A Substantive Void: Dependency, Conditionality, and Deformalization of the International Law of Self-Determination in the case of Palestine

by

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Abstract

Be it the Algerian National Liberation Front, the African National Congress in South Africa or the continued struggle of the Palestinian people, the principle of self-determination is largely central to all projects of national liberation. This paper addresses what is arguably a deficient conception of self-determination by highlighting two factors that contributed to this deficiency. The first is the re-enforcement of dependency in self-determination projects by international institutions, primarily through the Mandate System. The second is a merit-based system of conditionality for the granting of independence, accompanied by a tendency to deformalize the law, relegating self-determination to an empty principle, the substance of which is decided by the negotiations’ context. The case of Palestine is used to demonstrate how those factors are adopted as central means in resolving the Palestinian self-determination problem, which in-turn leads to a deficient conception that does not account for the core content of the right.
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Introduction

Using the language of colonialism in current international legal fora could seem largely out of context. It is still plausible, however, to draw direct and clear lineages between the language of international law and that of colonialism. The reference point is the conceptualization of the right to self-determination of peoples in light of the intertwined languages of colonialism and international law. Self-determination embodies the language of both worlds. It came as a consequence of colonialism and signaled the birth of post-WWII international law. Conceptually, the principle is linked with liberation, emancipation and independence. Its interpretation in the literature, on the other hand, swayed the principle into a conception that is antithetical to the project of liberation from all forces of domination and oppression. Be it the Algerian National Liberation Front during French rule\(^1\) or the African National Congress in South Africa or the continued struggle of the Palestinian people, first in Mandate Palestine\(^2\) and later in Occupied Palestine,\(^3\) the principle of self-determination was and still is largely central to all national liberation movements. The interpretation of self-determination as a mere formal granting of sovereignty creates a highly deficient meaning of the principle.

In this paper, I wish to address this deficient meaning of the right to self-determination by highlighting two-factors that contributed to its current formulation. I propose that there are two main themes that surround notions of liberation and emancipation taking the form of a ‘self-determination’ project. The first is the dependency theme, a theme that is largely visible in the


\(^{2}\) In 1936 the Arab High Committee in Palestine announced a strike and country-wide demonstrations took place, and 1939 revolts. The 1936 revolt became very violent after the interference of British police when it opened fire in Jaffa. See Ilan Pappe, _A History of Modern Palestine_ (Cambridge: Cambridge University Press, 2004) at 105.

literature, in international relations and in the mandates of international institutions, the League of Nations and its successor, the United Nations. The second is the *merit theme*, which propagates a merit-based system of independence that was also visible during the pre and post-WWII eras.

Under the first section, I will discuss the role of international institutions in the inter-war period in reinforcing notions of dependency. I will then highlight the dependency theme associated with Palestinians as a self-determination unit in Mandate Palestine and later in Occupied Palestine. Under the second section, I will reflect on the emerging literature on “earned sovereignty”, which advocates for conditional independence. This will be followed by a review of conditionality in international law and then conditionality in international negotiations on Palestine. I argue that themes associated with self-determination, the dependency and the merit-based independence, limit the principle of self-determination because of the deficient conception that fails to account for the core content of the right.

I argue that self-determination is deformed to a point where it is reduced to an empty principle, the substance of which is decided by the circumstances of negotiations. This proposition is deduced from the history of the principle’s formulation, a history that was dominated by dependency and power politics. Additionally, it is deduced from a post-Cold war settlement phenomenon, which created a predetermined merit-based system of independence. Interestingly, the dependency theme associated with the principle of self-determination feeds into the fashioning of the current deficiency of the principle, which can only be meaningful if placed in its negotiations’ context. The construction of the right to self-determination in this manner questions its utility as a liberating concept to be strived for by the different self-determination units around the world. This resonates with the different ‘self-determination stages’ that
Palestine has passed through, from mandatory to occupied Palestine. The Mandate for Palestine was a prototype of the dependency theme associated with the principle of self-determination, which also fed into the brittleness of current formulations of the Palestinian right to self-determination on the negotiating table.

1 Dependency in the Law of Self-Determination

1.1 The Role of International Institutions

The idea of dependency is not a novel feature of international relations. Ironically, it has always been central to notions of liberation, independence and the self-determination project at large. The opposing conceptual implications of dependence and independence create a puzzle. If legacies of dependency dominate independence processes, then what fate lays ahead of a newly-independent entity? An acontextual definition of self-determination will probably define it with reference to all the ‘independence and liberation’ vocabulary. This vocabulary is in stark contrast with the dependency theme that has historically accompanied self-determination projects. This marriage between dependency and the exercise of self-determination can be attributed to an international law that was largely shaped by colonialism and its consequences. The inheritance of the colonial legacy from generation to generation corners the problem of self-determination by solely conceptualizing it from a dependency perspective. As Susan Marks argues, it cannot be assumed that decolonization ended the “material subordination” of the colonial peoples. In-fact, she uses the term coined by Kwame Nkrumah – neo-colonialism – in explaining the relationship between the post-colonial state and its Western counter-part. According to Nkrumah, neo-colonialism is understood to be forms of control that are still present after decolonization through

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5 Ibid.
the norms of power politics in international relations. The strong presence of the relic of colonialism within contemporary international law feeds into global politics and the respective bargaining powers in the endless struggle between the North and the South. Antony Anghie has also been a proponent of this view; specifically he finds that cultural sub-ordination and economic exploitation are basic features of colonialism, which were not remedied by the formal process of decolonization and self-determination. On the contrary, they are still present in post-colonial international politics and consequently, shape our understanding of international law.

The role played by international institutions in reinforcing the legacy of dependence is noteworthy. Indeed, “colonialism profoundly shaped the character of international institutions at their formative stage.” This is most visible in the creation of the Mandate system under the auspices of the League of Nations. This system is especially revealing of the nature of the law on self-determination. Self-determination is placed in congruence with the League’s version of the ‘civilizing mission’ (which was also inherited by the United Nations’ Trusteeship Council). The Mandate system was crafted to be an international regime for the governance of territories that had been colonized or annexed by Germany and the Ottoman Empire (defeated in WWI),

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6 Ibid.
8 Ibid.
9 Ibid. at 516.
11 See The Covenant of the League of Nations article 22: “To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant...The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations.” See also The UN Charter article 76 (b) which states that one of the purposes of the Trusteeship System is “to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence.”
specifically those territories from the Middle East and Africa to the Pacific. Jan Smuts, the South African delegate to the League of Nations, was one of the biggest proponents of the Mandate System. In 1918, he argued that the decomposition of the Russian, Austrian and Turkish empires left peoples who are “more untrained politically” and are incapable of self-rule. Those peoples achieved self-determination but according to Smuts, they “require much nursing towards economic and political independence.” Those statements capture the real essence behind the Mandate System. The seemingly eloquent vocabulary used in the Covenant of the League of Nations in the phrase, ‘sacred trust of civilization’ is described as nothing but an “elegantly euphemistic justification for the colonial custody of the mandatory power.” As mentioned, the same concept was incorporated in article 73 of the UN Charter, further endorsing the concept of a “sacred trust”. This institutionalization of the idea of ‘trust’ normalizes and legitimates the territorial administration of the former colonies of the defeated powers through “reconstituting” those territories on the basis of the internationally-guaranteed notion of trust.

The Mandate System was created in the context of strong anti-colonial and national liberation struggles all over the colonized world as well as inside a war-torn Europe. The idea of having an imposed transition, which would ultimately lead to complete independence and self-government, was the only way the Mandate System can suppress the revolutionary voices whilst

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14 Ibid.
16 Ibid.
maintaining their political and economic exploitation, particularly that calls for independence coincided with a period when the economic value of the colonies became increasingly significant.\textsuperscript{19} International law became capable of containing anti-colonial movements through the promise of self-determination and the universalizing mission while ensuring that Western legal values were to be seen as natural, inevitable\textsuperscript{20} and perhaps desirable. The relationship between anti-colonial resistance and the creation of international institutions is interesting. This relationship developed with the call by anti-colonial movements for independent statehood and self-determination.\textsuperscript{21} From that moment, international law became an active party in regulating these forms of resistance.\textsuperscript{22} As mentioned, the creation of the Mandate System came as a form of convenience to manage the rising anti-colonial resistance movements. International law was able to shape itself in a way that would efficiently and effectively address colonial ‘troubles’.

The Mandate System was meant to eventually extend sovereignty to the territories it controlled. The idea was that these territories need a transitional phase supervised by an administering European power to be able to ultimately ‘earn’ their sovereignty as independent states and join the community of nations. Interestingly, this idea of earned sovereignty was adopted in post-decolonization settlements (discussed in Section II). The difference between the kind of sovereignty that was to be earned with the termination of the Mandate and the post-colonial sovereignty is the level of institutional involvement. In other words, earned sovereignty was institutionalized through the Covenant of the League of Nations. In the post-colonial world, this statement cannot be entirely accurate unless there is a wider conception of institution, to

\textsuperscript{19} Ibid at 563.  
\textsuperscript{20} Ibid at 566.  
\textsuperscript{22} It is important to note that resistance units sometimes adopt the language of international law. Therefore, one should be sceptical of the critical approach that deals with the resistance units as passive bystanders, being regulated by a hegemon international law.
include for example, the ‘institution’ of the community of nations, the semi-‘institutions’ created in Oslo, Dayton, Good Friday, etc... The political discourse continues to deformalize the principle of self-determination from a legal right to a negotiated principle in the context provided by those semi-institutions. Therefore, self-determination is truncated by this practice of deformalization, relegating independence to the political act of change of guard rather than genuine legal sovereignty transfer. With the termination of the Mandate System, sovereignty was not effectively extended to the mandated territories; rather it acquired a different form and character, creating two versions of sovereignty. A more contemporary embodiment of this distinction between the two versions of sovereignty is the distinction between sovereigns that are ‘worth preserving’ and those that are not. This was the argument used by some international lawyers in relation to Serbia in 1999 and later in Iraq. Gerry Simpson describes this distinction as ‘anti-pluralism’ and that entities falling in the latter category “suffer from degraded sovereignty; they are half-sovereigns.” Whether characterized as non-European sovereigns or half-sovereigns, mandated territories have been subject to significant subordination by the respective mandatory power. In the Middle East, France and Britain aspired to gain control over their mandates’ oil resources to the extent that they redrew the boundaries of the mandate territories of Palestine, Mesopotamia, and Syria to ensure the most efficient exploitation of their

23 Notably, there is a clear problem in this statement, namely the assumption of a determinant, unconditional and apolitical right of self-determination in the first place. The main argument used in self-determination literature is that the principle was transformed from a Pre-UN, primitive, political principle to a legal right granted to all peoples firstly in the UN Charter and later in the Human Rights Covenants. Evidently, this view is loaded with assumptions; the first being that the right to self-determination is in-fact granted to all self-determination units. Clearly, self-determination is primarily seen as independence from colonialism (as will be discussed later). Another assumption is that this view presumes that the post-1945 law on self-determination is not deeply enmeshed with international politics. It would be very difficult to argue that the international law of self-determination is a virgin legal discourse that is divorced from politics. Notwithstanding those assumptions made by mainstream scholarship, there is a tendency to deformalize the existing (already problematic) law on self-determination, reducing it a political exercise void of any legal substance.

