Abstract of issues:

Israel's planned withdrawal of its armed forces and settler population from Gaza has been presented as the termination of its occupation of that territory. Assessment of this contention, in contemporary international law, cannot be confined within the narrow framework of the traditional law of armed conflict as this pertains to occupied territory. Self-determination is “one of the essential principles of contemporary international law”:¹ its potential impact both on the law of armed conflict in general, and the Gaza withdrawal plan in particular, must be determined. Also, given Israel’s declared intent to continue to control both the airspace and maritime zones of Gaza, a narrow focus on the law of occupation is inadequate: any assessment of the legal consequences of the plan must take into account the law of civil aviation and of aerial warfare and, perhaps more importantly, of the law of the sea and of naval warfare.

Summary and anatomy of this argument:

Part I: The relevance of self-determination in the termination of occupation:
   a. the dynamic aspect of the Martens clause
   b. self-determination and international humanitarian law
   c. the consequences of the Wall advisory opinion
   d. self-determination – process and substance
   e. self-determination and unilateral withdrawal from Gaza
      i. the integrity of the occupied Palestinian territories as a self-determination unit
      ii. withdrawal and the process of self-determination
      iii. the post-withdrawal status of Gaza: dismemberment, illegal creation or business as usual?

Part II: The termination of occupation under the law of armed conflict:

Part III: Airspace and maritime zone issues:

Part IV: Summary of conclusions.

1. East Timor case (Portugal v Australia), ICJ Rep, 1995, 90 at 102, para.29.
Introduction:
The aim of Israel’s Revised Disengagement Plan of 6 June 2004\(^2\) is to ensure that:

In any future permanent status arrangement, there will be no Israeli towns and villages in the Gaza Strip. On the other hand, it is clear that in the West Bank, there are areas which will be part of the State of Israel, including major Israeli population centers, cities, towns and villages, security areas and other places of special interest to Israel.\(^3\)

To this end, Israel aims to evacuate Gaza, with the consequence that there will be no permanent presence of Israeli security forces within Gaza.\(^4\)

An assessment of the legal implications of Israel’s disengagement must proceed at two distinct normative levels. On the one hand, general international law is relevant to the analysis of the situation not simply for Israel and Palestine but, importantly, also for third States. Also pertinent, however, are the specific bilateral obligations assumed by Israel and Palestine as a result of the instruments adopted during the Oslo process,\(^5\) although the 1969 Vienna Convention on the Law of Treaties does not govern the Oslo instruments as one of the parties, the Palestine


\(^{3}\) Revised Disengagement Plan, Principle Three (Political and Security Implications).

\(^{4}\) Revised Disengagement Plan, Article 3.1, The Gaza Strip (Main Elements).

Liberation Organisation, is not a State. The Vienna Convention consciously adopted a restricted definition of treaties for its purposes, reflected in Article 1 which expressly provides, “The present Convention applies to treaties between States”. Further, Article 2.1.a defines a treaty as “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation”. Article 3 of the Vienna Convention, however, provides that the Convention does not prejudice the legal force of “international agreements concluded between States and other subjects of international law”, nor the application to them of rules contained in the Convention which have customary status. On the basis of customary law, Watson convincingly argues that the Oslo instruments are binding bilateral treaties. Further, neither Israel nor Palestine has claimed that the 1995 Israel-Palestine Liberation Organisation Interim Agreement, in particular, has terminated as the result of the operation of the customary law of treaties following alleged material breach or by the operation of the *clasula rebus sic stantibus*. Indeed, Principle Seven (Political and Security Implications) of the Disengagement Plan expressly contemplates the continued applicability of these instruments:

> The process set forth in the plan is without prejudice to the relevant agreements between the State of Israel and the Palestinians. Relevant arrangements shall continue to apply.


7. See Commentary to draft Article 3, Watts, supra note 6, 626-627.


The Oslo process, however, received little attention during the *Wall advisory opinion* proceedings before the International Court. Although passing mention was made of the Oslo instruments in representations made to the Court, generally this was done in the context of elucidating the history of Israel-Palestine relations\(^{10}\) rather than as a substantive ground of argument. Some States, for instance, relied on Oslo instruments to indicate that Israel had recognised the right of the Palestinian people to self-determination;\(^{11}\) the territorial integrity of the Occupied Palestinian Territory;\(^{12}\) or to claim that the Oslo instruments did not modify the occupied status of Palestine.\(^{13}\) It is worth noting that Palestine itself did not rest any substantive argument, whether in whole or in part, on Oslo instruments: for instance, it made no reference to the Oslo process in its discussion of change in the status of the territory nor in its discussion of self-determination.\(^{14}\) This lack of reliance on the Oslo instruments was reflected in the text of the advisory opinion. The Court referred to the Oslo process only twice: first, the Court noted its existence\(^{15}\) and, secondly, the Court alluded to the process in its elaboration of the Palestinian right to self-determination.\(^{16}\)

One can only speculate on the relative absence of discussion of the Oslo process in the advisory opinion proceedings but, assuming that the substantive


\(^{11}\) For instance, League of Arab States Written representation 60, para.7.2 and 77, para.8.34; and Malaysia Written Statement (30 January 2004) 43, para.118 and 44, para.120.

\(^{12}\) For instance, Jordan Written Statement (30 January 2004) 89-90, para.5.134; and Malaysia Written Statement 42-43, para.115.

\(^{13}\) Malaysia Written Statement 28-29, para.76.

\(^{14}\) See Palestine Written Statement 210-214, paras.472-482 and 235-238, paras.536-547.

\(^{15}\) *Wall advisory opinion*, para.77.

\(^{16}\) *Wall advisory opinion*, para.118.
content of the instruments could be relevant to the proceedings, two principal considerations seem relevant. In the first place, although the existence of the Oslo instruments was noted in the preamble of General Assembly resolution ES-10/14 (21 October 2003) which requested the Court to deliver the opinion, the question posed to the Court dealt with the legal consequences arising from the construction of the wall in terms of “the rules and principles of international law”, and not in terms of the bilateral legal relationships existing between Israel and Palestine. In short, the question addressed a different, and more general, set of normative issues, and also an audience which is not legally bound by the bilateral relationships created by the Oslo process. Further, reliance on the Oslo instruments could well have transformed the normative core of the advisory proceedings into an essentially bilateral dispute between Israel and Palestine. This transformation of the nature of the proceedings would have clearly attracted the Eastern Carelia doctrine, and thus cause the Court to decline to answer the question posed because the proceedings amounted to an attempt to circumvent the principle of consensual jurisdiction.

