Autonomy and Self-determination

Peter Hilpold, editor

CHAPTER 10*BIS*

SELF-DETERMINATION UNDER TREATY? TRIESTE, ITS PORT, AND SOME OPEN QUESTIONS

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I. Introduction

Self-determination, a perennial subject for political scientists, international relations scholars, and international lawyers, famously attracts different modes of analysis in each of the different fields it might concern. Even for international lawyers, it may mean different things, depending on which international law rules apply. The UN Charter, under Chapter XI, developed a series of rules for dealing with self-determination claims in a particular situation—that of the colonial territories and their peoples defined as such. Outside the colonial situation, claimants to independence have asserted that the rules of general international law may include a right to secede, at least for a people in a territory where the incumbent State has pushed the people to such an extreme that they have no alternative but independence. Whether a right exists to 'reparative' or 'remedial' secession remains controversial.[1]

A third possibility, comparatively little addressed, is that a people may obtain a right to

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[1] *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, Advisory Opinion, 22 July 2010, ICJ Rep. 2010 p. 403, 438 (paras. 82-83). Cf. *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 (Supreme Court of Canada), 20 August 1998, para. 126.

independence under special rules neither arising under the UN Charter nor belonging to general international law. There is nothing new about States creating new international entities by treaty;[2] a treaty may even confer international law rights on the inhabitants of a territory.[3] Because the rights conferred in that manner will be particular to the treaty conferring them, this area of practice eludes systematic analysis and generalization. It is with a view to examples in practice that the phenomenon is best elucidated. Arguably, no example in practice offers a more striking elucidation of the possibilities—and limitations—of self-determination under treaty than that of Trieste under the 1947 Peace Treaty and subsequent practice.

It might be supposed that Trieste, long ago re-incorporated into Italy's legal and administrative system, is an example holding historical interest only. Scholars addressing self-determination have indeed described the Free Territory of Trieste as having been "definitively abandoned."[4] However, in connection with Trieste a residue of international law questions has stubbornly persisted. The special dispensations for Trieste adopted by the Allied Powers after World War II were in important respects never implemented, but in some they were. In important respects, the parties involved wound up the main practical provisions under which Trieste was to have had an independent existence, but not all the parties expressly agreed to the alternative settlement that supplanted those provisions in practice. And those parties that did so agree, Italy among them, indicated that certain elements of the 1947 settlement continued—in particular the provisions for a free port.

Even as they stand, these matters still might hold little present interest. The case of Trieste has a degree of present saliency that it might otherwise lack, however, because inhabitants of Trieste in recent years (2010s) have engaged in a spirited, if uphill, campaign to bring the case to the fore. A group of Trieste inhabitants, the Triest NGO, have made representations about the territory and its port in the general debate at the UN Human Rights Council; they referred there in 2015 to "violation of international free territory of Trieste by Italy, where citizens were arrested for exercising their right of freedom of expression and of

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2 E.g., Albania, in accordance with Article III of the Treaty of London (Bulgaria, Greece, Montenegro, Serbia, and Turkey, 17/30 May 1913, 107 BFSP 656 and the Organic Statute for the Albanian State, 29 July 1913, as adopted by the Conference of Ambassadors, 29 July 1913: 11 *Nouveau recueil de traités* (3rd ser.) p. 650; and the Protocol of Florence, 17 December 1913: PCIJ ser. C. no. 5 (II) p. 266.

3 E.g., on the railway workers of the Free City of Danzig: *Jurisdiction of the Courts of Danzig*, Advisory Opinion, 3 March 1928, PCIJ Ser. B No. 15, pp. 17-18; on the public in Danzig as a whole: *Polish Postal Service in Danzig*, Advisory Opinion, 16 May 1925, PCIJ Ser. B No. 11 p. 41.

4 Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination. The Accommodation of Conflicting Rights* (rev. ed.) (Philadelphia: University of Pennsylvania Press, 1996) p. 401.

association."[5] A delegation from Trieste participated in the eighth session of the UN Forum on Minority Issues addressing Minorities in the Criminal Justice System in 2015.[6] Trieste was noted elsewhere at the UN as well when the Secretary-General recalled the international framework for Trieste, in passing, as an example "for the purpose of assisting and informing any future work" by the Secretariat on the Israel-Palestinian situation.[7] The Secretary-General's reference to Trieste prompted a parliamentary question in Italy.[8]

Moreover, protests in the territory that invoke self-determination and the 1947 Peace Treaty led to proceedings in Italian courts. Judgments in those proceedings addressed the question of sovereignty over the territory. The present chapter will consider the determinations of the court in one of those judgments, Judgment No. 00148/2013 of the Regional Administrative Court of Friuli Venezia Giulia of 9 October 2013. It then will turn to the international instruments relevant to the status of Trieste, with a view to evaluating the position taken in the judgment. It will close with considerations relating to human rights and self-determination in Trieste.

II. Sovereignty over Trieste: from Italy and back again?

Three international instruments relate to the question of sovereignty over Trieste: the Italian Peace Treaty of 1947, a Memorandum of Understanding of 1954, and the Treaty of Osimo of 1975. Notwithstanding the passage of some forty years since the last of these instruments, their interpretation and application arose as issues in proceedings in Italian courts in the 2010s. The general background to the proceedings was this: certain inhabitants of Trieste engaged in protests concerning the international legal status of the territory and its port; Italian authorities took steps against the protestors; and in the course of proceedings, the question of international legal status was raised.[9] The Trieste activists also brought a case of their own, an action to challenge the authority of Italy to hold elections in Trieste. This case in particular brought attention to the question of sovereignty.

(A) Passing judgment on sovereignty (2013)

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5 Human Rights Council, general debate on human rights situations requiring its attention, 24 June 2015, statement by Non-Violent Radical Party, Transnational and Transparty.

6 Office of the High Commissioner of Human Rights, 24-25 November 2015.

7 Letter dated 21 October 2015 from the Secretary-General addressed to the President of the Security Council, 23 October 2015, S/2015/809, p. 10.

8 Senator Francesco Russo (Italian Democrat party), 20 January 2016, nella seduata n. 563: Legislatura 17 Atto di Sindacato Ispettivo no. 4-05108.

9 See, e.g., proceedings against Paolo G. Parovel following his criticism of a plan to re-develop the Free Port: http://www.movimentotriestelibera.net/wp/archives/6340 (19 December 2016).

An appellant, Roberto Giurastante, in 2013 challenged the Regional government of Friuli Venezia Giulia for its adoption of a measure calling elections for the President of the Region and the Regional Council. The appellant argued that Trieste is not part of Italy but, instead, is a Free Territory, as provided in the 1947 Peace Treaty. On the basis of that argument the appellant asked the Regional Administrative Court to declare that it had no capacity to hear the case, that court being an organ of Italy and Italy having no jurisdiction in Trieste. The appellant requested that the matter be transferred to the UN Security Council, so that that body might "act as guarantor of the Free Territory of Trieste."[10]

As an initial point, the Court noted it was "paradoxical" that the appellant "repeatedly ask[ed] the Regional Administrative Court to pass a judgment, and to declare before and regardless to its outcome that the juridical value of the judgement shall not be recognised."[11] Referring to separation of powers, the Court observed that it "cannot enter political questions of national or international nature which fall outside the scope of… jurisdiction."[12] The Court emphatically rejected the request to refer the matter to the Security Council, invoking its lack of jurisdiction to grant such a request: "This court, conscious of the limits of jurisdictional activity, cannot, should not and will not deal with issues that fall outside its scope of competency."[13] The Court thus understood the matter to be one it could not properly adjudicate. In principle, it appears that the matter could have ended there.

However, the Court also addressed the Appellant's arguments in respect of the international status of Trieste. The Court reasoned that either there had never been a transfer of sovereignty from Italy to a Free Territory of Trieste or, if there had, sovereignty later had reverted to Italy.