24 Anghie, “Colonialism and the Birth of International Institutions,” supra note 7 at 520.
26 Ibid.
27 Ibid. at 58.
natural resources.\textsuperscript{28} If self-determination was fashioned to serve as a formal procedure of a sovereignty transaction, then its current indeterminacy should not be surprising.

Finally, international institutions played the role of constructing an imagined harmony between the principle of self-determination (with all the emancipatory connotations it holds) and the idea of the Mandate System as the ‘global nurse’. Issues ranging from the internal functioning to the declared onus of a sacred trust, all compete together to create a seemingly harmonious institutional stance or position. Nevertheless, this harmony is only declaratory; specifically, self-determination as a means to independence presumes the presence of a substantive core. Through perceived institutional harmony, there is an implication that self-determination is not only a procedural mechanism but a meaningful tool for independence.

Other than the Mandate System, the League of Nations has instituted other adjudicatory tools to deal with territorial disputes and the problem of nationalism. The Aland Islands Case is cited as one of the first cases to deal with self-determination in contemporary history. The Aland is a group of islands that were ceded by Sweden to Russia. When Finland declared independence from Russia, the islands requested to rejoin Sweden. People from Swedish descent composed 92.2% of the islands’ population. Finland rejected this request, refused to hold a plebiscite, arrested separatists and charged them with treason whilst sending troops to the islands. The United Kingdom brought the case before the Council of the League of Nations. Finland claimed that it was an issue of exclusive domestic jurisdiction; the Council rejected that claim and proceeded with the substance of the case. The jurists argued that normally, this issue would fall

\textsuperscript{28} Anghie, “Colonialism and the Birth of International Institutions,” \textit{supra} note 7 at 562. Notably the level of “exploitation” differs from one country to another. There are opposing arguments that suggest that colonization had its merits, for example in building infrastructure, educational system, etc...
under Finnish domestic jurisdiction; nevertheless, the abuse of sovereign powers gave rise to its admissibility.²⁹

The jurists found that the principle of self-determination cannot be applied in the Aland Case because it did not apply to “a people in a state that, like Finland, is “definitively constituted.”³⁰ The jurists stated that “[a]lthough the principle of self-determination of peoples plays an important part in modern political thought, especially since the Great War, it must be pointed out that there is no mention of it in the Covenant of the League of Nations.”³¹ Therefore, the principle cannot be put on equal footing with other positive rules of international law, specifically the principle of state sovereignty. The jurists found that “[p]ositive International Law does not recognize 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 recognizes the right of other States to claim such a separation.”³² According to Koskenniemi, the jurists in the Aland Islands Case attempted to downgrade self-determination to a political principle that should not subvert the sovereignty and stability of established states.³³

The Aland Opinion coincided with the adoption of World War I peace treaties that sought to provide solutions to the problem of European separatist nationalism. Through those treaties, there was a significant departure from traditional international law that deals exclusively with states.³⁴ Plebiscites and minorities’ protection were two of the suggested solutions in the peace

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³² Ibid
treaties. The minorities’ protection system was to provide international guarantees for the exercise of their civil rights and cultural autonomy within the confines of the respective states. From the start, the principle of self-determination was seen as an internal issue that can be resolved with the introduction of minorities’ rights. Even Wilson intended for self-determination to mean a right to democracy.

Interwar international lawyers saw nationalist forces and calls for revolutionary self-determination as ‘primitive’ in nature. The imposition of the modern state at the cost of abandoning indigenous affiliations was not seen as problematic. It was merely a matter of transition from the primitive to the modern. Self-determination was to be transformed from primitive nationalist passion to a more formal and limited principle. The tendency of separating self-determination from its nationalist and revolutionary origins has contributed to the current deficient conception of the principle. This trend coincided with the League’s initial involvement in disputed territories, through International Territorial Administration (ITA). The adoption of an internationally agreed upon framework of international governance was seen as a rational means of containing nationalist passion and ‘revolutionary’ self-determination. The City of Danzig was the first to be governed by ITA. The League of Nations took over governmental prerogatives from 1920 to 1939. During the same period, the League administered the German Saar Basin (the Saar), Upper Silesia, and the Colombian town and district of Leticia.

35 Ibid.
36 Ibid at 366, 368.
37 Castellino, International Law and Self-Determination, supra note 29 at 13.
39 Ibid.
The League’s administration of Upper Silesia was particularly complex.\(^{41}\) The national character of Upper Silesia was an issue of dispute between Poland and Germany.\(^{42}\) After an interpretation of the internationally-supervised plebiscite, the territory was partitioned into two states. It was then placed under ITA for 15 years.\(^{43}\) The international regime included, in addition to partition, the inter-war formula of self-determination. Specifically, there were extensive and detailed provisions for the protection of minorities, which were institutionally guaranteed and were subject to international adjudicatory and administrative bodies.\(^{44}\) It was through the “elimination of chaos and violence” by international administration that the League transformed the conception of self-determination from primitive nationalism to controlled legal order.\(^{45}\) In this context, the idea of partition came into being as a new international legal innovation.\(^{46}\) Ironically, it was the fear of disruption of the state system through nationalism that led to a departure from the state and gave rise to “autonomous legal creativity” through partition.\(^{47}\) This new inter-war formula was adopted in post-WWII nationalist conflicts from Palestine to Cambodia.\(^{48}\) International law continues to promise that through these all-encompassing, comprehensive plans, liberation and order can be achieved.\(^{49}\) The perception of primitivism of national self-determination has led to the development of a parallel system (of ITAs and Mandates, etc...) that claims to work for the same principles and at the same time contain the primitive side of nationalism. The sanctioned nationalism was one that accepted the imposed international regime and one that was open to the thriving legal creativity, such as the partitioning of a territory.

\(^{41}\) Berman, “Modernism, Nationalism and the Rhetoric of Reconstruction,” supra note 34 at 376.
\(^{42}\) Ibid.
\(^{43}\) Ibid.
\(^{44}\) Ibid.
\(^{45}\) Ibid.
\(^{46}\) Ibid.
\(^{47}\) Ibid.
\(^{48}\) Ibid. at 379.
\(^{49}\) Ibid.
1.2 Mandate Palestine

In the context of legal creativity, the Palestinian problem of self-determination was developed. The prolonged Palestinian struggle for national liberation is arguably a prototype self-determination case. From a British Mandate to proposed partition to an Israeli occupation, the Palestinian people have moved from one form of domination to another. The British Mandate saw that the sanctioning of settlement activity and the partitioning of a foreign territory falls under its authority as a mandatory power (and even as an occupying power before the mandate period). As mentioned, the Mandate System was intended to effectuate independence with respect to the principles of democracy and self-determination. Unlike other nation states in the Middle East, the British Mandate tied the fate of the Palestinians to the Balfour promise of 1917, diluting Palestinian self-determination of substantive value.\textsuperscript{50}

The juridical basis of the Zionist project in Palestine lies in the 1917 Balfour Declaration, a declaration that was made by a European power about a non-European territory.\textsuperscript{51} The Balfour Declaration was a British promise of the establishment of a “Jewish national home” in Palestine.\textsuperscript{52} It was not construed to be a legal document; nevertheless, as per article 22 of the League of Nations, the British Mandate was established in 1920 and the text of the mandate made direct reference to the Balfour Declaration.\textsuperscript{53} The Preamble and article 2 of the mandate refers to the importance of putting into effect the 1917 Declaration and establish a Jewish national home in Palestine.\textsuperscript{54} The juridification of the Balfour Declaration\textsuperscript{55} can be seen as a

\textsuperscript{52} “The Balfour Declaration” (1917), online: BBC News
\textsuperscript{http://news.bbc.co.uk/2/hi/in_depth/middle_east/israel_and_the_palestinians/key_documents/1682961.stm}
\textsuperscript{53} The Palestine Mandate, Council of the League of Nations 1922, online: The Avalon Project
\textsuperscript{http://avalon.law.yale.edu/20th_century/palmanda.asp}
\textsuperscript{54} Ibid.
form of legitimating settler activities in foreign territories; more importantly it legitimates the administering power as the sole agent in deciding the future of the territory. Notably the Mandate for Palestine was a treaty between the League of Nations and the British government, notwithstanding its rejection in British Parliament (because of the direct reference to the Balfour Declaration) with a 60 against 29 votes. The League of Nations’ decisions pertaining to the Palestine Mandate were equally problematic; it assigned the World Zionist Organization to oversee Jewish immigration and settlement in Palestine. The decision to delegate the contentious issue of Jewish immigration to an organization that has a fundamental stake in the establishment of a Jewish state in historical Palestine is particularly revealing of the nature and the agenda of the League of Nations’ Mandate System. With such an authorization, the League of Nations adopted the Zionist settlement project in Palestine.