Such considerations are irrelevant to the question of identifying and evaluating the legal implications of the disengagement plan. There must be a bifurcation of normative analysis which considers, on the one hand, the bilateral legal relationships between Israel and Palestine, but which also examines disengagement in the light of general international law and thus the implications for States and international organisations generally. Although the general aspects of disengagement must be set within the framework of the traditional law of armed conflict regarding the occupation of territory, this must also take account of the principle of self-determination. Self-determination has undoubtedly modified the traditional law of armed conflict, whether autonomously or through the operation of the Martens clause: the law of armed conflict does not exist in a normative vacuum isolated from developments in general international law. When the issue concerns a possible change in the international status of territory, the principle of self-

17. Watson, supra note 8 (“Wall decisions”), 24 enumerates a number of issues arising in the advisory opinion to which the provisions of the Oslo instruments had legal relevance, and expresses some mystification as to why these were not employed in the advisory opinion. The argument in the text outlines an answer based on procedural constraints inherent in the advisory proceedings.
determination, given its status as an “essential principle” of contemporary international law, must play a significant role in that evaluation, particularly in evaluating the implications for third States. Accordingly, the initial part of this analysis concentrates on the relationship between self-determination and the law of armed conflict.

Part I: The relevance of self-determination in the termination of occupation:

The implementation of the Disengagement Plan expressly contemplates a unilateral change by Israel of the legal status of Gaza – “the State of Israel is required to initiate moves not dependent on Palestinian cooperation”. As belligerent occupant of Gaza, Israel bears duties in relation to the territory and its people – for instance, under Article 43 of the Hague Regulations, the duty to maintain public order within the territory, and under Articles 55 and 56 of 1949 Geneva Convention IV, the duty of ensuring that food and medical supplies are available to the population and public health and hygiene within the territory “to the fullest extent of the means available to it”. Implementation of the Revised Disengagement Plan aims to divest Israel of these and its other responsibilities. Principle Six (Political and Security Implications) provides:

The completion of the plan will serve to dispel the claims regarding Israel’s responsibility for the Palestinians within the Gaza Strip.

Principle Seven, however, appears to contemplate a caveat to the effects of disengagement as it provides that the disengagement process “is without prejudice to the relevant agreements between the State of Israel and the Palestinians” which will continue to apply. Principles Six and Seven are surely contradictory. For instance, Article XXXI.7 of the 1995 Israel-Palestine Liberation Organisation Interim Agreement on the West Bank and the Gaza Strip provides:

Neither side shall initiate or take any step that will change the status of the West Bank and the Gaza Strip pending the outcome of the permanent status negotiations.

If Principle Six envisages a unilateral change effected by Israel in the status of Gaza, then this entails a Breach of Article XXXI.7. It is difficult to see what guarantee against prejudice Principle Seven may afford in this eventuality. 19

The question therefore arises of Gaza’s status under international law following implementation of the Revised Disengagement Plan. What are the consequences of Israeli withdrawal; can Israel unilaterally terminate its occupation of Gaza: what role should the Palestinian people’s right to self-determination play in this legal equation; what is the relationship between the right of self-determination and the traditional law of armed conflict, including the law of occupation?

a. the dynamic aspect of the Martens clause:

The law of armed conflict – which comprehends the law of occupation – is not a static body of international law whose content is dependent solely upon the provisions of treaties which have been concluded by States specifically to regulate the conduct and consequences of the use of military force, and also upon associated customary norms. On the contrary, the law of armed conflict itself recognises that its treaties are not comprehensive and that, as a discipline, it cannot be insulated from developments occurring in other fields of international law.

These considerations underpinned the Martens Clause which, by unanimous vote, was inserted into the preamble of 1907 Hague Convention IV. It provides:

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilised peoples, from the laws of humanity, and the dictates of the public conscience. 20

19. It should also be recalled that Principle Three (Political and Security Implications) envisages the maintenance of settlements in the West Bank and thus contradicts, eg, Interim Agreement Article XXXI.5 which expressly reserves the question of settlements for the permanent status negotiations.

20. On the Martens Clause, see: Military and paramilitary activities in and against Nicaragua case: merits judgment (Nicaragua v United States), ICJ Rep, 1986, 14 at 113-114, para.78; the
In the *Krupp* case, the US Military Tribunal at Nuremberg expressly affirmed and emphasised the rationale of the clause:

the preamble just cited, also known as "Mertens Clause", was inserted at the request of the Belgian delegate, Mertens, who was, as were others, not satisfied with the protection specifically guaranteed to belligerently occupied territory...it refers specifically to belligerently occupied country. The Preamble is much more than a pious declaration. It is a general clause, making the usages established among civilized nations, the laws of humanity and the dictates of public conscience into the legal yardstick to be applied if and when the specific provisions of the Convention and the Regulations annexed to it do not cover specific cases occurring in warfare, or concomitant to warfare.\(^\text{21}\)

The clause, which has been incorporated in other treaties relevant to the conduct of

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\(^{21}\) In re *Krupp* (1948) 15 Ann Dig 620 at p.622. Cassese, *supra note* 20, 204 argues that this ruling was obiter as the tribunal proceeded to apply specific provisions of the Hague Regulations, rather than Martens clause, to decide the case.
armed conflict, emphasises that the conventions do not provide a complete code for
the conduct of war but must be read within the context of general international law.
This is a relatively narrow interpretation of the clause which finds solid support in
State practice and judicial decisions.22 Meron argues that the pleadings in the
Nuclear weapons advisory opinion proceedings demonstrated that there was general
agreement on this construction of the Martens clause while “broader layers of
interpretation inspired strong disagreement”.23 Although the International Court
acknowledged the continued relevance of the clause,24 it “did not resolve the
principal controversies concerning its interpretation”.25 Nevertheless, the Australian
contention, made during its oral argument, that “[i]nternational standards of human
rights must shape conceptions of humanity and have an impact on the dictates of
public conscience”26 finds some support in the KW case, which was decided by the
Counsel de guerre de Bruxelles in 1950. In this, the Conseil de guerre employed
the Martens clause to import established human rights standards as interpretative
guidelines for the Hague Regulations.27 This is pertinent because self determination
is regarded as the pre-eminent human right: it has been claimed to be the human
right from which all others flow.28

Further, in the Nuclear weapons advisory opinion, the International Court
ruled:

the Court recalls that all States are bound by those rules in Additional Protocol I which, when
adopted, were merely the expression of the pre-existing customary law, such as the Martens

22. The most extensive analysis is Cassese, supra note 20.

23. Meron, supra note 20, 85.

24. Nuclear weapons advisory opinion, ICJ Rep, 1996(I), 226 at 257, para.78 and 259, para.84:
see also Nicaragua case: merits judgment, ICJ Rep, 1986, 14 at 113-114, para.218.