As to the first possibility—that sovereignty had never been transferred—the Court reasoned as follows:

> "The correct legal interpretation of the Peace Treaty and in particular of Article 21… leads to the conclusion that the birth of the Free Territory and the resulting transfer of sovereignty to the latter would be conditioned, at the least, by the first constituent instrument of said Free Territory, in other words, by the nomination by the Security Council of its government. This was done for evident practical reasons, as the initial temporary statute and the subsequent permanent statute could only be established with the nomination of a governor, but also for the determining reason

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10 *Giurastante* v. *Region of Friuli Venezia Giulia*, registered appeal No. 148 of 2013, Judgement of 28 October 2013 (Zuballi, President Judge; Di Sciascio & Settesoldi, Judges), para. 1 (Law)

11 Ibid., para. 6 (Law).

12 Ibid., para. 7 (Law).

13 Ibid., para. 7 (Law).

> that the nomination of a governor through the Security Council would have shown the common willingness of the victors to act upon the part of the Treaty which established the Free Territory.
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> As is known, the nomination of the governor never occurred and therefore the Free Territory never came in existence and there was no transfer of sovereignty to the latter."[14]

As will be considered below, the conclusion that "no transfer of sovereignty" took place in 1947 is not entirely obvious. The first possibility—the possibility that there was never a separation of Trieste from Italy—accordingly merits scrutiny.

As to the second possibility—the later reversion of sovereignty to Italy—the Court reasoned that this took place either through the 1954 Memorandum of London or through the Treaty of Osimo of 1975. The Court said that "[i]t must be highlighted that the Peace Treaty of 1947 did not, by any means, ban partial modifications by some of the signatories if these modifications interested the latter exclusively."[15] In the court's reasoning, "modifications" entailed by the re-absorption of Trieste into Italy and Yugoslavia "interested [Italy and Yugoslavia] exclusively"—i.e., such a modification did not interest any other party. Following logically from this reasoning, the court must have assumed that Trieste's inhabitants had no interest in the fate of the territory that would have limited the States Parties' power to dispose of its separate status.

So, in summary, the conclusion of the Regional Administrative Court holding that Trieste is part of Italy is based upon the following propositions:

i) Article 21 of the Peace Treaty was never put into effect and Italy continued to have sovereignty over Trieste in spite of that provision;

or

ii) Italian sovereignty ceased as a result of the Peace Treaty but was reinstated with the 1954 London Memorandum of Understanding (MOU) or with the 1975 Osimo Treaty; and

iii) No other party—whether a Party to the Peace Treaty or the inhabitants of Trieste—had a legal interest in the disposition of sovereignty over Trieste.

Considering the relevant legal instruments, difficulties come to light with each of these propositions.

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14 Ibid., para 10.4 (Law).
15 Ibid., para. 10.5.

(B) The 1947 Peace Treaty

1. Sovereignty under the Peace Treaty

The first proposition in the 2013 Judgment, as set out above, is contradicted by the express terms of Article 21. Article 21, paragraphs 1, 2, and 4, provide as follows:

> "1. There is hereby constituted the Free Territory of Trieste, consisting of the area lying between the Adriatic Sea and the boundaries defined in Article 4 and 22 of the present Treaty. The Free Territory of Trieste is recognized by the Allied and Associated Powers and by Italy, which agree that its integrity and independence shall be assured by the Security Council of the United Nations.
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> 2. Italian sovereignty over the area constituting the Free Territory of Trieste, as above defined, shall be terminated upon the coming into force of the present Treaty.
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> …
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> 4. The Free Territory of Trieste shall not be considered as ceded territory within the meaning of Article 19 and Annex XIV of the present Treaty."[16]

In short, Trieste was not transferred (ceded) to any existing State. The Parties to the Peace Treaty referred to Trieste as a newly recognized entity having "integrity and independence" separate from any existing State. Article 21 thus uses the language of recognition and invokes a constitutive act following the termination of the predecessor State's sovereignty.

Consistent with the assurance of integrity and independence, the boundary provisions of the Peace Treaty imply the separateness of Trieste from other States. Article 4 of the Peace Treaty defined the frontiers between the Free Territory and Italy. Article 22 defined the frontiers between the Free Territory and Yugoslavia. Read together, Articles 4 and 22 tend to confirm the conclusion also to be drawn from Article 21: the Free Territory was to be part of neither State. The Treaty defined the frontier between Yugoslavia and Italy under a separate provision, unrelated to Trieste (Article 3). Article 4, paras *(ii) and (iii)*, read together with Article 22, para. *(iv)*, suggest as well that the Free Territory was conferred jurisdiction over a maritime area extending as far as the high seas and separate from that of the two neighbouring States.

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[16] Treaty of Peace with Italy, signed 10 February 1947, entered into force 15 September 1947: 49 UNTS 126, 137-138. The States Parties were the USSR, United Kingdom, United States, China, France, Australia, Belgium, Belarus (Byelorussian SSR), Brazil, Canada, Czechoslovakia, Ethiopia, Greece, India, the Netherlands, New Zealand, Poland, Ukraine (Ukrainian SSR), South Africa, and Yugoslavia, as Allied and Associated Powers, and Italy.

As to the termination of the predecessor State's sovereignty, the only condition placed on that event was the coming into force of the Peace Treaty. The Peace Treaty entered into force on 15 September 1947.

Italian courts around that time accepted that the Treaty indeed had terminated Italy's sovereignty over Trieste. The Court of Cassation, for example, held that Trieste was "in foreign territory" and that it was a place "formerly belonging to national territory which, in consequence of the lost war, had to be ceded to a foreign State."[17] The use of the term "ceded" might be objected to, on the grounds that the Treaty made clear that no cession took place, but the conclusion of the Court of Cassation was clear enough: a new juridical entity—"a foreign State"—now exercised sovereignty over Trieste. Italy's sovereignty there had come to an end.

Some Italian jurists later expressed doubts as to the effects of Article 21(2). Professor Cammarata, for instance, argued that "the cessation of the Italian sovereignty over the area in question was conditioned by the actual setting up of the Free Territory."[18] Similarly, Professor Udina maintained that "[t]here is no cession in a strict meaning, because at the time when such cession should be operative … the new community does not exist as yet, be it as one of the contracting parties or as a third party benefitting by the provisions concerning it."[19] On this characterisation, it would seem, then, that the territory had become a special international zone under multilateral guarantee and belonging to no State.

The UK and the US did not accept this characterisation. Diverse positions can be found in the documents of these States addressing Trieste. At one extreme, an FCO memorandum stated that "Her Majesty's Government and the United States enjoy sovereignty over Zone A in virtue of the Peace Treaty with Italy."[20] In other more considered assessments of the legal situation preceding the 1954 London Memorandum, the UK describes its role and that of the US in terms of temporary administration.[21]

The year after the Peace Treaty entered into force, proposals were afoot among the Western Allies to return Trieste to Italy. The USSR protested the proposals. The correspondence between the USSR and United States sheds light on contemporary understandings of the legal status of Trieste. The USSR's memorandum to the United States on the matter read in pertinent part as follows:

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17 Allied Military Government, *Judicial Decisions and Legal Opinions on Matters of Jurisdiction Relating to the Free Territory of Trieste*, 1951, p. 24.

18 Ibid., p. 32.

19 Ibid., p. 43

20 FCO, 1 May 1952.

21 FCO, Additional Legal Position, 1953.

> "[T]he Soviet Government draws the attention of the [U.S.] Department of State to the fact that the treaty of peace with Italy, as with other states that participated in the war, was prepared by the Council of Foreign Ministers and examined in detail at the Paris Conference, with the participation of 21 states, which subsequently signed and ratified it, and that it entered into force only several months ago.
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> Hence it stands to reason that the proposal to decide the question of the revision of the treaty of peace with Italy in respect to one or another of its parts by means of correspondence or the organization of private conferences is considered unacceptable by the Soviet Government as violating the elementary principles of democracy."[22]

The Department of State Bulletin recorded the Soviet note under the title "U.S.S.R. Rejects Procedure for Drafting of Protocol to Italian Treaty." The USSR, for its part, confused the matter as well by referring to "elementary principles of democracy." The more apposite description would have been "elementary principles of treaty law," even as "procedure" and "democracy" might also have been relevant.