After WWI, Jewish immigration continued into Palestine with a parallel struggle between the Jews, the Arabs and the British on the scale of immigration. In the 1920’s the British government and parliament expressed their utmost commitment to the application of the Balfour Declaration, noting that self-government cannot be permitted in Palestine if it will be used “to frustrate the purpose of the Balfour Declaration.” Interestingly, Lord Balfour himself wrote that there is a “flagrant” contradiction between the Declaration and the Covenant of the League of Nations, specifically pertaining to the Covenant’s emphasis on self-determination. Using

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55 Notably, the attempt to give legal weight to the Balfour Declaration was made by Norman Bentwich who was a British legal advisor and then the first Attorney-General and described as the “most significant British official to elaborate the legal character of the term “national home.”” He defined it to mean: “a territory in which a people without receiving the rights of political sovereignty, has nevertheless, a recognized legal position and the opportunity of developing its moral, social and intellectual ideas.” Strawson, “Mandate Ways,” supra note 13 at 256.
56 John Quigley, The Case for Palestine, supra note 30 at 16.
57 Ibid.
60 Quigley, The Case for Palestine, supra note 30 at 80.
Balfour’s words, “in Palestine we do not propose even to go through the form of consulting the wishes of the present inhabitants of the country.”61 In the following period, US President Woodrow Wilson established a commission in Palestine which was to report back on the situation.62 The commission expressed concern over the rise of Jewish immigration and the rejection of Zionism by the majority (then comprising nine-tenth of the population). Hence the self-determination of the local population was being compromised.63

Tensions escalated in the 1930s giving rise to the 1936-1939 Arab revolt. In 1937, British authorities established the Palestine Royal Commission, known as the “Peel Commission” which proposed the partition of Palestine.64 The 1930s saw a change of outlook, international legal and policy concerns included primarily a quest for a new legal regime that neither adopted the pre-WWI power politics nor the “utopian Wilsonian naivetes”.65 Specifically, the main theme of this new regime was “peaceful change”.66 The growing Mandatory intervention in the domestic affairs in Palestine can at least theoretically serve to fulfill this new international prophecy. It was through the “economic advantages which Jewish immigration was expected to bring to Palestine as a whole,”67 that the Mandate would bring about “peaceful change” through the appeasement of Arab hostility towards the Mandate. In the Peel Commission Report, Britain stated that: “the Jewish National Home is no longer an experiment ... The contrast between the modern democratic and primarily European character of the National Home and that of the Arab

61 Ibid.
62 Ibid.
63 Ibid.
64 Kriesberg, supra note 58 at 64.
66 Ibid.
world around it is striking.” Reference to a “European character” of the Jewish National Home to be, is similar to some of the premises used to partition Palestine and create the Palestinian problem of self-determination in the first place. The report proposes that European Jewish immigrants coming into Palestine, escaping European persecution will impress the Arabs of Palestine, and therefore will end the hostility between Palestinians and Jews. The Peel Commission Report further advocated the influx of Jewish immigrants, creating a settler population, which, as was seen in the Nakba (Catastrophe) of 1948, resulted in massive population transfers and the creation of the Palestinian refugee problem.

Notably, the textural reading of the Mandate for Palestine posits the Jews as central to the territory, characterizing the Palestinians merely as the “existing non-Jewish communities”, who would be entitled to civil and political rights to the extent that such rights do not prejudice the creation of a Jewish national home in Palestine. By defining the Arabs of Palestine as “non-Jewish communities”, the Mandate is re-enforcing a certain conception of identity, nationalism and connection to the land. Arguably, it removes the ‘indigenousness’ of the Arab population in favor of the settler European Jewish populations. Not only did the Mandate deny the Arab population their ‘indigenousness’, it also denied them their ‘peopleness’; it did not present them as “a people” with a common identity and connection to the land. On the contrary, the Mandate presented them as separate communities whose entire identity is solely defined by their non-Jewishness.

This characterization of the Arab population has important implications on any form of a self-determination project in Palestine. A doctrinal perspective of contemporary international law

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68 Ibid.
69 Strawson, “Mandate Ways,” supra note 13 at 252
70 Ibid.
teaches us that although self-determination lies in a somewhat gray area, its essence clearly lies in its association with ‘a people’ seeking its realization. With the Mandate’s dismissive rhetoric of the “non-Jewish communities” in Palestine, the mechanics of an emancipatory project changes in its entirety. Self-determination in Mandate Palestine came to be *sui generis*, requiring the administering authority to “assemble the people” in an attempt to prepare the territory for self-government and independence. By creating its own core and periphery, the mandate centralized the Zionist settler project over the Arab indigenous one. Through this new orientation, the notion of dependency, with the changing forces of global politics (world-wide anti-colonial sentiment), is gradually transformed from a traditional understating of colonialism, which is embodied in European Empires, to a less traditional form of domination. It is difficult to categorize this latter form, yet it is suffice to say that it is another form of continued dependency and sub-ordination. The underlying difference is that this form is ‘here to stay’ Unlike the rhetoric used during the Mandate System, which was to ‘stay’ until the local population acquires the necessary capacities to stand on its own and join the family of civilized nations. The transformation of sub-ordination, from Colonialism to Zionism, made the latter part of the civilizing mission that was to civilize Palestine. More importantly, the Zionist civilizing mission included the establishment of institutions and the creation of Zionist civil society, confirming the permanency of this new form of dependency.

The created specificity of the exercise of self-determination in Mandate Palestine has been inherited in Occupied Palestine, whereby the case is often excluded as an exception to the

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71 Ibid.
72 It is useful to draw on scholarship that seeks to frame Israeli annexation of many areas of the West Bank through the construction of the Wall as a “temporary” measure. Adam Smith argues that “far from annexing a territory” the Israelis erection of the wall is only temporary in nature and should not be seen as relevant to the process of self-determination. See Adam Smith, “Good Fences Make Good Neighbours?: The “Wall Decision” and the Troubling Rise of the ICJ as a Human Rights Court,” (2005) 18 Harv. Hum. Rts. J. 251 at 258.
73 Ibid. at 258
74 Ibid. at 259.
norm. According to the British Attorney-General during the mandate period, Norman Bentwich, the principle of self-determination had to be modified because there are “two national selves” in Palestine. He further argues that the majority Arab population “cannot be allowed” to subvert the role of the mandate in relation to the fulfillment of the needs of the Jewish minority.\textsuperscript{75} In other words, the Arab population cannot be allowed to resist the mandate’s agenda of effectuating the terms of the Balfour Declaration, calling for the establishment of a Jewish national home in Palestine. Similar arguments were put forward by international lawyers, arguing that the politics of the case make it difficult to put into effect Arab calls for self-determination.\textsuperscript{76} Such arguments re-enforce the ‘exception discourse’ that was historically applied to the case of Palestine. Significantly, many years later, the UN’s Special Committee on Palestine concluded that as a consequence of the incorporation of the Balfour Declaration in the text of the mandate, self-determination “was not applied to Palestine, obviously because of the intention to make possible the creation of the Jewish Nation Home there.”\textsuperscript{77} Some argue that the case of Palestine as a self-determination unit is always presented as a peculiar case. Strong arguments are made on the prevalence of violations of international humanitarian law, while the self-determination question is presented as political as opposed to legal.\textsuperscript{78}

A deficient conception of self-determination helped in creating a continuum of dependency. Palestine went through an incomplete process of decolonization, whereby independence was only granted to the area designated by the 1947 General Assembly (GA) resolution 181, known as the “Partition Plan”. In 1947, European states recovering from the aftermath of WWII were faced with a mounting problem of Jewish refugees and displaced

\textsuperscript{75} Strawson, “Mandate Ways,” \textit{supra} note 13 at 257.
\textsuperscript{76} Quigley, \textit{The Case for Palestine}, \textit{supra} note 30 at 79.
\textsuperscript{77} Ibid.
\textsuperscript{78} Strawson, “Mandate Ways,” \textit{supra} note 13 at 253.
persons.\textsuperscript{79} From the perspective of European states, the partition of Palestine was the ultimate solution for the absorption of refugees, since the major European powers were unwilling to accept them.\textsuperscript{80} This convenience was also supported by a Jewish movement that advocated the creation of a Jewish State in Palestine. The Plan allocated 57\% of the land to the Jewish state even though the Jewish population constituted only 30\% of the population.\textsuperscript{81} The resolution was rejected by most countries in Asia, Africa and the Middle East, whereas it was strongly lobbied for by European and North American countries to the extent that some countries from the Global South ended up voting for it after threats from the United States of withdrawal of economic aid.\textsuperscript{82}

Evidently, as one writer puts it “\textit{[i]nternational law is not an innocent bystander in Palestine.}”\textsuperscript{83} The application of the so-called progressive development of the right to self-determination from a political to a legal right is still contested in the case of Palestine.\textsuperscript{84} As mentioned earlier, the re-iteration of Palestine’s specificity always places it in the realm of the exception, the political, and therefore outside the scope of the legal discourse. There has been a general trend of accusing international lawyers who call for the rights of the Palestinian people to self-determination, of “importing politics to the (allegedly) “apolitical””\textsuperscript{”} international law.\textsuperscript{85} Relying solely of diplomatic means and what is referred to as the “\textit{the “let-the-parties-decide}”