25. Meron, supra note 20, 87: see also Cassese, supra note 20, 210-211.


27. See Cassese, supra note 20, 207.

28. And you need a reference for this
Clause, reaffirmed in the first article of Additional Protocol I.\textsuperscript{29} This affirmation of the customary status of the Martens clause is important because Israel is party to neither the Hague Regulations nor Additional Protocol I, although the Israel High Court has itself affirmed the customary status of the Regulations.\textsuperscript{7}

b. self-determination and international humanitarian law:

While the Marten’s clause remains the residual provision by which self-determination (and other rules of customary international law) may be imported \textit{en bloc} into international humanitarian law, the doctrine of self-determination has also had a direct influence on specific treaty provisions that unequivocally form part of international humanitarian law \textit{per se}. This is particularly true of 1977 Additional Protocol I: self-determination provided an important part of the substantive normative backdrop to the negotiation of this instrument.

Before the convening of the Diplomatic Conference that lead to the conclusion of Additional Protocol I, the General Assembly adopted resolution 3103 (XXVIII)(12 December 1973), which was entitled \textit{Basic principles of the legal status of the combatants struggling against colonial and alien domination and racist régimes}. This recalled in its penultimate preambular paragraph that there was a “need for the elaboration of additional international instruments and norms envisaging, \textit{inter alia}, the increase of the protection of persons struggling for freedom against colonial and alien domination and racist régimes”: the fourth preambular paragraph had reaffirmed that such struggles were undertaken in exercise of the right of self-determination.

At the Diplomatic Conference, the majority of participating States emphasised that, in order to maintain the unity of international law, international humanitarian law could not be isolated and self-contained but had to take into account the rules of general international law. In this connection, emphasis was placed on the need to

\textsuperscript{29} ICJ Rep, 1996(I), 259, para.84.

adapt international humanitarian law to conform with the principles expounded by the International Court of Justice in paragraph 53 of the *Namibia advisory opinion*,\(^{31}\) namely that “an international instrument must be interpreted and applied within the overall framework of the juridical system in force at the time of the interpretation”.\(^{32}\)

A consequence of the influence of self-determination on Additional Protocol I was the adoption of Article 1.4 which extended the definition of international armed conflict to encompass “armed conflicts in which peoples are fighting against colonial domination and alien occupation\(^{33}\) and against racist régimes in the exercise of their right of self-determination”. Wilson notes that this provision demonstrated widespread support for self-determination as an established legal right: \(^{34}\) governments which opposed or abstained in the vote on Article 1.4\(^ {35}\) did so because they thought


\(^{33}\) Sandoz, *supra note 31*, 54 notes:

> The expression “alien occupation” in the sense of this paragraph – as distinct from belligerent occupation in the traditional sense of all or part of the territory of one State being occupied by another State – covers cases of partial or total occupation of a territory which has not yet been fully formed as a State.


\(^{35}\) Article 1.4 was adopted by 87 votes -1, with 11 abstentions – only Israel cast a negative vote: the abstaining States were Canada, Federal Republic of Germany, France, Guatemala, Ireland, Italy, Japan, Monaco, Spain, the United Kingdom, and the United States – see Wilson, *supra note 34*, 165.
that the criteria it employed were arbitrary and subjective, and feared that it would lead to an unequal and partial application of international humanitarian law. No delegation argued that the use of force in pursuit of self-determination was, in itself, illegitimate.\(^{36}\)

Accordingly, self-determination has been recognised as a relevant factor in international humanitarian law, but its constituent treaties do not determine its consequences in the termination of an occupation. This is a matter which must be considered by assessing the interplay of principles of customary international law. In particular, can it be maintained that the normative requirements of self-determination inevitably take priority in the application of the rules on the termination of occupation? The best guidance that can be obtained to answer this question is by examining the jurisprudence of the International Court of Justice which concerns the Palestinian people’s right to self-determination and the normative status of certain rules of international humanitarian law.

c. the consequences of the Wall advisory opinion:

In the Wall advisory opinion,\(^ {37}\) the International Court of Justice authoritatively affirmed the entitlement of the Palestinian people to the right of self-determination, ruling that this had also been recognised by Israel;\(^ {38}\) that it was a right erga omnes, whose realisation all UN member States, by virtue of General Assembly resolution 2625 (XXV)(24 October 1970),\(^ {39}\) as well as all States parties to the UN Covenants on Human Rights by virtue of common Article 1 of these Covenants, had the duty to

\(^{36}\) Wilson, supra note 34, 128.


\(^{38}\) Wall advisory opinion, para.118.

\(^{39}\) In the Nicaragua case, the International Court ruled that resolution 2625 expressed rules of customary international law – see Military and paramilitary activities in and against Nicaragua case: merits judgment (Nicaragua v United States), ICJ Rep, 1986, 14 at 99-100, para.188: see also Wall advisory opinion, para.87.
promote; and that the construction of the wall along its planned route “severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of Israel’s obligation to respect that right”. The Court also, however, recalled its ruling in the Nuclear weapons advisory opinion that certain rules of international humanitarian law constituted “intransgressible principles of international customary law” which incorporated obligations “which are essentially of an erga omnes character.”

