

The Problematic Concept of Sovereignty and the Question of Jerusalem

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When I was asked to prepare an article on sovereignty and Jerusalem my initial worry was that an article of this nature would undoubtedly be more complicated than met the eye. The question of sovereignty in international law is seriously problematic. The question of Jerusalem is also problematic in the sense that religious, political and legal aspects of the conflict over Jerusalem is quite difficult to separate from each other. This difficulty is even more entangled by the fact that this article is supposed to address Jerusalem as a separate entity from Palestine. In my view, although Jerusalem enjoys a unique religious, political and strategic status, this status is extendible to the rest of Palestine. Therefore, my task would have definitely been easier if I was to address the question of Jerusalem within the context of Palestine. I have always had my concerns regarding aspects of the selected research methodology when I am addressing a particular question. These concerns usually maximise when a particular issue is separated from its holistic context because once it is separated it loses some advantages that would have been better served within its holistic context. Nonetheless, this article intends to address the question of Jerusalem in the light of the problematic concept of sovereignty in International law without any prejudice to the legal aspects that would have arisen should the holistic approach have been applied.

Problematic Definition of Sovereignty

Oppenheim defines sovereignty as a “supreme authority, which on the international plane means not legal authority over all other states but rather legal authority which is not in law

The Problematic Concept of Sovereignty and the Question of Jerusalem dependent on any other earthly authority.”¹ Taking into account the supremacy of international law and also taking into account its external and internal aspect Lauterpacht defines sovereignty as ‘a delegated bundle of rights. It is a power which is derived from a higher source and therefore divisible, modifiable and elastic.’² Brownlie defines sovereignty as ‘... the legal competence which a State enjoys in respect of its territory.’³ As he concentrates on the external aspect of sovereignty, Brownlie emphasises that the ‘... validity of claims to territorial sovereignty against other States’ is an important element in the concept of sovereignty.⁴ Sovereignty, therefore, can be generally seen as the ability to conclude treaties and to participate in creating customary international law. Sovereignty can also be seen as the container of sovereign rights and powers, as well as the legal competence to exercise the powers and rights themselves. Most international lawyers have come to the conclusion that the concept of Sovereignty is very difficult to define.⁵ That is why Briery provides another interesting definition of sovereignty. He says,

*“... for the practical purposes of the international lawyer sovereignty is not a metaphysical concept, nor is it part of the essence of statehood; it is merely a term which designates an aggregate of particular and very extensive claims that states habitually make for themselves in their relations with other states. To the extent that sovereignty has come to imply that there is something inherent in the nature of states that makes it impossible for them to be subjected to law, it is a false doctrine which the fact of international relations do not support.”*⁶

The concept of sovereignty is originated in Jean Bodin’s political writing ‘*De Republic*’ in 1576.⁷ As France was eaten up by civil war and civil unrest, Bodin thought that the solution can be delivered by a strong government or monarch similar to a growing trend in other western European states.⁸ Making sovereignty ‘an essential principle of internal political order’,⁹ Bodin defines the latter as ‘a multitude of families and the possessions that they have in common ruled by a supreme power and by reason’.¹⁰ Although Bodin’s monarch was supposed to

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be above the law, 'it was law that made ruler, not as later theories of sovereignty have taught us to believe, the will of the rulers that made the law.'¹¹ This shows that although the concept of strong monarch was the solution, this solution was after all supposed to save the people in France from the tyranny of civil war. As Thomas Hobbs had experienced similar civil unrest, his writings came to echo Bodin's solution that the state needed a mighty common power similar to a totalitarian power in modern time.¹² By the time constitutional government emerged Locke and thereafter Rousseau were in favour of 'the theory that the people as whole were the sovereign'.¹³ This interpretation of sovereignty gained even stronger ground by the emergence of democracy as a new theory for governance,¹⁴ which managed to shift the emphasis from the concept of absolute monarch¹⁵ to people's sovereignty.¹⁶ At this stage writers were divided between two contradictory connotation of sovereignty – absolute sovereignty with a strong monarch, on the one hand, and peoples sovereignty, on the other. As the latter concept won, and as modern development led States to abandon independence in favour of inter-dependence the concept of relative sovereignty was born, flourished and dominated international relations.¹⁷ That is why in modern times there are hardly any voices in support of absolute sovereignty which is above the law.¹⁸ Jenks, therefore, commented that,

*"... 'sovereignty' in its original sense of 'supreme power' is not merely an absurdity but an impossibility in a world of States which pride themselves upon their independence from each other and concede to each other a status of equality before the law, ..."*¹⁹

In the past²⁰ the game of sovereignty, as Jackson terms it, was played only by states who used to be the exclusive players who both set the rules of the game and practiced sovereignty within the realms of these rules.²¹ Modern changes in the world has led to the emergence and acceptance of other types of players who have been recognised as having various degrees of status to participate in the game.²² O'Connell, therefore, warned

The Problematic Concept of Sovereignty and the Question of Jerusalem against the confusion that considers the concept of sovereignty as the key to the question of international personality.²³ Refusing to call it a term of art O'Connell states that the definition of sovereignty will vary according to the context used. Generally speaking O'Connell equates sovereignty with competence, i.e., international competence to a degree which varies from one entity to another with no regard to the personality of the entity.²⁴ The highest degree of competence in O'Connell's view is the plenary competence ranging up to a competence that can be equated with semi-sovereignty.²⁵ He, therefore, states that '... it is incorrect to exclude subordinate entities like colonies or member States of federations from the conception of Statehood in international law without previous reference to international legal acts which they may in fact perform.'²⁶

Despite the fact that most modern legal writing do not consider States to be the only possible candidate for sovereignty numerous modern writers still associate sovereignty with independence²⁷ which emphasises the exclusive authority of States' power without interference by an outside power.²⁸ It seems to me that sovereignty must be associated with the right to independence rather than an already achieved independence. Sovereignty in this sense becomes an indispensable ingredient of the right to self-determination.²⁹ Lauterpacht, therefore, while discussing the mandate system did not find it unusual that in certain cases the 'the exercise of sovereignty is ... vested in one person, i.e. the mandatory, and its titular ownership in another person, i.e. the league.'³⁰ What Lauterpacht did not realise was that while the exercise of sovereignty was in the hand of the mandatory the true title of sovereignty was still in the hands of the people of the mandated territory. This statement has a very important corollary. That is the concept of Sovereignty is wider than and includes the concept of administration, i.e., the latter is included in and considered only a part of the concept of sovereignty. That is why the mandated territory was not considered to form part of the mandatory's

The Problematic Concept of Sovereignty and the Question of Jerusalem territory,³¹ and therefore the mandatory did not have the right to dispose of the territory without its people's or the League's consent.³² Similarly, "[t]he very considerable derogation of sovereignty involved in the assumption of powers of government by foreign states, without the consent of Germany [after WWII] did not constitute a transfer of sovereignty. A similar case, recognized by customary law for a very long time, is that of the belligerent occupation of enemy territory in time of war."³³ That is to say sovereign rights cannot be lost by use of force or by imposition of restrictions on a particular sovereign.³⁴ In the Lighthouses in Crete and Samos case, (1937), by a majority of ten, the PCIJ concluded that although the 'Sultan had been obliged to accept important restrictions on the exercise of his rights of sovereignty in Crete, that sovereignty had not ceased to belong to him, however it might be qualified from a juridical point of view.'³⁵ If one applies this statement to the case of Jerusalem the only logical consequence would be that while the Israeli authorities have been exercising certain sovereign powers in Jerusalem, this exercise is both restricted to the necessities of the belligerent occupation and temporary in the sense that it does not help to develop any sovereign rights over Jerusalem.³⁶ This is supported by the Commentary on the Fourth Geneva Convention on the Protection of Civilian Persons in Time of War to which Israel is a party.³⁷ This has also been explicitly emphasised in UN S.C. Resolutions, such as 446 (1979), 592 (1986), 478 (1980) and 605 (1987) and indirectly in the UN S.C Resolution 242 (22nd Nov., 1967).³⁸

The principle of effective control has been said to be one of the main attributes of sovereignty. Marrying the concept of state and that of legal order, Kelsen concludes his pure theory of law saying that "[w]hat is usually called the legal order of the state, or the legal order set up by the state, is the state itself."³⁹ This technical notion⁴⁰ of the state, which is agreeable to the views of other writers,⁴¹ condense the four characteristics (permanent population, defined territory, government, and capacity to enter into relationship with other states),⁴² into a single concept