One of the main contemporary comments on Trieste in the United States was by Josef Kunz, in an article in the 1948 volume of the *Western Political Quarterly*. Kunz referred to the Soviet protest note.[23] There was also a United States response, which does not appear to have drawn attention from writers at the time. It seems a rather significant response. The United States said as follows:

> "While regretting that the Soviet Government has not found it possible to act favorably in this matter, the Government of the United States is at a loss to understand why the procedure suggested for the negotiation of a draft protocol to the Italian Treaty is considered unacceptable. It was the intention of the Government of the United States that the preliminary meeting of the powers principally concerned to negotiate a draft protocol should be followed by consultation with all other interested governments. In the view of the Government of the United States the suggested preliminary meeting is in fact the first step of the procedure followed in the drafting of the Treaty of Peace with Italy. As pointed out by the Soviet Embassy's memorandum the Treaty of Peace was prepared by the Council of Foreign Ministers and subsequently submitted for the consideration of the twenty-one states at the Peace Conference."[24]

The United States reply placed emphasis on the procedural aspects of the proposal—and then indicated that the United States had intended to follow any preliminary meeting with a full

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[22] U.S. Department of State Bulletin, no. 460, 25 April 1948, p. 525, Memorandum of the Soviet Embassy, Washington, DC, dated 13 Apr. 1948.

[23] Josef L. Kunz, "The Free Territory of Trieste," (1948) 1(2) *The Western Political Quarterly* 99, 103 n. 18d.

[24] U.S. Department of State Bulletin, no. 460, 25 April 1948, p. 525: U.S. Reply to the U.S.S.R., 16 Apr. 1948.

consultation (i.e., "followed by consultation with *all* other interested governments"). The reply made it fairly clear that the United States viewed any meeting consisting of fewer than the totality of "interested governments" as a "preliminary meeting" to be followed "subsequently" by "consideration of the twenty-one states of the Peace Conference." Viewing the matter that way, the United States appears to have accepted the position "pointed out by the Soviet Embassy's memorandum": the Treaty of Peace could be amended by the parties to the treaty as a whole but not by selected subgroups of them. The relevant parties at the time accordingly seem to have agreed that, failing consensus among the parties to the Treaty of Peace to adopt a different arrangement, Trieste was to remain as fixed in the Treaty.

It is true, as the Regional Administrative Court recalled in 2013, the Allied and Associated Powers never finalized the governing arrangements for the territory; no governor was ever properly appointed in accordance with the Treaty; "the nomination by the Security Council of its government" never took place. The difficulty with the court's reasoning is that the Peace Treaty did not stipulate finalizing the governing arrangements as a condition for the separation of the territory and termination of Italy's sovereignty over it. The States Parties at the time—or at the least the United States and the Soviet Union—appeared to have agreed that that that termination had already occurred and was not subject to the full establishment of a Free Territory government as a condition.

As a matter of general international law, there would have been no such condition either. The formation of a government in a territory and the international law status of the territory are analytically separate things. Territories have been treated as States notwithstanding the absence of effective government. Nothing in the Peace Treaty suggests a different approach. To the contrary, as noted, the termination of Italy's sovereignty is clearly stipulated in paragraph 2 of Article 21 to have occurred upon entry into force of the Treaty.

Other provisions of the Peace Treaty do nothing to contradict the disposition of sovereignty under Article 21. The demilitarization and neutrality provisions are not conclusive as to the status of the territory. States have demilitarized and declared neutral various territories which belong to a State (see, e.g., Savoy, the Aaland Islands, etc.). In any case Article 3 of the Permanent Statute for Trieste was never implemented, the Permanent Statute as a whole never having been implemented.

2. Political and foreign relations provisions under the Peace Treaty

The intended, but never implemented, Permanent Statute gives further indication of the legal consequences of the separation of Trieste from Italy under Article 21 of the Peace Treaty. Under the Permanent Statute for Trieste—which comprises Annex VI of the Peace Treaty—there

would have been a range of political arrangements in the Free Territory. The Free Territory would have had its own organs of government (Annex VI, Articles 9, 11, 12, 13), including an independent judiciary (Articles 14, 15, 16); a flag and coat-of-arms (Art. 8); and a Constitution (Art. 10). The Free Territory would have had its own police force (Annex VI, Article 28).

The Permanent Statute envisaged that the Free Territory "may be or become a party to international conventions or become a member of international organizations provided the aim of such conventions or organizations is to settle economic, technical, cultural, social or health questions" (Annex VI, Article 24, para. 3). This would have entailed a constraint on the treaty-making power of the Free Territory. The Free Territory also would have been obliged not to enter into any economic union or association "of an exclusive character with any State" (Annex VI, Article 24, para. 4). An obligation not to enter into union or association is not incompatible with the independence of a territorial unit for purposes of general international law; a limitation preventing a unit from adopting treaties which address general political matters is less clearly compatible with independence, especially where there is no mechanism for the unit to rescind or amend the provision which establishes that limitation.[25]

The provisions of Annex VI nevertheless suggest that the separation of Trieste was intended to entail a largely independent juridical existence for the territory. Cold War deadlock prevented the prescribed institutions from entering into operation, but it is unclear why that turn of events in itself would have (or could have) brought an end to the independence that the Peace Treaty otherwise stipulated and, in large part, established. The law of treaties recognizes that fundamental changes of circumstance may in some cases be invoked as a ground for terminating or withdrawing from a treaty, but this possibility does not arise when a treaty has established a boundary.[26]

3. Citizenship and human rights under the Peace Treaty

Citizenship and human rights provisions in the Peace Treaty tended to confirm the result expressed in Article 21, a separate existence for the Free Territory on the international plane. The main provisions of the Peace Treaty dealing with the nationality of individuals in ceded territory were not applicable to the Free Territory. This non-application made sense in view of the treaty terms separating Trieste from Italy and not ceding it to any other State Party.

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[25] This was the concern of the Council of Europe with the 1918 Treaty between France and Monaco. The treaty constrained Monaco's international practice to an extent which cast doubt on its independence. An anti-union provision exists under the constitutional settlement of 1960 for Cyprus; this has not seriously been considered to detract from the independence of the Republic of Cyprus.

[26] VCLT article 62, para. 2*(a)*.

Nationality for the Free Territory was addressed instead in the Permanent Statute under Article 6 which provided as follows:

> "1. Italian citizens who were domiciled on June 10, 1940, in the area comprised within the boundaries of the Free Territory, and their children born after that date, shall become original citizens of the Free Territory with full civil and political rights. Upon becoming citizens of the Free Territory they shall lose their Italian citizenship.
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> 2. The Government of the Free Territory shall, however, provide that the persons referred to in paragraph 1 over the age of eighteen years (or married persons whether under or over that age) whose customary language is Italian shall be entitled to opt for Italian citizenship within six months of the coming into force of the Constitution under conditions to be laid down therein. Any person so opting shall be considered to have re-acquired Italian citizenship. The option of the husband shall not constitute an option on the part of the wife. Option on the part of the father, or if the father is not alive, on the part of the mother, shall, however, automatically include all unmarried children under the age of eighteen years.
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> 3. The Free Territory may require those who take advantage of the option to move to Italy within a year, from the date on which the option was exercised.
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> 4. The conditions for the acquisition of citizenship by persons not qualifying for original citizenship shall be determined by the Constituent Assembly of the Free Territory and embodied in the Constitution. Such conditions shall, however, exclude the acquisition of citizenship by members of the former Italian Fascist Police (O.V.R.A.) who have not been exonerated by the competent authorities, including the Allied Military Authorities who were responsible for the administration of the area."