Further, the International Law Commission’s exegesis of the Court’s jurisprudence argues that self-determination and “intransgressible principles” of international humanitarian law do not simply constitute obligations erga omnes which all States must respect, but also that they have ius cogens status. In other words, that these obligations are peremptory – that States cannot derogate from these norms in their international relations. Doctrine affirms that there is a conceptual connection between the two categories of obligations erga omnes and ius cogens norms, but does not conclusively affirm their coincidence. de Hoogh underlines

40. Wall advisory opinion, para.88: see also paras.155-156.

41. Wall advisory opinion, para.122.

42. Wall advisory opinion, para.157: the Nuclear weapons advisory opinion ruling which the Court affirmed is from ICJ Rep, 1996(I), 257, para.79.


that obligations *erga omnes* are essentially connected with remedies available to States following a breach of international law, whereas the notion of *ius cogens* norms places emphasis on their substantive content.\textsuperscript{45}

In context, the Court’s rulings on “intransgressible principles” must refer primarily to their substantive content because it placed emphasis on the prohibition of the impugned conduct, rather than on remedies for the breach of these norms. Similarly, when considering the impact of self-determination on international humanitarian law, the issue is that of the influence of its substantive content – in particular all States’ duty to promote respect for and realisation of this right – rather than the remedies to which they may have recourse following a denial of self-determination.

 Accordingly, on the face of it, there appears to be two bodies of rules which have an equal normative status, neither of which allows derogation in favour of a competing rule. How, then, can self-determination temper the application of rules of international humanitarian law? The answer lies in the relative determinacy of the rules identified as being obligations *erga omnes* by the Court, and consequently – and derivatively – as *ius cogens* norms by the International Law Commission. Although self-determination has expressly been stated to fall within these categories, the identification of the specific rules of international humanitarian law which are “intransgressible” has been far less candid. The Court did not enumerate these rules in either the *Wall advisory opinion* or in the *Nuclear weapons advisory opinion*. In the latter, it simply opined:

> It is undoubtedly because a great many rules of international humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and “elementary considerations of humanity” as the Court put it in its Judgment of 9 April 1949 in the *Corfu Channel case* (*ICJ Reports, 1949*, p.22), that Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.\textsuperscript{46}

In the *Nicaragua case*, the Court also relied on this passage from *Corfu Channel*

\textsuperscript{45} de Hoogh, *supra note 44*, 53: compare Ragazzi, *supra note 44*, 203 et seq.

\textsuperscript{46} *Nuclear weapons advisory opinion*, ICJ Rep, 1996(I), 257, para.79.
and, accordingly, this may give some guidance in identifying the rules the Court thought are “intransgressible”. The Court stated:

Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court’s opinion, reflect what the Court in 1949 called “elementary considerations of humanity” (Corfu Channel, Merits, ICJ Reports 1949, p.22...).47

Common Article 3 of the Geneva Conventions, *inter alia*, requires the parties to a conflict to treat humanely people taking no active part in hostilities, including express prohibitions on the use of violence, torture, hostage taking, outrages on personal dignity, and extra-judicial punishment and execution. It makes no mention of the termination of occupation: the rules of international humanitarian law on this question must, therefore, be excluded from the category of intransgressible principles. Consequently, because of its peremptory normative status, self-determination must take precedence over these rules and thus temper their application.

In the *Wall advisory opinion*, the Court’s elucidation of the implications of the Palestinian people’s right to self-determination is, however, rather terse and couched abstractly. This attracted criticism from within the Court itself. For instance, while endorsing the Court’s affirmation of the Palestinian people’s right to self-determination, Judge Higgins thought it “quite detached from reality for the Court to find that it is the wall that presents a ‘serious impediment’ to the exercise of this right”.48

Nevertheless, elsewhere and also in the context of an argument on self-determination, Judge Higgins cautioned against:

the pursuance of a policy of legal deconstructionism – the systematic attempt to empty everything of all substance and meaning. Resolutions must be shown to say nothing. Findings must be shown not to have been made. The substantive rights of others must be shown to amount to nothing more than United Nations procedures that may or may not be


invoked, but which have no objective existence of their own.\textsuperscript{49}

The question is therefore that of identifying the content of self-determination – the aspects of the “objective existence” of this right – relevant to the termination of occupation.

d. self-determination – process and substance:

Like many legal concepts, self-determination designates a core content and an associated, yet integral, bundle of rights and duties. The core content is clear:

> all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.\textsuperscript{50}

Further:

> The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.\textsuperscript{51}

Following Drew’s analysis,\textsuperscript{52} self-determination has two distinct vectors. The classic formulation of its core content emphasises self-determination as process – the right freely to determine a political status – but this entails that self-determination must have a substantive content:

the right to a process does not exhaust the content of the right of self-determination under international law. To confer on a people the right of ‘free choice’ in the absence of more substantive entitlements – to territory, natural resources, etc – would simply be meaningless. Clearly, the right of self-determination cannot be exercised in a substantive vacuum. This is

\textsuperscript{49} Professor Higgins, advocate for Portugal, \textit{East Timor case} (Portugal v Australia), Pleadings, CR.1995/13 (13 February 1995), 8, para.1.

\textsuperscript{50} General Assembly resolution 2625 (XXV)(24 October 1970), \textit{Declaration on principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations}: affirmed \textit{Wall advisory opinion}, paras.88-89.

\textsuperscript{51} General Assembly resolution 2625.

both explicit and implicit in the law. For example, implicit in any recognition of a people’s right to self-determination is recognition of the legitimacy of that people’s claim to a particular territory and/or set of resources...[T]he following can be deduced as a non-exhaustive list of the substantive entitlements conferred on a people by virtue of the law of self-determination...: (a) the right to exist – demographically and territorially – as a people; (b) the right to territorial integrity; (c) the right to permanent sovereignty over natural resources; (d) the right to cultural integrity and development; and (e) the right to economic and social development.\textsuperscript{53}

In connection with the Israeli planned withdrawal from Gaza, two aspects of self-determination take on particular importance: the exercise of the process, of the free determination by the Palestinian people of its political status; and the substantive issue of the integrity of the self-determination unit.

e. self-determination and unilateral withdrawal from Gaza:
Traditionally, the termination of an occupation was simply a question of fact – “Occupation comes to an end when an occupant withdraws from a territory, or is driven out of it”.\textsuperscript{54}

the moment the invader voluntarily evacuates [occupied] territory, or is driven away by a levée en masse, or by troops of the other belligerent, or of his ally, the former condition of things ipso facto revives. The territory and individuals affected are at once, so far as International Law is concerned, considered again to be under the sway of their legitimate sovereign. For all events of international importance taking place on such territory the legitimate sovereign is again responsible towards third States, whereas during the period of occupation the occupant was responsible.\textsuperscript{55}

Characteristically, this was the corollary of the test which determines the start of an occupation which is essentially a question of fact\textsuperscript{56}, albeit one which must be


\textsuperscript{55}. Oppenheim-Lauterpacht, \textit{supra note} 54, 618.

distinguished from invasion pure and simple:

Invasion is the marching or riding of troops - or the flying of military aircraft - into enemy country. Occupation is invasion plus taking possession of enemy country for the purpose of holding it, at any rate temporarily. The difference between mere invasion and occupation becomes apparent from the fact that an occupant sets up some kind of administration, whereas the mere invader does not.  