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showing that territory and population "... appear as the territorial and personal spheres of validity of the national legal order."⁴³ The principle of effective control has also been addressed in some international⁴⁴ and municipal⁴⁵ cases. In *Aaland Islands Case*, it was very clear that the requirement of government was the establishment of 'a stable political organisation', and public authorities must be 'strong enough to assert themselves throughout the territories of the State without the assistance of foreign troops.'⁴⁶ In short the government should have the power to provide effective control over and establish order within its territories.⁴⁷ This effective control doctrine caused Crawford to suggest that "[t]here is thus a strong case for regarding Government as the most important single criterion of statehood, since all the others depend on it."⁴⁸ Brownlie further commented that, "... territory cannot be distinguished from jurisdiction for certain purposes. Both terms refer to legal powers, and when a concentration of such powers occurs, the analogy with territorial sovereignty justifies the use of the term 'territory' as a form of shorthand."⁴⁹ Shaw emphasises that 'the relevant framework [of the concept of state/sovereignty] revolves essentially around the territorial effectiveness.'⁵⁰ However, Lebanon case as well as Croatia and Bosnia cases showed that despite the ineffective control of the Lebanese, Croatian and Bosnian governments during their civil war (1975-1990 and 1991-1997⁵¹ respectively) and despite the interference of foreign troops, Lebanon maintained its membership of the UN, and the other two entities were both recognised by the European community as States and accepted for UN membership,⁵² i.e. the ineffective control of these governments did not deprive the relevant countries from their statehood. It seems that "State practice suggests that the requirement of "stable political organisation" in control of the territory does not apply during a civil war in a state that already exists"⁵³ provided that "it include some degree of maintenance of law and order."⁵⁴

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The problem with the principle of effective control is that it is completely detached from legitimacy, justice and morality issues. In fact the principle of effective control is very likely to be considered as a domestic affair where neither the United Nations nor any State might be able to interfere. As such the principle of effective control might come into conflict with the principle of self-determination and many other human rights issues without sufficient ability of international law to interfere. Having cited Crawford's and Kelsen's statements that Sovereignty precedes sovereignty and that '[a] national legal order begins to be valid as soon as it has become, on the whole efficacious, and ceases to be valid as soon as it loses its efficacy',⁵⁵ Jackson rightly commented that '[i]f this were still true today many Third World states probably would not exist.'⁵⁶ Jackson further observed that,

*"Third World sovereignty is a delicate subject to investigate because it raises difficult and indeed troubling questions which touch on some of the major taboo subjects of our time involving culture, poverty, and race."*⁵⁷

The emphasis on the effectiveness of the legal order as the most important element of its validity,⁵⁸ and the total disregard to justice as an indispensable component of legal order, as well as the disregard to the existence of human rights and democracy is doomed to totally collapse by the rise and development of the right to self-determination as an international and national right. The UN collective measures taken against the unilateral declaration of independence by Rhodesia in 1965⁵⁹ and against granting independence to Transkei in 1976,⁶⁰ because of their racist regimes is clear evidence that supports this argument. These two cases resulted in adding two more requirements to the classical characteristics of statehood; namely, statehood creation should not be "in violation of an applicable right to self-determination",⁶¹ and should not be attended by serious illegality such as being a direct result of a racist policy.⁶² However, some writers consider these two requirements to be

The Problematic Concept of Sovereignty and the Question of Jerusalem more relevant to the legitimacy and legality of the creation of new States rather than being prerequisites of their existence.⁶³

Sovereignty and Self-determination:

The emphasis on the principle of effective control over the state's territory as an element of sovereignty has been very much affected by the development of the principle of self-determination.⁶⁴ As the effectiveness of control is very much related to stability, civil unrest came to pose serious concerns to the international community. Although it was born after the end of WWI the concept of self-determination was not recognised as a principle until after the WWII when it was included in the UN Charter and later in other human rights documents.⁶⁵ This concept later came to play a major role during the de-colonisation period by both State practice and UN.

Two major outcomes have resulted from the recent development of the principle of self-determination. The first is that the emphasis on States as a sole subject of international law has been shifted in favour of the inclusion of 'liberation movements representing peoples oppressed by a colonial power, foreign occupier, or racist regime' as 'a new class of subjects' of international law.⁶⁶ The second is that it poses questions as to the real holder or owner of sovereignty in international law. This latter question will be the most important question to be answered in this article.

As Cassese concludes that Liberation movements are entitled to be a subject of international law, he differentiates between two types of self-determination: internal self-determination and international self-determination. According to him, fighting for the sake of the former is not recognised to enable liberation movements to become a subject of international law.⁶⁷ The latter is recognised, provided that the liberation movement falls into one of three categories: Fighting for freedom from colonialism or foreign occupation or racism.⁶⁸ However, reality has shown that a liberation movement fighting for internal self-determination may be recognised as a subject of

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Regarding the effect the Principle of Self-determination had on the principle of effective control, few examples can be cited here. The UN Special Mission to Guinea Bissau reported in 1972 that the inhabitants of the area effectively controlled by PAIGC supported PAIGC. This was a sufficient reason for ninety-three votes in favour of recognising the independence of Guinea Bissau from its former Portuguese colonial power despite the opposition of some western countries.⁶⁹

The unilateral declaration of independence of Rhodesia in 1965 and Transkei in 1976 were declared invalid by the UN who called upon States to collectively not recognise them.⁷⁰ Although all the elements of Statehood were present in the case of Rhodesia and Transkei, their declaration of independence were conducted by an apartheid political regime leading South Africa to a long standing civil war as the majority of the people rejected the new regimes. That is to say, the *de facto* control by such regimes over Rhodesia and Transkei was invalid based on being contrary to the principle of self-determination. This fact caused Shaw to comment that,

*"The best approach is to accept the development of self-determination as an additional criterion of statehood, denial of which would obviate statehood. This can only be acknowledged in relation to self-determination situations and would not operate in cases, for example, of secessions from existing states."*⁷¹

Although self-determination is one of the most fundamental and important norms of international law in general and international human rights law in particular, this norm found little success in attracting sufficient efforts to clarify its various aspects.⁷² In fact, the reader of international law will realise that many efforts have been exerted to add to its vagueness rather than to aid its clarity. At least two reasons can be cited here to prove this latter statement. The first is that discussions on self-determination always have to give due account to state practice⁷³

The Problematic Concept of Sovereignty and the Question of Jerusalem and reports of some commissions both of which have been riddled with political rather than legal conceptualisation. The second is that despite Woodrow Wilson's dream to see a new era of international peace where self-determination plays a central role,⁷⁴ 'self-determination in 1919 had little to do with the demands of the people concerned, unless those demands were consistent with the geopolitical and strategic interests of the Great Powers.'⁷⁵ Although this statement was meant to address the particular era during and after 1919, its credibility has never lost its significance throughout the development of the principle of self-determination during the last 82 years.⁷⁶ Let us see some examples of literature that have addressed this concept.

The International Committee of Jurist entrusted by the Council of the League of Nations to give an advisory opinion upon the legal aspects of the *Aaland Island* question (1920) came up with the following interesting opinion. It stated that the recognition of the self-determination

*"... principle in a certain number of international treaties cannot be considered as sufficient to put it upon the same footing as a positive rule of the Law of Nations. ... Positive International Law does not recognise the right of national groups, as such, to separate themselves from the State of which they form part by the simple expression of a wish, any more than it recognises the right of other States to claim such a separation. Generally speaking, the grant or refusal of the right to a portion of its population of determining its own political fate by plebiscite or by some other method, is, exclusively, an attribute of the sovereignty of every State which is definitively constituted."*⁷⁷

The reader of this report must bear in mind the following remarks. First, the report referred to the term 'national groups' instead of the term 'people' which at its best meant that the Committee was not accurate in describing the *Aaland Islands* people in order to justify departure from a clearly defined component of the self-determination norm.⁷⁸ This reluctance to acknowledge the right to self-determination caused the victorious powers after WWI to redesign the map of the rest of

The Problematic Concept of Sovereignty and the Question of Jerusalem the world in a manner that pleased their strategic interests without taking into account the wishes of the peoples concerned.⁷⁹ Amongst the unfortunate cases in this scenario was the case of Palestine where the indigenous people were not only disregarded but were also subject to systematic annihilation as if they never existed.⁸⁰