Although, as noted, the Permanent Statute did not enter into force in the manner prescribed under Article 21(3) of the Peace Treaty, there are examples suggesting that Yugoslavia recognised Free Territory citizenship in official records concerning matters of personal status such as registration of marriage. As with the Italian court judgments of the early 1950s, this administrative practice suggests that Yugoslavia gave the Peace Treaty its natural interpretation: Yugoslavia interpreted the Peace Treaty as having separated Trieste from Italy and established a new international entity.

Further human rights provisions addressed the rights of individuals in the Free Territory. These were also set forth in Annex VI. Article 4 of Annex VI provided as follows:

> "*Human Rights and Fundamental Freedoms*
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> The Constitution of the Free Territory shall ensure to all persons under the jurisdiction of the Free Territory, without distinction as to ethnic origin, sex, language or religion, the enjoyment of human rights and of the fundamental freedoms, including freedom of

> religious worship, language, speech and publication, education, assembly and association. Citizens of the Free Territory shall be assured of equality of eligibility for public office."

Article 5 of Annex VI provided as follows:

> "*Civil and Political Rights*
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> No person who has acquired the citizenship of the Free Territory shall be deprived of his civil or political rights except as judicial punishment for the infraction of the penal laws of the Free Territory."

Article 2, paragraph 2, of Annex VI provided that the Security Council shall "ensure the observance of the present Statute and in particular the protection of the basic human rights of the inhabitants." The duties of the Governor of the Free Territory were to have concerned, *inter alia*, human rights as stipulated in Annex VI under Article 17, para. 1; Article 20, para. 1; and Article 22, para. 1.

The failure to agree to a Governor set in train the political decisions that ultimately led to the (re-)establishment of Italian and Yugoslav effective control in the Free Territory. As noted, the failure to establish a particular form of government in a territory does not in itself determine the international legal status of the territory. Nevertheless, the form of government that the Permanent Statute envisaged for Trieste—in particular the far-ranging international functions and nationality provisions for Trieste and its inhabitants—reflects a consistent approach by the Parties to the Peace Treaty: Trieste was to be an entity separate from any State and having its own machinery of government, external relations, and citizenship control. The treatment of the Free Territory in the Permanent Statute further indicates that the intention was not to set up a provisional arrangement but, rather, a lasting special regime.

The particular governing arrangements that in fact were available under the political constraints of the day were not those originally envisaged. They would prove temporary—for example, as the UK and U.S. sometimes described their role. But just as the emergence of a territory as a separate international juridical entity is a process distinct from the choice of a government for the territory, the temporary character of an administration in a territory does not in itself determine the international law status of the territory. Changes in government do not affect international law continuity. These observations, typically applied to States,[27] arguably would apply *mutatis mutandis* to an entity such as the Free Territory.

The Peace Treaty, as seen from its provisions, was intended to establish a general

[27] See, e.g., *United States* v. *Iran*, Iran-U.S. Claims Tribunal, Award No. 574-B36-2, 3 December 1996, paras. 54-55.

settlement in respect of Trieste, not a mere transitory arrangement. Whether any consequences for the self-determination of Trieste follow from these provisions—in particular the provisions addressing the individual rights of the inhabitants of the territory—will be considered further below.[28]

Turning to the second (and alternative) proposition in the 2013 Regional Administrative Court judgment—that sovereignty was transferred from Italy but subsequently back again—the two agreements adopted after the Peace Treaty and pertaining to Trieste are now to be considered.

(C) Memorandum of Understanding (1954)

On 5 October 1954, an instrument was concluded in London under the title of "Memorandum of Understanding between the Governments of Italy, the United Kingdom, the United States and Yugoslavia regarding the Free Territory of Trieste."[29] According to Article 1 of the Memorandum, "it… proved impossible to put into effect the provisions of the Italian Peace Treaty relating to the Free Territory." Article 1 envisaged the steps taken under the Memorandum to be "practical arrangements" in response to the understanding that "[w]hen the Treaty [of Peace] was signed, it was never intended that" responsibilities for the Free Territory "should be other than temporary."

The Cold War played a crucial role in the adoption of the London Memorandum. The US Ambassador in Rome pressed for a solution favourable to the Italian Government because he was concerned that the "damaged, shaky and disunited" Scelba Government could collapse and that, with "half the Communists in Europe" based in Italy, "[w]hat are we expected to stop them with here, if not Trieste?"[30] These considerations would seem to have been fundamental to the decisions of the Powers at the time. They would have ceased to be relevant with the end of the Cold War. By then, however, the changes in the governing arrangement for the Territory had been implemented on the ground in fact for many years.

The four governments communicated the Memorandum to the Security Council. The USSR on 12 October 1954 acknowledged the communication and the agreement. The Memorandum terminated UK and US military government in Zone A and transferred Zone A to Italian civil administration; and terminated Yugoslav military government in Zone B and

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28 Cross-reference.

29 235 UNTS 99.

30 Amb. Luce to the Secretary of State, 18 March 1954, Luce files, lot 64 F 26, "Letters, 1954" (in *Foreign Relations of the United States*, 1952-1954, volume VIII).

transferred Zone B to Yugoslav civil administration. The boundary between the areas of Italian and Yugoslav civil administration was designated as the same as that between Zone A and Zone B, except for an adjustment in favour of Zone B. The Memorandum did not expressly indicate that sovereignty over Zone A and Zone B was transferred; nor did it make provision for change of nationality of inhabitants of either Zone.

Where a change of sovereignty over territory is effected by agreement, questions of nationality arise and, so, the parties to such agreement typically make provision for the settlement of those questions.[31] No such provision was made in the Memorandum, an omission which suggests that the parties did not believe that the transaction entailed a transfer of sovereignty over the territory; or, perhaps, they wished to leave the matter open for determination at a later time, or to avoid the legal puzzle that looking more closely at the matter might have exposed.

The Memorandum also contained provisions on human rights. According to Article 1 of the Special Statute annexed to the Memorandum of Understanding,

> "in the administration of their respective areas, the Italian and Yugoslav authorities shall act in accordance with the principles of the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on 10 December 1948 so that all inhabitants of the two areas without discrimination may fully enjoy the fundamental rights and freedoms laid down in the aforesaid Declaration."

The Special Statute further stipulates that Italy and Yugoslavia will implement their "common intention… to ensure human rights and fundamental freedoms without discrimination of race, sex, language and religion in the areas coming under their administration."

The main concern of the Special Statute was with safeguarding the rights of ethnic groups in the two zones. Article 4 safeguarded the rights of the Yugoslav ethnic group in the Italian-administered zone; and the Italian ethnic group in the Yugoslav-administered zone. Article 7 of the Special Statute provides that the boundaries of the administrative units in the two areas are not to be changed with a view to prejudicing the ethnic composition of the units.

Article 8 of the Special Statute provided for a Mixed Yugoslav-Italian Committee with the power to examine questions and complaints raised by individuals belonging to the two ethnic groups in respect of the application of the Statute. The British negotiation for the Memorandum referred to the minority rights provisions as "a very handsome, substantial

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[31] See Tom Grant, "Secession and State Succession" in Aleksandar Pavković & Peter Radan (eds.), *The Ashgate Research Companion to Secession* (Farnham: Ashgate, 2011) 365, 373-374.

façade" which "was not going to be tremendously effective in practice."[32] The practice under the minority rights provisions, though occasionally referenced in the literature, did not have a very significant effect on the emergence of the European human rights institutions. These provisions nevertheless extended substantive and procedural rights to the inhabitants of Trieste that distinguished them from other groups in Europe, including in the two neighbouring States.

See Yapou, "Human Rights in Territorial Disputes: The Trieste Precedents," (1983) 13 *Israel Yearbook on Human Rights* 277.