\textsuperscript{79} Quigley, \textit{The Case for Palestine}, \textit{supra} note 30 at 81.  
\textsuperscript{80} Ibid.  
\textsuperscript{81} The Partition Plan was a laid out in the UN GA Resolution 181 in 1947 which called for the partition of Palestine into a Jewish State and an Arab state and a special international regime for the city of Jerusalem. See Quigley, \textit{The Case for Palestine, supra} note 30 at 81. See also Rashid Khalidi, \textit{The Iron Cage: The Story of the Palestinian Struggle For Statehood} (Beacon Press, Boston, 2006) at 210. See the text of the Partition Plan, Future government of Palestine, UN GA Resolution 181 (II) (A/RES/181(II)(A+B)(29 November 1947), online: The United Nations http://domino.un.org/unispal.nsf/9a798adbfd322aff38525617b006d88d7/7f0af2bd897689b785256c330061d253!Ope nDocument \textsuperscript{82} Quigley, \textit{The Case for Palestine, supra} note 30 at 81  
\textsuperscript{83} John Strawson, “Mandate Ways,” \textit{supra} note 13 at 251.  
\textsuperscript{84} Ibid.  
approach ignores the potentially deficient political outcome that may not provide the Palestinians with minimum protection under international law.\textsuperscript{86} The idea is that a text-book application of self-determination is simply not possible in the case of Palestine; it has always been viewed as “idiosyncratic”.\textsuperscript{87} Nevertheless, the case of Palestine seems to reflect a prototype of a self-determination project in many ways. As previously mentioned, the colonial origins of the problem of Palestinian self-determination are evident. The terms of the Mandate for Palestine greatly shaped the current state of affairs and fundamentally interfered with (what would have been) Palestinian independence from colonial rule. In the words of Jean-Francois Gareau “one could be tempted to view the current unresolved situation as a matter of unfinished business resulting from a somewhat bungled process of decolonization, and the ‘question of Palestine’ as a persisting colonial thorn in the side of the United Nations.”\textsuperscript{88} Palestine moved from formal colonialism to another form of domination through occupation and settlement activities. One would expect that such a case would be much more ‘straight-forward’ than is commonly interpreted. Arguably, the \textit{constructed} idiosyncrasy in the case of Palestine is further evidence of the re-enforcement of a dependency discourse, which rids the Palestinian side of a legal bargaining power and imposes its submission to the existing imbalance of power.

1.3 The Right to Self-Determination in International Law

With the development of international politics, changes have taken place in the international law of self-determination. Therefore, before addressing the dependency discourse in Occupied Palestine, it is important to review the law on self-determination in post-Mandate international law. With the fall of colonial empires, the right to self-determination has been granted an

\textsuperscript{86} Ibid. at 168.
\textsuperscript{87} Gareau, “Shouting at the Wall,” \textit{supra} note 15 at 503.
\textsuperscript{88} Ibid.
elevated standard, supported by a literature that propagates a progress narrative. The literature written on self-determination in the post-WWII era has characterized the right to self-determination as a constantly progressing beacon of liberty and independence bestowed upon colonial peoples in the United Nations age. The most dynamic phase was the decolonization period, specifically in the 1960’s and 1970’s. The circumstances that gave rise to the principle of self-determination and gave it popularity among world-wide national liberation movements, was the decolonization period. On the other hand, the language used by the United Nations, mainly through the General Assembly Resolutions 1514 (The Declaration on the Granting of Independence to Colonial Peoples) and GA Resolution 2625 (The Declaration on Friendly Relations), demonstrates the limitations imposed on the right to self-determination. Specifically, self-determination was granted to “all peoples” as long as the process does not impair the territorial integrity and national unity of states. This is the same language used in the two human rights treaties: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). There are express limitations on secessionist activities in international law; despite the large scholarship written on the right to ‘external self-determination’ yet the right has historically been associated

with a formal process of independence from colonialism, which gave it its ‘erga omnes’ character, as stipulated by the ICJ in the *East-Timor Case*. Twenty years before the *East-Timor Case*, the ICJ gave its *Western Sahara Opinion*, discussing the meaning of self-determination and the means by which it can be exercised by the Sahrawis. The decision adopts the UN language of re-iterating the customary principle of external self-determination as a right belonging only to colonial peoples.

By conceiving self-determination within the narrow margins of formal independence from colonialism, the jurisprudence of the World Court has left us short of an adequate conception of the right to self-determination. The Court has consistently put forward the notion of *uti possidetis juris* as the application of the right to self-determination. In *Al Salvador v. Honduras*, the Court discussed the aim of such a principle and the importance of securing or “respecting” colonial boundaries at the time of independence. In that regard, it noted “that the essence of the agreed principle is its primary aim of securing respect for the territorial boundaries at the time of independence, and its application has resulted in colonial administrative boundaries being transformed into international frontiers.” In *Burkina Faso v. Mali*, the Court stated that the “Chamber cannot disregard the principle of *uti possidetis juris*, the application of which gives rise to this respect for intangibility of frontiers.” And it goes further to say that despite the lack of necessity for the purposes of the discussed case yet it wishes to reiterate the fact that *uti possidetis* “is a firmly established principle of international law where decolonization is

98 Ibid.
concerned, [and that] the Chamber nonetheless wishes to emphasize its general scope.” The Court concluded that _uti possidetis_ is a general principle which is “logically connected” with independence and decolonization. The jurisprudence of the Court has been dominated by the traditional conception of self-determination. As exemplified, the Court dealt extensively with self-determination in the context of decolonization. Nevertheless, and as a consequence of construing the application of self-determination solely through the principle of _uti possidetis_, the substance of the right was not as thoroughly examined by the Court. The focus on colonial territorial boundaries that do not reflect the indigenous allocation demonstrates the nature of self-determination. It is submitted that the right to self-determination should not be seen merely as a peoples’ right to choose its external political status (with imposed boundaries), rather it is a more comprehensive right that confers on peoples substantive entitlements.

The Court interpreted the 1960 Colonial Declaration as “confirming” and “emphasizing” that the exercise of self-determination is embodied in the free and genuine expression of the will of the peoples, through a referendum or a plebiscite, including the option of statehood. This interpretation translates into a democratic process in which the option of independent statehood is highly possible. Therefore, according to the ICJ, the essence of the right to self-determination is the right of peoples to freedom of choice. Notably, Judge Dillard found that self-determination is satisfied by free choice “not by a particular consequence of that choice or a particular method of exercising it.” Practical considerations necessary for the exercise of the right to self-determination were “left open by the Court”.

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100 Ibid.
101 Ibid.
102 Drew, “Self-Determination, Population Transfer & the Middle East Peace Accords,” _supra_ note 85 at 127
105 Ibid (quoting Western Sahara Opinion).
106 Ibid.
Opinion failed to adequately respond to the more substantive questions that truly shape the emerging entity. There is a list of unanswered questions by the Court, leaving the concept void of practical application: “In what circumstances, if any, does self-determination require a referendum to be held? Is it sufficient for the recognized representative of a self-determination unit to negotiate on behalf of its people? If so, can this truly be said to satisfy the requirement of free choice?” Another serious and related question is: who are the designated subjects of this ‘free choice’ propagated by the Court? In the case of Western Sahara, the repercussions of the “Green March” have to be taken into account. The Court only made a short reference to the fact that not all the people in the Sahara constitute a people entitled to self-determination. In 1975, the Court didn’t speculate that “a contemporary settler implantation was to become the most intractable obstacle to implementing the right of self-determination of the people of Western Sahara.”

The position of self-determination in international law has always been associated with some level of ambivalence. Philip Allot argues that the revolutionary character of self-determination and the self-identification exercises involved makes it very difficult to standardize and systematize it on the international level. Furthermore, the nature of this principle is generally subversive of the basic notions of the modern state, sovereignty and territorial integrity. The overwhelming focus on self-determination during its hey-days of the 1960’s and the 1970’s has contributed to a deficient and a superficial analysis of an increasingly important principle. Perhaps the jurisprudence of the ICJ during this period sheds some light on the basis of

107 Ibid.
108 In November 1975, the Moroccan King Hassan II ordered the transfer of over 300,000 Moroccans into Western Sahara, which was to be called ‘The Green March’. See “Regions and Territories: Western Sahara”, online: BBC News http://news.bbc.co.uk/2/hi/africa/country_profiles/3466917.stm
this ambivalence (as discussed earlier). In the context of decolonization, the right to self-determination was conceived as a tool for independence from colonialism. Self-determination was to be exercised exclusively from ‘salt-water colonialism’.\textsuperscript{111} As the jurisprudence of the ICJ shows, self-determination was to be exercised only within the boundaries established by the colonial powers. Therefore, the self-determination entity was defined by the pre-existing situation of colonialism.\textsuperscript{112} It is argued that the “domestication of national self-determination” has always been an arbitrary decision.\textsuperscript{113} Even when the 1975 Helsinki Final Act recognized self-determination outside the decolonization context, exhibiting more revolutionary tendencies; it made very strong emphasis on the principle of territorial integrity of existing states, emphasizing the traditional conception.\textsuperscript{114}

There is some kind of confusion that surrounds the interpretation of self-determination. It is bouncing between its revolutionary character and its traditional one, which aggravated its level of ambivalence and potential utility to self-determination units. For a meaningful interpretation of self-determination in contemporary negotiations, it is important to acknowledge the problematic colonial interpretation that was attached to the principle since its conception. This clash between the colonial and the modern application of self-determination affects even the most obvious cases, such as foreign military occupation. When addressing the case of foreign military occupation, international law defines it as ‘alien subjugation’; under this scenario the occupied territory has the right to self-determination. This is supported by the Declaration on Friendly Relations\textsuperscript{115} and by the Canadian Supreme Court Reference decision on the \textit{Secession of

\textsuperscript{112} Ibid.
\textsuperscript{113} Koskenniemi, “National Self-Determination Today,” supra note 33 at 243.
\textsuperscript{114} Ibid.
\textsuperscript{115} Supra note 92.
As discussed, because of the highly deficient development of the norm of self-determination and its marriage to decolonization, its current conception fails to account for substantive entitlements that should be part of the independence exercise, even in the case where there is an agreement on the applicability of the right to self-determination such as in cases of foreign military occupation. Therefore, international agreement that Palestinians have the right to self-determination and independence from occupation does not negate the fact that the kind of self-determination to be exercised is extremely deficient and (at some point) becomes antithetical to the project of independence (as will be discussed Section II on Merit-Based Self-Determination).

