Annex

# STUDY OF THE IMPLICATIONS, UNDER INTERNATIONAL LAW, OF THE UNITED NATIONS RESOLUTIONS ON PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES, ON THE OCCUPIED PALESTINIAN AND OTHER ARAB TERRITORIES AND ON THE OBLIGATIONS OF ISRAEL CONCERNING ITS CONDUCT IN THESE TERRITORIES*

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## INTRODUCTION

1. The General Assembly, by resolution 36/173 of 17 December 1981, requested the Secretary-General to prepare:

> "a report on the implications, under international law, of the United Nations resolutions on permanent sovereignty over natural resources, on the occupied Palestinian and other Arab territories and on the obligations of Israel concerning its conduct in these territories". 1/

The Secretary-General was requested to submit the report to the Assembly at its thirty-eighth session, through the Economic and Social Council. 2/

2. The present study, which has been prepared in connection with this request, is directed towards a legal analysis of the implications which the United Nations resolutions on permanent sovereignty may have with respect to the exercise of rights over natural resources in the occupied territories and with respect to the obligations of Israel concerning its conduct in those territories. The study will first examine the development of the principle of permanent sovereignty over natural resources. It will then consider the United Nations resolutions, in particular as they apply to occupied territories. It will also consider the relevant law of belligerent occupation and the implications of the United Nations resolutions as they may affect the obligations of an occupying Power. Finally, the study will consider implications with respect to the occupied Palestinian and other Arab territories and the obligations of Israel concerning conduct in those territories.

## I. THE PRINCIPLE OF PERMANENT SOVEREIGNTY OF PEOPLES AND NATIONS OVER THEIR NATURAL RESOURCES.

3. The principle of permanent sovereignty over natural resources found its first expression in the United Nations during the early 1950s in the parallel fields of economic development and human rights. 3/ On the economic side, the General Assembly, acting on reports of its Second Committee, adopted resolution 523 (VI) of 12 January 1952 and, more particularly, resolution 626 (VII) of 21 December 1952, in which the Assembly remembered "that the right of peoples freely to use and exploit their natural wealth and resources is inherent in their sovereignty and is in accordance with the Purposes and Principles of the Charter of the United Nations". This resolution almost immediately found some reference in State practice, being referred to both by Guatemala and by the United States of America in connection with the former's nationalization of the United Fruit Company. 4/ More significantly, it was cited by Italian 5/ and Japanese 6/ courts in upholding the validity of the Oil Nationalization Laws of Iran of 1951. 7/

4. At almost the same time, the principle of permanent sovereignty emerged in discussions in the Commission on Human Rights and in the Third Committee of the General Assembly as an essential element in the right of self-determination. 8/ The General Assembly had determined that an article relating to the right of

peoples to self-determination should be included in the International Covenants on Human Rights 9/ and, in 1954, requested the Commission on Human Rights to complete its recommendations on that article "including recommendations concerning their permanent sovereignty over their natural wealth and resources ...". 10/ Extensive work in the Commission on Human Rights and in the Third Committee at the tenth session of the Assembly in 1955, resulted in the approval of a text which, with only a minor drafting change, was to become article 1 of both the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. 11/ Paragraph 2 of the Article reads as follows:

> "All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence." 12/

5. These two threads ran together in 1958 with the establishment by the General Assembly of a Commission on Permanent Sovereignty over Natural Resources. 13/ Acting on a report of the Third Committee, the General Assembly, having noted that the right of peoples and nations to self-determination as affirmed in the two draft covenants completed by the Commission on Human Rights includes "permanent sovereignty over their natural wealth and resources", established the Commission on Permanent Sovereignty "to conduct a full survey of the status of this basic constituent of the right to self-determination". 14/ The work of the Commission, supported by extensive studies by the Secretariat, 15/ resulted in the adoption of the declaration on permanent sovereignty over natural resources (General Assembly resolution 1803 (XVII) of 14 December 1962). This resolution, adopted on the recommendation of the Second Committee by 87 votes to 2, with 12 abstentions, represented a carefully worked out compromise between the developing States on the one hand and the western market economy States on the other, particilarly on questions concerning expropriation. The right of nationalization, expropriation or requisitioning on grounds of public utility, security or the national interest was recognized, with appropriate compensation to be paid in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. 16/ The socialist States of Eastern Europe, some of whose key amendments had been rejected in close votes, abstained in the final vote on the resolution. 17/

6. In paragraph 1 of the declaration, the General Assembly states that "the right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned". In paragraph 7, the Assembly declares that "violation of the rights of peoples and nations to sovereignty over their natural wealth and resources is contrary to the spirit and principles of the Charter of the United Nations and hinders the development of international co-operation and the maintenance of peace".

7. The declaration (resolution 1803 (XVII)) has been cited in international arbitrations, 18/ national court decisions, 19/ Government decrees and diplomatic protests. 20/

8. Since the adoption of the declaration in 1962, the General Assembly has adopted a number of resolutions reaffirming an inalienable right to permanent sovereignty and linking the principle of development programmes. 21/ These culminated in 1974 in resolutions 3201 (S-VI) and 3203 (S-VI) of 1 May 1974 on the establishment of a new international economic order and resolution 3281 (XXIX) of 12 December 1974, containing the Charter of Economic Rights and Duties of States. 22/ Permanent sovereignty over natural resources is a pillar of both the new international economic order and the Charter of Economic Rights and Duties of States. 23/

9. In addition to United Nations resolutions dealing with permanent sovereignty generally, from 1972 onwards a series of General Assembly resolutions 24/ have dealt specifically with permanent sovereignty over natural resources in the occupied Palestinian and other Arab territories. These will be dealth with in more detail later in the present study. 25/

10. Permanent sovereignty has become a pervasive principle appearing in many different contexts. As previously noted, 26/ it appears in article 1 of both International Covenants on Human Rights. On 26 May 1983, 78 States had ratified or acceded to the International Covenant on Economic, Social and Cultural Rights and 75 to the International Covenant on Civil and Political Rights. No reservations relating to permanent sovereignty have been made by any of the signatories or parties. 27/ The principle of permanent sovereignty also appears in other treaties and international agreements. The General Assembly, in adopting resolution 1803 (XVII), had reserved its position with respect to succession of States which, it noted, was being examined by the International Law Commission. The Commission did not include a provision on permanent sovereignty in its draft articles on succession of States in respect of treaties. However, at the resumed session of the Vienna Conference in August 1978, article 13 was added providing that:

> "Nothing in the present Convention shall affect the principles of international law affirming the permanent sovereignty of every people and every State over its natural wealth and resources." 28/

In its draft articles on succession of States in respect of State property, archives and debts, the Commission did give prominent, although controversial, place to the principle of permanent sovereignty in the articles dealing with newly independent States. 29/ Those articles were adopted virtually unchanged by the Conference by 52 votes to 21 (art. 15) and 55 votes to 21, with 1 abstention (art. 38). The articles, relating, respectively, to State property and to State debts, provide that agreements between predecessor and newly independent States "shall not infringe the principle of the permanent sovereignty of every peole over its wealth and natural resources". Another treaty, the Banjul Charter on Human and Peoples' Rights, drawn up by the Organization of African Unity, also contains an article (art. 21) setting forth in some detail the right to permanent sovereignty of all peoples over their wealth and natural resources. 30/

11. The Lima Declaration and Plan of Action on Industrial Development and Co-operation, endorsed by the General Assembly in its resolution 3362 (S-VII) of 16 September 1975, has important provisions on permanent sovereignty. 31/ The

proposed Code of Conduct on Transnational Corporations, likewise contains a draft article on permanent sovereignty. 32/ Proposals for provisions on permanent sovereignty have been made in such diverse organs as the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization 33/ and the Legal Sub-Committee of the Committee on the Peaceful Uses of Outer Space. 34/ The principle of permanent sovereignty is also the subject of very extensive literature although much of this has centred on questions concerning expropriation of foreign owned properties and is not directly relevant to the present study. 35/

12. It may be concluded that the permanent sovereignty over natural resources is a generally accepted principle of international law. The controversies which rage over the subject concern its precise content and its relationship to other principles of international law. The existence of the principle itself at least as a generic norm is no longer open to question. States have generally accepted the principle of permanent sovereignty in one form or another, either as in resolution 1803 (XVII) or as in the resolutions on the new international economic order, as well as in the International Covenants on Human Rights. It is considered at the same time a basic constituent of the right of self-determination and an essential and inherent element of State sovereignty. It may be defined as the prerogative of peoples to determine how their resources will be developed, used, conserved and preserved 36/ and the "inalienable" right of each State to full exercise of authority over its natural wealth with the correlative right to dispose of its resources fully and freely. 37/

13. While there remains little doubt that the right of States and peoples to permanent sovereignty over natural resources is an established principle of international law, it would seem that a substantial majority of States would go further and assert that it is an imperative norm having the character of jus cogens. 38/ A smaller, but economically influential group of States would appear to feel strongly to the contrary. 39/ On the one hand a number of States would point out that the principle had not acquired independently the recognition "by the international community of States as a whole" required by article 53 of the Vienna Convention on the Law of Treaties to make it an imperative norm. On the other hand, it may be maintained by other States that as a constitutive element of sovereignty and self-determination the principle had already an inherent status approaching jus cogens.

## II. UNITED NATIONS RESOLUTIONS ON PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES

14. For the purposes of the present study the United Nations resolutions on permanent sovereignty over natural resources may be grouped in three categories: first, those resolutions which deal with permanent sovereignty generally; secondly, General Assembly resolutions dealing with permanent sovereignty over national resources 40/ in the occupied Palestinian and other Arab territories; and, thirdly, Security Council resolutions concerning the occupied territories. While resolutions in this third category do not expressly refer to permanent sovereignty, they contain provisions which are relevant to natural resources in the occupied territories.

## A. Resolutions dealing with permanent sovereignty generally

15. General Assembly resolutions dealing with permanent sovereignty over natural resources generally were surveyed in section I of the present study, in showing the development of the principle of permanent sovereignty. Particular points in those resolutions which may be relevant to the situation in the occupied territories would include the following:

(a) The right to permanent sovereignty is a right to freely use, control and dispose of natural resources. It is permanent and inalienable, inherent in sovereignty and a basic contitutuent of the right to self-determination.

(b) The right to permanent sovereignty is a right of both States and peoples. While there may be some confusion in certain passages, this conclusion clearly emerges from the resolutions as a whole. It also necessarily follows from the status of permanent sovereignty as a basic constituent of the right of peoples to self-determination. In resolutions 837 (IX), 1314 (XIII), 1803 (XVII) and 2692 (XXV), the General Assembly refers to "peoples and nations".

(c) The right to permanent sovereignty should be respected in conformity with the rights and duties of States under international law (resolution 1515 (XV)). Its violation is contrary to the spirit and principles of the Charter of the United Nations (resolution 1803 (XVII)). Any measure or pressure directed against any State exercising the right is a flagrant violation of the principles of self-determination of peoples and non-intervention, as set forth in the Charter, which, if pursued, could constitute a threat to international peace and security (resolution 2993 (XXVII)). No State may be subjected to economic, political or any other type of coercion to prevent the free and full exercise of this inalienable right (resolution 3201 (S-VI)).

(d) The right to permanent sovereignty includes the right of peoples to regain effective control over their natural resources. In resolution 3171 (XXVIII), the General Assembly: "Supports resolutely the efforts of the developing countries and of the peoples of the territories under colonial and racial domination and foreign occupation in their struggle to regain effective control over their natural resources."

(e) The right to permanent sovereignty also includes, in case of violation, the right to restitution and full compensation. In resolution 3201 (S-VI), paragraph 4 (f), the General Assembly includes the following principle: "The right of all States, territories and peoples under foreign occupation, alien and colonial domination or apartheid to restitution and full compensation for the exploitation and depletion of, and damages to, the natural resources and all other resources of those States, territories and peoples." (See to the same effect article 16 of resolution 3281 (XXIX) and paragraph 33 of the Lima Declaration endorsed by the General Assembly in resolution 3362 (S-VII)). 41/

(f) The last-mentioned resolutions add the duty of all States to extend assistance and in paragraph 2 of article 16 of resolution 3281 (XXIX), the General Assembly declares that: "No State has the right to promote or encourage investments that may constitute an obstacle to the liberation of a territory occupied by force."

## B. General Assembly resolutions on permanent sovereignty over natural resources in the occupied Palestinian and other Arab territories

16. The General Assembly, at its twenty-seventh session in 1972, acting on the report of the Special Political Committee, affirmed "the principle of the sovereignty of the population of the occupied territories over their national wealth and resources" (resolution 3005 (XXVII), para. 4). In the following sessions the Assembly, acting on reports of the Second Committee, adopted a series of resolutions dealing specifically with permanent sovereignty over national resources 42/ in the occupied Palestinian and other Arab territories (resolutions 3175 (XXVIII), 3336 (XXIX), 3516 (XXX), 31/186, 32/161, 34/136, 35/110, 36/173 and 37/135). 43/ In addition to the resolutions expressly referring to permanent sovereignty, a large number of other resolutions are directly relevant, to confirming the application of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (hereinafter referred to as the Fourth Geneva Convention) to all of the Arab territories occupied by Israel since 1967 44/ and in considering violations of the convention. In particular, in many of those resolutions the General Assembly condemns, inter alia, confiscation and expropriation of private and public Arab property and other transactions for the acquisition of land and illegal exploitation of the natural wealth, resources and population of the occupied territories. 45/

17. In its resolutions on permanent sovereignty in the occupied territories, the General Assembly, by preambular reference, recognizes the pertinence of (a) relevant provisions of international law and the provisions of the international conventions and regulations, in particular Hague Convention No. IV of 18 October 1907 and the Fourth Geneva Convention of 12 August 1949, concerning the obligations and responsibilities of the occupying Power; (b) previous resolutions on permanent sovereignty over natural resources, particularly their provisions supporting resolutely the efforts of the developing countries and the peoples of the territories under colonial and racial domination and foreign occupation in their struggle to regain effective control over their natural and all other resources, wealth and economic activities; and (c) the pertinent provisions of the resolutions on the new international economic order (3201 (S-VI) and 3202 (S-VI)) and on the Charter of Economic Rights and Duties of States (3281 (XXIX)). The following points are made in those resolutions:

(a) The General Assembly emphasizes the right of the Arab States and peoples to full and effective permanent sovereignty and control over their natural and other resources, wealth and economic activities (resolutions 37/135, 36/173, 35/110, 34/136 and 32/161 and, with variations, resolutions 31/186, 3336 (XXIX), 3175 (XXVIII) and 3005 (XXVII).