This distinction flows clearly from the provisions of the Regulations annexed to 1907 Hague Convention IV respecting the Laws and Customs of War on Land, Articles 42 and 43 of which provide:

42. Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.

43. The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

The subsequent emergence of the right to self-determination cannot fail to have had an effect on the traditional test for the termination of occupation. If “occupation is a question of fact and of the construction which international law places upon facts”, then self-determination, given its peremptory status, cannot fail to be part of the law relevant to occupation, including the conditions for the termination of an occupation.

i. the integrity of the occupied Palestinian territories as a self-determination unit:

Drew notes that:

Despite its text book characterization as part of human rights law, the law of self-


58. McNair and Watts, supra note 56, 378.
determination has always been bound up more with notions of sovereignty and title to territory than what we traditionally consider to be “human rights.”

This uncontroversial view also found expression in Palestine’s written statement to the International Court during the Wall advisory opinion proceedings. Palestine repeatedly spoke of “the territorial sphere over which the Palestinian people are entitled to exercise their right of self-determination”.

Similarly, in the East Timor case proceedings, Portugal underlined that self-determination has a territorial basis, and that its exercise simultaneously decides both the destination of the people and of the territory. Portugal described the relationship between the people and the territory as a “principle of individuality”. This entails that the territory which is the basis of the right is legally distinct from any other territory and, moreover, is entitled to territorial integrity. It forms a single unit which must not be dismembered. Further:

un territoire qui constitue l’assise du droit d’un peuple à disposer de lui-même... ne peut changer de statut juridique que par un acte d’autodétermination de ce peuple. La Résolution 1541 du 17 décembre 1960 de l’Assemblée générale précise bien cette norme.

Leaving to one side East Jerusalem, which Israel has purported to annex despite the protests of other States and the United Nations that this is illegal, Israel

59. Drew, supra note 52, 663.

60. See, eg, Wall advisory opinion Pleadings, Palestine Written Statement, 239, para.548 and 240, para.549.

61. East Timor Pleadings, Portuguese Memorial (18 November 1991), 195, para.7.01: emphasis suppressed in quotation. See also Wall advisory opinion Pleadings, League of Arab States Written Statement, 62, para.8.2 and 76, para.8.28.

62. For instance, for the views of the European Union see, eg, Marston G (Ed), United Kingdom materials on international law, 61 British Yearbook of International Law 463 (1990) 624; ibid, 62 British Yearbook 535 (1991) 696, 697; and ibid, 64 British Yearbook 615 (1993) 724; for the United States’ view, see 1976 United States practice in international law, 634, and for a consensus statement issued by the Security Council on 12 November 1976, see ibid, 711 at 712; see also, in particular, Security Council resolutions 476 (30 June 1980) and 478 (20 August 1980), and the review of Security Council action at Wall advisory opinion, para.75.
and the Palestine Liberation Organisation have agreed that the West Bank and Gaza form “a single territorial unit” whose integrity is to be preserved pending the conclusion of permanent status negotiations.63 In particular, Article XXXI.7 of the 1995 Israel-Palestine Liberation Organisation Interim Agreement stated:

Neither side shall initiate or take any step that will change the status of the West Bank and the Gaza Strip pending the outcome of the permanent status negotiations.

Consonant with the International Court’s finding that the Interim Agreement affirmed the Palestinian people’s right to self-determination,64 these provisions simply record the status and integrity of the West Bank and Gaza as a single self-determination unit, upon which the Palestinian people is entitled to exercise that right. Further, relying on the Interim Agreement, the Israel High Court has affirmed Israel’s recognition of the unity of the West Bank and Gaza as a single territorial unit.65

ii. withdrawal and the process of self-determination:

Israel’s plan to withdraw from Gaza is unilateral in both its conception and execution. Manifestly, should it claim that, or act as if, withdrawal entails a change in the status of Gaza – from occupied territory to some other status – then this will be in breach of the obligation Israel assumed under Article XXXI.7 of the Interim Agreement. All other things being equal, breach of treaty probably would not, in itself, be fatal to

63. See the 1993 Declaration of Principles on Interim Self-Government Arrangements, Article IV; and the 1995 Washington Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Article XI.1: for commentary, see Shehadah R, From occupation to Interim Accords: Israel and the Palestinian Territories (Kluwer: London: 1997) 35-37. The question of Jerusalem is, of course, a matter reserved for the permanent status negotiations, see the Agreed minutes to the Declaration of Principles on Interim Self-Government Arrangements, Understanding in relation to Article IV; and 1995 Interim Agreement, Articles XVII.1 and XXXI.5.

64. Wall advisory opinion, para.118.

65. Ajuri v IDF Commander, HCJ 7015/02 (3 September 2002), [2002] IsrLR 1, opinion of President Barak, 17-18, para.22. See also the B’tselem/HaMoked report, One big prison: freedom of movement to and from the Gaza Strip on the eve of the disengagement plan (March 2005), <http://www.hamoked.org.il/items/12800_eng.pdf>, 20-21, which notes, inter alia, that Israel incorporated the Interim Agreement in its entirety into its military legislation in both the West Bank and Gaza, and that this legislation has not been revoked.
such a claim: withdrawal might well amount to a termination of occupation, albeit a termination effected unlawfully which would engage Israel’s responsibility. Further, the legal consequences of breach of the Interim Agreement would, in principle, only be relevant in the bilateral relations between Israel and Palestine. Palestine could choose either to pursue remedies available under Article XXI of the Interim Agreement, or simply disregard the breach. For third States (and international organisations), breach of a bilateral agreement is a res inter alios acta in which they have no legal interest, and which entails no mandatory legal consequences for them.