1.4 Occupied Palestine

The regime operating in the Occupied Palestinian Territories (OPT) creates circumstances that are conducive to the continual dependency of the self-determination unit. The British Mandate made the necessary demographic changes, setting the stage for a new form of control. The influx of massive numbers of Jewish immigrants created a thriving ‘settlement business’. As Catriona Drew argues, sending immigrants to a territory is “the most effective means of colonizing” it. The consequences of such form of “colonization” are demonstrated through the deficient meaning of self-determination, which does not account for this process of forcible transfers. In the case of Palestine, these transfers have taken different forms at different points of the conflict. In 1948, the transfers have been the result of war and the influx of refugees. Later it took the form of formal occupation and finally with the erection of the Wall and the growing settlements in the West Bank, population transfers are still taking place. The construction of settlements in the OPT has been the most obvious intrusion on Palestinian independency.

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116 Reference Re Secession of Quebec, Supreme Court of Canada (SCC) 1998, at 73.
118 Ilan Pappe refers to this as ‘ethnic cleansing’. See Generally, Pappe, A History of Modern Palestine, supra note 2.
As was the case during the mandate period, the creation of an international institution was instrumental in the creation of circumstances that fit into the continuum of dependency. As mentioned, the League of Nations played an important role in the creation of the Palestinian problem. Similarly, the United Nations, upon its birth, had its own share of contributing to the Palestinian problem of self-determination. Notably, one of the first topics discussed under the newly-created United Nations was “The Question of Palestine.” Furthermore, the United Nations Charter universalized the principle of self-determination, something which was not provided for in the Covenant of the League of Nations pertaining to the pre-WWI colonial possessions. It is tempting to provide an altruistic analysis of such a shift created by the birth of a new international institution. Nevertheless, the United Nations provided another venue for continued dependency of colonized peoples (who arguably remained “colonized” despite the formal exercise of self-determination). The universalizing mission of the United Nations reflected primarily the determination of the new world powers constituting the bipolar hegemony of post-WWII embodied in the United States and the Soviet Union, legitimating the extension of their influences to other regions.

In the case of Palestine, one of the primary projects of the United Nations was the Partition of Palestine into two states, under General Assembly Resolution 181 of 1947. Notoriously, the Partition resolution engineered a markedly unfair deal by providing more land to the minority Jewish population. Rashid Khalidi argues that the clear imbalance in the Partition Plan fits with the geo-political context of the time. WWII, unlike WWI, ended with a human tragedy that was targeted at the people who were later to constitute a considerable part of Israeli

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120 Ibid.
121 Ibid. at 177.
122 Ibid.
citizenry. The events of WWII created sympathy towards the Jewish population and as Khalidi argues, it was the unlucky fate of the Palestinians to be in conflict with the victims of the Holocaust.\textsuperscript{123} Therefore, the visible injustice in the Partition Plan was supported by all the major powers in the General Assembly, creating a new class of victims, the Palestinian people.\textsuperscript{124} In that regard, the Partition Plan provided the legitimacy (from international sympathy) and legality of the circumstances that created the contemporary Palestinian-Israeli conflict. As time progressed, the creation of the state of Israel became a convenience; keeping a strategic territory in “friendly hands” was important for Western powers, specifically the United States.\textsuperscript{125}

As mentioned, parallel to this imposed dependency was an active universalization project at the United Nations. The negotiations that took place in San Francisco in 1945 on the principle of self-determination are telling. Insistence of the Soviet Union triggered reconsideration by the four powers: the UK, US, China and France, of the draft text of the UN Charter, which initially failed to make any reference to the principle of self-determination.\textsuperscript{126} It was eventually agreed as per article 1(2) that one of the purposes of the United Nations is “to develop friendly relations among nations based on the respect for the principle of equal rights and self-determination of peoples.”\textsuperscript{127} Additionally, article 55 of the UN Charter stipulates that “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 higher standards. . .”\textsuperscript{128} After the adoption of the UN Charter, two General Assembly resolutions became significant in the legal literature on the

\begin{footnotes}
\item[123] Ibid.
\item[124] Ibid.
\item[125] Ibid. at 180.
\item[128] Ibid. at 55.
\end{footnotes}
principle of self-determination. First, the 1960 Declaration on the Granting of Independence to Colonial Peoples General Assembly explicitly stated that colonialism is illegal and that:

[i]mmediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or color, in order to enable them to enjoy complete independence and freedom.\(^\text{129}\)

The Declaration ended by emphasizing respect for “the sovereign rights of all peoples and their territorial integrity (emphasis added).”\(^\text{130}\) Second is the 1970 Declaration on Friendly Relations (GA Resolution 2625), which explicitly stated that the right to self-determination shall not impair the territorial integrity of states in compliance with the principle of equal rights.\(^\text{131}\) The creation of jurisprudence on the right to self-determination in international law created case-specific inquiries on the application of this right. The case of Palestine rose as one of the major self-determination projects. There is close to an international consensus that Palestinians have a right to self-determination;\(^\text{132}\) specifically there is an international assertion through the different United Nations bodies of the inalienability of this right in the case of Palestine.\(^\text{133}\) However, there is a clear disagreement, or at least contestation, on what the right to self-determination of the Palestinians should entail,\(^\text{134}\) or the conditions necessary for its success. By institutionalizing a regime of dependency, a formal exercise of self-determination will always remain deficient of genuine emancipation. The ‘two-state’ formula in the case of Palestine/Israel is encapsulated

\(^{129}\) *Supra* note 91.
\(^{130}\) Ibid.
\(^{131}\) *Supra* note 92.
\(^{133}\) Report of the UN Human Rights Council in its Tenth Session, A/HRC/ 10/29, March 2009, online: The United Nations
\(^{134}\) Drew, “Self-Determination, Population Transfer & the Middle East Peace Accords” *supra* note 85 at 127.
under this regime. Historically, the two-state solution was favoured by the European states and by the United Nations, first in the 1947 Partition Plan and later with the Road Map.\textsuperscript{135} The Palestinian national movement has, from the 1920s to the 1970s, adopted the view that a two-state solution will be divisive of national unity and constitutes an unjust solution to the Palestinian problem of self-determination.\textsuperscript{136} In 1988, the Palestinian National Congress met in Algiers where the Palestinian Liberation Organization (PLO) issued the ‘Declaration of Independence’.\textsuperscript{137} The declaration accepted the UN Partition Plan as the cornerstone of Palestinian self-determination.\textsuperscript{138} Significantly, in this declaration, the PLO accepted for the first time to compromise the territory of historic Palestine.\textsuperscript{139} The UN General Assembly acknowledged the Declaration and the proclamation of the State of Palestine, reiterating the Palestinian’s right to exercise their self-determination within the 1967 borders.\textsuperscript{140} With those developments came the birth of the two-state solutions that continued to be the centre of negotiations in the 1990s\textsuperscript{141} (and to-date).

The formulation of the two-state solution as the only solution fostered the existing regime of occupation, which continues to create the conditions that would limit the viability of any future Palestinian state. The Palestinian people, decades after the 1967 invasion, are still extremely dependent on Israel. There are a number of issues that lie at the core of their self-determination that are consistently denied, implanting a regime of continued dependency. Among such issues is the economic dependency that strikes Palestinian day-to-day livelihood.

\begin{itemize}
\item \textsuperscript{136} Ibid.
\item \textsuperscript{138} Ibid.
\item \textsuperscript{139} Ibid.
\item \textsuperscript{140} Ibid.
\item \textsuperscript{141} Ibid.
\end{itemize}
The period following the outbreak of the 1st Intifada clearly demonstrated the politics of economic dependency. Israel’s refusal to evacuate or redeploy its forces, except from poverty-stricken areas, shifted the focus from the livability of a Palestinian entity to the viability of the Palestinian National Authority (PNA) “as the guardian of precarious stability.”142 Notably, American aid to Palestine was conditional on its reallocation of its budget, significantly increasing the security budget. Only through increasing the security budget was Palestine considered an “acceptable partner and eligible for American aid”.143 It is remarkable that the acceptable threshold of security forces was four times as much as Israel; specifically the PNA employed sixteen policemen for every thousand inhabitants.144 With the outbreak of the 2nd Intifada, Israeli authorities further reinforced Palestinian sub-ordination and dependency by withholding Palestinian tax money worth hundreds of millions of dollars.145

The main problem of dependency is that it dilutes the project of self-determination of any real substance. Even if formal independence is ‘granted’, the politics of dependency have become so permanent in nature to be smoothly removed at a snap-shot of independence. International law has provided ample support for this form of ‘snap-shot’ independence, through different forms, most notably through its adoption of uti possidetis146 as the means of effectuating self-determination of colonial peoples. International law only ‘merits sovereignty’ to those entities that submit to this assigned dependency, be it dependency on the colonizing power or the occupying power or on international institutions functioning under the nose of hegemonic powers. The prototype of the celebrated ‘Two-State Solution’ in the case of Palestine is one of

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143 Ibid.
144 Ibid.
145 Ibid. at 129.
the most obvious examples of normalizing dependency. In the ‘two-state’ scenario, Palestinians are required to accept an unviable state and to be capable of ‘earning’ their sovereignty.

2 Merit-Based Self-Determination

The dependency theme seen during the Mandate period and in a post-colonial world creates the circumstances for placing notions of independence and liberation under guard. Specifically, independence became conditional on the fulfillment of certain qualifications that merits eventual sovereignty. The ‘civilizing mission’ manifests this dynamic of a merit-based system of emancipation. The idea behind the civilizing mission is that self-determination units must move from the darkness of tribalism to the light of a liberal democratic state to be worthy of sovereignty and independence. Even with the creation of the modern liberal state, there is a possibility of “failure” of the state. When the created state fails to sustain itself politically and economically, it is deemed as a failure from the perspective of the international community. The term ‘state failure’\textsuperscript{147} implies exclusive responsibility of the state and its people for the collapse of governance.\textsuperscript{148} With a history of colonialism, mandates and global economic exploitation, it is very difficult to place such a burden on the ex-self-determination unit. Bringing conditionality into the picture exacerbates the situation. Even remedial solutions such as ITA are only concerned with local causes of ‘failure’; it has no authority over the role played by foreign states, international financial institutions and multinational corporations. This is not to suggest that ITA should be able to address the role played by other stakeholders, but it is to suggest that the proposed remedial solutions on the international level are only concerned with the actions

\textsuperscript{147} Ralph Wilde, “The Skewed Responsibility Narrative of the “Failed States” Concept,” 9 ILSA J. Int’l & Comp. L. 425 (2002-2003) at 425. Wilde suggests that the “failed states” concept originated in Western scholarship, and has been utilized in Western policy discourse. Examining this language may be helpful, therefore, in understanding Western ideas of a “failed” other and a “successful” self. Just as Edward Said studied “Orientalism” \textit{inter alia} as a way of understanding how Western culture conceives itself through an alienated, oriental “other,” the failed state concept may be illuminating in so far as our understandings of those who use it are concerned.