The alleged conceptual confusion of the components of the right to self-determination has sometimes resulted in producing a contradictory practice. A case in point is the *Aaland Islands* case mentioned above. Hannum observed that '[d]espite its recognition that the vast majority of the Aaland population would choose union with Sweden if a referendum were held, the Commission reached a similar conclusion as to the scope of self-determination—"a principle of justice and of liberty, expressed by a vague and general formula which has given rise to the most varied interpretations and differences of opinions".⁸¹ The report went on to say,

*Is it possible to admit as an absolute rule that a minority of the population of a State, which is definitely constituted and perfectly capable of fulfilling its duties as such, has the right of separating itself from her in order to be incorporated in another State or to declare its independence? The answer can only be in the negative. To concede to minorities, either of language or religion, or to any fraction of a population the right of withdrawing from the community to which they belong, because it is their wish or their good pleasure, would be to destroy order and stability within States and to inaugurate anarchy in international life; it would be to uphold a theory incompatible with the very idea of the State as a territorial and political unity.*⁸²

In the case of Palestine the majority of the people were Palestinian Arabs before the minority Jewish residents and immigrants changed the demographic map of Palestine.⁸³ If one applies the *Aaland Islands* report above on the case of Palestine (Jerusalem in particular) the result would be that the Jewish minority who were living in Palestine should not have been allowed to establish a separate State because taking 'their wish, or their good pleasure', as the commission put it, 'would be to

The Problematic Concept of Sovereignty and the Question of Jerusalem destroy order and stability within States and to inaugurate anarchy in international life'. The disregard of this basic norm of international law by the international community has been the only reason for the existence of the most complicated and international peace threatening case in the world, the Palestinian question.

As time went by the principle of self-determination has been consolidated to first become a recognised international right very much relevant to de-colonisation and then later to become an *erga omnes*⁸⁴ and possibly *jus cogens*⁸⁵ international right outside the realm of de-colonisation.⁸⁶ The development of this principle culminated in the *Western Sahara Case* (1975) when the concept that the people are the true holders of sovereignty was categorically confirmed.⁸⁷ Upon the end of the Spanish colonisation of Western Sahara, a dispute erupted between Morocco, Spain and Mauritania. The UN demanded that a referendum must be conducted in order to effect the principle of self-determination, which was eventually accepted by Spain in 1975.⁸⁸ In the meantime, both Morocco and Mauritania claimed historic rights over Western Sahara.⁸⁹ The case was then referred to the ICJ to decide to whom the true title of sovereignty over Western Sahara belonged. The Court referred to the de-colonisation policy and stated that,

*"(b) The integration should be the result of the free expressed wishes of the territory's people acting with the full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes, ..."*⁹⁰

When discussing the right to self-determination some writers, whether intentionally or unconsciously, have tried to confuse the subject by referring to what they term as inherent ambiguity in this right. Definition of people has been amongst this particular phenomenon.⁹¹ This is not an accurate introduction to the right to self determination. Although some writers, for their own political and ideological ends, justify the exclusion of indigenous people from being the prime subject of this right, those writers lack sufficient evidence to prove their

The Problematic Concept of Sovereignty and the Question of Jerusalem views.⁹² In fact the reader of international law literature concerning the right to self-determination will come to the conclusion that indigenous people are, in fact, on top of the list of categories included in the definition of the term 'people'.⁹³

Some International lawyers claim that the exercise of the right to self-determination must not violate the frontiers and territorial integrity of the existing States.⁹⁴ The Arbitration Commission of the European Conference on Yugoslavia stated that, 'the State is commonly defined as a community which consists of a territory and a population subject to an organised political authority'. It further commented that 'such a state is characterised by sovereignty'.⁹⁵ The most striking comment of the above Commission was, however, that 'the form of internal political organisation and constitutional provisions constituted 'mere facts', although it was necessary to take them into account in order to determine the government's sway over the population and the territory'.⁹⁶ Having referred to the forgoing statements Shaw did not hesitate to argue that 'such provisions are neither exhaustive nor immutable,' and that other factors such as self-determination and recognition may be relevant.⁹⁷ The Draft Declaration on the Rights of Indigenous Peoples, therefore, has rejected the restriction of the inviolability of frontiers and territorial integrity of the existing States and demanded an unrestricted right to self-determination.⁹⁸

The discussion so far leads to the conclusion that despite the definitional problem of the concept of sovereignty, one major element is very clear and beyond dispute. That is the title to sovereignty is vested in the people and not in the public authority who practice the sovereign powers.⁹⁹ From this conclusion one can deduce the following remarks. First, the public authority who assume sovereign powers is, or is supposed to be, a mere representative of the people and its exercise of powers should be delimited by the people themselves. Constitutional law of numerous countries contains sufficient evidence to prove this phenomenon. Second, *ultra vires* exercise of sovereign powers can lead to international

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responsibility of the very persons who committed the wrongful act. This can be clearly seen in the Nuremberg trials and war crimes tribunals. State responsibility in this case is diminished and individual responsibility becomes the unavoidable outcome.¹⁰⁰ The third is that a usurpation of sovereign powers by an internal public authority or outside power does not affect the original title of sovereignty¹⁰¹ as it is vested in the indigenous people and their ancestors. The most notable evidence of this conclusion can be found in theories such as residual sovereignty,¹⁰² and the rule that agreements between international entities do not bind third parties without their consent.¹⁰³ The very fact that the colonial powers' exercise of jurisdictional control over mandated and trusteeship territories did not deprive indigenous people from retaining and regaining their title to territorial sovereignty is, yet, more evidence to prove the forgoing remark.

Sovereignty over Jerusalem

Turing now to the question of Jerusalem, it is not very difficult after the above discussion to see who is entitled to have sovereignty in Jerusalem. Taking into account that the true holders of sovereign rights are the people, the indigenous people of Jerusalem (who are part and parcel of the indigenous people of Palestine) are then the true owners of sovereignty in Jerusalem.¹⁰⁴ As Jerusalem was first occupied by Great Britain and then by Israel, and taking into account the right to self-determination and the concept of residual sovereignty,¹⁰⁵ the people of Jerusalem are the true holders of the sovereign rights over its territories.¹⁰⁶ But how can we identify the indigenous people of Jerusalem? This question, which is usually posed to create confusion, does not have a chance in the case of Jerusalem. It is very clear that the consecutive Israeli governments and their predecessor the Zionist movements have systematically and repeatedly tried to distort the demographic image of Palestine in general and Jerusalem in particular.

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Describing the Jewish immigration into Palestine during the mandate, John Quigley wrote,

*“Britain allowed substantial migration of Jews from Europe to Palestine, augmenting the Jewish sector of Palestine’s population, which stood at under ten percent as of World War I, to one third by World War II.”*¹⁰⁷

During the spring and summer of 1948, the three Jewish military forces took 80% of Palestine, expelling most of the Arabs from this area. By late 1948, three quarters of a million Arabs had left Palestine, and the Arab population of Jerusalem which at the start of the year stood at 65,000, was less than 4,000.¹⁰⁸

These migration records and their further details were stated in almost all the literature addressing the Palestinian question including the UN special reports and resolutions. Kletter, therefore, has emphasised that “Israel should not be allowed to benefit from the demographic changes it made while occupant.”¹⁰⁹ Regardless of the present ratio of the immigrant Jews to the Palestinians, the identification of the indigenous people who used to reside in Palestine before the WWI is not difficult¹¹⁰ taking into account the following. First, thanks to modern documentation mechanisms, there are sufficient records that are able to draw a clear picture of the demographic changes in Jerusalem throughout the last century. Most of the Palestinians, whether they are living in Jerusalem have been deported and, therefore, living abroad, still have title deeds and other documents that are able to prove their ownership of land, homes and other properties, which have been usurped by the consecutive Israeli governments and their predecessor the Zionist movements, as well as their residency in Jerusalem. Verification of such deeds and documents, though it may take time, is not difficult.¹¹¹

Any other claim of sovereignty over Jerusalem is void. That is to say, all the Israeli claims which are based on grounds such as, vacuum of sovereignty, historic rights, religious claims, prescription, occupation in self defence, and so on and so forth,