(D) Treaty of Osimo

Italy and Yugoslavia on 10 November 1975 adopted a Treaty on the delimitation of the frontier for the part not indicated as such in the Peace Treaty of 10 February 1947 (Treaty of Osimo).[33]

The Treaty of Osimo, under Article 3, provides for resolution of nationality questions, including the option of persons moving to the State of their ethnic background. The States Parties agreed to "conclude an agreement on a global lump-sum compensation" for Italian natural and juridical persons whose property in territory within Yugoslavia was expropriated (Article 4). Though Article 8 of the Treaty of Osimo envisaged that the Special Statute annexed to the Memorandum of Understanding would cease to have effect, measures taken at the municipal level to implement the provisions of the Special Statute are to remain in force (Article 8). Thus, in at least a residual way, the distinct human rights of Trieste inhabitants would seem to have remained in force after 1975.

A question might be asked whether, during this period and after, the question of Trieste was properly removed from the agenda of the Security Council and, if so, when and by what decision. Amidst the deadlock over the appointment of the territorial governor, the United States at the 641st meeting of the Security Council on 23 November 1953 proposed that consideration of the question of Trieste be postponed; the U.S. proposal was accepted; and then the matter, again on U.S. proposal, was further postponed at the 647th meeting on 14 December 1953.[34] This attracted an objection from the USSR, whose representative observed that "this proposal was actually one for the indefinite postponement of the discussion of the Trieste problem… meaning that the Security Council was 'simply being left out of the question.'"[35] The tabular list of agenda items contained in the Security Council repertory for the period

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32 Quoted in Maura Hametz, *Making Trieste Italian, 1918-1954* (Woodbridge: Royal Historical Society/Boydell Press, 2005) p. 141.

33 10 Oct. 1975, entered into force 3 Apr. 1977: 1466 UNTS 25.

34 *Repertoire of the Security Council* (1952-1955), pp. 134-5.

35 Ibid, p. 135, quoting USSR representative at SC 647th mtg, 14 Dec. 1953.

ending 11 November 1968 refers to the Question of the Free Territory as it had been considered at the 344th meeting on 4 August 1948 and shows the last action by the Council to have been the rejection of the Soviet draft resolution on 19 August 1948 (SC 354th meeting). This tabular list—which was current up to 31 December 1968—is the last reference in the Security Council repertory to any action on the question of Trieste.[36] On 27 May 1977, the Secretary-General issued a statement in connection with a meeting he had had with the Permanent Representatives of Italy and Yugoslavia on the matter of the Treaty of Osimo. The two States had indicated that it was "no longer necessary for the Security Council to remain seized of the two items on its agenda concerning Trieste."[37] The Secretary-General "welcomed [the] joint demarche" of the two States.[38] On 9 January 1978, the Secretary-General published a summary statement on matters of which the Security Council is seized and on the state reached in the Council's consideration.[39] The Secretary-General in the 9 January 1978 statement indicated that the two Trieste items—i.e., appointment of a Government for the Free Territory[40]and the question of the Free Territory[41]—had been deleted with the consent of the Council from the list of matters of which the Council is seised.[42]

III. Acquiescence in the return of sovereignty to Italy?

In spite of the problems with the approach taken by Italian courts toward Trieste, there is one argument for Italian sovereignty which is not only robust in an analytical sense but also virtually unassailable in a practical sense. This argument is that, at least since the Treaty of Osimo, the Italian exercise of sovereignty over Trieste has been met with no major international protest. A search of the accessible State practice discloses no protest from any of the State parties to the Peace Treaty either. It could be that such protests were made but not released into the public domain. But this is mere supposition. No less significant is the absence of protest from the international institutions, the Security Council in particular, entrusted with various functions in relation to Trieste.

In these circumstances, Italy may rely on having exercised sovereignty in an effective and unchallenged manner for at least four decades now, and thus to have acquired (or re-

36 *Repertoire of the Security Council* (1966-1968), p. 42.
37 *Repertory of Practice of United Nations Organs*, Supp. 5, vol. V (1970-1978), p. 119.
38 Ibid, citing Press Release SG/SM/2451 of 27 May 1977.
39 S/12520.
40 S/12269, item 5.
41 S/12269, item 13.
42 *Repertory of Practice of United Nations Organs*, Supp. 5, vol. V (1970-1978), p. 131, n. 796 (with citations).

acquired) title to Trieste through prescription. The principle of prescription has been summarized as follows:

> "the continuous and undisturbed exercise of sovereignty over [a territory] during such a period as is necessary to create under the influence of historical development the general conviction that the present condition of things is in conformity with international order."[43]

The attitude of other States, particularly those with competing claims or legal interests (such as the other State parties to the Peace Treaty in the case of Trieste), has considerable weight where a State relies on prescription. The International Court of Justice has emphasized the attitude of other States in the following terms:

> "Under certain circumstances, sovereignty over territory might pass as a result of the failure of the State which has sovereignty to respond to conduct a titre de souverain of the other State or, as Judge Huber put it in the Island of Palmas case, to concrete manifestations of the display of territorial sovereignty by the other State (Island of Palmas Case (Netherlands/United States of America), Award of 4 April 1928, RIAA, Vol. II, p. 839). Such manifestations of the display of sovereignty may call for a response if they are not to be opposable to the State in question. The absence of reaction may well amount to acquiescence. The concept of acquiescence 'is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent…' (Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, I.C.J. Reports 1984, p. 305, para 130). That is to say, silence may also speak, but only if the conduct of the other State calls for a response."[44]

International law does not offer clear guidance as to the length of time that is required before display of sovereignty acquires full titular force, but the attitude of other States may also be relevant to the determination of the period.[45] In the case of Trieste, forty years in the absence of any serious international challenge is no short period. It is certainly arguable that, if one or more States Parties to the Peace Treaty had officially protested against the formalisation of Italian sovereignty on the occasion of the conclusion of the Treaty of Osimo (that is, over twenty years after the London Memorandum), those protests would have interfered with the crystallisation of the Italian title of prescription. As noted, the record of such protests is thin or non-existent.

It is true that where sovereignty over territory has been established clearly under title

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43 *Oppenheim's International Law*, Vol. I, Peace, 9th ed, para. 269, p. 706.

44 *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore*), Judgment, ICJ Rep. 2008, p. 12 (para. 121).

45 Malcolm Shaw, *International Law*, 7th ed., p. 365.

of a treaty, then that title prevails over *effectivités.* In other words, evidence of actual possession and administration does not supersede a treaty that unambiguously assigns sovereignty.[46] The situation with Trieste is not simply a contest between one treaty and the long-standing fact of Italian administration. It is also a matter concerning later treaties—the Memorandum and Osimo.

Another unusual factor for Trieste is that it is not a situation in which two States claim a disputed territory. One State claims the territory and there is no other entity organized at the international level to which title could be transferred in the event that that State's title were impugned. This characteristic of the situation would give rise to a serious problem of remedies. The remedy in the standard case of a dispute over sovereignty to territory is either (i) confirmation that the current administering State holds sovereignty; or (ii) an award of the territory to the other State and its transfer to that State's administration.[47] The absence of an organized international entity that could effectively administer the territory further differentiates the situation from the ordinary territorial dispute.

So the Italian claim to sovereignty, which possesses analytical merit for the reasons noted above, even if it is not an irrefutable claim, is in a practical sense very difficult to challenge. There are examples of States—e.g. Canada in the case of Quebec and the UK in the case of Scotland—agreeing to offer a vote on independence to certain territorial units, but such arrangements, while not contrary to international law, were not required by international law.

To leave the analysis there would suffice, if the separation of Trieste from Italy had been an ordinary act of cession to another State Party of the Peace Treaty. The difficulty—indeed the striking aspect of the 1947 settlement—is that Trieste was not ceded to another State. It, instead, was constituted as a separate entity under international law and its inhabitants given the range of rights noted above (nationality, non-discrimination, etc.). In light of this aspect of the 1947 settlement, it may be asked whether, quite apart from the States Parties to the Peace Treaty, the inhabitants of Trieste themselves held any right that should have been taken into account when national administration returned to the territory.