(b) The right of permanent sovereignty over natural resources belongs to the Arab States and peoples whose territories are under Israeli occupation. In all but one of the resolutions, the General Assembly refers to Arab States and peoples, while in resolution 37/135 the Assembly refers to the right of the Palestinian and other Arab peoples whose territories are under Israeli occupation.

(c) The General Assembly reaffirms that all measures undertaken by Israel to exploit the human, natural and all other resources, wealth and economic activities in the occupied territories are illegal and calls upon Israel to desist immediately from such measures (resolutions 37/135, 36/173, 35/110, 34/136 and 32/161 and, with variations, 3336 (XXIX) and 3175 (XXVIII)).

(d) Resolution 31/186 reaffirms the right of the Arab States and peoples to regain full and effective control over their natural and all other resources and economic activities.

(e) The General Assembly reaffirms the right to the restitution of, and full compensation for, the exploitation, depletion, and loss of and damage to, their natural, human and all other resources, wealth and economic activities, and calls upon Israel to meet their just claims (resolutions 37/135, 36/173, 35/110, 34/136, 32/161 and, with variations, 31/186 and 3336 (XXIX)). Resolution 3175 (XXVIII) refers to restitution of and full compensation for the exploitation and looting of, and damages to, the natural resources, as well as the exploitation and manipulation of the human resources of the occupied territories.

(f) The General Assembly calls upon all States to support the exercise of the foregoing rights (resolutions 37/135, 36/173, 35/110, 34/136 and 32/161) and calls upon all States, international organizations, specialized agencies, business corporations and all other institutions not to recognize, co-operate with or assist in any manner in any measures undertaken by Israel to exploit the natural resources of the occupied territories or to effect any changes in the demographic composition, the character and form of use of their natural resources or the institutional structure of those territories (resolutions 37/135 and 36/173 and, with variations, 35/110, 34/136, 32/161 and 3005 (XXVII)).

(g) In its latest resolution (37/135), the General Assembly condemns Israel for its exploitation of the natural resources of the occupied Palestinian and other Arab territories. 46/

18. In resolutions 3336 (XXIX) and 3175 (XXVIII), the General Assembly declares that the principles of permanent sovereignty and restitution apply to all States, territories and peoples under foreign occupation, colonial rule, or apartheid; in resolution 3336 (XXIX) the Assembly adds "alien domination ... or subjected to foreign aggression".

## C. Security Council resolutions relating to the occupied territories

19. Although there are no Security Council resolutions expressly referring to permanent sovereignty over natural resources, a number of resolutions relating to the occupied territories are relevant to the subject. Among the most directly pertinent provisions is paragraph 8 of resolution 465 (1980), adopted by the Security Council on 1 March 1980. The Security Council requested the commission established under resolution 446 (1979) to continue to examine the situation relating to settlements in the Arab territories occupied since 1967, including Jerusalem, and "to investigate the reported serious depletion of natural resources, particularly the water resources, with a view to ensuring the protection of those important natural resources of the territories under occupation".

20. The following points are contained in Security Council resolutions:

(a) The Security Council recognizes that the Fourth Geneva Convention is applicable to all the Arab territories occupied by Israel since 1967 (resolutions 484 (1980), 471 (1980), 465 (1980), 446 (1979), and consensus statements of 26 May 1976 and 11 November 1976; see also resolutions 497 (1981), 478 (1980), 476 (1980), 469 (1980), 452 (1979), 271 (1969) and 237 (1967)).

(b) The Security Council has called upon Israel scrupulously to observe the provisions of the Geneva Conventions and international law governing military occupation (resolution 271 (1969)); to abide scrupulously by the Fourth Geneva Convention (resolution 446 (1979)); to comply strictly with the provisions of that Convention and to refrain from (consensus statement of 11 November 1976) and rescind (consensus statement of 26 May 1976) any measures which violate them; to respect and comply with the provisions of the Convention (resolution 471 (1980)); and to adhere to them (resolution 484 (1980)).

(c) The Security Council has determined "that the policy and practice of Israel in establishing settlements in the Palestinian and other Arab territories occupied since 1967 have no legal validity and constitute a serious obstruction to achieving a comprehensive, just and lasting peace in the Middle East (resolution 446 (1979)). In resolution 452 (1979), the Security Council considered that the policy in establishing settlements has no legal validity and constitutes a violation of the Fourth Geneva Convention and called upon the Government and people of Israel to cease, on an urgent basis, the establishment, construction and planning of settlements in the Arab territories occupied since 1967, including Jerusalem. In resolution 465 (1980), the Security Council determined that the policy and practice of Israel of settling parts of its population and new immigrants in those territories constitute a flagrant violation of the Fourth Geneva Convention and also constitute a serious obstruction to achieving a comprehensive, just and lasting peace in the Middle East. It called on Israel to rescind those measures, to dismantle existing settlements and, in particular, to cease, on an urgent basis, the establishment, construction and planning of new settlements. It also called upon all States not to provide Israel with any assistance to be used specifically in connection with settlements in the occupied territories 47/ (see also resolution 471 (1980) and consensus statements of 26 May 1976 and 11 November 1976). 48/

(d) The Security Council has also confirmed that all legislative and administrative measures and actions taken by Israel which purport to alter the status of Jerusalem, including expropriation of land and properties thereon, are invalid and cannot change that status (emphasis added). It urgently called upon Israel to rescind all such measures (resolutions 252 (1968), 267 (1969), 298 (1971) and consensus statement of 11 November 1976; see also resolutions 478 (1980) and 497 (1981)).

21. In the preamble to its resolution 242 (1967), the Security Council emphasized "the inadmissibility of the acquisition of territory by war and the need to work for a just and lasting peace in which every State in the area can live in security". 49/ The Security Council reaffirmed the principle that acquisition of territory by military conquest is inadmissible in resolutions 252 (1968),

271 (1969) 298 (1971), 476 (1980), 478 (1980) and 497 (1981). In the last of those resolutions the Security Council reaffirmed "that the acquisition of territory by force is inadmissible, in accordance with the United Nations Charter, the principles of international law, and relevant Security Council resolutions". Resolutions of the General Assembly have even more strongly emphasized this principle (resolutions 37/88 E, 37/123, 36/147 E, 35/122 E, 34/70, 33/29, 32/20, 3414 (XXX), 2949 (XXVII), 2799 (XXVI), 2628 (XXV) and particularly 2625 (XXV)).

22. Finally, it is relevant to note the reports of the Security Council commission established under resolution 446 (1979) to examine the situation relating to settlements in the Arab territories occupied since 1967, including Jerusalem, 50/ and the Security Council resolution approving the recommendations of the commission (resolution 465 (1980)). Provisions from the operative paragraphs of this resolution have already been examined in preceding paragraphs, but it should also be observed that the Security Council in a preambular paragraph took into account "the need to consider measures for the impartial protection of private and public land and property, and water resources". As already described in paragraph 19 above, the Council also requested the commission to investigate the reported serious depletion of natural resources, particularly the water resources, with a view to ensuring the protection of those important natural resources of the territories under occupation.

## III. THE LAW OF BELLIGERENT OCCUPATION

23. The law of belligerent occupation is of relatively recent origin. 51/ Originally, as stated by Oppenheim, "enemy territory occupied by a belligerent was in every point considered his State property, so that he could do what he liked with it and its inhabitants". 52/ During the second half of the eighteenth and early nineteenth centuries 53/ there was a shift away from wartime annexation towards the concept of belligerent occupation as a temporary status not involving a change in sovereignty. 54/

24. Detailed rules were developed in the latter part of the nineteenth and early twentieth centuries with the Lieber code issued to Union Forces during the American Civil War, the unratified Brussels Declaration of 1874, the Hague Conventions of 1899 and 1907 and the Geneva Conventions of 1949, as well as various military manuals. These rules have been recently confirmed and strengthened with the adoption of the 1977 Protocols to the Geneva Conventions. In particular, section III (arts. 42-56) of the Regulations Respecting the Laws and Customs of War on Land, annexed to Hague Convention No. IV of 18 October 1907, is a universally accepted codification of international law on belligerent occupation. That section, which is entitled "Military Authority Over the Territory of the Hostile State" is reproduced in appendix I to the present study. Articles of the Fourth Geneva Convention and of the 1977 Protocols of particular relevance are reproduced in appendices II and III, respectively.

25. The primary principle on which the law of belligerent occupation rests is that the occupation does not bring about any acquisition or tranfer of sovereignty. Sovereignty remains where it was before the occupation although its exercise may be suspended when it conflicts with the rights of the occupant. The occupant gains no rights of sovereignty but only those military rights expressly permitted by the law of belligerent occupation. His authority is limited to transitional and temporary powers of a purely military and administrative nature. 55/ He is to 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 (art. 43 of the Hague Regulations).

26. The rights and obligations of the occupant with respect to property are spelt out in articles 46 and 52 to 56 of the Hague Regulations. In addition, article 47 forbids pillage, article 50 forbids general penalties, while articles 48, 49 and 51 regulate the collection of taxes, levies and contributions. Distinctions are made with respect to private and public property and with respect to movable and immovable property. Private property must be respected and cannot be confiscated (art. 46). Requisitions in kind and services can only be demanded from municipalities or inhabitants for the needs of the army of occupation. They must be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in military operations against their own country. They must either be paid for in cash or a receipt given and payment made as soon as possible (art. 52). The second paragraph of article 53 also permits the seizure of private property generally described as ammunition or munitions of war (munitions de guerre), as well as transport and communication facilities, but these must be restored and compensation fixed when peace is made. While the scope of the term munitions de guerre has been subject to much discussion it is narrowly interpreted even in the face of total war situations. 56/ The property of municipalities and that of institutions dedicated to religion, charity, education, and the arts and sciences, is treated as private property and all seizure or destruction is forbidden (art. 56).

27. The general rule with respect to private property is that it cannot be confiscated. Requisitions may be made only for the needs of the army of occupation. In this connection it may be noted that the Supreme Court of Israel has held that the requisitioning of private land in the occupied territories for the establishment of settlements not required for security reasons was contrary to article 52 of the Hague Regulations. 57/

28. Public property is covered by the first paragraph of article 53 and by article 55 of the Hague Regulations. Under article 53 an army of occupation can only take possession of cash funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies and, generally, all movable property belonging to the State which may be used for military operations. As already noted, property of municipalities and of cultural and humanitarian institutions even if State owned is excluded. Immovable property is dealt with under article 55 which reads as follows:

> "The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging

to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties and administer them in accordance with the rules of usufruct."

It is this article of the Hague Regulations which is most directly relevant to the question of land and other natural resources in occupied territories and will therefore be examined in some detail. It has been the subject of learned discussion in recent years, in connection with Israel's exploration for oil in the Gulf of Suez 58/ and while the particular dispute may now be moot, considerable light has been thrown on the interpretation of article 55 and a number of issues illuminated.

29. The occupying State is not placed in the position of an owner but is only an "administrator and usufructuary" of public lands and other immovable property. In principle a usufructuary may use the property but without detriment to its substance. He is entitled to the fruits but not the capital. The property that is the subject of the usufruct is not to be consumed. This interpretation is expressly confirmed by the second sentence of article 55 which stipulates that the occupying State "must safeguard the capital of these properties". The principle is readily applicable to crops and other renewable resources, but its application to minerals and other non-renewable resources is controversial. Extraction of minerals is in fact a depletion of capital and a detriment to the substance. However, this was not well understood by the Roman jurists who developed the principle of usufruct. They apparently believed that minerals were self-renewing or at least inexhaustible and permitted their extraction by a usufructuary. 59/

30. The first issue, therefore, has concerned mineral extraction. Article 55 has generally been interpreted to permit the "working of mines". 60/ The controversy has been over the question whether new mines might be opened. One view seems to be that an occupant may "work" existing mines at the rate they were being worked prior to the occupation but that it may not open new mines. 61/ When the text of what is now article 55 of the Hague Regulations was first drafted at the Brussels Conference in 1874, there was a near consensus in municipal law systems that a usufructuary could not open new mines. This was the position of the French Civil Code of 1804 which had been widely copied in civil law countries. The same principle also applied to a life tenant in common law whose position is closely analogous to the usufructuary in civil law. 62/ There was thus a well-established meaning for the term when it was inserted into the text of the article.

31. Another view is that article 55 only prohibits wanton dissipation or destruction or abusive exploitation of public resources. Or in a less extreme form that it only prohibits waste and negligent development. Article 55 does not expressly prohibit the opening of new mines and authorities interpreting the article have not made a distinction between existing mines and opening new mines. Moreover, it has been argued that municipal law concepts such as usufruct should not be transposed into international law. 63/

32. If the interpretation of article 55 is not to be guided by the meaning of usufructuary in municipal law, a third view would be to re-examine article 55 in accordance with the ordinary meaning of the terms (art. 31 of the Vienna Convention

on the Law of Treaties). From such examination it might be concluded that to "safeguard the capital" any exploitation of mineral resources should be prohibited. If in 1874 or 1907 these resources were still considered inexhaustible that is certainly not the case today. 64/

33. Whether article 55 is understood to permit the working of old mines, the opening of new mines or no depletion of minerals whatsoever, there is general agreement that it prohibits waste and spoliation. On this point all authorities are agreed although there may be differences of opinion as to what constitutes waste. 65/ McDougal and Feliciano, 66/ stated that "the occupant may not wantonly dissipate or destroy the public resources and may not permanently alienate them (salva rerum substanta)". "Spoliation" was dealt with in a number of cases following the Second World War. 67/ Article 147 of the Fourth Geneva Convention provides that "grave breaches", if committed against persons or property protected by the Convention, include "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly".

