

In conclusion, the Palestine – Israel conflict has the hallmarks of an irresolvable conflict: an extended geopolitical conflict, grounded in religious, ethnic and historical foundations. Above all, the ongoing occupation of Palestine by Israel and the imbalance in statehood status have been central point to the failed outcomes of the peace process.²²⁸ It is within this context that the Palestinian people aspire to self-determination, a right that has been recognized by the international community.²²⁹ Closely related to the realization of this right is the enforcement of international human rights and humanitarian law concerning populations under occupation and populations within conflict.²³⁰ There is consensus from within the international community that Israel has been occupying Palestine since 1967.²³¹ This article has established that, as an occupying power, Israel has not fulfilled its responsibilities concerning administration, transfer or population and good governance. It has arguably failed to meet the criteria for legal occupation under four-part test proposed (annexation, temporariness, best interests and good faith) and has therefore moved into illegal occupation.²³² This determination mirrors the determination of the ICJ in the advisory opinions on *Namibia*²³³ and is supported by its *Wall* advisory opinion.²³⁴ The Palestinian people can therefore seek to enforce their rights under the law of occupation, to seek self-determination and genuine autonomy free from Israeli occupation. In regard to the enforcement of their rights, this article has addressed another challenge: the status of statehood.

Whilst the comprehensive application of the *Montevideo criteria*²³⁵ to the Palestinian context falls outside the scope of this article, this discussion has clearly identified the subject of the right of self-determination, known as the ‘principal party’ that is recognised by the international community, is the Palestinian people.²³⁶ It has also asserted that the authority that will enable the processes by which the expression of self-determination can take place, is through the PLO.²³⁷ Whilst the international community has recognised the right of the Palestinian people to exercise their right to self-determination and pursue national independence and sovereignty,²³⁸ key areas for further discussion have been identified including: the need for adequate representation of all Palestinian people within authority structures,²³⁹ a clearer articulation of the role of the PLO within the international community,²⁴⁰ and the analysis of a principle of democracy within the Palestinian context and its relation to recognition by the international community.²⁴¹

This article has sought to analyse Palestinian attempts to enforce their right of self-determination and associated rights through international judicial mechanisms including applications made before the ICC and the ICJ. In the current context, the

²²⁸ *Clinton Plan* (2000); the *Bush Road Map* (2002), *Unofficial Geneva peace draft* (2003). Alan Dowty, & Michelle Gawerc, ‘The Intifada: Revealing the Chasm’ (2001) 3 *Middle East* 5, 39.

²²⁹ *The right of the Palestinian people to self-determination* (n 6).

²³⁰ *Wall Advisory Opinion* (n 2), para 112.

²³¹ SC Res 237 (n 100).

²³² Lynk (n 12). See also Ben-Naftali (n 14).

²³³ *Namibia* (n 15), para 16.

²³⁴ *Wall Advisory Opinion* (n 2), para 88.

²³⁵ These include a fluctuating population, undefined borders, restrictions on the capacity of the Palestinian people to effectively govern their determined population.

²³⁶ GA Res. 3210 (n 88); GA Res. 3236 (n 17); GA Res. 3375 (n 88).

²³⁷ GA Res. 3236 (n 17).

²³⁸ *Ibid.*

²³⁹ *Palestine - Progress Report of the United Nations Mediator* (n 179).

²⁴⁰ Any reform to the internal governance structures of Palestine needs to be wary of the encroachment of external ideologies that do not represent the will of the people.

²⁴¹ *Universal Declaration on Democracy* (n 179).

recognition of Palestine as a 'non-member observer' state,²⁴² combined with its treaty practice engagement since the General Assembly resolution, has resulted in the understanding that the ICC can accept jurisdiction over crimes committed in Palestinian territory, which was recognised in 2015 by the ICC.²⁴³ With this recognition, Palestine has been able to accede to the Rome Statute in 2015, and refer situations to the ICC under the declaration of article 12(3).