Termination of occupation, however, is a matter of general international law and, even if primarily a question of fact, is nonetheless dependent upon “the construction which international law places upon facts”. Termination of occupation, to be legally effective, must be in conformity with the requirements of self-determination. This is a matter of concern to all States. If the exigencies of self-determination are disregarded, then this breach of self-determination can only entail a duty for States of non-recognition of the illegal situation thus created, as well as a

66. Article XXI (Settlement of differences and disputes) provides:

Any difference relating to the application of this Agreement shall be referred to the appropriate coordination and cooperation mechanism established under this Agreement. The provisions of Article XV of the [Declaration of Principles] shall apply to any such difference which is not settled through the appropriate coordination and cooperation mechanism, namely:

1. Disputes arising out of the application or interpretation of this Agreement or any related agreements pertaining to the interim period shall be settled through the Liaison Committee;

2. Disputes which cannot be settled by negotiations may be settled by a mechanism of conciliation to be agreed between the Parties.

3. The Parties may agree to submit to arbitration disputes relating to the interim period, which cannot be settled through conciliation. To this end, upon the agreement of both Parties, the Parties will establish an Arbitration Committee.

67. McNair and Watts, supra note 56, 378.
duty not to render aid or assistance in maintaining that illegal situation. Nor would States be absolved of their duty to promote, through joint and separate action, the actual realisation of the right of the people entitled to self-determination.

In the case of withdrawal from Gaza, two aspects of self-determination assume fundamental importance: the substantive aspect of the territorial integrity of the self-determination unit; and the process aspect of the free expression of the will of the Palestinian people.

A situation imposed unilaterally by an occupying power cannot under any circumstances be considered as an exercise of self-determination. This does not observe – indeed it brazenly disregards – the process aspect of self-determination. As Portugal declared in the East Timor case proceedings, the fundamental idea that dominates the exercise of the right of self-determination is that of freedom of choice:

au sens où le choix accompli par la population concernée doit s’être effectué en l’absence de toute contrainte extérieure, notamment militaire.

A situation imposed unilaterally by an occupant involves no choice on the part of the population entitled to self-determination. It cannot change the status of the territory in question. As Australia affirmed during the East Timor case proceedings, a State will:

breach the obligation to respect the right of a people to self-determination if its conduct prevents or hinders the exercise by the people of a non-self-governing territory of their right freely to determine their future political status.

Consequently, any claim that the international status of Gaza may be changed by virtue of unilateral action undertaken by Israel which does not take into account the free choice of the indigenous population is manifestly a breach of self-determination, in addition to a breach of the provisions of the Interim Agreement.

68. Compare Wall advisory opinion, para.159.
69. Compare Wall advisory opinion, paras.88 and 156.
70. East Timor Pleadings, Portuguese Memorial, 91, para.4.22.
71. East Timor Pleadings, Australian Counter-Memorial (1 June 1992), 167, para.375.
An analogy can be drawn here with the, admittedly unsatisfactory and seriously flawed, arrangements made for the termination of the Indonesian occupation of East Timor. The right of the East Timorese people to self-determination ultimately was rooted in Portugal’s failure to implement its duty of decolonisation before it was ousted from the territory by Indonesian forces in 1975, but Indonesia’s occupation gave it a role in the self-determination arrangements set out in the May 1995 East Timor Accords. The principal agreement, concluded between Portugal and Indonesia, requested the United Nations Secretary-General to conduct a popular consultation to ascertain whether the East Timor people would accept or reject a proposed constitutional framework granting the territory autonomy within Indonesia. To assist in this, the Secretary-General was also asked to establish a special United Nations mission. This General Agreement was supplemented by tripartite agreements between Indonesia, Portugal and the United Nations: the Modalities Agreement which set out the arrangements for the popular consultation; and the Security Agreement which aimed at establishing an environment free of intimidation for the consultation. The referendum question posed in the Modalities Agreement was inadequate: the population was given a restricted range of options, namely, special autonomy within Indonesia or independent Statehood as the default outcome should the offer of autonomy be rejected. Despite the deficiencies of this process, termination of occupation was, nonetheless, preceded by an attempt to determine the wishes of the population regarding its future political status. As Roberts has observed:

The essential feature of the ending of an occupation is often, though not always, an act of self-determination involving the inhabitants of the occupied territory. This act of self-determination may well require, as prerequisite or consequence, the withdrawal of foreign forces. Over the past four decades the international community has favoured self-determination in respect of at least five occupations – those of Namibia, the West Bank and

Analogous considerations are apparent in the arrangements made for the
termination of the occupation of Iraq. Because of the removal of the pre-occupation régime, instead of seeking its reinstitution and the reconstruction of its institutions as
would be expected under the traditional Hague law of belligerent occupation, the
Security Council has repeatedly affirmed “the right of the people of Iraq to determine
their own political future”. In accordance with this imperative, “in Iraq the stated
purpose of establishing the Interim Government has been to assist the development
definition of self-determination and democracy”.

To evaluate the self-determination issues that might be implicated in Israel’s
planned withdrawal by concentrating solely on Gaza is, however, to adopt too narrow
a focus. To note that no self-determination process has taken place in Gaza is to
consider only the procedural aspect of the right: it fails to consider its substantive
content. One substantive aspect is decisive in evaluating the disengagement plan:
the population of Gaza alone cannot exercise a right of self-determination. It
possesses no such right: in the case of Palestine, that right belongs to the population
of the territorial self-determination unit as a whole which comprises the West Bank
(including occupied East Jerusalem) as well as Gaza. The territorial integrity of a


75. See Security Council resolutions 1472 (28 March 2003), preambular paragraph 7; 1483 (22 May 2003), preambular paragraph 4; 1511 (16 October 2003), preambular paragraph 2; and 1546 (8 June 2004), preambular paragraph 4 and operative paragraph 3.