34. Another issue on which opinions have differed is whether the proceeds taken under article 55 may be used for the economy of the occupant generally or only for purposes of the occupation itself. 68/ On the one hand article 55, unlike articles 48, 49 and 52, has no express provision concerning the use of the property involved and it has been stated that authorities apparently have not referred directly to any restrictions on the use of usufructus. On the other hand, it was clarified during and after the Second World War that the economy of an occupied country can only be required to bear the expenses of the occupation and that this principle applied to property under article 55 as well as under other articles of the Hague Regulations. A resolution of the London International Law Conference of 1943 stated:

> "The rights of the occupant do not include any rights to dispose of property, rights or interests for purposes other than the maintenance of public order and safety in the occupied territory. In particular, the occupant is not, in international law, vested with any power to transfer a title which will be valid outside that territory to any property rights or interests which he purports to acquire or create or dispose of; this applies whether such property, rights or interests are those of the State or of private persons or bodies. This status of the occupant is not changed by the fact that he annexes by unilateral action the territory occupied by him." 69/

35. The point is made even more explicit in the Judgment by the International Military Tribunal established after the Second World War:

> "Article 49 of the Hague Convention provides that an occupying power may levy a contribution of money from the occupied territory to pay for needs of the army of occupation, and for the administration of the territory in question. Article 52 of the Hague Convention provides that an occupying power may make requisitions in kind only for the needs of the army of occupation, and that these requisitions shall be in proportion to the resources of the country. These Articles, together with Article 48, dealing with the expenditure of money collected in taxes, and Articles 53, 55 and 56 dealing with public

property, make it clear that under the rules of war, the economy of an occupied country can only be required to bear the expenses of the occupation, and these should not be greater than the economy of the country can reasonably be expected to bear." 70/

36. A further issue under discussion with respect to article 55 is whether an occupant is entitled to grant a commercial concession to exploit mineral rights. 71/ The matter seems to remain an open question, but in any event the occupant could not grant a concession for something he could not do himself or for a period beyond that of the occupation. It would also seem that the granting of concessions would also be subject to legislation applicable in the occupied territory which normally is that of the occupied Power. 72/

37. Although not expressly relating to property, article 49 of the Fourth Geneva Convention is directly relevant to questions of land and other natural resources. The last paragraph of article 49 provides that:

"The Occupying Power shall not deport or transfer parts of its own civilian population in the territory it occupies." 73/

38. Acquisition or use of land or other resources for the purposes of such deportation or transfer of civilian population is therefore unjustified and illegal. 74/, 75/ Moreover, any permanent settlement would be in direct conflict with the temporary character of an occupation under general international law. 76/

## IV. PERMANENT SOVEREIGNTY AND THE LAW OF BELLIGERENT OCCUPATION

39. Permanent sovereignty over natural resources, now established as a right of nations and peoples under international law, has important implications for the law of belligerent occupation. As has been noted in section III of the present study, rights of sovereignty do not belong to the occupant but remain where they were before the occupation with the States and peoples of the occupied territories. Both the principle of permanent sovereignty and the law of belligerent occupation have as an important purpose the protection of sovereign rights in land and other natural resources. The application of the principle of permanent sovereignty would lead to a narrower interpretation of powers of the occupying State and would strengthen the rights of the occupied States and peoples to the protection of their property. 77/ Where the meaning of a rule is unclear or has been subject to controversy, differences would be resolved in favour of that interpretation which best protects the rights of the occupied States and peoples over their natural resources. For example, the principle of permanent sovereignty might give impetus to a new look at the rights of a usufructuary under article 55 of the Hague Regulations and might lead to an interpretation consistent with the requirement of that article that an occuping State "must safeguard the capital" of properties subject to usufruct.

40. Another point of contact between the principle of permanent sovereignty and the law of belligerent occupation concerns State responsibility for internationally illegal acts. 78/ Wanton plunder or destruction of natural resources by an

occupying State is a crime under the law of belligerent occupation and would give rise to international criminal responsibility. Illegal use or taking of property or depletion of resources contrary to the Hague Regulations and the Fourth Geneva Convention, even if not amounting to the crime of spoliation, gives rise to States responsibility and its consequences. The Permanent Court of International Justice, in the well-known Chorzow Factory case, observed that:

> "... it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparations". 79/

A breach of the obligations of an occupying State with respect to natural resources in occupied territories consequently involves a duty to make reparations. Reparation is a "corollary" and "indispensable complement" of the failure to comply with international obligations. 80/ The Permanent Court, in the Chorzow Factory case, went on to declare that:

> "The essential principle contained in the actual notion of an illegal act - a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals - is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it - such are the principles which should serve to determine the amount of compensation due for an act contrary to international law." 81/

41. The obligation to make reparation is reinforced by that element of the principle of permanent sovereignty calling for restitution and full compensation for the exploitation and depletion of, and damages to, the natural resources of territories and peoples under foreign occupation. 82/ The right to restitutio in integrum or equivalent compensation is a principle applicable both to the law of belligerent occupation and to the law of permanent sovereignty where the rights of nations and peoples have been violated.

## V. IMPLICATIONS OF UNITED NATIONS RESOLUTIONS ON PERMANENT SOVEREIGNTY FOR THE OCCUPIED TERRITORIES AND THE OBLIGATIONS OF ISRAEL THEREIN

### A. Effect of United Nations resolutions

42. The General Assembly has asked for the implications, under international law, of United Nations resolutions on permanent sovereignty. In considering "implications under international law" one must have in mind the question of the legal effect of resolutions generally. It is not the intention to attempt a definitive answer, even if such answer could be given, to this complex and widely discussed question. 83/ As far as the General Assembly is concerned one starts from the proposition that resolutions are normally hortatory or recommendatory. 84/

Nevertheless, the International Court of Justice has said "it would not be correct to assume that, because the General Assembly is in principle vested with recommendatory powers, it is debarred from adopting in specific cases within the framework of its competence resolutions which make determinations or have operative design." 85/ This statement, it will be recalled, was made with respect to General Assembly decisions relating to another territory (Namibia, formerly South-West Africa) which had been a mandate under the League of Nations. In a perhaps less relevant situation the Court also stated that:

> "... the functions and powers conferred by the Charter on the General Assembly are not confined to discussion, consideration, the initiation of studies and the making of recommendations; they are not merely hortatory. Article 18 deals with 'decisions' of the General Assembly 'on important questions'. These 'decisions' do indeed include certain recommendations, but others had dispositive force and effect." 86/

The Court has also relied on General Assembly resolutions as a source of law. 87/

43. While many would view repetition of resolutions as significant, 88/ many would not consider it in and of itself sufficient. 89/ The effect of individual resolutions would also be weighed in the light of such factors as their terms and intent, voting patterns, community expectations and, perhaps most important for some, acceptance in State practice. 90/ The role of a particular resolution in interpreting provisions of the Charter of the United Nations in declaring existing customary international law, in enunciating general principles of law or in providing subsidiary evidence of rules of law might also be relevant to its evaluation. 91/

44. There is a vast literature concerning the legal effect of General Assembly resolutions and their status as a source of international law. 92/ Opinions and nuances are almost as varied and as numerous as the writers themselves. The writers run the gamut from Judge Elias 93/ who considers resolutions adopted in accordance with Article 18 of the Charter of the United Nations to be binding to Professor Arangio-Ruiz 94/ who would dismiss nearly all resolutions as merely recommendatory.

45. The situation with respect to Security Council decisions on the other hand is clear. Article 25 of the Charter states that:

> "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

Thus decisions of the Security Council are legally binding on the Members of the United Nations and under paragraph 6 of Article 2 may be enforced not only with respect to Members but also with respect to States that are not Members of the United Nations. There has, however, been a view expressed that Article 25 applies only to decisions on enforcement measures under Chapter VII of the Charter. The International Court of Justice has rejected this view:

"The Oil Nationalization Law was enacted ... in accordance with the resolution of the General Assembly of the United Nations relating to the exploitation of the natural resources of the various countries."

7/ Contra. Anglo-Iranian Oil Co., Ltd. v. Jaffrate and others (The Rose Mary) Aden, Supreme Court, 9 January 1953. International Law Reports, vol. 20 (1953), p. 316.

8/ See Repertory of Practice of United Nations Organs, vol. III (1956), pp. 95-96; Antonio Cassese, "The self-determination of peoples", in Henkin, ed., The International Bill of Rights, 1981, pp. 92-113; Hyde, supra (note 4) at pp. 856-860.

9/ See resolutions 421 (V) of 4 December 1950, sect. D, and 545 (VI) of 5 February 1952; A. P. Movchan, "The human rights problems in present day international law", in Tunkin, ed., Contemporary International Law (1969), at pp. 247-248.

10/ Resolution 837 (IX) of 14 December 1954.

11/ Report of the Third Committee (A/3077, 8 December 1955); annotations prepared by the Secretary-General (A/2929, 1 July 1955). For the texts of the Covenants, see resolution 2200 (XXI) of 16 December 1966, annex. See Hyde, supra (note 4) at p. 856, and Schwelb, American Journal of International Law, vol. 64 (1970) p. 361.

12/ In addition, article 25 of the International Covenant on Economic, Social and Cultural Rights and article 47 of the International Covenant on Civil and Political Rights provides:

"Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources."

See Theodoor C. van Boven, "Distinguishing criteria of human rights", in Karel Vasak, general ed., The International Dimensions of Human Rights, vol. 1, at p. 159; David J. Halpern, "Human rights and natural resources", William and Mary Law Review, vol. 9 (1967-1968), pp. 770-787.

13/ Resolution 1314 (XIII) of 12 December 1958. See also resolution 1720 (XVI) of 19 December 1961.

14/ The General Assembly also asked the Commission to make recommendations, where necessary, for its strengthening, and decided that due regard should be paid to the rights and duties of States under international law and to the importance of encouraging international co-operation in the economic development of underdeveloped countries (resolution 1314 (XIII), para.1). See also resolution 1515 (XV) of 15 December 1960.

15/ Documents A/AC.97/5/Rev.2, E/3511 and A/AC.97/13 (1962). For subsequent Secretariat reports on permanent sovereignty, see documents E/3840 of 14 November 1963; A/7268 of 11 October 1968; A/8058 of 14 September 1970; E/5170 of 7 June 1972; A/9716 of 20 September 1974; E/C.7/53 of 31 January 1975; E/C.7/66 of 17 March 1977; E/C.7/99 of 14 March 1979; and E/C.7/119 of 7 May 1981. For reports on permanent sovereignty over national resources in the occupied Arab territories, see A/32/204 of 11 October 1977 and A/36/648 of 10 November 1981.

16/ Paragraph 1 of the Declaration contained in resolution 1803 (XVII). See Karol N. Gess, "Permanent sovereignty over natural resources", The International and Comparative Law Quarterly, vol. 13 (1964), pp. 398-449; Stephen M. Schwebel, "The story of the United Nations declaration on permanent sovereignty over natural resources", American Bar Association Journal, vol. 49 (1963), pp. 463-469.

17/ See Official Records of the General Assembly, Seventeenth Session, Plenary Meetings, 1194th plenary meeting, p. 1134. Critics of the Declaration referred to it as "a charter for foreign investment". See Hossain, supra (note 3), p. 37.

18/ See in particular Professor René-Jean Dupuy's award in "Texaco overseas petroleum company/California Asiatic Oil Company and the Government of the Libyan Arab Republic", International Legal Materials, vol. 17 (1978), p. 1 at pp. 27-30. For the original French text, see Journal du droit international, vol. 104, No. 2 (April, May, June 1977), p. 350 ff.; and Dr. Sobhi Mahmassani's award in "Libyan American Oil Company (LIAMCO) and the Government of the Libyan Arab Republic", International Legal Materials, vol. 20 (1981), p. 1 at pp. 100-103.

19/ Banco Nacional de Cuba v. Chase Manhattan Bank, 658 F. 2d 875 (1981) at pp. 889-892; ... Sociedad Minera el Teniente S.A. v. Aktiengesellschaft Norddeutsche Affinerie, 19 Aussenwirtschaftsdienst des Betriebs-Beraters [AWD] 163 (1963). See Andreas F. Lowenfeld, International Private Investment, International Economic Law series, vol. II (1976), pp. 130-133.

20/ See Chilean Decree Concerning Excess Profits of Copper Companies, 28 September 1971, para. 5; Lowenfeld, supra (note 19), at pp. 322-323; Francisco Orrego Vicuna, "Some international law problems posed by the nationalization of the copper industry by Chile", American Journal of International Law, vol. 67 (1973), pp. 711-727.

21/ Resolutions 2158 (XXI) of 25 November 1966; 2386 (XXIII) of 19 November 1969; 2542 (XXIV) of 11 December 1969; 2626 (XXV) of 24 October 1970; 2692 (XXV) of 11 December 1970; 3016 (XXVII) of 18 December 1972; 3041 (XXVII) of 19 December 1972, endorsing Trade and Development Board resolution 88 (XII); and 3171 (XXVIII) of 17 December 1973. In addition, resolution 2993 (XXVII) of 15 December 1972 on the implementation of the Declaration on the Strengthening of International Security, adopted on the report of the First Committee, reaffirmed (para. 4):

"that any measure or pressure directed against any State while exercising its sovereign right freely to dispose of its natural resources constitutes a

flagrant violation of the principles of self-determination of peoples and non-intervention, as set forth in the Charter, which, if pursued, could constitute a threat to international peace and security."

22/ Resolution 3201 (S-VI) provides (para. 4 (e)) that:

"The new international economic order should be founded on full respect for the following principles: ...

"(e) Full permanent sovereignty of every State over its natural resources and all economic activities. In order to safeguard these resources, each State is entitled to exercise effective control over them and their exploitation with means suitable to its own situation, including the right to nationalization or transfer of ownership to its nationals, this right being an expression of the full permanent sovereignty of the State. No State may be subjected to economic, political or any other type of coercion to prevent the free and full exercise of this inalienable right."

See also article 2, para. 2 (c), of the Charter of Economic Rights and Duties of States (resolution 3281 (XXIX)).

Paragraph 4 (f) of resolution 3201 (S-VI) added:

"The right of all States, territories and peoples under foreign occupation, alien and colonial domination or apartheid to restitution and full compensation for the exploitation and depletion of, and damages to, the natural resources and all other resources of those States, territories and peoples."

See also article 16 of resolution 3281 (XXIX).