On the ICC jurisdiction, this article has articulated the proposition that there seems to be no evident obstacle to adjudication by the ICC on actions taken by Israel on clearly defined Palestinian territory after the recognition of statehood by the General Assembly in 2012, including actions of an occupying power. On the Palestinian initiation of ICJ proceedings against the United States made in 2018,²⁴⁴ a similar justification can be made as to the jurisdictional capacity of the ICC. The ratification of the ICJ statute could also be made without becoming party to the UN Charter.²⁴⁵ The jurisdiction of the court could be invoked under article 35(2) of the ICJ Statute, which provides that the ICJ is open to states not party to the Statute under conditions laid down by the Security Council.²⁴⁶

In addition, the collective recognition of Palestine by UNESCO has allowed for the application of the *Vienna Formula* which identifies the functional purpose of statehood in international legal instruments that allows for participation.²⁴⁷ A claim before the ICJ is not required to satisfy the traditional elements of statehood, but may utilise a functional approach to support the valid participation in a treaty that is open to states, without consideration of an entity's territorial legal status and where the term statehood is not defined. Therefore, the ICJ does not need to consider Palestine's status under the law of statehood when deciding on its jurisdiction. The decision of the ICJ to exercise its jurisdiction will also not result in any constitutive effect on Palestinian statehood. Therefore, both the ICC and ICJ are valid avenues for the application and enforcement of the right of self-determination and associated rights for the Palestinian people.

Potential issues concerning the jurisdiction of these courts have been explored, as well as the capacity for the enforcement of decisions of these courts. Of significance to this discussion is the recognition of Palestine as a 'non-member observer' state.²⁴⁸ Jurisdiction is also supported by collective recognition (including Palestinian membership of UNESCO) by the international community, and the resultant capacity to engage with international legal instruments through the *Vienna Formula*.²⁴⁹ *Resolution 377* reveals the latent potential of the General Assembly that resides within the United Nations and assembles a procedural framework for this power to be exercised by the General Assembly in situations where the Security Council fails to execute its responsibilities to maintain international peace and security. The application of *Resolution 377* within the General Assembly may provide a final avenue for self-determination for the Palestinian people, noting it applies in response to threats to peace, breaches of peace, or acts of aggression, and when other mechanisms (including the Security Council) have failed.

The brief discussion on the role of the United States utilising its Security Council veto vote raises concerns regarding the geopolitical motivations of its decisions on resolutions concerning Palestine. Whilst claims of genocide, war crimes, ethnic

²⁴² *Status of Palestine in the United Nations* (n 19), para 2.

²⁴³ Zimmermann (n 193); Ronen (n 21).

²⁴⁴ *Palestine v. United States of America* (n 30).

²⁴⁵ See for example Switzerland, Nauru, Italy.

²⁴⁶ SC Res 9 (n 209).

²⁴⁷ *VCLT* (n 22), art 81.

²⁴⁸ *Status of Palestine in the United Nations* (n 19), para 2

²⁴⁹ *VCLT* (n 22).

cleansing and crimes against humanity demand a response from the international community that could form a basis for the triggering of *Resolution 377*,²⁵⁰ this article has established that key challenges in the realisation of the right to self-determination, as highlighted in the case of the Palestinian people, could also form a basis for action under *Resolution 377*.

This article has identified two challenges associated with applying the right of self-determination in a way that can promote genuine autonomy for the Palestinian people: occupation and statehood. It has also outlined a way forward through international fora. In a world where self-determination remains a fundamental principle in international law, the international community has an opportunity to support the realisation of self-determination in the case of Palestine. Whilst the application and enforcement of self-determination is not without challenge or limitation, the words of David Ben-Gurion, the First Prime Minister of Israel, in 1931 ring true today:

The Arab in Palestine has the right to self-determination. This right is not limited, and cannot be qualified by our own interests... It is possible that the realization of the aspirations (of the Palestinian Arabs) will create serious difficulties for us... but this is not a reason to deny their rights.²⁵¹

²⁵⁰ Kolb (n 238).

²⁵¹ John Collins, 'Self-Determination in International Law: The Palestinians' (1980) 12 *Case W. Res. J. Int'l L.*, 137.