IV. Trieste as a self-determination unit?

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46 *Frontier Dispute (Burkina Faso/Mali)*, Chamber Judgment, 22 Dec. 1986, ICJ Rep. 1986 p 554, 586-587.

47 For the latter situation, see *Temple of Preah Vihear (Cambodia v. Thailand*), Judgment, 15 June 1962, ICJ Rep. 1962 p. 6, 37, wherein see esp. operative para. 1: the Temple did not belong to Thailand, and so it belonged to Cambodia.

Modern international law contains a regime for operationalizing the right of a people to self-determination. The rules of the UN Charter concerning decolonization, as the General Assembly developed them, make clear that a colonial people, as defined, has a right to independent statehood. The definition of colonial people marks the limit of the applicability of those rules. The modern law of decolonization, in short, does not apply to all situations in which a self-determination claim might arise.

As noted in the introduction to this chapter, however, self-determination claims might arise under two further rubrics. The concept of remedial secession, which remains controversial, plainly would not apply in Trieste. Trieste is not a territory *in extremis*. If a possibility exists that a self-determination right vested in the inhabitants of Trieste, then this would be by virtue of the treaty settlement of 1947.

Nothing in the treaty settlement explicitly declares the existence of a "people" of Trieste or the applicability of the right of self-determination to them. This comes as no surprise. The Peace Treaty was not concerned chiefly with the fate of the inhabitants of one or another border area. Its concern instead was to settle affairs between the Allied and Associated Powers, on the one hand, and Italy as a former Axis aggressor, on the other. So, if a right of self-determination originates in the 1947 Peace Treaty, then this would have to be inferred from other terms.

The Peace Treaty, though not principally concerned with the rights of the inhabitants of the border area, nevertheless contains provisions protecting their rights. It is unlikely that the fate of the human rights guarantees of the Peace Treaty has any direct legal consequence for individuals in Trieste today, particularly in light of the more extensive human rights guarantees found in the European Convention on Human Rights which are applicable to Trieste. For example, when the UN Human Rights Committee considered Italy's Fourth Periodic Report under the ICCPR in 1997, notice was drawn, e.g., to the Slovene minority in Trieste and the treatment of the territory of Trieste under Italian legislation; no mention was made of the human rights provisions of Annex VI.[48] Absence of reference to an international law rule in one transaction does not demonstrate that the rule no longer operates; but it would be telling if no indication of its operation exists in any modern practice.

The guarantees in the European Convention on Human Rights no doubt apply to Trieste. Even if the question of territorial title remains, those guarantees still apply by virtue of the fact of Italian effective control there and the resultant international responsibility. This is in line

[48] Consideration of Reports submitted by States Parties under Article 40 of the Covenant, 28 May 1997: CCPR/C/103/Add.4, p. 46, para. 210.

with the settled jurisprudence of the European Court of Human Rights on Article 1 of the Convention.[49] As to the substance of the individual rights guarantees of the European Convention, these are more robust than those in the Peace Treaty; and they are subject to judicial procedures lacking under the Peace Treaty.

A general point about the human rights provisions of the Peace Treaty nevertheless may be made. The intended Permanent Statute for the Free Territory did not address only the status of the territory as a unit. It also addressed the rights of individuals inhabiting that unit, and it set down certain obligations toward individuals subject to multilateral guarantee. The provisions for the Free Territory without doubt went beyond the sorts of arrangements sometimes seen in connection with military basing and other time-limited use rights. This was a legal architecture intended to create an overall juridical situation, specifying not only an international law status for the territory but also a basis for legal relations of individuals in the territory under international law. Indeed, the two main agreements adopted after 1947 in respect of Trieste suggested that the parties understood the rights of the inhabitants to be, in some sense, entrenched and thus not at the disposal of the States Parties to the Peace Treaty.

The Memorandum of Understanding of 1954 guaranteed the rights of the inhabitants. Article 1 of the Special Statute annexed to the Memorandum already has been noted. Article 1 of the Special Statute obliged Italy and Yugoslavia to apply the Universal Declaration of Human Rights to all inhabitants of the zones of the Free Territory and to do so "without discrimination." Article 7 fixed the existing boundaries of the administrative units in the two areas, so as to prevent gerrymandering in favour of one or the other main ethnic group. The Mixed Yugoslav-Italian Committee under Article 8 also has been noted. These are specific rules protecting the inhabitants of the territory, and they were accompanied by a procedural mechanism in the form of the Committee. The rules and the procedural mechanism presumably operate[d] under international law, the Memorandum having given no plain indication that one or the other national legal system should apply instead.

Even under the Treaty of Osimo, which in the standard account would seem to have completed the "de-internationalization" of Trieste, the measures that the national authorities had taken to implement the Special Statute were to remain in force (Treaty of Osimo, Article 8). In short, human rights protections, translated from their international legal source to local law, could not be revoked, their preservation being stipulated as an international law obligation

[49] See *Ilaşcu and others* v. *Moldova and Russia*, ECtHR, Application no. 48787/99, Judgment, 8 July 2004; *Cyprus* v. *Turkey*, ECtHR, Application no. 25781/94, Judgment, 10 May 2001.

in the 1975 treaty. To this extent, the rights of the inhabitants of Trieste belonged to a special international law regime, even if by 1975 only its municipal shadow remained.

So the following can be said in respect of the inhabitants of Trieste. The rights of the inhabitants were not a matter only of general international law or later developments in European human rights law, even as those developments surely apply to them. The rights of the inhabitants are also contained in certain treaty instruments that address them in a distinct way. Considering the history, it is plausible that the Allied and Associated Powers saw the inhabitants as a relatively minor practical problem—a potential source of irritation in a delicate emerging Cold War flashpoint—and incorporated the human rights protections into the Peace Treaty to mitigate the risk of a local ethnic incident precipitating a wider crisis. Plausible as this reading may be, the human rights protections might yet be read on their own terms.

A territorial settlement between Italy and Yugoslavia and the other Allied and Associated Powers could have been superseded by practice among those parties. They have either expressed or implied that the settlement in fact adopted has been superseded. There are, however, two significant complications that this picture elides. The relevant international instruments *(i)* created a new international entity—the Free Territory—in plain terms independent from any existing State; and *(ii)* acknowledged special rights applicable to the inhabitants of the Free Territory. The general international law that emerged after 1945 resists the change of boundaries without consent of the States involved. To bring about the termination of a recognized international entity composed of territory belonging to no State presents a conceptual difficulty, made all the harder in practice by the absence of a government apparatus capable of giving (or withholding) the consent of that entity. Trieste is not analogous to internationally-prescribed separation zones or neutral areas set up to place a no-man's land between warring parties. Its geopolitical purpose may have been similar—i.e., to prevent friction—but the modalities adopted for Trieste were very different from those in places like Cyprus, Viet Nam, or Korea. Nobody talks about a citizenship of the DMZ or envisages permanent institutions of government with international relations powers. Proposals in the early 1950s in fact were made to settle the disposition of Trieste by plebiscite,[50] a seeming admission that interests were at stake other than those of the States Parties to the Peace Treaty.

Modern international law recognizes self-determination as a human right. True, self-determination is realized in most places by most individuals by their participation in the

[50] See e.g. the speech of Prime Minister Giuseppe Pella: "Trieste and South Tyrol", *The Tablet*, 31 October 1953, p. 419.

government of an existing State; it does not equate to a right to create an independent State. But the inhabitants of Trieste, after the separation of the territory from Italy, were not participants in the government of any pre-existing State. How, precisely, they came again to be part of Italy, and thereby to exercise their right to self-determination as participants in the Italian State, is at best rather obscure. An approach that took account of the preference of the inhabitants would have had a strong rationale in those circumstances. It would have resolved the unsettled questions surrounding the Free Territory.

V. The Free Port of Trieste

The territorial settlement noted above and the human rights stipulations adopted in 1947 and after were not the only matters addressed in the several international instruments that addressed Trieste. There was also a special regime concerning the port of Trieste.