76. Roberts, supra note 73, 42.
self-determination unit\textsuperscript{77} cannot be disrupted, particularly by a belligerent occupant:

If an occupant controlled only part of a state and that part was not considered to be a distinct unit entitled to self-determination, the occupant would not be entitled to effect the secession of the occupied area (as in Northern Cyprus). Similar considerations imply that the occupant would not be entitled to establish a new government in such a region even if its inhabitants supported such an act.\textsuperscript{78}

Whether one considers either the process aspect of self-determination, or the substantive aspect of the occupant’s duty to maintain the integrity of the territory, Israel’s unilateral withdrawal – insofar as this aims to change the international status of Gaza – either fails to observe the requirements of the former, or threatens to breach the latter, or both.\textsuperscript{79} Accordingly, Israel’s withdrawal does not respect the right of the Palestinian people to self-determination and thus is in breach of international law, whether respect for self-determination is conceived of as an obligation \textit{erga omnes} incumbent upon all States or as a peremptory norm. Within the compass of the law of self-determination, what consequences flow for the international legal status of Gaza after Israel’s withdrawal?

\textbf{iii. the post-withdrawal status of Gaza: dismemberment, illegal creation or business as usual?}

As noted above, Principle Six (Political and Security Implications) of the Revised Disengagement Plan provides:

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\textsuperscript{78} Benvenisti E, \textit{The international law of occupation} (Princeton UP: Princeton: 1993) 183: see also Roberts, \textit{supra note 73}, 28-29; and Sassòli M, \textit{Article 43 of the Hague Regulations and peace operations in the twenty-first century}, \texttt{<http://www.ihlresearch.org/ihl/pdfs/sassoli.pdf>}, 14. In paragraph 4 of the separate opinion he appended to the \textit{Wall advisory opinion}, Judge Koroma expressed this point more bluntly: “Under the régime of occupation, the division or partition of an occupied territory by the occupying Power is illegal”.

\textsuperscript{79} As noted above, it will also be in breach of the obligation Israel assumed under Article XXXI.7 of the 1995 Interim Agreement.
The completion of the plan will serve to dispel the claims regarding Israel’s responsibility for the Palestinians within the Gaza Strip.

This clearly contemplates that Israel will either divest itself of responsibility for Gaza completely, or that it will remain as occupant of the territory but without its concomitant obligations, mandated by international law, towards its inhabitants. The latter may be dismissed as a legal impossibility: a State cannot unilaterally absolve itself from the performance of its obligations under international law. It can, of course, act as if these obligations did not exist and thus breach them, but a State cannot unilaterally cancel its obligations and declare that they no longer exist. But if Israel claims that it has divested itself of Gaza, what is the international status of the territory?

It is possible that some will assume that withdrawal terminates occupation and constitutes a devolution of authority to the Palestinian authorities which thereby becomes the presumptive government of an independent Gaza, which is perceived as the initial, if partial, emergence of Palestine as a State. Accordingly, simply by unilaterally removing its presence from Gaza, Israel will propel Gaza into the world of States. The validity of this assumption depends on whether Gaza could fulfil the internationally recognised requirements for Statehood.

The classic account of the basic criteria for Statehood is that contained in Article 1 of the 1933 Montevideo Convention on the Rights and Duties of States. This provides:

The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States.\(^\text{80}\)

These criteria constitute the minimum elements of Statehood\(^\text{81}\) and, as Crawford

\(^\text{80}\) Reproduced, 29 American Journal of International Law: Document supplement 75 (1934).

notes, they are based on the principle of effectiveness of territorial units, which is essentially a factual test. Manifestly, a permanent population inhabits Gaza, and its borders are reasonably well-defined. It is unequivocally established in international law that the requirement of territory for the purposes of the criteria of Statehood does not entail that the territory in question has exactly defined or undisputed borders. If this were the case, then Israel itself would not be a State. As the International Court of Justice observed in the *North Sea continental shelf cases*, there is:

> no rule that the land frontiers of a State must be fully delimited and defined, and often in various places and for long periods they are not, as is shown by the case of the entry of Albania into the League of Nations (*Monastery of Saint Naoum, Advisory Opinion, 1924, PCIJ, Series B, No. 9*, at p.10).  

In broad terms, the requirement of government entails that there is an authority which is “in general control of its territory, to the exclusion of other entities not claiming through or under it.” This formulation is obviously influenced by Judge Huber’s definition of independence, expounded in the *Island of Palmas case*, that:

> Sovereignty in the relations between States signifies independence. Independence in relation to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.

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83. *North Sea continental shelf cases* (Federal Republic of Germany v Denmark; Federal Republic of Germany v the Netherlands), ICJ Rep, 1969, 3 at 32, para.46.


85. *Island of Palmas case* (United States/Netherlands, 1928), 2 Reports of International Arbitral Awards 829, 838.
Indeed Crawford, like other doctrinal writers, substitutes this notion of independence for the traditional criterion of the capacity to enter into relations with other States. As he correctly observes, this capacity is not confined to States and is better seen as a consequence of, rather than a criterion, for Statehood.86 Independence is the central requirement of Statehood, which is dependent on the existence of an effective government.87

A distinction must, however, be drawn between formal and actual independence.88 Formal independence denotes the situation when an entity apparently possesses the outward signs of Statehood: actual independence describes the factual ability of the relevant authorities to exercise governmental powers – in other words, whether the government in fact fulfils Judge Huber’s definition of independence. Formal independence can mask a relationship of dependence, where an ostensibly independent government acts under the direction of another State. This relationship is frequently associated with some form of occupation, such as Japan’s creation of Manchukuo in occupied Manchuria in the early 1930s.89 1949 Geneva Convention IV attempts to guard against the formation of ostensibly independent, but nonetheless puppet, authorities in occupied territory.90

86. Crawford, supra note 81, 47-48: see also Brownlie, supra note 81, 71-72; and Jennings and Watts, supra note 81, 122. In relation to Palestine’s ability to conduct foreign relations under the Oslo instruments, see Singer J, Aspects of foreign relations under the Israeli-Palestinian Agreements on Interim Self-Government Arrangements for the West Bank and Gaza, 28 Israel Law Review 268 (1994).

87. See, eg, Crawford, supra note 81, 42, 48; Higgins, supra note 81, 25; Lauterpacht, supra note 81, 27-28; and Marek K, Identity and continuity of States in public international law (Droz: Geneva: 1968, 2nd edn) 162.

88. See, for instance, Brownlie, supra note 81, 71-72; Crawford, supra note 81, 52-71; Higgins, supra note 81, 26-27; Lauterpacht, supra note 81, 26-30; and Marek, supra note 87, 165-180.