The Problematic Concept of Sovereignty and the Question of Jerusalem are all void and unacceptable in international law. In his clearly biased note, in which he tried hard to find a legal basis for Israel to claim sovereignty over Jerusalem, Kletter could not avoid to conclude that, "Israeli claims are also weak. Its claim of historic rights is invalid. Jewish law does not demand sovereignty, but only settlement."¹¹² Even when Kletter tried to find such a basis by twisting rules and principles of International law, he could not find any thing but 'a weak argument for awarding title to Israel'. That is the argument of 'defensive conquest'.¹¹³ No other international lawyer can or will accept defensive conquest to be a basis for claiming territorial sovereignty. Yet other writers, such as O'Connell, also tried to twist International Law to provide another basis for Israel. While asserting his objective criteria regarding sovereignty, O'Connell managed to crumble his own theory by considering Israel to have fulfilled the conditions of personality by 'self assertion in a vacuum of sovereignty'.¹¹⁴ The fatal mistake in O'Connell's statement is that he relied on Alexander's article¹¹⁵ without an objective examination of the case of Palestine. Yet O'Connell himself provides evidence against his shallow un-investigated statement above. He says,

"This is not to say, however, that international law allows for the indiscriminate spawning of new legal entities at the whim of existing States. Such a conclusion would be absurd. For the creation of personality in communities international law lays down conditions of territory, population and constitutional competence".¹¹⁶

None of the conditions of territory, population and constitutional competence can be satisfied in favour of Israel. Jerusalem according to International Law is an occupied territory under the occupation of Israel as has been numerously emphasised by the UN resolutions where Israel has been referred to as the occupying power.¹¹⁷ The vast majority of the present Israeli populations are immigrants who replaced the original people of Palestine who have been forcibly and unlawfully displaced or expelled from their land.¹¹⁸ Israel has

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no constitutional competence because it is a belligerent occupying power¹¹⁹ and therefore, all its measures in Jerusalem have no legal basis and lack validity. Furthermore, with the emergence and development of the right to self-determination, neither the concept of indeterminate sovereignty¹²⁰ nor the concept of vacuum of sovereignty can hold ground. This has been clearly settled in the *Western Sahara Case* stated above. In his argument against the concept of vacuum of sovereignty in Palestine, Quigley, observed that,

“There was not void of sovereignty in Palestine because, during the mandated period, the community of citizens of Palestine held sovereignty subject to Great Britain’s administration.”¹²¹

From an international law point of view, there is no doubt that Israel is a belligerent occupant of Jerusalem as it occupied the western sector of the city in 1948 and its eastern sector in 1967.¹²² This is based on the UN resolutions,¹²³ non-recognition by the overwhelming majority of States of Israel’s sovereignty over Jerusalem, the various plans of the UN regarding the city and the fact that throughout the Palestinian problem since the Balfour declaration and the UN attempts to internationalise the city up to the present time Jerusalem has been considered at least as a *corpus seperatum*.¹²⁴ And as Israel is a belligerent occupant it is required by International law to refrain from altering the city of Jerusalem as much as possible pending the solution of the dispute.¹²⁵ Therefore, by annexing the city and considering it as the capital of Israel, Israel’s action is totally invalid in international law.¹²⁶

The UN has repeatedly persisted on the inalienable right of the displaced Palestinians to return to their homeland Palestine in general and Jerusalem in particular. Numerous UN resolutions have addressed this right,¹²⁷ which can also be supported by the development of international human rights relating to the indigenous people especially Draft Declaration On The Rights Of Indigenous Peoples which emphasises the following: (I) The (inherent) right of self-determination by

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virtue of which they have the right to "freely determine their political status and freely pursue their economic, social and cultural development"; (2) Indigenous peoples have the right to full enjoyment of all human rights and fundamental freedoms recognised in international law"; (3) The right to be free from adverse discrimination; (4) Full "guarantees against genocide", ethnocide and cultural genocide; (5) "Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return"; (6) The right of indigenous peoples "to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions and practices, in accordance with internationally recognised human rights standards."¹²⁸

Concluding Remarks:

Despite the definition problem of sovereignty, it is clear that the sovereign rights belong to the indigenous people of the territory concerned. This has been clearly settled in modern international law. This has also been specially emphasis in the ICJ judicial cases, the principle of self-determination, and the principles relating to the protection of indigenous peoples' rights. Applying these principles to the case of Jerusalem, it can be concluded, beyond doubt, that the indigenous people of Palestine are the only rightful owners of sovereign rights in Jerusalem. Any other claim is contrary to the rules and principle of international law.

1 Oppenheim, L.F.L., Oppenheim's International Law, Eds., Jennings, Robert and Watts, Arthur, Longman, London, 9th ed., 1992, Vol. 1. p. 122. Oppenheim further commented that 'Sovereignty in the strict and narrowest sense of the term implies ... independence all round, within and without the border of the country.', *ibid*.

2 Lauterpacht, E, *International Law, Being the Collected Papers of Hersch Lauterpacht, The law of Peace*, Vol. 3, Cambridge University Press, Cambridge, 1977, p. 7-8; In the search for its various dimensions, Sovereignty has two major contexts *Internal* (Territorial Sovereignty) and *External* (the ability to conclude treaties and to participate in creating customary international law and independently conducts its affairs). Lauterpacht, E, *ibid.*, p. 6-7. External context of sovereignty have five major aspects: the first is Sovereign Equality between States which was originally introduced by naturalists writers who assimilate States to individuals who are presumed to be naturally equal and therefore all nations are too equal by nature. In modern time this has been adopted by the UN Charter, Art. 2(1). The principle was also re-emphasised by UN special Committee on Principles of International Law concerning Peaceful Relations and Co-operation among States. However, reality has shown that some states are more equal than the others; e.g. great powers and their role in the UN Security Council. Amongst the Legal consequence of sovereign equality (or independence) is that each State has exclusive jurisdiction over its territory and population and other states have the duty of non-intervention in the domestic affairs of other States. See for instance, *Status of Eastern Carelia Case* [1923] PCIJ Rep. Ser. B, No 5. The second aspect is sovereign equality is peaceful co-existence which is emphasised in the UN Charter Preamble, Art. 2 (1, 2, 3 and 4). The third is Observance of International Duties and Obligations in good faith. The fourth is that Sovereignty is very much related to Independence and interdependence. And the fifth is that sovereignty is not absolute but a relative concept. This was, inter alia, emphasised in *Trail Smelter Arbitration* (1938 and 1941) 3 RIAA, p. 1905, and in *Corfu Channel Case*, ICJ Report (1949), p. 22, and in also articulated in the Principle 21 and 22 of the Stockholm Declaration on the Human Environment 1972: 11 ILM (1972), p. 1416. Brownlie observed that '[i]n spite of the influence of Austin and Salmond, it may be asserted that sovereignty is divisible as a matter of principle and as a matter of experience. Brownlie, I, *Principles of International Law*, Clarendon Press, Oxford, 4th ed. 1990, p. 116; Cf., Brownlie, I, *Principles of International Law*, Clarendon Press, 5th ed., 1998, p. 114.

3 Brownlie, I, *Principles of International Law*, Clarendon Press, 5th ed., 1998, p. 120

4 Bownlie, I, *Ibid.*, 121.

5 Koskenniemi, Martti, from Appology to Utopia, The Structure of International Legal Argument, Finish Lawyers Company, Helsinki, 1989, pp. 192-263, especially, 192-193 and 206-212.

6 Brierly, J. L., The Law of Nations, Clarendon Press, Oxford, 1963, p. 47. Objecting to Brierly's doubts about the adequacy of the use of the term 'territorial sovereignty, (Brierly, J. L., *op. cit.*, p. 14-16,) Sahovic and Bishop stated that "this term can be said to have been generally accepted to describe the nature of the authority of the state over its territory", see Sahovic, Milan and Bishop, William W., The Authority of the State: Its Range with Respect to Persons and Places, in Sorensen, Max, Manual of Public International Law, Macmillan, London, 1968, p. 311 at 314.

7 Brierly, J. L., *ibid.*, p. 7-9; De Lupis, Ingrid Detter, International law and the Independent State, 2nd ed., Gower, Aldershot, 1987, p. 3.

8 Brierly, J. L., *ibid.*

9 *Ibid.*, p. 10.

10 Q. in, Brierly, J. L., *ibid.*, p. 7-9.

11 Brierly, J. L., *ibid.*, p. 10. This interpretation is based on the fact that the dominant philosophy in the middle ages was the natural law philosophy.