Following a request of the General Assembly at its thirty-second session (resolution 32/145 of 16 December 1977; see also resolution 33/92 of 16 December 1978) to take into account relevant provisions of the resolutions adopted at its sixth and seventh special sessions, the United Nations Commission on International Trade Law (UNCITRAL) included in its proposed work programme an item entitled "Legal implications of the new international economic order." At its thirty-fourth session, the General Assembly requested the Secretary-General, in collaboration with the United Nations Institute for Training and Research (UNITAR) and in co-ordination with UNCITRAL, to study the question of the consolidation and progressive development of the principles and norms of international economic law relating in particular to the legal aspects of the new international economic order" (resolution 34/150 of 17 December 1979; see also resolutions 35/166, 36/107 and 37/103). For the UNITAR study dealing with permanent sovereignty, see note 3 supra. The International Law Association has established an International Committee on the Legal Aspects of a New International Economic Order and has considered reports of the Committee at its Fifty-ninth Conference (Belgrade 1980), pp. 1-2 and 263-311, and at its Sixtieth Conference (Montreal 1982), pp. 3 and 183-238.

23/ See Samuel K. B. Asante, "Restructuring transnational mineral agreements", American Journal of International Law, vol. 73 (1979), p. 340; Karen Hudes, "Towards a new international economic order", Yale Studies in World Public Order, vol. 2 (1975), pp. 121-122; Ria Kemper, "The concept of permanent sovereignty and its impact on mineral contracts", Legal and Institutional Arrangements in Minerals Development (1982), p. 32.; Ernst U. Petersman, "The new international economic order: principles, politics and international law", in Macdonald, Johnston and Morris, eds., The International Law and Policy of Human Welfare (1978), pp. 463-464. Professor Dupuy in the TEXACO case considered that while resolution 1803 (XVII) represented a consensus the later resolutions did not (supra, note 18, at p. 30). Dr. Mahmassani in the LIAMCO case on the other hand concluded that the said resolutions, including 1803 (XVIII) and 3281 (XXIX), "if not a unanimous source of law, are evidence of the recent dominant trend of international opinion concerning the sovereign right of States over their natural resources ..." (supra, note 18, at 103). See S. Roy Chowdhury in International Law Association, Sixtieth Conference (Montreal) (1982), p. 219.

24/ Resolutions 3005 (XXVII) of 15 December 1972; 3175 (XXVIII) of 17 December 1973; 3336 (XXIX) of 17 December 1974; 3516 (XXX) of 15 December 1975; 31/186 of 21 December 1976; 32/161 of 19 December 1977; 34/136 of 14 December 1979; 35/110 of 5 December 1980; 36/173 of 17 December 1981 and 37 135 of 17 December 1982.

25/ See para. 17 below.

26/ Para. 4 above.

27/ The United Kingdom made a declaration to the effect that, in case of conflict between obligations under article 1 of the Covenants and obligations under the United Nations Charter, obligations under the Charter shall prevail. India made a declaration to the effect that "self-determination" applies only to peoples under foreign domination. France objected to India's statement as a condition not provided for by the United Nations Charter. Israel signed both Covenants without reservation on 19 December 1966 but has not ratified either.

28/ For discussion at the Conference, see Official Records of the United Nations Conference on Succession of States in Respect of Treaties, vol. I, First Session, Vienna, 4 April-6 May 1977; ibid., vol. II, Resumed Session, Vienna, 31 July-23 August 1978, pp. 20, 21, 23, 26, 28 and 131-140; and ibid., vol. III, Documents of the Conference, Report of the Committee of the Whole (resumed session), paras. 49-52.

29/ See the report of the International Law Commission on the work of its thirty-third session (Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 10 (A/36/10 and Corr.1)), pp. 72-88 and 206-242, for draft articles 14 and 36 and commentary thereto. See also the report of the Commission on the work of its twenty-ninth session, in Yearbook of the International Law Commission, 1977, vol. II, part two, pp. 91-92. For discussion and comments, see materials cited under articles 14 and 36 in the guide for the draft articles on succession of States in respect of state property prepared for the 1983 Vienna

Conference by the Codification Division, Office of Legal Affairs (ST/LEG/14, 8 February 1983), pp. 49-51 and 87-90.

30/ International Legal Materials, vol. 21 (1982), p. 58 at 62.

31/ A/10112, chap. IV, paras. 32 and 33 of the Declaration and Plan of Action.

32/ E/C.10/1982/6 (5 June 1982), para. 6. See also E/C.10/1983/S/2 (4 January 1983), para. 36; E/C.10/1983/S/4, p. 5; and E/C.10/62 (9 June 1980), paras. 46-48. See also CTC Reporter, No. 12 (Summer 1982) for special issue on the Code, particularly pp. 3 and 6.

33/ For proposal by Romania to include the principle of permanent sovereignty in the Charter of the United Nations, see A/AC.182/WG.56 (21 April 1983) and report of the Special Committee (Official Records of the General Assembly, Thirty-second Session, Supplement No. 33 (A/32/33)), p. 176, and A/C.6/437. For a proposal in the context of the Manila declaration on the peaceful settlement of international disputes see report of the Special Committee (Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 33 (A/35/33)), pp. 70 and 76.

34/ For the text of proposed principle XVI of the draft principles on remote sensing of the earth from space, which refers to "full and permanent sovereignty of all States and peoples over their wealth and natural resources" see report of the Legal Sub-Committee of the Committee on the Peaceful Uses of Outer Space (A/AC.105/320, 13 April 1983), p. 20. See also the discussion in the Working Group on Remote Sensing at previous sessions of the Legal Sub-Committee (A/AC.105/305 (1982), annex 1, p. 6; A/AC.105/288 (1981), annex 1 p. 5; A/AC.105/240 (1979), annex 1, p. 5).

35/ For discussion of permanent sovereignty, see UNITAR study, supra (note 3) and the following books and articles: Samuel K. B. Asante, "Restructuring transnational mineral agreements", American Journal of International Law, vol. 73 (1979), pp. 335-371; Hans W. Baade, "Permanent sovereignty over natural wealth and resources", in Miller and Stanger, eds., Essays on Expropriation (1967); S. K. Banerjee, "The concept of permanent sovereignty over natural resources: an analysis", Indian Journal of International Law, vol. 8 (1968), pp. 515-546; Charles N. Brower and John B. Tepe, Jr., "The Charter of Economic Rights and Duties of States: a reflection or rejection of international law", International Lawyer, vol. 9 (1975), pp. 295-318; Ian Brownlie; "Legal status of natural resources in international law", Recueil des Cours, vol. 162, (1979-I), pp. 255-271; and Principles of Public International Law, pp. 512-515 and 540-545 (3rd ed., 1979); Antonio Cassese, "The self-determination of peoples", in Henkin, ed., The International Bill of Rights, (1981), pp. 92-113; Rudolph Dolzer, "New foundations of the law of expropriation of alien property", American Journal of International Law, vol. 75 (1981), pp. 553-589; A. A. Fatouros, "International law and the internationalized contract", American Journal of International Law, vol. 74 (1980), pp. 134-141; G. Fischer, "La souveraineté sur les ressources naturelles", Annuaire français de droit international, vol. 7 (1962), p. 516; Wolfgang Friedmann, The Changing Structure of International Law (1964), pp. 320-321; Karol N. Gess, "Permanent sovereignty over natural resources", The International and Comparative

Law Quarterly, vol. 13 (1964), pp. 398-449; G. W. Haight, "Principles of international law on friendly relations", International Lawyer, vol. 1 (1966), pp. 101-104; and "The new international economic order and the Charter of Economic Rights and Duties of States", International Lawyer, vol. 9 (1975), pp. 591-604; Rosalyn Higgins, "The development of international law by the political organs of the United Nations", Proceedings of the American Society of International Law, Fifty-ninth Annual Meeting (1965), pp. 116-124 at pp. 121-122; Kamal Hossain, ed., Legal Aspects of the New International Economic Order (1980), pp. 1, 4-7, 32-44; Karen Hudes, "Towards a new international economic order", Yale Studies in World Public Order, vol. 2 (1975), pp. 88-181; James N. Hyde, "Permanent sovereignty over natural wealth and resources", American Journal of International Law, vol. 50 (1956), pp. 854-867; Eduardo Jiminez de Arechaga, "International law in the past third of a century", Recueil des Cours, vol. 159 (1978-I), pp. 285-310; and "State responsibility for the nationalization of foreign-owned property", Journal of International Law and Politics, vol. 11 (1978), pp. 179-195; Ria Kemper, "The concept of permanent sovereignty and its impact on mineral contracts", in Legal and Institutional Arrangements in Minerals Development, Mining Journal Books (1982), pp. 29-36; and Nationale Verfügung über nativiliche Ressourcen und die Neue Weltwirtschaftsordnung der Vereinten Nationen (1976); Henry Landau, "Protection of private foreign investments in less developed countries - its reality and effectiveness", William and Mary Law Review, vol. 9 (1967-1968), pp. 804-823 at pp. 811 and 813; Robert F. Meagher, An International Redistribution of Wealth and Power - A Study of the Charter of Economic Rights and Duties of States (1979), pp. 50-54, 81-83; Robert von Mehren and R. Nicholas Kourides, "International arbitrations between States and foreign private parties: the Libyan nationalization cases", American Journal of International Law, vol. 75 (1981), pp. 476-529; Maarten H. Muller, "Compensation for nationalization: A North-South dialogue", Columbia Journal of Transnational Law, vol. 19 (1981), pp. 35-78, particularly pp. 73-78; Muhamad A. Mughraby, Permanent Sovereignty over Oil Resources: A Study of Middle East Oil Concessions and Legal Change (1966); P. J. O'Keefe, "The United Nations and permanent sovereignty over natural resources", Journal of World Trade Law, vol. 8 (1974), pp. 239-282; Ernst U. Petersmann, "The new international economic order: principles, politics and international law", in Macdonald, Johnston and Morris, eds., The International Law and Policy of Human Welfare (1978), pp. 449-469, particularly pp. 462-469; Edward D. Re, "Nationalization and the investment of capital abroad", Georgetown Law Journal, vol. 42 (1953-1954), p. 44 at pp. 51-53; Andres Rozental, "The Charter of Economic Rights and Duties of States and the new international economic order", Virginia Journal of International Law, vol. 16 (1975-76), pp. 309-322; Oscar Schachter, "The evolving international law of development", Colombia Journal of Transnational Law, vol. 15 (1976) pp. 1-16; and Sharing the World's Resources (1977), pp. 20-23 and 124-135; Stephen M. Schwebel, "The story of the United Nations declaration on permanent sovereignty over natural resources", American Bar Association Journal, vol. 49 (1963), pp. 463-469; I. Seidl-Hohenveldern, "The social function of property and property protection in present-day international law", in Kelshoven, Kuyper and Lammers, eds., Essays on the Development of the International Legal Order in Memory of Haro F. van Panhuys (1980), pp. 77 and 91-92; and "International economic 'soft law'", Recueil des Cours, vol. 163 (1979-II), pp. 165-246; S. Prakash Sinha, New Nations and the Law of Nations (1967), p. 96; V. I. Sopozhnikov, "Sovereignty over natural resources",

1964-65 Soviet Yearbook of International Law, p. 76 (in Russian, summary in English); Steiner and Vagts, Transnational Legal Problems (1976), pp. 462-471; Francisco Orrego Vicuna, "Some international law problems posed by the nationalization of the copper industry by Chile", American Journal of International Law, vol. 67 (1973), pp. 711-727; P. J. I. M. de Waart, "Permanent sovereignty over natural resources as a cornerstone for international economic rights and duties", in Meijors and Vierdag, eds., Essays on International Law and Relations in Honour of A. J. P. Tammes (1977), pp. 304-322; Thomas W. Walde, "Permanent sovereignty over natural resources: recent developments in the mineral sector", Natural Resources Forum (July 1983); Burns H. Weston, "International law and the deprivation of foreign wealth: a framework for future inquiry", in Falk and Black, eds., The Future of the International Legal Order, vol. II (1970), pp. 36-37, 142 and 159-166; and "The Charter of Economic Rights and Duties of States and the deprivation of foreign-owned wealth", American Journal of International Law, vol. 75 (1981), pp. 437-475; Robin C. A. White, "A new international economic order", The International and Comparative Law Quarterly, vol. 24 (1975), pp. 542-552; and "Expropriation of the Libyan oil concessions - two conflicting international arbitrations", The International and Comparative Law Quarterly, vol. 30 (1981), pp. 1 and 11-13; Gillian White, "A new international economic order", Virginia Journal of International Law, vol. 16 (1976), pp. 323-345; Hasan S. Zakariya, "Sovereignty over natural resources and the search for a new international economic order", in Hossain, ed., Legal Aspects of the New International Economic Order (1980), pp. 208-219.

36/ A/36/648, annex, para. 69 (consultants' report annexed to the report of the Secretary-General, 10 November 1981).

37/ Oscar Schachter, Sharing the World's Resources (1977) at p. 124, citing resolutions 1803 (XVII); 3016 (XXVII); 2692 (XXV); 3201 (S-VI), para. 4 (e); and 3202 (S-VI), sect. VIII.

38/ See articles 15 and 38 of the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts and the discussion of these articles in the International Law Commission, the Sixth Committee and the Vienna Conference. See particularly statements made at the Conference by India, A/CONF.117/C.1/SR.13, p. 5; Brazil, p. 12; Hungary, p. 13; Senegal, SR.14, p. 4; Thailand, p. 6; Syrian Arab Republic, p. 6; Egypt, SR.36, p. 2; Morocco, p. 12. For references to jus cogens in relation to permanent sovereignty, see Brownlie, Principles of Public International Law, supra (note 35), at p. 513; supra (note 3), pp. 269-270; S. Roy Chowdhury, International Law Association, Sixtieth Conference (Montreal) (1982), p. 219; Muller, supra (note 35), at pp. 77-78, footnote 159.

39/ See discussion and voting at the Vienna conference. For the roll-call vote on the Convention, which was adopted by 54 votes to 11, with 11 abstentions, see Journal of the conference, No. 27, 88(?) April 1983, p. 7. The vote on paragraph 4 of article 15 was 49-21-4 and on article 38, 55-21-1. See particularly statements made at the Conference by Switzerland, A/CONF.117/C.1/SR.14, pp. 4-5; United States of America, SR.15, p. 5; Netherlands, p. 8; Federal Republic of Germany, SR.36, p. 7; Canada, SR.37, p. 6. See also statements of Greece, SR.37, p. 4, and Sweden, p. 6.

40/ The term "national resources" covers "natural and all other resources, wealth and economic activities".