(A) The Free Port under the Peace Treaty

1. The Free Port provisions: overview

According to Article 34 of the Peace Treaty,

> "A free port shall be established in the Free Territory and shall be administered on the basis of the provisions of an international instrument drawn up by the Council of Ministers, approved by the Security Council, and annexed to the present Treaty (Annex VIII). The Government of the Free Territory shall enact all necessary legislation and take all necessary steps to give effect to the provisions of such instrument."

The Security Council in resolution 16 (1947) recorded its approval of the instrument. As noted above, the implementation of the instrument remained incomplete: the States parties never agreed to execute the provisions that would have completed the constitution of the government of the Free Territory. The Peace Treaty included certain provisions respecting the Free Port that nevertheless could be applied by any government administering the Free Territory, whether or not otherwise constituted in accordance with the Peace Treaty.

Goods transiting the Free Port are free from any customs duties or charges "other than those levied for services rendered" (Annex VIII, Article 5, para. 2). Priority for berthing space is to be given to ships of Yugoslav and Italian merchant vessels (Article 3, para. 3) but the port is otherwise a Free Port—i.e., open to ships of all States. Annex VIII, Article 3, para. 2, stipulates that "[t]he establishment of special zones in the Free Port under the exclusive jurisdiction of any State is incompatible with the status of the Free Territory and of the Free Port."

2. State practice in regard to the Free Port provisions

Various States, from time to time, relied upon the Free Port provisions. For example, there was a bilateral Economic Cooperation Agreement between the United States and Austria;[51] and a bilateral agreement between Germany and Greece addressing transhipment of certain cargoes.[52] These were in 1948 and 1952 respectively—i.e., before the London memorandum. There were also later agreements, as noted below, that treated the Free Port as continuing in operation.[53] Italian authorities for their part accepted, and seem still to accept, that international law rights exist in respect of the use of the Free Port.[54]

(B) The Free Port under the Memorandum of Understanding

Article 5 of the Memorandum of Understanding provides as follows:

> "The Italian Government undertakes to maintain the Free Port at Trieste in general accordance with the provisions of Articles 1-20 of Annex VIII of the Italian Peace Treaty."

This is plainly a provision establishing an international obligation upon Italy. It is not however precise or very exacting. It refers to precise terms—the terms contained in Articles 1-20 of Annex VIII—but it stipulates only that Italy will maintain the Free Port "in general accordance" with those terms. The phrase "in general accordance" does not confer an unlimited discretion on Italy; but it falls short of saying precisely what Italy shall do to fulfil the obligations under Article 5 of the Memorandum.

The interpretation and application of Article 5 will be in light of the relevant

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51 2 July 1948, 20 UNTS 30

52 Gemeinsames Protokol über die Besprechungen des gemischten Ausschusses für die deutsch-griechischen Wirtschaftsbeziehungen in Bonn in der Zeit vom 14. Bis 28. July 1952, Anlage 1. 182 UNTS 109, 112:

> 5) "Die Umfüllung darf nur in den Zollhäfen Sète (Frankreich) Genua (Italien) und Triest (internationals Verwaltungsgebiet) unter ständiger Überwachung durch beamtete Chemiker des Zentraldienstes der Allgemeinen Staatlichen Chemischen Anstalt in Athen, die den in den Zollhäfen zuständigen griechischen Konsularbehörden beigeben werden, stattfinden."
> [Such trans-shipment may be made only in the customs ports of ... and Trieste… under the constant supervision of official chemists of the State General Chemical Laboratory in Athens attached to the Greek consular authorities in the authorized customs ports.]

53 Cross-reference.

54 There are numerous examples of such acceptance which have also been noted by the Italian courts. By way of illustration, see the website of the Trieste Port Authority which states that "il referente normativo primario del regime giuridico del Porto Franco di Trieste è l'Allegato VIII al Trattato di Pace di Parigi del 1947" ("the principal statutory framework for the legal regime applicable to the Free Port of Trieste is Annex VIII of the 1947 Peace Treaty of Paris") at: http://www.porto.trieste.it/ita/porto/porto_franco

circumstances. Particularly relevant is the failure of the administrative apparatus and legal regime envisaged under the 1947 Peace Treaty ever to come into full operation. It cannot be that Italy is to implement Annex VIII in a vacuum of general law. The original understanding under the Peace Treaty was that the general legal framework would be provided by the Free Territory of Trieste. The Free Territory, in effect still-born owing to the failure of the Powers to come to agreement as to its implementation, never provided the requisite legal or institutional framework. Italy, since 1954 obliged to "maintain the Free Port at Trieste *in general accordance* with the provisions of Articles 1-20 of Annex VIII," is to be expected to provide that framework. This would seem to provide the answer to the question of whether a legal basis exists for Italy to apply Italian law in the area of the Free Port. At least if the Memorandum of 1954 is accepted as having settled arrangements for the Free Territory, Italian law is a substitute for the law of the Free Territory, which never achieved full form.

It is arguable that, if Article 5 of the Memorandum of Understanding of 1954 had obliged Italy to act in full accordance with Annex VIII, then a question would arise as to the accordance of Italy's conduct since 1954 with that obligation. The parties to the Memorandum however understood that an obligation of full accordance would have been inoperative. The legal and institutional framework of the Free Territory is tightly interwoven with the Free Port, a point which will be considered further below.[55] While the Free Port regime is an extensive regime setting out a range of obligations in respect of the operation of a port (evidently in certain respects on an extra-territorial basis), it is not a complete regime for the administration of a territory. The complete regime was contained in the Permanent Statute of the Free Territory (Annex VI of the 1947 Italian Peace Treaty). The difficulty is that the Permanent Statute was not implemented; the institutions it envisaged as governing the Free Territory were not formed. This does not mean that the substantive obligations of Italy "to maintain the Free Port at Trieste in general accordance with the provisions of Articles 1-20 of Annex VIII" have lapsed, but the interpretation and application of the phrase "in *general* accordance with" would have to take into account the legal and institutional situation that emerged.

It might be thought that a provision in terms such as Article 5 of the MOU has little substantive content. After all, the phrase "in general accordance with" evidently exempts from prohibition conduct that is not in strict accordance with the relevant obligations. If a State is free to engage in conduct not strictly in accordance with its obligations, then the door would

55 Cross-reference

appear to be open for the State to ignore the obligations, or at least to re-fashion them according to its wishes. The phrase does not, as such, invoke a margin of appreciation, but in practice it would seem to invite a rather wide one. When considering reservations to an acceptance of compulsory jurisdiction, the ICJ in the *Norwegian Loans* case concluded that, past a certain point, a reservation swallows the acceptance, and so whatever reciprocal obligation might have existed for another State disappears.[56]

Article 5 of the MOU however does not go that far. It still indicates an obligation. The UNCLOS Annex VII Tribunal in the *Chagos Archipelago* arbitration in 2015 indeed suggested the obligatory character of provisions such as this. The parties there disputed the meaning of a statement of the UK in the 1965 discussions with Mauritius at Lancaster House. In the statement, the UK said that it would use its good offices with the United States to ensure that fishing rights (among other rights) would "remain available to the Mauritius Government *as far as practicable*."[57] The situation is analogous, because, with the Free Port at Trieste after the 1954 Memorandum, circumstances made it impossible to implement the provisions in precise accordance with the original terms of the 1947 Peace Treaty. The provisions might be implemented as far as practicable, which is to say in a manner that generally accords with the provisions. Taking the Award in *Chagos Archipelago* as a guide, provisions such as these are legally binding, notwithstanding the margin they reserve to the States they bind.[58]

(C) Continuation of the Free Port provisions by operation of the Treaty of Osimo

Finally, there is the treatment of the Free Port under the Treaty of Osimo of 1975. Article 7 of the Treaty of Osimo provides as follows:

> "On the date of the entry into force of this Treaty, the Memorandum of Understanding signed at London on 5 October 1954 and its annexes shall cease to have effect in relations between the Italian Republic and the Socialist Federal Republic of Yugoslavia."