12 Brierly, J. L., The Law of Nations, Clarendon Press, Oxford, 1963, p. 12-13; see also Walzer, Michael, Thick and Thin, Moral Argument at Home and Abroad, University of Notre Dame Press, London, 1994, pp. 77-79.

13 This doctrine 'was held to justify the American and the French Revolutions.', Brierly, J. L., The Law of Nations, Clarendon Press, Oxford, 1963, p. 14; see also, Jean Jacques Rousseau, The Social Contract & Discourses, Translated by G.D.H. Cole, London, J.M. Dent & Son, 1923. Cell, Howard R., and MacAdam, James I., Rousseau's Response to Hobbes, Peter Lang, New York, 1988. *Cf.*, Cobban,

Alfred, Rousseau and the Modern State, London, George Allen & UNWIN Ltd., 1943; Suanzes, Joaquin Varela, Sovereignty in British Legal Doctrine, http://www.murdoch.edu.au/elaw/issues/v6n3/suanzes63_text.html, p. 16-17.

14 Thornberry, Patrick, The Democratic or internal aspect of Self-Determination with some Remarks on Federalism, in Tomuschat, Christian (ed.), Modern Law of Self-Determination, Martinus Nijhoff, Netherlands, 1993, pp. 101-105; Buchanan, Allen, Democracy and Secession, in Moor, Margaret (ed.) National Self Determination and Secession, Oxford University Press, Oxford, 1998, pp. 14-33

15 See Hannum, Hurst, Autonomy, Sovereignty and Self-Determination, the Accommodation of Conflicting rights, Rev. Ed, University of Pennsylvania Press, Philadelphia, 1996, p. 15.

16 Suanzes, Joaquin Varela, *op. cit.*, p. 16-17.

17 Shaw, Malcolm N., International Law, Cambridge University press, 4th ed., 1997, pp. 142-143. Unlimited State autonomy is no longer the norm. Rarely we find nowadays a State that "... has not accepted restrictions on its liberty of action", Starke, J. G., *op. cit.*, p. 100. This idea led Shaw to classify independence into formal and actual independence when he was discussing South Africa and Lithuania cases, (Shaw, Malcolm N., International Law, *ibid.*, pp. 143-144,) whether by means of international treaties or by belonging to regional or international organisations. "'Sovereignty' is therefore a term of art rather than a legal expression capable of precise definition." Nonetheless, "[w]hen we say that a particular state is independent, in a concrete way we attribute to that state a number of rights, powers, and privileges at international law. Correlative to these rights, etc., there are duties and obligations binding other states who enter into relations with it. These rights, etc., and correlative duties are the very substance of state independence." Starke, J. G., *op. cit.*, p. 100.

18 Hannum, Hurst, *supra* note 15, p. 15. Brierly expressed his discomfort with the difficulties of the latter interpretation in combining 'two contradictory ideas: that of absolute power somewhere in the state, and that of the responsibility of every actual holder of power for the use of which he puts it.', see Brierly, J. L., *op. cit.*, p. 14-15. Brierly,

however, seems to have overseen the concept of representative democracy in that although the people themselves are the real owners of sovereign powers, there delegate and representatives after all are the individuals who put it in practice. Sovereignty in this sense can be both unlimited and the persons who put it in practice can be responsible. This argument can also be the answer to Brierly's second discomfort that the State is a juristic entity and not a natural person. See, Brierly, J. L., *op. cit.*, p. 15-16.

19 Larson, Arthur, Jenks, C. Wilfred, et al., *Sovereignty with the law*, Dobbs Ferry, NY, Oceana, 1965, p. 11. Jenks also observed that “[s]overeignty as a factor in international relations is a psychological rather than a logical problem. It has been and is still paraded as an almost mythical objection to rational courses of international action by some who would never challenge the principle that the rule of law is the necessary basis of any acceptable form of state; ...” *Ibid.*, p. 11. “The concept of sovereignty as a power beyond the law paralyses and inhibits the growth of law, ...” *Ibid.*, p. 15.

20 While Sahovic and Bishop were tracing up the development of the concept of sovereignty they identified few theories that explained its connotation. The first was the Patrimonial theory which denotes that ‘the territory ... was considered to be the personal possession of the ruler ... [who] was considered the absolute master.’ A second theory was the area theory, which considers the “territory as ‘the constitutive element of the concept of the state’ and violation of territory is considered a violation of the state’s personality. Sahovic, Milan and Bishop, William W., *op. cit.*, p. 315. Kelsen, therefore, introduced the theory that the territory was considered “as the area of state jurisdiction”. He states that the “[t]erritory of a state is a figurative expression designating a certain quality of the national law – its territorial sphere of validity – not a relationship among individuals under the law. The territory of a state is not a thing; it is especially not the land or a piece of land; it is an area determined by international law.” Kelsen, Hans, *Principles of International Law*, 2nd ed., Holt, Rinehart and Winston, London, 1966, p. 216, Quoted in, Sahovic, Milan and Bishop, William W., *op. cit.*, p. 315.

21 Jackson, Robert H., *ibid.*, p. 34-40; O’Connell, D.P., *International Law*, Stevens & Sons, 2nd ed., 1970, Vol. 1, p. 83 and 283-84. Hannum states that the concept of sovereignty as an attribute of

statehood has received universal agreement. However, this understanding would go counter to any type of equating sovereignty with statehood, see Hannum, Hurst, *supra* note 15, pp. 15-16.

22 Jackson, Robert H., *op. cit.*, p. 40-49. O'Connell, D.P., *International Law*, Stevens & Sons, 2nd ed., 1970, Vol. 1, p. 83 and 283-84.

23 O'Connell, D.P., *ibid.*, p. 83.

24 *Ibid.*, p. 283.

25 O'Connell, D.P., *ibid.*, p. 283.

26 *Ibid.*, p. 284.

27 Judge Huber, *Island of Palmas Case*, Netherlands v. US (1928), in Jennings, *The Acquisition of Territory in International Law*, *op. cit.*, p. 4; Harris, D. J., *op. cit.*, P. 190; Jessup, Philip C., *The Palmas Island Arbitration*, 22 AJIL (1928) pp. 735-752; see also Judge Anzilotti's opinion in *Austro-German custom Union Case*, *loc. cit.* Crawford considers independence the central criterion of statehood, Crawford, J., *The Creation of State in International Law*, Clarendon Press, Oxford, 1979, p. 47. Crawford also draws distinction between independence as criterion for statehood and independence as a right of States in order to aid his discussion on the *Austro-German Custom Union Case* which assigned two elements to independence. The first element is separate existence within reasonably coherent frontiers and the second is the absence of subjection to the authority of another State. And irrespective of further detail discussion, these two elements seem to be the most important element of independence as well as of sovereignty. *Austro-German Customs Union Case*, *loc. cit.*; see also Crawford, J., *ibid.*, p. 49 and 52. However, Brierly believes that independence is both descriptive - i.e. detached from the question of morality or social desirability - and negative in the meaning that "... we cannot legitimately infer from it anything whatsoever about the positive rights to which a state maybe entitled." He further comments that "... 'independence' does not mean freedom from law, but merely freedom from control by other states." Brierly, J. L., *op. cit.*, p. 129-130; Koskenniemi criticises the attempt to define sovereignty by the term 'independence' stating that, 'To define "sovereignty" as "independence"

is to replace one ambiguous expression with another'. Koskenniemi, Martti, *op. cit.*, p. 209, see also pp. 206-212.

28 Oppenheim, L.F.L., *op. cit.*, Vol. 1, p. 122; Brownlie, I, *op. cit.*, p. 76; Crawford, J., *supra* note 27, p. 27; Hannum, Hurst, *supra* note 15, p. 15.

29 This agrees with the views provided in De Lupis, Ingrid Detter, *International law and the Independent State*, 2nd ed., Gower, Aldershot, 1987, pp. 3-21.

30 E. Lauterpacht, *op. cit.*, Vol. 1, 1970, p. 373.

31 E. Lauterpacht, *op. cit.*, Vol. 1, 1970, p. 373.

32 *Cf.*, E. Lauterpacht, *ibid*; Brownlie, I, *op. cit.*, pp. 108-9.

33 Brownlie, I, *op. cit.*, p. 107.

34 Austro-German custom Union Case, Advisory Opinion, P.C.I.J. Report, Ser. A/B No 41(1931); see also Koskenniemi, Martti, *op. cit.*, pp. 209-210 and 248.