\textsuperscript{148} Ibid. at 425
committed by the state.\textsuperscript{149} Therefore, all conditionality is placed on the ‘failed state’. There is a clear asymmetry in the responsibility allocated by the failed state concept. This skewed responsibility is further supported by the regime of international institutions.\textsuperscript{150} As mentioned, international institutions played a significant role in reinforcing a dependency discourse during the League of Nations period and later under the United Nations system. Additionally, the creation of international guilt through such concepts as failed state, terrorist, fundamentalist, etc... puts the merit-based independence into the picture, whereby a particular entity is forced to depart from a particular form of governance and accept international conditions to attain independence.

In the following section, I will discuss this merit-based self-determination in light of a rising literature (particularly in the United States) on the so-called ‘earned sovereignty’ approach, which embodies this merit-based system and claims that it presents a viable alternative to mainstream scholarship.\textsuperscript{151} Second, I will discuss the visible presence of this merit-based system in international bargaining, specifically in peace negotiations in the case of Palestine. The underlying premise is that such a view places the burden of liberation on the self-determination unit; it sets up conditions necessary for meriting independence, just like colonialism during the Mandate period placed its own list of prerequisites prior to decolonization.

2.1 Earned Sovereignty

The merit-based system of independence was conceptualized by a small number of scholars who claim that such a system presents a novelty in the redundancy and failure of traditional literature

\textsuperscript{149} Ibid. at 427
\textsuperscript{150} Ibid. at 428.
on self-determination. This scholarship emerged after the end of the Cold War, proposing that peoples seeking self-determination are increasingly able to “earn” their sovereignty only when they satisfy certain conditions, notably when their institutions reach the standards set forth by the international community.\textsuperscript{152} Therefore, according to the earned sovereignty approach, a given self-determination unit must work for being worthy of sovereignty—it must ‘earn’ it. One of the contributors to this line of scholarship, Michael P. Scharf, argues that international lawyers need to adopt a new position on sovereignty; specifically, recognize sovereignty as a spectrum as opposed to a singular concept.\textsuperscript{153} He submits that there is a range of intermediate sovereignties that fall within this spectrum; he also includes what is referred to as “deferred sovereignty”, “conditional independence”, and “provisional statehood” within the range of sovereignties.\textsuperscript{154} This emerging literature cites seven examples of earned sovereignty cases: East Timor, Montenegro, Northern Ireland, Bougainville, Bosnia, Southern Sudan, Palestine, Western Sahara and Kosovo.\textsuperscript{155} In all those cases, the self-determination unit is subject to conditional independence enforced by the ‘international community’ in an attempt to elevate its status from an ‘asovereign’ movement to a sovereign state, notwithstanding the degrees of sovereignty between those two extremes. The conditions involved in the process of earning sovereignty, can include democratization, eradicating terrorism and economic liberalization.\textsuperscript{156} Such conditions are recurring in international political discourse, and used as a dangerous tool by world powers, 

\textsuperscript{154} Ibid.
\textsuperscript{155} Parfitt, supra note 152 at 1. Parfitt notes that Kosovo went through this process of earned sovereignty, by engaging in 9-year “institutional building” under the auspices of both the UN and NATO, until it eventually “earned” its independence from Serbia in February 2008.
\textsuperscript{156} Ibid. at 8.
most notably in the 2003 War on Iraq, whereby the democratization mission stood in stark similarity to the old civilizing mission.

The imposed supervision of the ‘international community’ to such conflicts brings back the notion of sacred trust, whereby those peoples lacking appropriate standards of civilization are in-turn lacking in sovereignty, an idea which initially originated from Enlightenment ideas.\textsuperscript{157} From the Enlightenment to Western liberal notions of sovereignty and statehood following the framework envisioned by Immanuel Kant, there is a rejection of sovereignty by entities created under a different framework.\textsuperscript{158} In other words, sovereignty is conditional on its adoption of liberal ideas in its internal system of governance.\textsuperscript{159} Such a framework places the blame of the self-determination problem on internal characteristics that fall short of the international community’s expectations. Similarly, the so-called notion of ‘state failure’ follows the same line of argument, which suggests that the elements of failure lie exclusively in indigenous factors as opposed to (and in addition to) other states, non-state actors, corporations and international institutions (discussed earlier).\textsuperscript{160} Ralph Wilde discusses this framework in light of his discussion of ITA; he argues that the introduction of ITA in existing states is often justified by the host state’s deficiency in conforming to the liberal conception of the state.\textsuperscript{161} In the case of non-existing states (who aspire for eventual statehood), Wilde argues that ITA is also justified since it is presumed that the international regime will introduce the required elements of a successful liberal state which will eventually merit sovereignty.\textsuperscript{162} The United Nations Mission in Kosovo’s (UNMIK) policy in 2002 is a clear manifestation of this view of earned sovereignty. By adopting a policy of “standards before status”, UNMIK was able to enforce certain standards that are

\textsuperscript{157} Wilde, \textit{International Territorial Administration}, supra note 17 at 317.
\textsuperscript{158} Ibid. at 260.
\textsuperscript{159} Ibid.
\textsuperscript{160} Ibid. at 261.
\textsuperscript{161} Ibid.
\textsuperscript{162} Ibid.
predominantly liberal notions of internal governance.\textsuperscript{163} In that regard, international intervention is normalized if it is labeled with deeply-held liberal Western values. By doing that, earned sovereignty is merely a more contemporary form of the tabooed civilizing mission of the colonial period. As one writer puts it, earned sovereignty “disempowers” peoples seeking self-determination “by replacing one form of domination with another.”\textsuperscript{164} Additionally, earned sovereignty assigns the degree of sovereignty to be granted to the different self-determination units based on their level of conformity to the required conditions.\textsuperscript{165} It is very difficult to distinguish this approach from the ‘gradation of sovereignty’ approach, adopted during the Mandate period, whereby the most ‘civilized’ mandates were under the A category of mandates and the grade changes as the level of civilization does. As previously mentioned, formal independence means very little if emancipation is attached to a cycle of dependency and subordination.

The earned sovereignty approach endorses a certain process, without which the process of independence will not be achieved. It proposes international supervision of the self-determination unit before and after sovereignty is granted.\textsuperscript{166} In the pre-sovereignty phase, there is an internationally-monitored period of ‘shared sovereignty’ between the self-determination unit and the state or the international institution.\textsuperscript{167} In the post-sovereignty phase, there is ‘constrained sovereignty’, which places limitations on the sovereignty of the newly “independent” state.\textsuperscript{168} The recent case of the 2007 ‘Comprehensive Proposal for the Kosovo Status Settlement’ and the United Nations Transitional Administration in East Timor (UNTAET) both provide a framework of a post-independence system of international monitoring and

\textsuperscript{163} Ibid.
\textsuperscript{164} Parfitt, supra note 152 at 2.
\textsuperscript{165} Ibid at 14.
\textsuperscript{166} Drew, “The Meaning of Self-Determination,” supra note 96 at 96.
\textsuperscript{167} Ibid.
\textsuperscript{168} Ibid. at 97
military presence.\textsuperscript{169} Similarly, in the context of Palestine, the Road Map\textsuperscript{170} is an archetype of the earned sovereignty approach.

### 2.2 Conditionality in International Law

On the level of international law, the introduction of conditionality in the so-called ‘sovereignty-based’ disputes brings self-determination back to its Wilsonian era.\textsuperscript{171} This was a period when the exercise of Central and Eastern European self-determination was dependent on the achievement of a set of conditions, mainly the protection of the rights of minorities.\textsuperscript{172} It was also a period when non-European self-determination was conditional on achieving the required standard of civilization.\textsuperscript{173} There is an overwhelming emphasis in the literature on the contribution of Woodrow Wilson to the revival of the concept of self-determination. As David Raic argues, “the name of the American President Wilson and his ideas are inextricably bound up with the concept of self-determination.”\textsuperscript{174} Raic presents a comprehensive traditional account of the history of the concept, presenting the Wilsonian conception to be self-determination’s venture point in international relations. More importantly, he argues that Wilson was the “first” to give substance to the concept of self-determination, inspired by democratic political thought taken from the American and French revolutions.\textsuperscript{175} For Wilson, self-determination is “entirely a corollary of democratic theory.”\textsuperscript{176} Bill Bowring, on the other hand, argues that the reference in

\begin{itemize}
\item \textsuperscript{169} Ibid. at 97, 98.
\item \textsuperscript{170} A Performance-Based Roadmap to a Permanent Two-State Solution to the Israeli- Palestinian Conflict, presented to Israeli and Palestinian leaders by the Quartet- The United Nation, The European Union, The United States and Russia, online: BBC News \url{http://news.bbc.co.uk/2/hi/middle_east/2989783.stm}
\item \textsuperscript{171} Parfitt, supra note 152 at 7.
\item \textsuperscript{172} Ibid.
\item \textsuperscript{173} Ibid.
\item \textsuperscript{174} David Raic, \textit{Statehood and the Law of Self-Determination} (Martinus Nijhoff Publishers, 2002) at 177.
\item \textsuperscript{175} Ibid.
\item \textsuperscript{176} Ibid.
\end{itemize}
the standard literature of international law to Wilson as a “progenitor of the concept” is wrong.\textsuperscript{177} Wilsonian self-determination was not only conditional but was restricted only to some empires, excluding others; specifically, self-determination was to be applied only to the former Ottoman, Austro-Hungarian and Russian empires, excluding the European Empires and American “interest” in Puerto Rico and the Philippines.\textsuperscript{178} The Leninist conception, on the other hand, notwithstanding the inconsistencies between Soviet rhetoric and application, is arguably more revolutionary and all-encompassing. In Lenin’s Decree on Peace in 1917, he extended the right to self-determination to all peoples, “discarding the imperialist distinction between ‘civilized’ and ‘uncivilized’ nations.”\textsuperscript{179} The colonial relic had its impact on the competing notions of self-determination. Evidently, the Wilsonian notion had dominated the literature on self-determination and therefore served as the basis of the post-WWII conception of the right to self-determination. The adoption of Wilsonian self-determination with its themes of exclusion and conditionality is consistent with the earned sovereignty approach. A very similar approach was used during the Mandate System and the Trusteeship Council in the League of Nations and the United Nations, respectively. These systems signaled an unquestioned fact: the ‘civilized’ nations are the only guardians of the principle of self-determination and they are therefore in a position to set up comprehensive formulas of independence that included a list of conditions to be satisfied by the self-determination unit. One visible example of such conditions is the creation of international commercial activity in the mandates that were expected in-turn to serve European material interests, referred to as the “duel mandate”.\textsuperscript{180} Through submission to this mechanism, colonial peoples can earn their sovereignty and join the civilized world. Similarly, in


\textsuperscript{178} Ibid.