41/ For collection of texts of provisions relating to restitution see UNITAR/DS/5, supra (note 3), pp. 440-442. See also UNITAR/DS/5, pp. 351-354 and 373; Meagher, supra (note 35), pp. 82-83; Schachter, Sharing the World's Resources, pp. 21-23; Gillian White, supra (note 35), p. 338; Brower and Tepe, supra (note 35), p. 316.

42/ The term "national resources" covers "natural and all other resources, wealth and economic activities".

43/ For the consideration of these resolutions in the Second Committee see Official Records of the General Assembly, Twenty-eighth Session, Second Committee, 1578th meeting, p. 441; 1579th meeting, pp. 445-449; 1580th meeting, pp. 449-450; 1581st meeting, pp. 473-474; Twenty-ninth Session, 1630th meeting, pp. 335-336; 1635th meeting, pp. 359-364; Thirtieth Session, 1708th meeting, p. 357; 1712th meeting, pp. 373-377; Thirty-first Session, 62nd meeting, pp. 2-5; Thirty-second Session, 56th meeting, pp. 4-10; Thirty-fourth Session, 42nd meeting, p. 3, 53rd meeting, pp. 3-5; Thirty-fifth Session, 17th meeting, pp. 3-6; Thirty-sixth Session, 45th meeting, pp. 4-6; 46th meeting, pp. 13-15; Thirty-seventh Session, 36th meeting, p. 2; 40th meeting, pp. 2-9; 41st meeting, pp. 6-8; 42nd meeting, pp. 2-3.

44/ Resolutions 37/88, 37/122, 37/123, 36/15, 36/147, 36/150, 36/226 B, 35/122, 34/90, 33/113, 32/91, 31/106, 3525 (XXX), 3240 (XXIX), 3092 (XXVIII), 2252 (ES-V). See also 2851 (XXVII), 2727 (XXV), 2546 (XXIV) and 2443 (XXIII). Resolutions and decisions of the General Assembly and of the Security Council relating to the question of Palestine, 1947-1982, are collected in documents A/AC.183/L.2 and Add.1-3.

45/ Resolutions 37/88 C, 36/147 C, 35/122 C, 34/90 A, 33/113 C, 32/91 C, 31/106 C, 3525 (XXX) A, 3240 (XXIX) A and 3092 (XXVIII) B.

46/ Resolutions adopted by the General Assembly on the report of the Special Political Committee have contained similar condemnations of "illegal exploitation of the natural wealth, resources and population of the occupied territories". See resolutions cited in note 45.

47/ The International Court of Justice (I.C.J. Reports 1971, p. 54) has stated:

> "A binding determination made by a competent organ of the United Nations to the effect that a situation is illegal cannot remain without consequence. Once the Court is faced with such a situation, it would be failing in the discharge of its judicial functions if it did not declare that there is an obligation, especially upon Members of the United Nations, to bring that situation to an end. As this Court has held, referring to one of its decisions declaring a situation as contrary to a rule of international law: 'This decision entails a legal consequence, namely that of putting an end to an illegal situation.' (I.C.J. Reports 1951, p. 82)".

48/ See also resolutions of the General Assembly, in particular 37/88 C, paras. 7-9 and 11; 36/147 C, paras. 7-9 and 11; 35/122 C, paras. 5-8; 34/90 A, paras. 5-8; 33/113 C, paras. 5-8; 32/91 C, paras. 5-8; 31/106 C, paras. 5-8; 3525 A (XXX), paras. 5-10; 3240 A (XXIX), paras. 3-8 and 3092 B (XXVIII), paras. 3-8.

49/ Resolution 242 (1967) also:

"Affirms that the fulfilment of Charter principles requires the establishment of a just and lasting peace in the Middle East which should include the application of both the following principles:

"(i) Withdrawal of Israel armed forces from territories occupied in the recent conflict;

"(ii) Termination of all claims or states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force."

50/ Documents S/13450 and Corr.1 and Add.1; S/13679; S/14268.

51/ For discussion of the law of belligerent occupation see Castren, The Present Law of War and Neutrality (1959); E. Feilchenfeld, The International Economic Law of Belligerent Occupation (1942); Greenspan, The Modern Law of Land Warfare (1959); Hyde, International Law Chiefly as Interpreted by the United States (2nd ed., 1945), vol. 3, pp. 1876-1912; M. McDougal and F. Feliciano, Law and Minimum World Public Order (1961), pp. 732-832; L. Oppenheim, International Law (H. Lauterpacht, ed., 7th ed., 1948-1952), vol. 2, pp. 430-456; G. Schwarzenberger, International Law, vol. 2 (1968), pp. 161-358; J. Stone, Legal Controls of International Conflict (2nd impress. rev., w. supp. 1953-1958, 1959), pp. 693-732; G. von Glahn, The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation (1957). See also materials collected in Hackworth, Digest of International Law, vol. 1 (1940), pp. 144-159; vol 6 (1943), pp. 386-415; and Whiteman, Digest of International Law, vol. 1 (1963), pp. 946-966, and vol. 10 (1968), pp. 540-598.

52/ International Law, vol. 2, p. 432 (H. Lauterpacht, ed., 7th ed., 1948-1952).

53/ A convenient transition point is found in the United States Supreme Court opinion by Chief Justice John Marshall in American Insurance Company v. Canter (1 Peters 542 (1828)):

"the usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at a treaty of peace".

54/ Schwarzenberger, International Law, vol. 2 (1968), p. 166; Oppenheim, supra (note 51); von Glahn, The Occupation of Enemy Territory (1957), p. 7.

55/ Oppenheim, supra (note 51), pp. 433-434; von Glahn, supra (note 51), pp. 31-33; Schwarzenberger, supra (note 51), pp. 172-173; K. Skubiszewski in Sorensen, Manual of Public International Law, p. 833 (1968); Feilchenfeld, supra (note 51), p. 817; P. Fauchille, Traité de droit international public (1921), pp. 215-216; Capotorti, L'Occupazione nel Divitto di Guerra (1949), United States, p. 57; Department of State, Memorandum of Law, 1 October 1976, reproduced in International Legal Materials, vol. 16 (1977), pp. 734-735; and other authorities cited in footnote 1 of the Memorandum.

56/ Does crude oil in situ constitute munitions de guerre? In Bataafsche (N. V. de Bataafsche Petroleum Maatschappij and Others v. The War Damage Commission, International Law Reports, p. 810 (1956)), C. J. Whyatt held the seizure and subsequent extraction and refining of crude petroleum was economic plunder and that such crude oil was not munitions de guerre. Focus was on amenability to direct military use. Due to the need for "elaborate installations" (p. 823) to extract and refine it, the oil failed to qualify as "arms or ammunition which could be used against the enemy in fighting" (ibid.). In counterpoint, J. Whitton dissenting, noted the shift from reliance on horse and steam engine in 1907 to the dependence on petroleum-based transport. Given this shift, he saw an apparent inconsistency in allowing seizure of refined petroleum but not crude stocks in situ (p. 847).

Although some writers - Oppenheim, vol. 2, p. 404; Smith, "Booty of war", British Yearbook of International Law, vol. 13 (1946), pp. 227 and 228; and Feilchenfeld, para. 161, pp. 39-40 - have defined munitions de guerre in broad terms, e.g., "all movable articles for which a modern army can find any normal use" (Smith, loc. cit.), E. Lauterpacht, "The Hague Regulations and the seizure of munitions de guerre", British Yearbook of International Law, vol. 32 (1955-56), pp. 218-243, offers a narrow interpretation based on the factors of "direct use" and the likelihood of prolonging conflict (p. 234). Lauterpacht also relies on the intent of the drafters of the Brussels Declaration and the Hague Regulations as seen in contradistinction to prior practice of unrestricted seizure. This interpretation accords with the use of the term munitions de guerre "as being a term of art descriptive in a general way of weapons and other movable objects which could readily be employed in battle ..." (p. 226).

57/ Supreme Court Judgement with regard to the Elon Moreh Settlement, unofficial English translation in International Legal Materials, vol. 19 (1980), p. 148 ff.

58/ Edward R. Cummings, "Oil resources in occupied Arab territories under the law of belligerent occupation", Journal of International Law and Economics, vol. 9 (1974), pp. 533-593; Antonio Crivellaro, "Oil operations by a belligerent occupant: the Israel-Egypt dispute", The Italian Yearbook of International Law, vol. 3 (1977), pp. 171-187; Allan Gerson, "Off-shore oil exploration by a belligerent occupant: the Gulf of Suez dispute", American Journal of International Law, vol. 71 (1977), pp. 725-733; Brice M. Clagett and O. Thomas Johnson, Jr., "May Israel as a belligerent occupant lawfully exploit previously unexploited oil resources of the Gulf of Suez?", American Journal of International Law, vol. 72 (1978), pp. 558-585; Panel of American Society of International Law (Edward R. Cummings, Brice M. Clagett, William D. Rogers and Allan Gerson, and

remarks by David Small), Proceedings of the Seventy-second Annual Meeting, April 27-29, 1978, pp. 118-142; Monroe Leigh, United States Department of State Memorandum of Law on Israel's right to develop new oil fields in Sinai and the Gulf of Suez, International Legal Materials, vol. 16 (1977), pp. 733-753; Israel: Ministry of Foreign Affairs Memorandum of Law on the right to develop new oil fields in Sinai and the Gulf of Suez, International Legal Materials, vol. 17 (1978), pp. 432-444; Letter of David H. Small, Assistant Legal Adviser, Department of State, Digest of United States Practice in International Law 1977, pp. 920-922.

59/ See examples given by Clagett and Johnson, supra (note 58), at p. 568. One amusing exception from Justinian's Digest: "... marble is not included in the fruits of the estate, unless it grows on the estate, as happens in some quarries in Gaul and Asia."

60/ United States Army Field Manual (F. M. 27-10) para. 402; United Kingdom Manual of Military Law, para. 610; Stone, Legal Controls of International Conflict (1954), p. 714.

61/ Cummings, Crivellaro, Clagett and Johnson and Department of State Memorandum; contra Gerson, Rogers and Israel Ministry of Foreign Affairs Memorandum (supra, note 58). For a point-by-point analysis and rejection of the Israeli argument see the Crivellaro and Clagett and Johnson articles cited in note 58 supra.

62/ Blackstone, Commentaries on the Laws of England (1766), p. 282.

63/ Israel, Ministry of Foreign Affairs Memorandum of Law, supra (note 58).

64/ The Arbitration Tribunal in the ARAMCO case (Saudi Arabia v. Arabian American Oil Company (1958)), International Law Reports, vol. 27 (1963), p. 117 at 157) stated:

> "An oil concession is a mining concession. It possesses the characteristic feature of the latter concession, i.e., its operation destroys the very substance of the concession. The products of the enterprise are not, therefore, fruits or income, but a part of the capital. This is aptly expressed by Planiol:
>
> > "'What is extracted from a mine or from a quarry is not a product of the soil; it is the soil itself which is being extracted; the "exploitation" inevitably results in the exhaustion of the mine. (Traité élementaire de droit civil, vol. I, 3rd ed., No. 3590, p. 1,173; translation).'"

Clagett and Johnson (note 58 at p. 574), in arguing that article 55 at the very least prohibits the opening of new mines, conclude, "Finally, and most importantly, by separately requiring that occupants 'safeguard the capital' of public property, the drafters of article 55 clearly stated their intention that occupants be held to the traditional obligation of usufructuaries to 'preserve the substance' of the property - and obligation that logically prohibits any exploitation of minerals." They also quote (p. 570) 6 F. Laurent, Principes de droit civil, pp. 563-564 (4th ed., 1887): "To be sure, the usufructuary enjoys like the proprietor, but he

enjoys the fruits and not the capital. The products of mines and quarries are certainly not a fruit but a part of the ground. It is therefore the substance of the thing which the exploiter successively depletes; how can the usufructuary have the right to exploit the mines and quarries when he must conserve the substance?"

65/ The French Court of Cassation, in reversing a lower court decision, held article 55 to require a belligerent occupant to observe regulations limiting the rate at which forests could be exploited to that which existed prior to the occupation. "Administration of Waters and Forests v. Falck, 1927", Annual Digest and Reports of International Law Cases, vol. 4 (1927-1928), p. 563.

66/ Supra (note 51) at pp. 812-813. See Gerson, supra (note 58), at p. 730.

67/ In re Krupp and others (Annual Digest and Reports of International Law Cases, Year 1948, case No. 214, p. 622 ff.); In re Krauch and others (I. G. Farben trial) (ibid., case No. 218, pp. 672-678); and In re Flick and others (Annual Digest ..., Year 1947, case No. 122, p. 266).

68/ The United States Department of State Memorandum of Law (supra, note 58) at pp. 742-746 takes the latter position that the property can only be used for purposes of the occupation while the Israel Ministry of Foreign Affairs Memorandum of Law (supra, note 58) at pp. 436-437 considers that there are no restrictions of this kind with respect to article 55.

69/ The full text of the resolution is reproduced in von Glahn, The Occupation of Enemy Territory (1957), pp. 194-195, "In view of its importance, according to the belief of the writer ...", von Glahn adds that it represents "the latest word on the problem [of transfer of title to property beyond the occupied Territory], comprising as it did the considered opinion of scores of outstanding jurists".

70/ Trial of the Major War Criminals before the International Military Tribunal, vol. 1 (1974), pp. 238-239, 6 F. R. D. 69, 120. Annual Digest and Reports of International Law Cases, vol. 13 (1946), p. 203 at pp. 214-215. See also Clagett and Johnson (supra, note 58, pp. 580-582) and authorities cited therein. Schwarzenberger refers to this as "a justifiable generalization" (supra, note 51, p. 251) and Stone broadly summarizes the occupant's powers "within the limits of what is required for the army of occupation and the needs of the local population" (supra, note 51, p. 697).

71/ See United States Department of State and Israel Ministry of Foreign Affairs Memoranda of Law (supra, note 47) at pp. 746-748 and 437-441, respectively.

72/ Article 43 of the Hague Regulations requires the occupant to respect "unless absolutely prevented, the laws in force in the country".

73/ The official commentary, p. 283 (Jean S. Pictet, ed.), to this paragraph of article 49 of the Fourth Geneva Convention states:

"It is intended to prevent a practice adopted during the Second World War by certain Powers, which transferred portions of their own population to occupied territory for political and racial reasons or in order, as they claimed, to colonize those territories. Such transfers worsened the economic situation of the native population and endangered their separate existence as a race."