35 Crete and Samos case, 1937, PICJ Series A/B, No 71, p. 103; see also E. Lauterpacht, *op. cit.*, Vol. 1, 1970, pp. 372-73.

36 Austro-German custom Union Case, Advisory Opinion, P.C.I.J. Report, Ser. A/B No 41(1931); see also Koskenniemi, Martti, *op. cit.*, pp. 209-210 and 248.

37 It states that, "... the occupation of territory in wartime is essentially a temporary, *de facto* situation, which deprives the occupied power of neither its statehood nor its sovereignty; ... Consequently, occupation as a result of war, while representing actual possession to all appearances, cannot imply any right whatsoever to dispose of territories." See ICRC, *Commentary: IV Geneva Convention*, pp. 275-276. See also *The Status of Jerusalem*, *infra* note 80.

38 http://www.un.org/Depts/dpa/qp/qp/docs/S_PV242.htm;
http://www.un.org/Depts/dpa/qp/qp/docs/S_PV446.htm;
http://www.un.org/Depts/dpa/qp/qp/docs/S_PV592.htm;
http://www.un.org/Depts/dpa/qp/qp/docs/S_PV478.htm;
http://www.un.org/Depts/dpa/qp/qp/docs/S_PV605.htm.

39 Kelsen, Hans, *The Pure Theory of Law and Analytical Jurisprudence*, 55 Harv L R (1942), p. 44, at 65.

40 Starke, *op. cit.*, p. 96.

41 Brierly states that “A states is an *institution*, that is to say, it is a system of relations which men establish among themselves as a means of securing certain objects, of which the most fundamental is a system of order within which their activities can be carried on. See, Brierly, *op. cit.*, p. 126; Crawford, J., *supra* note 27, p. 36-40 and 47-48; MacLean states, “What matters is the effective establishment of political community”, MacLean, R. M., *Public International Law*, 18th ed., 1996/97, p. 39.

42 Brierly writes Modern states are territorial; their government exercise control over persons and things within their frontiers, ...” Having alluded to the lack of exact definition of the term ‘state’, Starke preferred to go about the term by identifying its essential characteristics referring to Montevideo Convention on Rights and Duties of States 1933. Starke, *op. cit.*, p. 95; Montevideo Convention on the Rights and Duties of States 1933, Art. 1 states that: “The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relationship with other states.” Starke further comments that “... a fixed territory is not essential to the existence of a state provided that there is an acceptable degree of what is characterised as ‘consistency’ in the nature of the territory in question of its population, ...”, Starke, *op. cit.*, p. 95 and 95-96; see also Crawford, J., *supra* note 27; *Deutsche Continental Gas-Gesellschaft v. Polish State* (1929-30) the German-Polish Mixed Arbitral Tribunal; (1969) ICJ Report, para. 46; Shaw, Malcolm N., *supra* note 17, p. 140; Jennings, *The Acquisition of Territory in International Law*, Manchester University Press, Manchester, 1963, p. 11.

43 Kelsen, Hans, *The Pure Theory of Law and Analytical Jurisprudence*, 55 Harv L R (1942), p. 44, at 65. See also Kelsen, H., *General Theory of Law and State*, Russell & Russell, New York, 1967, p. 288. Having trying to avoid providing the physical or material identity of States, Marek comments that “[a] State, like Heraclitus’ river, is in a constant state of flux [footnote omitted]. Generation pass

away; territory may undergo even purely physical changes; while the legal order itself, far from being static, continually develop by reason of its essentially dynamic character.” See, Marek, Krystyna, Identity and Continuity of States in Public International Law, Librairie Dros, Geneva, 1968, p. 4.

44 In *Aaland Island dispute (1920)*, p. 8-9, for instance, the League of Nations commission of Jurists further stated that, “Finland did not become a definitely constituted State until a stable political organisation had been created, and until the public authorities had become strong enough to assert themselves throughout the territories of the State without the assistance of foreign troops.” See, *infra* footnote 46; Hillier, T., Principles, *op. cit.*, p. 77; see also Shaw, Malcolm N., *supra* note 17, p. 140.

45 For instance in Schtrucks case, 33 ILR 319, the alleged crime was committed in Jerusalem which was not under *de jure* sovereignty of Israel. The House of Lords held that the instruments concerned were not concerned with sovereignty but with territory in which territorial jurisdiction is exercised. Viscount Radcliffe concluded that ‘territory in the present context included whatever is under the state’s effective jurisdiction.’

46 *Aaland Islands Case*, Report of the International Committee of Jurists *Q. in* Shaw, Malcolm N., *supra* note 17, p. 142. See also Barros, James, The Aland Islands Question, Its Settlement by the League of Nations, Yale University Press, London, 1968, pp. 282-293.

47 Crawford, J., *supra* note 27, p. 42-47; see also Shaw, Malcolm N., *supra* note 17, pp. 140-143.

48 Crawford, J., *supra* note 27, p. 42.

49 Brownlie, I, *op. cit.*, p. 115-116.

50 Shaw, Malcolm N., *supra* note 17, p. 140.

51 Bildt, Carl, Peace Journey, The Struggle for Peace in Bosnia, Weidenfeld and Nicolson, London, 1998.

52 Membership of the UN is exclusive to state according to article 4 of the UN Charter. See Shaw, Malcolm N., *supra* note 17, p. 143; see also Weller, M., The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia, 86 AJIL, (1992), p. 569.

53 Harris, DJ., Cases and Materials on International Law, Sweet & Maxwell, London, 5th ed., 1997, p. 104.

54 Crawford, J., *supra* note 27, p. 46.

55 Quoted in Jackson, Robert H., *ibid.*, p. 34; For the general meaning of this statement see, Kelsen, H., General Theory of Law and State, Russell & Russell, New York, 1945., p. 3-49 esp. 29-49.

56 Jackson, Robert H., *ibid.*, p. 34.

57 Jackson, Robert H., Quasi-States: Sovereignty, International Relations, and the Third World, Cambridge University Press, Cambridge, 1993, p. 10.

58 *Ibid.*, p. 10-15.

59 UN pressed for collective non-recognition of the unilateral declaration of independence by Rhodesia in 1965 because of its apartheid regime. It also pressed for economic, financial and diplomatic sanctions according to Art. 41 of the UN Charter. See for instance UN S.C. Res. 216 (1965), 217 (1965), 221 (1966), 232 (1966), 253 (1968) 277 (1970), 288 (1970), 314 (1972); 318 (1972), 320 (1972) and 328 (1973); UN G. A. Res. 2379 and 2383, 7 ILM (1968), p. 1401 and 1402. See also Zacklin, Ralph, United Nations and Rhodesia, A Study in International Law, Praeger Publishers, London, 1974; Windrich, Elaine, The Rhodesian Problem, A Documentary Record 1923-1973, Routledge & Kegan Paul, London, 1975; Gowlland-Debbas, V., Collective Response to the Unilateral Declaration of Independence of Southern Rhodesia and Palestine, 61BYIL, (1990), p. 135; Fawcett, J. E. S., Security Council Resolutions on Rhodesia, 41 BYIL (1965-1966), pp. 102-121; Brownlie, *op. cit.*, pp. 98.

60 The UN refused to recognised the independence of Transkei which was granted by South Africa, see UN G. A. Res. 31/6, 2775E (XXVI), 3411D (XXX); No other State recognised the new State of

Transkei except South Africa, see Crawford, James, the Criteria for Statehood in International Law, 48 BYIL (1976-1977), pp. 93 at 162-164 and 176-180, see also the Status of Transkei, 15 ILM (1976), p. 1175.

61 Crawford, J., *supra* note 27, p. 106; see also Crawford, J., *supra* note 60, pp. 93-182; Gowlland-Debbas, V., *supra* note 59. Fawcett, J. E. S., *supra* note 59, pp. 112-113.

62 Crawford, J., *supra* note 27, p. 225-227; see also Gowlland-Debbas, V., *supra* note 59.

63 Starke, *op. cit.*, pp. 96-97.

64 Shaw, Malcolm N., *supra* note 17, pp. 144-145.

65 Articles 1(2) include amongst the purposes of the UN the development of "... friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, ..."; Article 55 states "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: ... (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." The same article also states that "All members pledge themselves to take joint and separate action in co-operation with the Organisation for the achievement of the purposes set forth in Article 55."; See also Shaw, Malcolm N., *supra* note 17, pp. 177-178.