\textsuperscript{179} Ibid at 144.

\textsuperscript{180} Parfitt, \textit{supra} note 152 at 10. Parfitt discusses Anghie’s analysis of this system and refers to what he calls the ‘economisation of sovereignty’
a post-mandate era, self-determination units are required to adopt certain values and certain economic systems before sovereignty is granted to them. The dynamic of this practice of conditionality becomes most obvious in the context of peace and/or other negotiations. The following section will address this dynamic of conditionality in the Palestinian-Israeli negotiations.

2.3 Conditionality in International Negotiations on Palestine

In the context of international bargaining and peace negotiations, the problems of a merit-based sovereignty approach are most visible. This approach can potentially leave very little to be said on the negotiations table because it places the burden of conditions on the self-determination unit to merit its sovereignty, depriving it of a legal bargaining power. Peace treaties (supervised by the international community) play a fundamental role in strengthening and institutionalizing the earned sovereignty approach.

In the case of Palestine, the text of the Oslo Accords, officially the Declaration of Principles on Interim Self-Government Arrangements (DOP)\textsuperscript{181} embodies many elements of the earned sovereignty approach. Evidently, the accords were not meant to grant unconditional sovereignty to the Palestinian people, but merely “interim self-government”. Richard Falk finds that the right to self-determination has never been “explicitly and unconditionally affirmed” in the negotiations between the Palestinians and the Israelis.\textsuperscript{182} In the DOP, under the ‘Aim of Negotiations’ section, it is stated that a permanent settlement should be reached after a five-year

\textsuperscript{181} Declaration of Principles On Interim Self-Government Arrangements (‘Oslo Agreement’), 13 Sep. 1993, online: The United Nations High Commissioner on Human Rights \url{http://www.unhcr.org/refworld/docid/3de5e96e4.html}

transitional period, based on Security Council (SC) Resolutions 242\textsuperscript{183} and 338\textsuperscript{184}. Notably, the ambiguity of resolution 242 was not dealt with; this resolution was adopted after the 1967 war which calls for Israeli withdrawal from “territories occupied”\textsuperscript{185} in exchange for regional security from the neighboring states, without specifying what is meant by ‘withdrawal’ or ‘territories’.\textsuperscript{186} In that context, SC Resolution 242 created regional conditionality for an ambivalent and undefined outcome; there was to be ‘some form’ of withdrawal from ‘some unknown territory’. The resolution makes no reference to the right to self-determination and only mentions sovereignty pertaining to existing states in the region.

Furthermore, the DOP does not deal with a right to self-determination of the Palestinian people, making instead a few references to the recognition of “mutual legitimate and political rights,” without defining the content of those rights and their relationship to permanent status issues.\textsuperscript{187} Before the start of the ‘permanent status negotiations’, the European Union’s Minister of Foreign Affairs declared in a letter sent to Arafat that the Palestinians will continue to have the “unqualified” right to self-determination “including the option of a state” (emphasis added).\textsuperscript{188} On the contrary, the United States never spoke of an unconditional right to self-determination.\textsuperscript{189} It is unclear what exactly self-determination means in the eyes of the European Union; it is true that from the Minister’s perspective, self-determination is unconditional yet

\textsuperscript{185} Falk, “Some International Law Implications,” \textit{supra} note 182 at 17.
\textsuperscript{186} Omar Dajani, “Shadow or Shade? The Roles of International Law in Palestinian-Israeli Peace Talks,” (2007) 32 Yale J. Int’l L. 61 at 85. Reference to “Permanent Status Issues” according to the DOP includes “Jerusalem, refugees, settlements, security arrangements, borders, relations and co-operations with other neighbours, and other issues of common interest.” See DOP, article V (2) \textit{supra} note 181.
\textsuperscript{187} Ibid. at 85.
\textsuperscript{188} Ibid.
there is no clear content of what this right entails. All the information available is that it includes the “option” of a state. Either way, the line taken by the United States seems to be the general line taken in Palestinian-Israeli peace negotiations. As mentioned in the preceding section, conditionality has become central to post-Cold War peace settlements. There is an emerging state practice pursuing conditionality in some bi-lateral and multi-lateral negotiations, thereby creating a legal basis for earned sovereignty.\textsuperscript{190} Peace agreements ranging from East Timor, Northern Ireland, Bosnia-Herzegovina, Kosovo, and Western Sahara, all follow the blue print of the earned sovereignty approach.\textsuperscript{191} The Road Map along with the Oslo Accords in the Palestinian-Israeli context, also follow a merit-based system of independence.\textsuperscript{192}

In 2003, Kofi Annan handed the text of a “performance-based roadmap to a permanent two-state solution the Israeli-Palestinian conflict” to the President of the Security Council, following the creation of a quartet composed of the EU, Russia, the US and the US.\textsuperscript{193} A few months later, there was a unanimous adoption of Resolution 1515 which called on parties to fulfil their obligations under the Roadmap with the support of the quartet, as a means of adopting the “\textit{vision of two states living side by side in peace and security.”}\textsuperscript{194} The Road Map proposed a settlement that is based on the Madrid Peace Conference, the ‘land for peace’ formula and Security Council Resolutions 242, 338 and 1397.\textsuperscript{195}

\textsuperscript{190} Drew, “The Meaning of Self-Determination,” \textit{supra} note 96 at 96.
\textsuperscript{191} Ibid.
\textsuperscript{192} Ibid.
\textsuperscript{193} Victor Kattan, “The Wall, Obligations \textit{Erga Omnes} and Human Rights” \textit{supra} note 137 at 74.
\textsuperscript{194} Ibid.
\textsuperscript{195} Ibid.
The Road Map has been described as a “performance-based” plan, making no reference to international law. Notably, under the Road Map, the settlements were found to be in violation of the Mitchell Report and not in violation of the number of international legal instruments, moving back to the tendency towards legal exclusion of the case of Palestine. Under the framework of the Road Map, conditionality takes another form; specifically, it takes the form of concessions on issues referred to as ‘final status’ issues. The case of Palestine becomes reduced to a pragmatic and prolonged “peace process,” whereby politicians propose a certain framework without questioning its legitimacy and potentially conflicting implications. As Nathaniel Berman puts it, these politicians engage in “unreflective pragmatism”, a visible symptom of the debates surrounding the future of Palestine, from issues of statehood to the refugees to the Wall.

Phase II of the Road Map creates a timetable for a potential independent Palestinian state that is constrained by “[e]nhanced international role in monitoring transition with the active, sustained, and operational support of the Quartet.” Evidently, international supervision and intervention at large became infused with self-determination. This supposedly liberating principle became intertwined with politics of international intervention (or international administration) which questions the authenticity of the project of independence, even in the eyes of traditional literature on self-determination (encapsulated in the 1975 International Court of

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197 Ibid.
199 Welchman, supra note 196 at 4.
200 Berman, “But the Alternative is Despair,” supra note 89 at 1902.
201 Ibid.
202 Drew, “The Meaning of Self-Determination,” supra note 96 at 97 (quoting the text of the Road Map)
203 Ibid. at 98.
This approach, seen visibly in Kosovo, East Timor and Palestine among others, normalizes the conditionality of independence in a post-colonial era. Arguably, this normalization dilutes the self-determination of content, whilst placing an unfair burden on the self-determination unit to ‘earn’ its sovereignty instead of placing this burden on the administering/colonizing/controlling/occupying power. With this logic, the Arab rejection of the UN Partition Plan in Palestine for example, can be seen as an act unworthy of sovereignty. Resisting external intervention becomes an act of international dissent that is inconsistent with the aims of the ‘administering power’ and/or the international community, hence is rendered insufficient for earning the aspired sovereignty and self-determination.

Conditionality is also seen in further and equally consequential negotiations. The electoral victory of Hamas in 2006 led to the formulation of additional demands by the Quartet. First, Hamas had to acknowledge Israel’s right to exist without Israel’s acknowledgement of the Palestinian’s right to self-determination. Second, Hamas had to renounce violence, which includes all forms of resistance, by dismantling its armed wing prior to any act of ending the occupation or dismantling settlements on the side of Israel. Thirdly, notwithstanding Israel’s violation of agreements between the PLO and Israel (including Oslo and the Road Map), Hamas had to adhere to all such agreements. This should not give the wrong impression of a passive Palestinian leadership, which is only a recipient of violence and occupation. Evidently, Palestinians have contributed to the stale-mate reached on the negotiations table. Nevertheless, the different positions of ‘occupier and occupied’ assigns different expectations from each party.

204 Ibid. See also Western Sahara, Advisory Opinion, supra note 95
206 Ibid.
207 Ibid.
Especially with a regime of conditionality, the occupier is expected to share the burden of conditions assigned to the self-determination unit.