74/ Protocol I to the Geneva Conventions, adopted on 8 June 1977 by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (see A/32/144 of 15 August 1977, reproduced in International Legal Materials, vol. 16 (1977), p. 1,391 at p. 1,428), adds special emphasis to this provision by making the transfer of civilian population into occupied territory a grave breach of the Protocol. Article 85, paragraph 4, provides:

"In addition to the grave breaches defined in the preceding paragraphs and in the Conventions, the following shall be regarded as grave breaches of this Protocol, when committed wilfully and in violation of the Conventions or the Protocol:

"(a) The transfer by the occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or part of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention; ..."

75/ Michael Bothe, Karl Joseph Partsch and Waldemar A. Solf, New Rules for Victims of Armed Conflicts (1982), p. 518, in the commentary on this provision of article 85, para. 4 state:

"Subparagraph (a) does not relate to a provision of the Protocol but to article 49 of the Fourth Convention. This is an exceptional case. It is also remarkable that the main case envisaged in subparagraph (a) - the transfer by the occupying power of parts of its own civilian population into the territory it occupies - appears in article 49 of the Fourth Convention only in paragraph 6 at the end. The reason for this inversion is a practical experience in a specific case: the settlement of Israelis on the Golan Heights and on the West Bank of Jordan, while article 49 was influenced by experiences during World War II, when a great number of inhabitants of occupied territories in Eastern Europe had been transferred to other regions."

See also Gerhard von Glahn, Law among Nations (4th ed., (1981)), pp. 678-679.

76/ See Digest of United States Practice in International Law 1977, pp. 922-924. Alfred L. Atherton, Assistant Secretary for Near Eastern and South East Asia Affairs, testifying before a House of Representatives Subcommittee said, "... we see the Israeli settlements as inconsistent with international law. (citing the Fourth Geneva Convention, article 49) ... In addition, we believe that under international law generally a belligerent occupant is not the sovereign power and does not have the right to treat occupied territory as its own or to make changes in the territory except those necessitated by the immediate needs of the

occupation. In general an occupant may only use the resources of the territory, including public lands, to meet the expenses of administering the territory and the military needs of the army of occupation and for the direct benefit of the indigenous inhabitants". See also Letter of the Legal Adviser of the Department of State, International Legal Materials, vol. 17 (1978), pp. 777-779; American Journal of International Law, vol. 72 (1978), pp. 908-911. The Supreme Court of Israel in the Elon Moreh Settlement case (International Legal Materials, vol. 19 (1980), pp. 176-177) asks "how is it possible to establish a permanent settlement on land which has been seized only for temporary use?" and replies that such establishment "encounters a legal obstacle which is unsurmountable." Alan Gerson, Israel, the West Bank and International Law (1978), p. 161, states "Such use [civilian settlement] is in contravention of article 55 of the Hague Regulations requiring the occupant to act as administrator and usufructuary of enemy public property."

77/ Antonio Crivellaro (supra, note 58), pp. 184-185; Clagett and Johnson (supra, note 58), p. 577. Professor Crivellaro, referring to the principle of permanent sovereignty, states:

> "The point just made unquestionably strengthens the Egyptian position and confirms the unlawful nature of Israel's conduct. The rights of a sovereign State (albeit occupied) over its public property are already safeguarded and the powers of the occupying State respectively restricted by the customary law of warfare. The same public property, such as natural resources, becomes all the more and especially protected in that the international community has deemed it necessary to categorically ascribe such property to the sole power of the lawful owner State." (p. 185)

78/ See the reports of the International Law Commission dealing with state responsibility. The latest report is in Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 10 (A/37/10).

79/ Permanent Court of International Justice, Judgement No. 13 (Indemnity), 13 September 1928, in Manley O. Hudson, World Court Reports, vol. I, p. 664.

80/ World Court Reports, pp. 662 and 664.

81/ Ibid., pp. 677-678; see also p. 694.

82/ Paragraphs 15 (e) and 17 (e) above.

83/ For some views on the legal effect of General Assembly resolutions see Michael Akehurst, "Custom as a source of international law", British Yearbook of International Law 1974-1975, vol. 47, p. 1-53, particularly pp. 5-8; Gaetano Arangio-Ruiz, "The normative role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations", Recueil des Cours, vol. 137 (1972-III), p. 419 at pp. 431-518; Obed Asamoah, "The legal effect of resolutions of the General Assembly", Columbia Journal of Transnational Law, vol. 3 (1964-1965), pp. 210-230; and The Legal Significance of the Declarations of the General Assembly of the United Nations (1966); Sir Kenneth Bailey, "Making international law in the United Nations", Proceedings of the American Society of

International Law, Sixty-first Annual Meeting (1967), pp. 233-239; Suzanne Bastid, "Observations sur une 'etape' dans le developpement progressif et la codification des principes du droit international" in Recueil d'études de droit international en hommage à Paul Guggenheim (1968), pp. 132-145; Adam Basak, Decisions of the United Nations Organs in the Judgments and Opinions of the International Court of Justice (1969); Rudolf L. Bindschedler, "La délimitation des compétences des Nations Unies", Recueil des Cours, vol. 108 (1963-I), pp. 344-366; Samuel A. Bleicher, "The legal significance of re-citation of General Assembly resolutions", American Journal of International Law, vol. 63 (1969), pp. 444-478; Hanna Bokar-Szego, The Role of the United Nations in International Legislation (1978); D. W. Bowett, The Law of International Institutions (3rd ed., 1975), pp. 41-51; Brownlie, supra, notes 3 and 35; Pierre F. Brugière, Les pouvoirs de l'Assemblée générale des Nations Unies en matière politique et de sécurité (1955); Jorge Castaneda, Legal Effects of United Nations Resolutions (1969); Alex C. Castles, "Legal status of United Nations resolutions", Adelaide Law Review, vol. 3 (1967-1970), pp. 68-83; Bin Cheng, "United Nations resolutions on outer space: 'instant' international customary law?", Indian Journal of International Law, vol. 5 (1965), pp. 23-48; Anthony d'Amato, "On consensus", Canadian Yearbook of International Law, vol. 8 (1970), pp. 104-122; Ingrid Detter, Law Making by International Organizations (1965); Lino di Qual, Les effets des résolutions des Nations Unies (1967); C. J. R. Dugard, "The legal effect of United Nations resolutions on apartheid", South African Law Journal, vol. 83 (1966); Nabil El Arabi, "Legal effects of the General Assembly resolutions: some remarks", Revue egyptienne de droit international, vol. 31 (1975), pp. 273-277 (in Arabic); T. Olawale Elias, "Modern sources of international law", in Transnational Law in a Changing Society, Essays in Honor of Philip C. Jessup (1972), pp. 44-52; Richard A. Falk, "On the quasi-legislative competence of the General Assembly", American Journal of International Law, vol. 60 (1966), pp. 782-791; Oscar M. Garibaldi, "The legal status of General Assembly resolutions: some conceptual observations", Proceedings of the American Society of International Law, Seventy-third Annual Meeting (1979), pp. 324-327; Francisco Ramos Galino, "Las resoluciones de la Asamblea General de las Naciones Unidas y su fuerza legal", Revista Espanola de Derecho Internacional, vol. 11, (1958), pp. 95-128; A. Gomez Robledo, "Le ius cogens international: sa genèse, sa nature, ses fonctions", Recueil des Cours, vol. 172 (1981-III); Leo Gross, "The United Nations and the role of law", International Organization, vol. 19 (1965), pp. 537-561; Edvard Hambro, "Some notes on parliamentary diplomacy", in Transnational Law in a Changing Society, Essays in Honor of Philip C. Jessup (1972), pp. 296-297; M. S. A. Hamid, "La valeur juridique des résolutions des organisations internationales comme source de principes de droit international", Revue egyptienne de droit international, vol. 24 (1968), p. 119 (in Arabic); Rosalyn Higgins, The Development of International Law through the Political Organs of the United Nations (1963), particularly pp. 1-10; see also Proceedings of the American Society of International Law, Fifty-ninth Annual Meeting (1965), pp. 116-124, and Sixty-fourth Annual Meeting (1970), pp. 37-48; R. C. Hingorani, Modern International Law (1979), p. 25; R. Y. Jennings, "Recent developments in the International Law Commission: its relations to the sources of international law", The International and Comparative Law Quarterly, vol. 13 (1964), p. 385 at pp. 390-394; E. Jimenez de Arechaga, "General course in public international law", Recueil des Cours, vol. 159 (1978-I), pp. 12 and 30-34; D. H. N. Johnson, "The effect of resolutions of the General Assembly of the United

Nations", British Yearbook of International Law 1955-56, vol. 32, pp. 97-122; Christopher C. Joyner, "United Nations General Assembly resolutions and international law: rethinking the contemporary dynamics of norm-creation", California Western International Law Journal, vol. 11 (1981), pp. 445-478; Rahmatullah Khan, "The Legal Status of the resolutions of the United Nations General Assembly", Indian Journal of International Law, vol. 19 (1979), pp. 552-559; Gabriella Rosner Lande, "The changing effectiveness of General Assembly resolutions", Proceedings of the American Society of International Law, Fifth-eighth Annual Meeting (1964), pp. 162-170; "The effect of the resolutions of the United Nations General Assembly", in Robert S. Wood, ed., The Process of International Organization (1971), pp. 199-220; Myres S. McDougal and W. Michael Reisman, "The prescribing function in the world constitutive process: how international law is made", Yale Journal of World Order Studies, vol. 6 (1980), p. 249; Edward McWhinney, book review, American Journal of International Law, vol. 75 (1981), p. 393; Maurice Mendelson, "The legal character of General Assembly resolutions: some considerations of principle", in Kamal Hossain, ed., Legal Aspects of the New International Economic Order (1980), pp. 95-107; Hermann Mosler, The International Society as a Legal Community (1980), pp. 88-91; N. G. Onuf, "Professor Falk on the quasi-legislative competence of the General Assembly", American Journal of International Law, vol. 64 (1970), pp. 349-355; Christopher Osakwe, "Contemporary Soviet doctrine on the sources of general international law", Proceedings of the American Society of International Law, Seventy-third Annual Meeting (1979), pp. 310-324; Clive Parry, The Sources and Evidences of International Law (1965), pp. 19-23; G. Piotrowski, "Les résolutions de l'Assemblée générale des Nations Unies et la portée du droit conventionel", Revue de droit international de sciences diplomatiques et politiques, vol. 33 (1955), pp. 111-125 and 221-242; W. Michael Reisman, "International lawmaking: a process of communication", Proceedings of the Seventy-fifth Anniversary Convocation of the American Society of International Law (1981), pp. 101-120; Paul Laurence Saffo, "The common heritage of mankind: has the General Assembly created a law to govern seabed mining?", Tulane Law Review, vol. 53 (1978-1979), pp. 492-520; Oscar Schachter, "The relation of law, politics and action in the United Nations", Recueil des Cours, vol. 109 (1963-II), pp. 185-188; and "Towards a theory of international obligation", Virginia Journal of International Law, vol. 8 (1967-1968), pp. 300-322; also in Schwebel, ed., The Effectiveness of International Decisions (1971), pp. 9-31; Christopher Schreuer, Decisions of International Institutions before Domestic Courts (1981); Stephen M. Schwebel, "The effect of resolutions of the United Nations General Assembly on customary international law", Proceedings of the American Society of International Law, Seventy-third Annual Meeting (1979), pp. 301-309; S. Prakash Sinha, "Identifying a principle of international law today", The Canadian Yearbook of International Law, vol. 11 (1973), pp. 116-120; Krzysztof Skubiszewski, "Recommendations of the United Nations and municipal courts", British Yearbook of International Law 1972-1973, pp. 353-364; "The General Assembly of the United Nations and its power to influence national action", Proceedings of the American Society of International Law, Fifty-eighth Annual Meeting (1964), pp. 153-162; "Enactment of law by international organizations", British Yearbook of International Law 1965-1966, p. 198 at pp. 229-233; F. Blaine Sloan, "The binding force of a 'recommendation' of the General Assembly of the United Nations", British Yearbook of International Law 1948, pp. 1-33; Louis B. Sohn, John A. Sibley lecture: "The shaping of

international law", Georgia Journal of International and Comparative Law, vol. 8 (1978), pp. 1-25 at 13-25; "The development of the Charter of the United Nations", in Maarten Bos, ed., The Present State of International Law and Other Essays (1973), pp. 39-59; Max Sorensen, "Principes de droit international public", Recueil des Cours, vol. 101 (1960-III), pp. 92-103; Julius Stone, "Conscience, law, force and the General Assembly", in G. Wilner, ed., Jus et Societas - Essays in Tribute to Wolfgang Friedmann (1979), pp. 297-337; Erik Suy, "Innovations in international law-making processes", in Macdonald, Johnston and Morris, eds., The International Law and Policy of Human Welfare (1978), pp. 187-200; A. J. P. Tammes, "Decisions of international organs as a source of international law", Recueil des Cours, vol. 94 (1958-II), pp. 261-364; H. W. A. Thirlway, International Customary Law and Codification (1972), pp. 61-79; Gregory I. Tunkin, Theory of International Law (1974), pp. 161-179; and "International law in the international system", Recueil des Cours (1975-IV), pp. 142-152; F. A. Vallat, "The competence of the United Nations General Assembly", Recueil des Cours (1959-II), pp. 207-289; Alfred Verdross, "Les principes généraux de droit dans le système des sources de droit international public, in Recueil d'études de droit international en hommage à Paul Guggenheim (1968), pp. 525-526; Michel Virally, "La valeur juridique des recommandations des organisations internationales", Annuaire françois de droit international, vol. 2 (1956), p. 66; "Le rôle des 'principes' dans le developpement du droit international", in Recueil d'études de droit international en hommage à Paul Guggenheim (1968), pp. 531-554.

84/ A Philippine proposal at the San Francisco Conference to give the General Assembly, acting in conjunction with the Security Council, legislative authority was rejected by 26 votes to 1 (United Nations Conference on International Organization, II/2/22). Generally recognized exceptions are resolutions on matters internal to the organization and decisions on budgetary matters under Article 17 of the Charter.

85/ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970), Advisory Opinion, I. C. J. Reports 1971, p. 50.

86/ Certain Expenses of the United States, Advisory Opinion, I. C. J. Reports 1962, p. 163.