66 Cassese, Antonio, Self-determination of Peoples - A Legal Reappraisal, Cambridge University Press, Cambridge, 1996, p. 166; See also Tyner, S., Wars of National Liberation in Africa and Palestine: Self-determination for Peoples or for Territories?, 5 Yale Studies in World Public Order, 1978, p. 234; Freudenschuss, H., Legal and Political Aspects of the Recognition of National Liberation Movements, 11 Millennium: Journal of International Studies, 1982, p. 115; Shaw, Malcolm N., the International Status of National Liberation Movements, 5 Liverpool Law Review, 1983, p. 19-34; Shaw, Malcolm N., *supra* note 17, pp. 144-46 and 173-75; Ranjeva, R., Peoples and National

Liberation Movements, in Bedjaoui (ed.), *International law: Achievements and Prospects*. Paris, 1991, pp. 101-112.

67 Cassese, Antonio, *supra* note 66, p. 167. Having cited the example of puppet governments, Cassese commented that, "Although this may be judged a serious deficiency in the current international legal regime, one must not allow political or ideological aspirations to obscure reality." Hannum also differentiates between internal and external aspects of self-determination. Internal aspect of self-determination is concerned with the right of both the state and people to independence from foreign domination or intervention. External aspect of self-determination signifies the right to freedom from colonial power. See, Hannum, Hurst, *supra* note 15, pp. 27-30, 41, 48-49.

68 Cassese, Antonio, *supra* note 66, p. 167.

69 UNGA Res. 3061(XXVIII); see also Shaw, Malcolm N., *supra* note 17, pp. 144-145.

70 *Supra* notes 59 and 60.

71 Shaw, Malcolm N., *supra* note 17, pp. 145-146.

72 Hannum states that '[p]erhaps no contemporary norm of international law has been so vigorously promoted or widely accepted as the right of all peoples to self-determination. Yet the meaning and content of that right remains vague and imprecise as when they were enunciated by president Woodrow Wilson and others at Versailles.', see, Hannum, Hurst, *supra* note 15, p. 27; see also Jennings, *The Acquisition of Territory in International Law, op. cit.*, p. 78; See also Berman, Nathaniel, *infra* note 91, at 52-105.

73 See also Hannum, Hurst, *supra* note 15, p. 28.

74 Although Woodrow Wilson proposed that self-determination is both recognised and included in the Covenant of the League of Nation, his proposal was not successful. See Hannum, Hurst, *supra* note 15, p. 28-32.

75 See also Hannum, Hurst, *supra* note 15, p. 42-48.

76 For instance, In *Western Sahara Case, Advisory Opinion*, it was stated that, "... Self Determination defined as the need to pay regard to the freely expressed will of the peoples, is not affected by the fact that in certain cases the General Assembly has dispensed with the requirement of consulting the inhabitants of a given territory. Those instances were based on the consideration that a certain population did not constitute a "people" entitled to self-determination or on the conviction that a consultation was totally unnecessary, in view of special circumstances." See (1975) ICJ Rep., p. 12 para. 59.

77 Q. in Hannum, Hurst, *supra* note 15, p. 29; Shaw, Malcolm N., *supra* note 17, pp. 177; Verzijl, J.H.W., *International Law in Historical Perspective*, Vol. 1, Leiden: Sijthoff, 1968, p., pp. 328-332; see also Whiteman, Marjorie M., *Digest of International Law*, Department of State Publication, Washington, 1963, Vol. 2, Pp. 1202-1206

78 Hannum, Hurst, *supra* note 15, p. 29. See also, *The Aaland Islands* question, *Commission of Rapporteurs*, Report presented to the Council of the League of Nations, Q. in Hannum, Hurst, *ibid*.

79 Hannum states that '[w]ith few exceptions in frontier regions (and only if the region was not an overly sensitive one), no plebiscites or referenda were held to determine the wishes of the people affected by the Versailles map making.' See Hannum, Hurst, *supra* note 15, p. 29.

80 Quigley, John, *Sovereignty in Jerusalem*, 45 *Catholic University L. R.*, (1996) p. 765; *The Status of Jerusalem*, Report for and Under the guidance of the Committee on the Exercise of the Inalienable Rights of the Palestinian People, UN, New York, 1997; *The Secret History of the Balfour Declaration and the Mandate*, http://www.islam.co.za/themessage/thesis/thesis_2/toc.htm.

81 See Hannum, Hurst, *supra* note 15, p. 29; See also, Barros, James, *op. cit.*, p. 293-300.

82 *The Aaland Islands* question, *Commission of Rapporteurs*, Report presented to the Council of the League of Nations, Q. in Hannum, Hurst, *supra* note 15, p. 29-30.

83 See *infra* note 107, 108 and 109.

84 See for instance *East Timor Case*, (1995) ICJ Rep. P. 90 at 102; Elliott, Paul D., *The East Timor Dispute*, 27 ICLQ, (1978), p. 238-249.

85 Some writers believe that the right to self-determination is now part of *jus cogens*, see for instance, Brownlie, I, *op. cit.*, p. 513; Cassese, Antonio, *op. cit.*, p. 113 note 53 and p. 140; *Cf.*, Crawford, J., *supra* note 27, p. 102, note 1, and p. 81.

86 The emphasis on the principle of self-determination was recently culminated in its inclusion in the Guideline on Recognition of New States in Eastern Europe and the Soviet Union in 1992 by the European Community, 31 ILM, 1992, pp. 1486-87; see also Shaw, Malcolm N., *supra* note 17, p. 146. See also UN G.A. Res 40/50. The General Assembly has consistently re-affirmed 'the inalienable right of the people of Western Sahara' to self-determination and independence. See UN G.A. Res. 3458A and UN G.A. Res. 3458B; see also UN S.C. Res. 377 (1975) and UN S.C. Res. 380 (1975).

87 *Western Sahara Case, Advisory Opinion*, (1975) ICJ Report; see also Franck, Thomas M., *The Stealing of the Sahara*, 70 AJIL, (1976), p. 694-721. See also Sep. Op. of Judge McNair in *South West Africa Case*, 1950) ICJ Rep., (advisory Opinion), p. 29, at p. 150; *infra* note 90. In *Namibia Case* the Court stated '... the last fifty years, ..., have brought important developments. These developments leave little doubt that the ultimate objective of the sacred trust was the *self-determination and independence of the peoples concerned*.' See *Namibia Case* (1971) ICJ Rep., (advisory Opinion), p. 16 at p. 31, (emphasis added).

88 *Western Sahara Case, Ibid.*

89 *Ibid.*

90 *Ibid.*, p. 12; see also, Hunnum, Hurst, *supra* note 15, 37-38; Ott, David H, *Public International Law in the Modern World*, Pitman, London, 1987, p. 72. In his separate opinion, McNair stated that 'The Mandates System (and the "corresponding principles" of the International Trusteeship System) is a new institution -- a new relationship between territory and its inhabitants on the one hand and the government which represents them internationally on the other -- a

new species of international government, which does not fit into the old conception of sovereignty and is alien to it. The doctrine of sovereignty has no application to this new system. Sovereignty over a Mandated Territory is in abeyance; if and when the inhabitants of the Territory obtain recognition as an independent State, as has already happened in the case of some of the Mandates, sovereignty will revive and vest in the new State. See *South West Africa Case*, *supra* note 92.

91 See for instance, Hannum, Hurst, *supra* note 15, pp. 27-49; Berman, Nathaniel, *Sovereignty in Abeyance: Self-Determination and International Law*, 7 *Wis. Int'l L. J.*, (1988), p. 51, at 84-102; Jackson, Robert H., *op. cit.*, p. 139-159; Hillier, T., *op. cit.*, pp. 723-728; Kletter, Larry, *The Sovereignty of Jerusalem in International Law*, 20 *Col. J. I. Trans. L.*, (1981), p. 319, at 347-349; Shaw, Malcolm N., *supra* note 17, p. 181.

92 *Ibid.*

93 Hannum, Hurst, *supra* note 15, pp. 75-103; UN Draft Declaration of the rights of Indigenous Peoples, 22 December, 1993; see also, UN, report on the 11th Session of the Working Group of Indigenous Peoples, 22 December, 1993; Art. 55 of UN Charter; UN GA Res. 637A(VII) 1952; UN GA Res. 1514 (XV) 1960; Self-determination and Human Rights: Common Art. 1 of the International Covenant on Civil and Political Rights (1966) & the International Covenant on Economic, Social and Cultural Rights (1966); the Declaration of Principles of International Law Concerning Friendly Relations 1970, GA Res. 2625 (XXV); World Conference on Human Rights 1993.