The imposition of conditions for independence on a war-stricken entity such as the PNA is likely to fail. The peace process has been going on for years and there is still little sign of progress; therefore there is a resort to “provisional” solutions. The history of occupation in Palestine transcended traditional notions of occupation in International Law. Specifically, the long-term nature of occupation in Palestine makes any ‘provisional’ proposals susceptible to criticism. Temporary solutions are proposed until agreement over ‘final status issues’ is reached. The difficulty of reaching such an agreement and the complex political reality mean that temporary solutions will become permanent and form the future status quo. Therefore, calls for provisional borders while leaving other final status issues to a future date should be rejected.\textsuperscript{208} The creation of a provisional Palestinian state will reduce the self-determination problem to just another border dispute.\textsuperscript{209}

Notwithstanding the problems associated with the international law of self-determination outlined in this paper, yet there is a tendency to deformalize the already-problematic law. Even when the law provides only modest protection, there is still a political will to deformalize it and to leave the negotiating context to decide the applicable law. Israel has been constructing the Wall in the West Bank, including areas around and in East Jerusalem, since April 2002.\textsuperscript{210} The Israeli government and the Israeli Supreme Court, acting as the High Court of Justice (HCJ), hold that the Wall is merely an anti-terrorism tool that has no annexation implications.\textsuperscript{211} It is true that the HCJ’s \textit{Beit Sourik} decision provided some recourse to the victims, however by

\begin{thebibliography}{9}
\bibitem{208} Ibid.
\bibitem{209} Ibid.
\bibitem{210} Kattan, “The Wall, Obligations \textit{Erga Omnes},” \textit{supra} note 137 at 94.
\end{thebibliography}
avoiding the larger issue it evaded the conclusion reached by the ICJ’s Advisory Opinion on the
*Legal Consequences of the Construction of the Wall: occupation and de facto annexation by the*
wall and the settlements deny Palestinians the right to self-determination.\(^{212}\) It is no surprise that
the erected wall snakes around densely-populated Jewish settlements in the West Bank.\(^{213}\) The
Wall poses two different forms of challenges to the exercise of self-determination. The first
being a likely annexation of territories illegally used for settlement activity. The second is the
hardship experienced by the Palestinian population as a consequence of the Wall, affecting
around 210,000 Palestinians.\(^{214}\) Specifically, those living between the Wall and the green line are
cut off from their livelihood, be it schools, farmlands, hospitals, work-places and other services,
creating a new class of refugees and/or internally displaced persons (IDPs).\(^{215}\) One of the
purposes of the Wall is to force Palestinian residents to leave their homes and start from scratch
in other areas of the West Bank, “by making life intolerable for them.”\(^{216}\) The ICJ’s Advisory
Opinion recognized that the Wall is a major impediment to the exercise of self-determination.
Specifically the Court found that the existence of a ‘Palestinian people’ is no longer an issue,
recognizing the Palestinian’s right to self-determination as a result of the construction of the
Wall.\(^{217}\) It further stated that the obligations violated by Israel in the construction of the Wall
include certain obligations *erga omnes*: the right to self-determination and certain obligations
under international humanitarian law.\(^{218}\) Nevertheless, Judge Rosalyn Higgins, in her Separate
Opinion, argues that the construction of the separating wall is irrelevant to the exercise of the
right to self-determination. She disagrees with the majority opinion, arguing that the right to self-

\(^{212}\) Aeyal Gross, “The Construction of a Wall Between The Hague and Jerusalem: The Enforcement and Limits of
\(^{214}\) Ibid. at 95.
\(^{215}\) Ibid.
\(^{216}\) Ibid.
\(^{217}\) *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ
Reports 2004, at 118.
\(^{218}\) Ibid. at 155.
determination has nothing to do with the construction of a separating Wall in the West Bank.\textsuperscript{219} She questions that the Court’s finding whether the Wall in-fact poses a “serious impediment” to the exercise of the Palestinian right to self-determination.\textsuperscript{220} With that interpretation, self-determination is presented as an empty principle that is void of any substantive value. Despite the World Court’s majority opinion, the right to self-determination is still trapped in ‘the Higgins perspective’. All projects designed to directly affect the future status of Palestine are infused with notions of continued dependency and conditionality. Even with the majority opinion’s support of the Palestinian right to self-determination, there is a parallel deormalization of the law in the negotiations on the status of Palestine. As discussed, through international bargaining and conditionality, the legal bargaining power of the Palestinians is weakened by a historically deficient conception of self-determination and by the burden bestowed upon them to abide by certain conditions to merit their sovereignty and to have an independent state.

\textsuperscript{219} Separate Opinion of Judge Higgins, ICJ Decision of the Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory, (Jul. 2004), online: The United Nations http://domino.un.org/unispal.nsf/357668878a81e92785256df9005c23c2/9e0eea943982c8ee85256eeb005961bb!OpenDocument&Click=

\textsuperscript{220} Ibid.
Conclusion

The conception of self-determination has been shaped by two main factors. The first is a history of dependency that was visible primarily through the role played by international institutions. The second is a merit-based system of independence which sets up prerequisites for the exercise of self-determination. The merit-based status is portrayed as “an alternative literature” through the scholarship written on earned sovereignty. Nevertheless, it bears the same legacies of the traditional account. The dual conceptualization of the right to self-determination through these two seemingly different accounts has created a very limited conception of self-determination. Under those accounts, self-determination is merely a reflection of an external status that is easily molded by international relations and bargaining powers. The case of Palestine lies between the different deficient conceptions of self-determination that fail to capture the essence of the emancipation process. As mentioned earlier, despite the fact that there is an international consensus that Palestinians have a right to self-determination, nevertheless there is a clear disagreement, on what the right to self-determination of the Palestinians should entail. What practical implications do such assertions have on the exercise of the Palestinians of their alleged right to self-determination? Does the current legal formulation of the right to self-determination address issues such as the construction of the wall, or the building of settlements as being part and parcel of the general right to self-determination? Whilst concluding that current conceptions are deficient; it is important to investigate the content of the right to self-determination in international law. Arguably, the right to self-determination has a “discernable core content”, embodied in issues such as freedom of movement (obstructed by the construction of the Wall,

222 Ibid. 121.
the settlements, checkpoints and curfews) including freedom from any form of “demographic manipulation such as the imposition of an alien settler population,”\textsuperscript{223} and socio-economic rights including the right to control and permanent sovereignty over natural resources,\textsuperscript{224} confiscation of land, and home demolitions. All those sub-rights directly question the current regime in the West Bank and the Gaza Strip. Significantly, they question the viability of a future exercise of self-determination and a potential Palestinian state. When the right to self-determination confers minimal substantive entitlements on the self-determination unit, it becomes very easy to reach this ‘rare’ consensus on the Palestinian’s right to self-determination. This is especially the case since the legal right is itself deformed to a point where its application and substance are determined solely by the negotiations’ context. Notably, the trend of deformedization normalizes acceptance of an incomplete process of independence. For example, the normalization of injustice (such as annexation) changes the list of conditions attached to the exercise of self-determination. In other words, the normalization of the existence of the settlements will create another set of conditions to be negotiated (such as the security of settlers), and the outcome will be a truncated independence with an annexed settler-inhabited territory. The key is to strike a balance between the specificities and the generalities of a given self-determination case. Specificity should not automatically trigger the exception discourse, whereby the case is rendered as ‘political’ that is to be dealt with outside the law, and a generality should not void the case of specific legal substance.

It is important to think of self-determination as holding an inseparable duality of meaning namely, self-determination as an outcome and self-determination as a process.\textsuperscript{225} To neglect the process of the exercise of the right to self-determination is to ignore the core of the emancipation

\textsuperscript{223} Ibid. at 135.
\textsuperscript{224} Ibid.
\textsuperscript{225} Gareau, “Shouting At the Wall,” supra note 15 at 495.
exercise. It is undeniable that independence from colonialism as an outcome was a remarkable historical moment in the history of the North-South relationship. Nevertheless, the focus on the outcome falsely linked emancipation through self-determination solely to the decolonization moment. Therefore, instead of ridding the concept of its colonial implication, it underscores its unavoidable marriage with decolonization. Self-determination is the right to choose, whereby a give people have the right to select the outcome of their choice. More importantly, they have a right “to be provided [with] a process through which the choice will be expressed.”

Unfortunately, control over the process is often left to third-parties, who largely ignore the substantive entitlements that give meaning to the right. The privilege of control sanctions the pronouncement of conditions that must be met in-order for independence to be realized. Therefore, the process of self-determination imposes a burden on the self-determination unit instead of imposing it on the occupying power.

There must be a clear distinction between the legal right to self-determination under international law, which is attached to a bundle of substantive entitlements, and the political process of negotiations. It is important to note that such a statement does not extract international law from its inherently political context; it simply re-enforces an adequate conception of self-determination that can enhance the Palestinian bargaining power in the negotiations. It is also to bring the case of Palestine to the forefront of self-determination cases, as opposed to a mere exception that is too tangled up in politics. It is the point of this paper that the legal conception of self-determination bestows upon the unit certain rights that have historically been denied in the different self-determination projects, most notably in the

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226 Ibid.
227 Ibid.
228 Ibid at 496.
229 Ibid. at 166.
decolonization process. The themes of dependency are still relevant; Palestinians must ensure that their version of self-determination does not re-enforce this dependency discourse. Additionally, the self-determination exercise should neither be ‘snap-shot’ independence nor a prolonged process of earning sovereignty by satisfying conditionality. On the contrary, it should be a process of creating the needed circumstances that would rid self-determination from the dependency and merit-based discourses.

Addressing the content of self-determination is a topic that is worth further exploration and research that is beyond the scope of this paper. By investigating the core content of the right, self-determination can potentially disassociate itself from its history of application and interpretation. Therefore, issues ranging from freedom of movement, sovereignty over natural resources, the Wall, the settlements, and the refugees (among others) can move to the forefront of the self-determination entitlement. Self-determination can move from being a formal process of defining the external status to a more internal process that seeks genuine emancipation, whereby the burden is not placed on the occupied but on the occupier.