87/ In particular resolutions 1514 (XV) and 2625 (XXV). Western Sahara, Advisory Opinion, I. C. J. Reports 1975, p. 32-33. See also Namibia Advisory Opinion, I. C. J. Reports 1971, p. 31.

88/ One may also recall the statements of individual judges concerning the accumulative effect of resolutions. Judge Lauterpacht in the South West Africa Voting Procedure case stated:

> "Although there is no automatic obligation to accept fully a particular recommendation or series of recommendations, there is a legal obligation to act in good faith in accordance with the principles of the Charter and the System of Trusteeship. An administering State may not be acting illegally by declining to act upon a recommendation or series of recommendations on the

"It is not possible to find in the Charter any support for this view. Article 25 is not confined to decisions in regard to enforcement action but applies to 'the decisions of the Security Council' adopted in accordance with the Charter. Moreover, that Article is placed, not in Chapter VII, but immediately after Article 24 in that part of the Charter which deals with the functions and powers of the Security Council. If Article 25 had reference solely to decisions of the Security Council concerning enforcement action under Articles 41 and 42 of the Charter, that is to say, if it were only such decisions which had binding effect, then Article 25 would be superfluous, since this effect is secured by Articles 48 and 49 of the Charter." 95/

The Court consequently held that decisions of the Security Council taken in accordance with its general powers under Article 24 of the Charter were legally binding and that States were under an obligation to accept and carry them out. 96/ The principal question with respect to Security Council resolutions is whether the Council adopted them as decisions, in which case they are binding, or merely as recommendations.

46. It is of course for Member States, the General Assembly and the Security Council and, if requested, the International Court of Justice to determine the effect of particular United Nations resolutions.

## B. Applicability of the law of belligerent occupation

47. Section IV of the present study examined generally the relationship between the principle of permanent sovereignty over natural resources and the law of belligerent occupation. In effect they would strengthen and reinforce one another. In Section V.C below, the study will examine specifically the implications of the United Nations resolutions on permanent sovereignty on the occupied Palestinian and other Arab territories and on the obligations of Israel concerning its conduct in those territories. Before doing this, however, the applicability of the law of belligerent occupation to the occupied territories should be noted.

48. Basically the law of belligerent occupation includes (a) the rules of general international law as codified in the Hague Regulations and (b) the Fourth Geneva Convention to which Israel and the Arab States concerned are parties. Territory is considered occupied when it is actually placed under the authority of the hostile army (art. 42 of the Hague Regulations). The applicability of the law of belligerent occupation and particularly the Fourth Geneva Convention to the occupied Palestinian and other Arab territories has been recognized in numerous resolutions of the Security Council and the General Assembly as well as in statements of Foreign Offices. 97/ It is true that Israel has questioned the applicability of the Geneva Conventions and the Hague Regulations partly on the ground that it does not recognize the sovereignty of the Arab States in the territories 98/ and partly on the ground that the rules apply only up to the time that active hostilities have ceased. 99/ Neither ground justifies the relaxation of the rules for the protection of occupied territories.

49. With respect to the former ground "international law knows only two categories of occupation by a conquering state: belligerent occupation properly so called and assumption of sovereignty over the conquered areas". 100/ A State cannot escape from its obligations as an occupant merely by asserting a controversy as to sovereignty in the occupied territories. With respect to the second ground, it is clear that rules protecting occupied territories continue to apply as long as the occupying Power continues to exercise governmental functions in such territories. 101/ This is made explicit by article 6 of the Fourth Geneva Convention which specifically provides that the Convention should continue to bind the occupying Power "for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory" with respect to enumerated articles including the important article 49.

## C. Implications of United Nations resolutions

50. As far as existing law is concerned one starts therefore with the law of belligerent occupation reinforced by the principle of permanent sovereignty over natural resources. Admittedly the law of belligerent occupation is not altogether adequate to deal with situations of prolonged occupation following the close of active military operations since a speedy end to an occupation was envisaged. But the alternative de lege ferenda for a long-term occupation where it does continue would be towards a status which would provide greater rights and protections for the occupied territories. 102/ With the exigencies of an active military operation removed, the rationale for the special powers of the occupant are reduced while the humanitarian considerations are if anything enhanced by prolonged occupation. 103/ The principle of permanent sovereignty over natural resources would strengthen any trend in this direction.

51. In the light of the foregoing, the following are some of the implications of United Nations resolutions on permanent sovereignty over natural resources on the occupied Palestinian and other Arab territories and on the obligations of Israel concerning its conduct in those territories which might be considered:

(a) The primary right of peoples and nations to permanent sovereignty over their natural resources is a right freely to use, control and dispose of such resources. The full exercise of this right can only take place with the restoration of control over the occupied territories to the States and peoples concerned. Such restoration is the first implication of the resolutions on permanent sovereignty over natural resources.

(b) A second implication derived directly from the primary right would be that in any interim pending full implementation of the foregoing, control over land, water and other natural resources should be restored to the local population. This would include allowing municipalities and other local Palestinian and Arab authorities to control the natural resources for which they had had responsibility prior to the occupation. 104/

(c) A third implication would be that the occupying Power is under an obligation not to interfere with the exercise of permanent sovereignty by the local population.

(d) A fourth implication of the United Nations resolutions on permanent sovereignty over natural resources would be the strengthening of the protection of the natural resources of the occupied territories afforded by the law of belligerent occupation. In any event such resources could not be used by the occupying Power beyond the limits imposed by the Hague Regulations and the Fourth Geneva Convention. Land and other resources may not be taken for settlements or permanently acquired for any purposes. Privately owned land and other resources may, if at all, only be requisitioned for the needs of the army of occupation and must be paid for. Public land cannot be used beyond usufruct and the proceeds must then be used only in connection with the occupation. While there is a practice of working existing mines, if any, the text of article 55 of the Hague Regulations requires the occupying Power to "safeguard the capital" of properties subject to usufruct. The principle of permanent sovereignty would imply that no depletion of natural resources should be permitted and would emphasize the provision in article 55 on safeguarding the capital. A further requirement of the Hague Regulations is that property of municipalities should be treated as private property. Land held for the benefit of municipalities and similar local groups, even if registered in the name of the State or central authorities, should be protected as private. The principle of permanent sovereignty of peoples over their natural resources suggests the strengthening of this provision as well as the other limitations placed by the law of belligerent occupation on an occupant's use of natural resources.

(e) A fifth implication of permanent sovereignty would be to reinforce a right under international law to reparation for any loss or damage to natural resources suffered as a result of violations of the rules of belligerent occupation.

## VI. CONCLUSION

52. The right of peoples and nations to permanent sovereignty over their natural resources has been accepted as a principle of international law although its exact content and relation to other principles of international law have yet to be fully developed and defined. The principle of permanent sovereignty has been specifically applied by the General Assembly to the occupied Palestinian and other Arab territories, and Security Council resolutions have also dealt with the protection of property rights in those territories. Moreover, both the General Assembly and the Security Council have recognized the applicability of the law of belligerent occupation to the occupied territories. The law of belligerent occupation gives some protection to the principle of permanent sovereignty while the principle of permanent sovereignty enhances and reinforces the law of belligerent occupation. The law of belligerent occupation should be interpreted and applied to protect to the greatest extent possible the principle of permanent sovereignty. Implications of the United Nations resolutions on permanent sovereignty over natural resources as they apply to the occupied Palestinian and other Arab territories and to the obligations of Israel therein have been set forth in paragraph 51 of the present study.

53. While normally General Assembly resolutions are recommendatory, there may be legal effects depending on a number of variables. Decisions in Security Council

resolutions are binding. It is for Member States, the General Assembly and the Security Council and, if requested, the International Court of Justice to assess in each case the legal effect of a particular resolution.

## Notes

1/ Paragraph 8 of resolution 36/173. The French text, which is more precise than the English, reads as follows:

> "... un rapport sur les incidences, en droit international, des résolutions de l'Organisation des Nations Unies relatives à la souveraineté permanente sur les ressources naturelles, aux territoires palestiniens et autres territoires arabes occupés et aux obligations d'Israël quant à son comportement dans ces territoires."

2/ Resolutions 36/173 of 17 December 1981 and 37/135 of 17 December 1982.

3/ For a more detailed history and discussion of the progressive development of the principle of permanent sovereignty over natural resources in the United Nations system, see United Nations Institute for Training and Research, Progressive Development of the Principles and Norms of International Law Relating to the New International Economic Order, (UNITAR/DS/5, 15 August 1982), pp. 291-377, particularly at pp. 327-363. For a collection of texts, see UNITAR, A New International Economic Order, Selected Documents 1945-1975, vols. I and II, compiled by Alfred George Moss and Harry N. M. Winton, and Selected Documents, 1976 and 1977, compiled by Hideko Makiyama. See also Ian Brownlie, "Legal status of natural resources in international law", Recueil des Cours (1979-I), pp. 255-271; and Kamal Hossain, ed., Legal Aspects of the New International Economic Order (1980), pp. 33-35.

4/ Department of State Bulletin, vol. 29 (September 1953), pp. 357-360. See UNITAR/DS/5 supra (note 3), at p. 329; James N. Hyde, "Permanent sovereignty over natural wealth and resources", American Journal of International Law, vol. 50 (1956), p. 854. See also Karol N. Gess, "Permanent sovereignty over natural resources", The International and Comparative Law Quarterly, vol. 13 (1964), p. 408; and Edward D. Re, "Nationalization and the investment of capital abroad", Georgetown Law Journal, vol. 42 (1953-1954), p. 44 at pp. 51-54.

5/ Anglo-Iranian Oil Company v. S.U.P.O.R. Company (Unione Petrolifera per L'Oriente, S.P.A.), Civil Court of Rome, 13 September 1954, International Law Reports, vol. 22 (1955), p. 23 at pp. 40-41. The Court stated:

> "It is evident that the decision of the United Nations ... taking into consideration the date when it was taken and the international situation to which it related, constitutes a clear recognition of the international lawfulness of the Persian Nationalization Laws".

6/ Anglo-Iranian Oil Company v. Idemitsu Kosan Kabushiki Kaisha, High Court of Tokyo 1953, International Law Reports, vol. 20 (1953), p. 305 at p. 313. The Court considered that:

same subject. But in doing so it acts at its peril when a point is reached when the cumulative effect of the persistent disregard of the articulate opinion of the Organization is such as to foster the conviction that the State in question has become guilty of disloyalty to the Principles and Purposes of the Charter. Thus an Administering State which consistently sets itself above the solemnly and repeatedly expressed judgment of the Organization, in particular in proportion as that judgment approximates to unanimity, may find that it has overstepped the imperceptible line between impropriety and illegality, between discretion and arbitrariness, between the exercise of the legal right to disregard the recommendation and the abuse of that right, and that it has exposed itself to consequences legitimately following as a legal sanction." (I. C. J. Reports 1955, p. 120)

Judge Tanaka dissenting in the 1966 South West Africa case said "the accumulation of authoritative pronouncements such as resolutions, declarations, decisions, etc., concerning the interpretation of the Charter by the competent organs of the international community can be characterized as evidence of the international custom referred to in Article 38, paragraph 1 (b)." (I. C. J. Reports 1966, p. 292) See also dissenting opinion of Judge Jessup, p. 441. Alex C. Castles, "Legal status of United Nations resolutions", Adelaide Law Review, vol. 3 (1967-1970), pp. 68-83 at p. 83, has summed up the position as follows:

"The law-making force of an accumulation of resolutions on a particular subject may also find legal force from another source of rule-making in the international community. The unanimous or almost unanimous practice of states as exemplified in their consistent support for a series of resolutions on a particular matter may also indicate that a particular practice has become a recognized element of customary international law."

For an analysis of General Assembly practice see Samuel A. Bleicher, "The legal significance of re-citation of General Assembly resolutions", American Journal of International Law, vol. 63 (1969), pp. 444-478. See also Oscar Schachter, "Towards a theory of international obligation", Virginia Journal of International Law, vol. 8 (1967-1968), pp. 300-322; also in Schwebel, ed., The Effectiveness of International Decisions (1971), at pp. 12-13.

89/ See Gaetano Arangio-Ruiz, "The normative role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations", Recueil des Cours, vol. 137 (1972-III), p. 476:

"The simple repetition of a rule in the Assembly does not by itself 'create' - in spite of overwhelming majorities, similarity (or identity) of content, frequency of reiteration or citation, or length of the period covered by the repetitions - a corresponding customary norm. It would be too easy if the 'shouting out' of rules through General Assembly resolutions were to be law-making simply as a matter of 'times' shouted and size of the choir."

90/ Judge Hermann Mosler, The International Society as a Legal Community (1980), pp. 88-89, concludes: "After quite a long and fierce dispute it now seems that the extreme views, on the one hand that resolutions have no binding effect at all or on the other hand that they have a legislative effect, have been abandoned

and that a generally accepted view is emerging. There can be no single answer to the question - resolutions must be distinguished accordingly to various factors, such as the intention of the General Assembly, the content of the principles proclaimed and the majority in favour of their adoption." Professor W. Michael Reisman, in the Harold D. Lasswell Memorial Lecture at the Seventy-fifth Anniversary Convocation of the American Society of International Law, in presenting the McDougal-Lasswell-Reisman analysis of such factors, expressed them as a process involving the communicators, policy content, authority signal, control intention and the target audience. Proceedings, 1981, pp. 101-120 at p. 108. A fuller expression is presented on p. 107.

91/ Compare Article 38 of the Statute of the International Court of Justice.

92/ See note 83 supra.

93/ "Modern sources of international law", in Friedman, Henkin and Lissitzyn, eds., Transnational Law in a Changing Society, Essay in Honor of Philip C. Jessup, p. 46; and Proceedings of the American Society of International Law, 1981, pp. 29-31.

94/ Supra, note 83.

95/ Namibia Advisory Opinion, I. C. J. Reports, 1971, p. 53.

96/ Ibid., p. 53. See p. 52 for the power of the Security Council to take decisions under Article 24. See Rosalyn Higgins, "The Advisory Opinion on Namibia: which United Nations resolutions are binding under Article 25 of the Charter?", The International and Comparative Law Quarterly, vol. 21 (1972), pp. 270-286.