94 *Arbitration Commission, E. C. Conference on Yugoslavia* (1992), 92 *ILR.*, p. 167.

95 *Ibid.*, pp. 162 and 165; Craven, M., *The EC Arbitration Commission on Yugoslavia*, 66 *BYIL*, 1995, p. 333; see also Shaw, Malcolm N., *supra* note 17, p. 140.

96 *Arbitration Commission, ibid.*; Craven, M., *ibid.*; See also Shaw, Malcolm N., *ibid.*

97 Shaw, Malcolm N., *ibid.*

98 Catherine J. Iorns , The Draft Declaration of the Rights of Indigenous Peoples, School of Law, Murdoch University, <http://www.murdoch.edu.au/elaw/issues/v11n1/iorns2.txt>, comments on Part I and IX.

99 Suanzes, Joaquin Varela, *op. cit.*, p. 16-17; Shaw, Malcolm N, *supra* note 17, pp. 215-218; Ott, David H, *op. cit.*, London, 1987, p. 66-75.

100 Shaw, Malcolm N, *supra* note 17, pp. 184-190; MacLean, R M., *supra* note 41, p. 49. The evidence of this statement can be found in the war crimes tribunals such as those of Nuremberg, Yugoslavia and Rwanda, see, for instance, Judgement at Nuremberg, 41 AJIL, (1947), Supp. P. 172; Statute of the International Criminal Tribunal for the Former Yugoslavia, 32 ILM (1993), p. 1203; UN S. C. Res. 955 concerning the establishment of International Tribunal for Rwanda.

101 Koskenniemi, Martti, *op. cit.*, pp. 209-210 and 248.

102 *Infra*, footnote 105.

103 See for instance, Vienna Convention on the Law of Treaties (1969), Arts. 34-38; see also Sinclair, Sir Ian, the Vienna Convention on the Law of Treaties, Manchester University Press, Manchester, 1973, pp. 98-106.

104 Quigley, John, Sovereignty in Jerusalem, 45 Catholic University L. R., (1996), p. 765, at 778.

105 The concept of residual sovereignty is perhaps amongst the important point that should be addressed in this article. In Article 3 of the Treaty of Peace of 8 September 1951, Japan agreed that, 'the United States will have the right to exercise all and any powers of administration, legislation and jurisdiction over the territory and inhabitants of these [Ryukyu] islands, including their territorial waters'. In 1951 the United States Secretary of State referred to the 'residual sovereignty' of Japan over the islands. United States courts, therefore, ruled that the islands were considered a 'foreign country' and referred to the 'de facto sovereignty of the United States and to the Japanese interest in terms of 'residual sovereignty' or 'de jure sovereignty'.

Restoration of full Japanese sovereignty was the subject of bilateral agreements of 1968, 1969 and 1970.” Brownlie, I, *op. cit.*, p. 110-111.

106 Even if the current people of Jerusalem agreed to give the Israeli authorities the right to sovereignty, this right will not be transferred to Israel for ever. In discussing the use and possession granted in perpetuity Brownlie commented, “By a Convention of 18 November 1903 Panama granted to the US ‘in perpetuity the use, occupation and control of a zone of land and land under water of the construction ... and protection’ of the Panama Canal, ten miles in width. ... the residual sovereignty remains with the grantor. ... the residual sovereignty remains transferable and the grantee has no power of disposition.” Brownlie, I, *op. cit.*, pp. 112.

107 Quigley, *ibid.*, p. 767.

108 Quigley, *ibid.*, p. 771-772.

109 He first states that “using the principle of self-determination, the city [of Jerusalem] would presently be awarded to Israel.” He, then states that “Israel should not be allowed to benefit from the demographic changes it made while occupant.” Kletter, Larry, *The Sovereignty of Jerusalem in International Law*, 20 Col. J. I. Trans. L., (1981), p. 319, at 362; Quigley also concluded a similar remark, see Quigley, John, *ibid.*, pp. 778-779.

110 *Cf.*, Kletter, Larry, *The Sovereignty of Jerusalem in International Law*, 20 Col. J. I. Trans. L., (1981), p. 319, at 347-349.

111 For instance, Quigley, observed that, “In Palestine under the mandate, the inhabitants carried Palestinian citizenship. When Britain withdrew, the community of citizens was entitled to exercise its latent sovereignty. The majority of that community of citizens was represented by a United Nations recognised political organisation, the Arab Higher Committee, which asserted a right to establish a government in Palestine.” That is to say their citizenship was well documented. See Quigley, John, *op. cit.*, p. 778; see also the *International Status of Palestine*, 90 *Journal Du Droit International*, (1963), p. 964.

112 Kletter, Larry, *op. cit.*, at 362.

- 113 Kletter, Larry, *ibid.*, at 362.
- 114 O'Connell, D.P., *op. cit.*, p. 84; Schwebel, Stephen M., What Weight to Conquest?, 64 AJIL (1970), p. 344-347; Blum, Yehuda Z., The Missing Reversioner: Reflections on the Status of Judea and Samaria, in Moore, John Norton (Ed.), The Arab-Israeli Conflict, Princeton University Press, New Jersey, 1974, Vol. II, pp. 287-314.
- 115 Alexander, Israel in Fieri, 4 ILQ, (1951).
- 116 O'Connell, D.P., *op. cit.*, p. 84.
- 117 See *supra* note 38 and *infra* notes 122, 123 and 127.
- 118 See discussion above, and see also *supra* notes 107, 108 and 109.
- 119 See *supra* note 36, 37 and 38 and *infra* notes 122, 123 and 127.
- 120 For instance, "... Japan renounced all rights to Formosa. However, Formosa has not been subject to any act of disposition; it has not been transferred to any state. In the view of the British Government: 'Formosa and the Pescadores are ... territory the *de jure* sovereignty over which is uncertain and undetermined', Brownlie, I, *op. cit.*, pp: 108-109.
- 121 Quigley, John, *op. cit.*, p. 765, at 778.
- 122 See for instance, The Status of Jerusalem, *supra* note 80; Quigley, John, *op. cit.*, p. 766; Kletter, Larry, *loc. cit.*
- 123 See for instance, UN S. C. Res. 242 (1967), UN S. C. Res. 252 (1968), UN S. C. Res. 267 (1969), UN S. C. Res. 271 (1969), UN S. C. Res. 298 (1971), UN S. C. Res. 446 (1979), UN S. C. Res. 465 (1980), UN S. C. Res. 476 (1980), UN S. C. Res. 478 (1980) and UN S. C. Res. 672 (1990); UN G. A. Res. 2253 (1967), UN G. A. Res. 2254 (1967), UN G. A. Res. ES-716 (1982), UN G. A. Res. 54/37 (1999). See also Quigley, John, *op. cit.*, p. 769-70 and 772-77.
- 124 *Ibid.*; see also UN G. A. Res. 181(II); UN G. A. Res. 194(III), (1948); UN G. A. Res. 303 IV, (1949); UN G. A. Res. 356 (IV),

(1949); UN Trusteeship Council Res. 113(S-2), (1949) and UN Trusteeship Council Res. 427, (1949).

125 Quigley, *ibid.*, p. 774.

126 See for instance, The Status of Jerusalem, *supra* note 80; Quigley, John, *op. cit.*, p. 766; Kletter, Larry, *loc. cit.*

127 See for instance, G.A. Res. 194, UN GOAR, 186th Plen. Mtg., para. 11. UN Doc. A/810 (1948) *reprinted in* 2 UN Resolutions 85 (1973); S.C. Res. 779, UN Doc. S/RES/779 (1992), *reprinted in* 1992 UNYB 343; S.C. Res. 787, UN Doc. S/RES/787 (1992), *reprinted in* 1992 UNYB 375; S.C. Res: 876, UN Doc. S/RES/876 (1993), *reprinted in* 1992 UNYB 510; S.C. Res. 1009, UN Doc. S/RES/1009 (1995), 3563 mtg.; S.C. Res. 1019, UN Doc. S/RES/1019 (1995), 3591 mtg.; see also Quigley, John, *op. cit.*, p. 766.

128 *Supra* note 98.