90. See Article 47, and also Pictet J (Ed), Commentary to Geneva Convention IV relative to the protection of civilian persons in time of war (ICRC: Geneva: 1958) 272-275. Article 47 is discussed
In relation to Israel’s Disengagement Plan, it should be noted that Crawford argues that if a State claims to possess a discretionary authority to intervene in the internal affairs of a putative State, whether or not this claim is based in consent, this is inconsistent with the latter’s formal independence.\(^9^1\) Article One.3 (Security Situation following the Relocation) of the Disengagement Plan provides:

The State of Israel reserves its fundamental right of self-defense, both preventative and reactive, including where necessary the use of force, in respect of threats emanating from the Gaza Strip.\(^9^2\)

Leaving this matter to one side, Gaza is manifestly a populated territory: let us assume for present purposes that, Israeli disengagement terminates its occupation of Gaza in terms of the (traditional) law of armed conflict, and an effective and independent Palestinian government emerges in control of the territory. May that government legitimately be able to claim that Gaza is a State?

The traditional criteria for Statehood – population, territory, government and independence – are based on the notion of (factual) effectiveness, but in contemporary international law, “statehood [is] a normative concept in the international system and not a merely descriptive one.”\(^9^3\) If an entity, ostensibly qualified to be a State according to the traditional criteria, emerges into the international arena in breach of a normative component of Statehood, then its

\(^9^1\) Crawford, supra note 81, 56.

\(^9^2\) This Article is discussed infra, Part II. In the Wall advisory opinion, para.139, the International Court denied that an occupying State could have resort to self-defence in relation to threats emanating from occupied territory: for a sympathetic exegesis of this ruling, see Scobie I, Words my mother never taught me – “In defense of the International Court”, 99 American Journal of International Law 76 (2005); and for criticism, Wedgwood R, The ICJ advisory opinion on the Israeli security fence and the limits of self-defense, 99 American Journal of International Law 52 (2005); and Murphy SD, Self-defense and the Israeli Wall advisory opinion: an ipse dixit from the ICJ?, 99 American Journal of International Law 62 (2005).

existence is tainted by illegal creation. Consequently it cannot claim to be a State. A clear example of the denial of Statehood to an entity that apparently fulfilled the traditional descriptive requirements was Rhodesia, which emerged as a result of the Unilateral Declaration of Independence promulgated by its minority racial government in 1965. This was seen as the creation of an entity in violation of the right to self-determination which thus could not be recognised as a State.\textsuperscript{94} Breach of self-determination has also been adduced as a reason for the non-recognition of the “homeland-States” or bantustans created by the South African government during the apartheid period.\textsuperscript{95} This consequence follows logically from the status of self-determination as a peremptory norm of international law which cannot be disregarded in international relations. Entities which purport to be States but which have been created in violation of self-determination are legal nullities:

they are without legal effect as States, not because they fail to meet the essential requirements of statehood but because their existence violates a peremptory rule of international law.\textsuperscript{96}

Accordingly, even if we assume that Israeli disengagement terminates its occupation and that Gaza fulfils the traditional descriptive requirements of Statehood, it cannot claim to be nor can it be regarded as a State by other international actors. Israel’s Disengagement Plan violates the process aspect of the Palestinian people’s right to

\begin{thebibliography}{99}
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\item \textsuperscript{94} See, for instance, Crawford, supra note 81, 103-106, and 84-106 generally; Dugard, supra note 89, 90-98; Okeke, supra note 81, 81 et seq; and Wilson, supra note 34, 69.
\item \textsuperscript{96} Dugard, supra note 89, 131, see 127-131; and also Crawford, supra note 81, 77-84.
\end{thebibliography}
self-determination because of the absence of popular consultation. Further, were
the claim to be made that Gaza alone had emerged as the putative State of
Palestine, this would breach the substantive aspect of self-determination which
prohibits the dismemberment of the self-determination unit. Accordingly, any claim
that Gaza can achieve Statehood as a result of the disengagement is the assertion
of a legal nullity:

An act offending against jus cogens cannot be voidable or relatively invalid but only void. All
acts and transactions, such as treaties, unilateral acts and actions of states that offend again
jus cogens are void and not voidable.97

Any consideration of the factual effectiveness of the territorial entity is over-ridden by
the circumstance of illegal creation arising from the breach of the peremptory norm
of self-determination.

What, then, is the international legal status of Gaza after disengagement? An
argument might be made that Gaza has gained some sui generis international, or
internationalised, status which stops short of Statehood. Together with the rest of
Palestine, Gaza already has an international status as a self-determination unit. This
cannot be changed by Israeli disengagement. As Portugal observed during the East
Timor proceedings, albeit within the context of decolonisation, under UN law (arising
from the interpretation of the United Nations Charter and practice within the
organisation), a member State responsible for a non-self-governing territory cannot
claim that the status of that territory has changed in defiance of the views of the
competent UN organs. Since 1948, the General Assembly has held that a member
State does not have the exclusive competence to make this qualification unilaterally,
even under the pretext of a change of status.98 This is consonant with the fate of
Rhodesia and the South African “homelands” which retained the international status
they enjoyed before their fictive claims to Statehood were made.

The complication in the case of Gaza is that it is also occupied territory: do the
terms of Israel’s Disengagement Plan actually terminate its occupation of Gaza,
leaving Gaza as a detached portion of a self-determination unit which is subject

97. Orakhelashvili, supra note 53, 83.

98. East Timor Pleadings, Portuguese Reply (1 December 1992), 90, para.4.32.
neither to external nor internationalised administration? Normally the evacuation of a non-self-governing territory would result in its presumptive Statehood, but this option is not legally available to Gaza because its evacuation is accompanied by a breach of self-determination. If Israeli occupation terminates with disengagement, then the precise contours of the international legal status of Gaza are unclear.

In any event, Israel’s unilateral disengagement appears to disregard the consideration which then-Professor Higgins identified as the essence of self-determination:

So what then is the essence of the right of self-determination...? It is first that the peoples of a non-self-governing territory be treated as such - that is to say, that their interests be not assimilated with those of the governing State. In the concrete situation it must be looked at to see whether the interests of an administering Power (if as is usual, it is still in effective control), or any other power, really coincide with those of the people. The people must be treated as an alterité, entitled to that consideration now; not just peoples whose entitlements may come some day, some time, but happily not yet.99