97/ For example see Digest of United States Practice in International Law 1978, pp. 1575-1578; and British Yearbook of International Law 1980, pp. 480-481. The Supreme Court of Israel in the Beit-El and Elon Moreh Settlement cases recognized the applicability to the occupied territories of the Hague Regulations as customary international law being a part of the municipal law of Israel. Stone argues that this is not equivalent "to a holding that under international law the only standing under which Israel may exercise authority in the territories concerned is that of a belligerent occupant". ("Aspects of the Beit-El and Elon Moreh cases", Israel Law Review, vol. 15 (1980), p. 476 at pp. 493-494). It should also be noted that although Israel is a party to the Fourth Geneva Convention and thus bound internationally, Israeli courts follow the British practice of not applying treaty law until it has been incorporated into municipal law by legislation. Consequently the Supreme Court noted that the Geneva Conventions belonged to consensual international law which is not in the nature of a law that binds an Israeli court.

98/ See Yehuda Z. Blum, "The missing reversioner: reflections on the status of Judea and Samaria", Israel Law Review, vol. 3 (1968), pp. 279-301; Meir Shamgar, "The observance of international law in the administered territories", Israel Yearbook on Human Rights, vol. 1 (1971), pp. 262 ff. For discussion see Allan Gerson, Israel, the West Bank and International Law (1978), p. 80.

99/ See Israel Ministry of Foreign Affairs, Memorandum of Law (note 58 supra), pp. 432-433. The Israel Ministry of Foreign Affairs relied on a statement by Feilchenfeld (supra, note 51, p. 6) that section III of the Hague Regulations applies expressly only to the typical case of belligerent occupation where one belligerent has overrun a part of the territory belonging to an enemy State, where both armies are still fighting in the field and where no armistice or other agreement has been concluded. There seems to be no support in state practice for this view and Feilchenfeld himself states that "it is generally recognized that the Hague Regulations continue to apply, except so far as deviations result from, or have been stipulated in, the armistice agreement" (ibid., p. 111). Nor has anyone pointed out precisely where the Hague Regulations so limit their applicability (Clagett and Johnson, supra, note 58, p. 561).

100/ Alwyn Freeman, "Law of war booty", American Journal of International Law, vol. 40 (1946), pp. 796-797. Even in traditional international law the latter (assumption of sovereignty) could take place only with the conclusion of a peace treaty or the complete subjugation of an enemy State (debellatio). Under the law of the United Nations Charter acquisition of territory by force is inadmissible. Supra, paragraph 21 of this study.

101/ Schwarzenberger (supra, note 51, p. 173) states:

> ... "in the absence of any agreement between belligerents to the contrary, it [a rule pertaining to the laws of war] applies as much after, as before, an armistice, for post-armistice occupation is still belligerent occupation."

102/ In this connection see the proposal for a trustee-occupant status in Allan Gerson, "Trustee-occupant: the legal status of Israel's presence in the West Bank", Harvard International Law Journal, vol. 14 (1973), pp. 1-49; and Israel, the West Bank and International Law (1978), pp. 78-82. See also Mahnoush H. Arsanjani, "United Nations competence in the West Bank and Gaza Strip", The International and Comparative Law Quarterly, vol. 31 (1982), pp. 426-450, for the suggestion that these occupied territories be considered non-self-governing territories with the protection of Article 73 of the Charter of the United Nations and resolution 1514 (XV). Such status would be based on the mandate and trusteeship concept of "sacred trust" whose ultimate objective, as indicated by the International Court of Justice, is the self-determination and independence of the people concerned (I. C. J. Reports 1971, p. 31). For specific reference to permanent sovereignty in this context, see Decree No. 1 of the United Nations Council for Namibia adopted for the purpose of securing for the people of Namibia adequate protection of the natural resources of the territory. The preamble of the Decree expressly relies on General Assembly resolution 1803 (XVII) "which declared the right of peoples and nations to permanent sovereignty over their natural wealth and resources." See Ralph Zacklin, "The problem of Namibia in international law", Recueil des Cours, vol. 171 (1981-II), pp. 318-327; George R. Schockey, Jr., "Enforcement in United States courts of the United Nations Council for Namibia's decree on natural resources", Yale Studies in World Public Order, vol. 2 (1976), p. 295 at pp. 296 and 328; H. G. Schermers, "The Namibia Decree in national courts", The International and Comparative Law Quarterly, vol. 26 (1977), pp. 81-96; Objective Justice, special issue on Namibia, vol. 14 (1982).

103/ In this connection see the official commentary (Jean S. Pictet, ed.) to article 6 of the Fourth Geneva Convention. The rationale for terminating the application of the Convention as a whole while maintaining certain articles in force is in line with this view. The drafters of the Geneva Convention envisaged a speedy return of control to the authorities of the occupied territories, and, in any event, if the occupation were to be prolonged "as hostilities have ceased, stringent measures against the civilian population will no longer be justified" (pp. 62-63).

104/ See the annex to the report of the Secretary-General on permanent sovereignty over national resources in the occupied Arab territories (A/36/648, annex, para. 69, 10 November 1981).

## APPENDIX I

## Annex to Hague Convention No. IV of 18 October 1907: Regulations Respecting the Laws and Customs of War on Land

[Original: English/French]

Military authority over captured territory.

### SECTION III.—DE L'AUTORITÉ MILITAIRE SUR LE TERRITOIRE DE L'ETAT ENNEMI.

### ARTICLE 42.

Actual occupation.

Un territoire est considéré comme occupé lorsqu'il se trouve placé de fait sous l'autorité de l'armée ennemie.

Extent.

L'occupation ne s'étend qu'aux territoires où cette autorité est établie et en mesure de s'exercer.

### ARTICLE 43.

Preservation of order and safety.

L'autorité du pouvoir légal ayant passé de fait entre les mains de l'occupant, celui-ci prendra tou'es les mesures qui dépendent de lui en vue de rétablir et d'assurer, autant qu'il est possible, l'ordre et la vie publics en respectant, sauf empêchement absolu, les lois en vigueur dans le pays.

### ARTICLE 44.

Forcing information from inhabitants forbidden.

Il est interdit à un belligérant de forcer la population d'un territoire occupé à donner des renseignements sur l'armée de l'autre belligérant ou sur ses moyens de défense.

### ARTICLE 45.

Requiring oath of allegiance forbidden.

Il est interdit de contraindre la population d'un territoire occupé à prêter serment à la Puissance ennemie.

### ARTICLE 46.

Rights and property to be respected.

L'honneur et les droits de la famille, la vie des individus et la propriété privée, ainsi que les

### SECTION III.—MILITARY AUTHORITY OVER THE TERRITORY OF THE HOSTILE STATE.

### ARTICLE 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.

### ARTICLE 43.

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

### ARTICLE 44.

A belligerant is forbidden to force the inhabitants of territory occupied by it to furnish information about the army of the other belligerent, or about its means of defence.

### ARTICLE 45.

It is forbidden to compel the inhabitants of occupied territory to swear allegiance to the hostile Power.

### ARTICLE 46.

Family honour and rights, the lives of persons, and private property, as well as religious convic-

convictions religieuses et l'exercice des cultes, doivent être respectés.

La propriété privée ne peut pas être confisquée.

ARTICLE 47.

Le pillage est formellement interdit.

ARTICLE 48.

Si l'occupant prélève, dans le territoire occupé, les impôts, droits et péages établis au profit de l'Etat, il le fera, autant que possible, d'après les règles de l'assiette et de la répartition en vigueur, et il en résultera pour lui l'obligation de pourvoir aux frais de l'administration du territoire occupé dans la mesure où le Gouvernement légal y était tenu.

ARTICLE 49.

Si, en dehors des impôts visés à l'article précédent, l'occupant prélève d'autres contributions en argent dans le territoire occupé, ce ne pourra être que pour les besoins de l'armée ou de l'administration de ce territoire.

ARTICLE 50.

Aucune peine collective, pécuniaire ou autre, ne pourra être édictée contre les populations à raison de faits individuels dont elles ne pourraient être considerées comme solidairement responsables.

ARTICLE 51.

Aucune contribution ne sera perçue qu'en vertu d'un ordre écrit et sous la responsabilité d'un général en chef.

Il ne sera procédé, autant que possible, à cette perception que d'après les règles de l'assiette et de la répartition des impôts en vigueur.

Pour toute contribution, un reçu sera délivré aux contribuables.

tions and practice, must be respected.

Private property cannot be confiscated. No confiscation.

ARTICLE 47.

Pillage is formally forbidden. Pillage forbidden.

ARTICLE 48.

If, in the territory occupied, the occupant collects the taxes, dues, and tolls imposed for the benefit of the State, he shall do so, as far as is possible, in accordance with the rules of assessment and incidence in force, and shall in consequence be bound to defray the expenses of the administration of the occupied territory to the same extent as the legitimate Government was so bound. Collection of taxes.

ARTICLE 49.

If, in addition to the taxes mentioned in the above Article, the occupant levies other money contributions in the occupied territory, this shall only be for the needs of the army or of the administration of the territory in question. Levies for military needs.

ARTICLE 50.

No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible. General penalty for acts of individuals forbidden.

ARTICLE 51.

No contribution shall be collected except under a written order, and on the responsibility of a Commander-in-chief. Collection of contributions.

The collection of the said contribution shall only be effected as far as possible in accordance with the rules of assessment and incidence of the taxes in force.

For every contribution a receipt shall be given to the contributors. Receipts.

ARTICLE 52.

Requisitions for needs of army.

Des réquisitions en nature et des services ne pourront être réclamés des communes ou des habitants, que pour les besoins de l'armée d'occupation. Ils seront en rapport avec les ressources du pays et de telle nature qu'ils n'impliquent pas pour les populations l'obligation de prendre part aux opérations de la guerre contre leur patrie.

Authority.

Ces réquisitions et ces services ne seront réclamés qu'avec l'autorisation du commandant dans la localité occupée.

Payment.

Les prestations en nature seront, autant que possible, payées au comptant; sinon, elles seront constatées par des reçus, et le paiement des sommes dues sera effectué le plus tôt possible.

ARTICLE 52.

Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country.

Such requisitions and services shall only be demanded on the authority of the commander in the locality occupied.

Contributions in kind shall as far as possible be paid for in cash; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible.

ARTICLE 53.

Seizure of public cash, property, etc.

L'armée qui occupe un territoire ne pourra saisir que le numéraire, les fonds et les valeurs exigibles appartenant en propre à l'Etat, les dépôts d'armes, moyens de transport, magasins et approvisionnements et, en général, toute propriété mobilière de l'Etat de nature à servir aux opérations de la guerre.

Telegraphs, transportation, etc.

Tous les moyens affectés sur terre, sur mer et dans les airs à la transmission des nouvelles, au transport des personnes ou des choses, en dehors des cas régis par le droit maritime, les dépôts d'armes et, en général, toute espèce de munitions de guerre, peuvent être saisis, même s'ils appartiennent à des personnes privées, mais devront être restitués et les indemnités seront réglées à la paix.

ARTICLE 53.

An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the State, depôts of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for military operations.

All appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval law, depôts of arms, and, generally, all kinds of ammunition of war, may be seized, even if they belong to private individuals, but must be restored and compensation fixed when peace is made.

ARTICLE 54.

Submarine cables to neutral territory.

Les câbles sous-marins reliant un territoire occupé à un territoire neutre ne seront saisis ou détruits que dans le cas d'une nécessité absolue. Ils devront également être restitués et les indemnités seront réglées à la paix.

ARTICLE 54.

Submarine cables connecting an occupied territory with a neutral territory shall not be seized or destroyed except in the case of absolute necessity. They must likewise be restored and compensation fixed when peace is made.

CONVENTION—WAR ON LAND. OCTOBER 18, 1907.

ARTICLE 55.

L'Etat occupant ne se considèrera que comme administrateur et usufruitier des édifices publics, immeubles, forêts et exploitations agricoles appartenant à l'Etat ennemi et se trouvant dans le pays occupé. Il devra sauvegarder le fonds de ces propriétés et les administrer conformément aux règles de l'usufruit.

ARTICLE 55.

Administration of public property in occupied territory.

The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.

ARTICLE 56.

Les biens des communes, ceux des établissements consacrés aux cultes, à la charité et à l'instruction, aux arts et aux sciences, même appartenant à l'Etat, seront traités comme la propriété privée.

Toute saisie, destruction ou dégradation intentionnelle de semblables établissements, de monuments historiques, d'œuvres d'art et de science, est interdite et doit être poursuivie.

Certifié pour copie conforme:
Le Secrétaire-Général du Ministère des Affaires Etrangères des Pays-Bas,

HANNEMA.

ARTICLE 56.

Municipal, religious, etc., property.

The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property.

Legal proceedings for seizure, etc.

All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.

/...

APPENDIX II

Geneva Convention relative to
the Protection of Civilian Persons
in Time of War of 12 August 1949
(Fourth Geneva Convention)

...

ARTICLE 6

The present Convention shall apply from the outset of any conflict or occupation mentioned in Article 2.

In the territory of Parties to the conflict, the application of the present Convention shall cease on the general close of military operations.

In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143.

Protected persons whose release, repatriation or re-establishment may take place after such dates shall meanwhile continue to benefit by the present Convention.

...

ARTICLE 46

In so far as they have not been previously withdrawn, restrictive measures taken regarding protected persons shall be cancelled as soon as possible after the close of hostilities.

Restrictive measures affecting their property shall be cancelled, in accordance with the law of the Detaining Power, as soon as possible after the close of hostilities.

...

ARTICLE 49

Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.

Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.

The Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extend, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated.

The Protecting Power shall be informed of any transfers and evacuations as soon as they have taken place.

The Occupying Power shall not detain protected persons in an area particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demand.

The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.

...

ARTICLE 53

Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or co-operative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.

...

ARTICLE 147

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

# APPENDIX III

## Protocol Additional to the Geneva Convention of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977

...

## SECTION II

### REPRESSION OF BREACHES OF THE CONVENTIONS AND OF THIS PROTOCOL

Article 85 - Repression of breaches of this Protocol

1. The provisions of the Conventions relating to the repression of breaches and grave breaches, supplemented by this Section, shall apply to the repression of breaches and grave breaches of this Protocol.

...

4. In addition to the grave breaches defined in the preceding paragraphs and in the Conventions, the following shall be regarded as grave breaches of this Protocol, when committed wilfully and in violation of the Conventions or the Protocol:

(a) the transfer by the occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention;

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May 25, 1983

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