It follows from general principles of interpretation that this provision could only affect relations between Yugoslavia and Italy. Yugoslavia and Italy are the only parties to the Treaty to which the provision belongs. Indeed, Article 7 in terms indicates that the Memorandum of Understanding "shall cease to have effect *in relations between the Italian Republic and the*

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56 *Certain Norwegian Loans (Fr.* v. *Nor.)*, Judgment, 6 July 1957, ICJ Rep. 1957 p. 9, 27.

57 *Republic of Mauritius* v. *United Kingdom* (*Chagos Marine Protected Area Arbitration*)(Shearer, President; Greenwood, Hoffmann, Kateka & Wolfrum, Arbitrators), Award, 18 March 2015, para. 294 (emphasis added).

58 Ibid., para. 547, subpara. B(1).

Socialist Republic of Yugoslavia"—i.e., Article 7 does not purport to affect the pre-existing treaty relations of other States. This limitation on the scope of Article 7 has legal significance. It supports the conclusion that the provisions in the 1947 Italian Peace Treaty which created the Free Port of Trieste either (i) continue in force or (ii) in any case are not affected by the Treaty of Osimo

The ground for this conclusion is that the Free Port provisions of the 1947 Italian Peace Treaty (and of Article 5 of the 1954 Memorandum of Understanding which continued the Free Port provisions) establish treaty rights in other States; they are not provisions limited in their effect to Italy and Yugoslavia. It follows that the Free Port provisions, insofar as those provisions created rights in States other than Italy and Yugoslavia, were not affected by the Treaty of Osimo.

That the Treaty of Osimo did not affect the operation of the Free Port provisions to the extent that those provisions apply to other States is evidently accepted by Italian courts, including the Regional Administrative Court in its 2013 judgment:

> "The only part of the Peace Treaty concerning the Free Territory but not the issue of the boundary between Italy and Yugoslavia, and which therefore concerned countries other than Italy and Yugoslavia was the regime of the Free Port of Trieste which was actually expressly protected by the Memorandum of London of 1954, in Article 5 and implicitly by the Treaty of Osimo, which in its Article 7 annulled the Memorandum of London with regard to the bilateral relations between Italy and Yugoslavia in a way that maintained Article 5 of the Memorandum on the Free Port."[59]

As mentioned, the continuation of a special legal régime for the Free Port also is acknowledged by the Trieste Port Authority, a public body of Italy.[60] According to the Port Authority,

> "The primary instrument governing the legal regime of the Free Port of Trieste is Annex VIII to the 1947 Paris Peace Treaty."[61]

Italy, as recently as 2012, has notified the EU of the existence of Trieste as a Free Port.[62] The

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59 Appeal No. 148 of 2013, Regional Administrative Court of Friuli Venezia Giulia (Division One), Judgment, 28 Oct. 2013, p. 49 (English language translation furnished by TRIEST NGO).

60 See http://www.porto.trieste.it/eng/port_authority/mission:
"The Port Authorities are non-profit public bodies, with administrative, budgetary and financial autonomy, established under the reform of legislation concerning ports enacted in Italian Law 84 dated 28 January 1994. They have legal status under public law and are subject to oversight by the Ministry of Infrastructure and Transport and the Ministry of Economy and Finance."

61 http://www.porto.trieste.it/eng/port/free_port_area

62 Free Zones in Existence and in Operation in the Community as Notified by the Member States to the Commission:

Port Authority draws attention to the changes which occurred after 1947, especially "Italy's subsequent assumption of international responsibility for the city and the Port of Trieste under the Memorandum of Understanding signed in London in 1954."[63] The Memorandum and subsequent measures evidently did not abrogate the provisions of Annex VIII stipulating a customs regime "unique in the Italian and EU legal system." The Port Authority indicates as follows:

> "As regards the customs regime, the Free Zones of the Port of Trieste enjoy the legal status of customs clearance exemption, which involves a whole series of beneficial operating conditions for the Free Port of Trieste. This is undoubtedly the biggest area of difference between the regulations of the Free Port of Trieste and national and EU ones."

It also appears that a number of other States have assumed the Free Port provisions in respect of customs and tariff treatment to remain in force. For example, treaties with Austria in 1955[64] and 1985 and with Hungary in 1988 provide for the use of the Free Port.[65]

Multilateral practice also reflects the special status of the Free Port. For example, GATT Article XXIV, paragraph 3, provides as follows:

> "3. The provisions of this Agreement shall not be construed to prevent:
>
> …
>
> (b) Advantages accorded to the trade with the Free Territory of Trieste by countries contiguous to that territory, provided that such advantages are not in conflict with the Treaties of Peace arising out of the Second World War."

GATT Article XXIV does not refer expressly to the Free Port provisions; but it makes clear that the general trade regime embodied in the GATT did not override the specific regime of trade in respect of the Free Territory.

(D) The Free Port provisions as a subsisting right of Trieste?

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http://ec.europa.eu/taxation_customs/resources/documents/customs/procedural_aspects/imports/free_zones/list_freezones.pdf

63 Ibid.

64 Agreement concerning the use of the port of Trieste (Austria-Italy), signed 22 October 1955, entered into force 1 January 1956: 260 UNTS 327.

65 The 1985 Austrian treaty and the 1988 Hungarian treaty are noted by the Triste Port Authority: http://www.porto.trieste.it/eng/port/free-port For the 1988 treaty between Italy and Hungary, this was adopted 19 April 1988: *Gazz. Uff.* No. 17 of 22 January 1990, implemented by law No 440 of 30 December 1989 (Italy). See Tullio Treves, "Italy and the Law of the Sea" in Tullio Treves & Laura Pineschi (eds.), *The Law of the Sea: The European Union and Its Member States* (The Hague: Nijhoff, 1997) p. 330, note. 20.

Unlike the treaty provisions concerning the Free Territory as a whole, the provisions concerning the Free Port have not by express agreement or any other obvious mechanism ceased to have effect. The Free Port provisions indicate rights to be held by all parties to the Peace Treaty and rights to be held by other States as well. As noted above, Italian courts acknowledge that neither the Memorandum of Understanding of 1954 nor the Treaty of Osimo of 1975 terminated the Free Port arrangements. To the contrary, the 1954 instrument expressly indicates that the Free Port provisions continue in force. The 1975 treaty implicitly accepts the same, or at least it can be credibly argued.

There nevertheless would be difficulties in establishing a practical effect for the Free Port provisions today. In particular, there is the problem that the Free Port provisions (which at least would seem to remain in force) are tightly connected to the non-self-executing general provisions concerning the Free Territory which the parties never implemented. This problem is elucidated, when the particular provisions connecting the administration of the Free Port to the government of the Free Territory are considered.

(1) ***The problem of the entanglement between the Free Port and Free Territory provisions***

Though the Free Port provisions would seem to have survived the expiry of the general provisions concerning the Free Territory, the administration of the Free Port is interconnected with numerous provisions concerning the Free Territory. In particular, the administrative apparatus of the Free Port under the Peace Treaty is integrated to the Free Territory in a number of respects. Examples of the integral relation between the Free Port and the Free Territory include the following:

> *Under Annex VIII (the Instrument for the Free Port of Trieste)*
>
> ¤ Article 2, para. 1: "The Free Port shall be established and administered as a State corporation of the Free Territory…"
>
> ¤ Article 2, para. 2: "All Italian state and para-statal property within the limits of the Free Port which, according to the provisions of the present Treaty, shall pass to the Free Territory shall be transferred, without payment, to the Free Port."
>
> ¤ Article 3, para. 4: "In case it shall be necessary to increase the area of the Free Port such increase may be made upon the proposal of the Director of

the Free Port by decision of the Council of Government with the approval of the popular Assembly."

¤ Article 4 (application of Free Territory laws to the Free Port).

¤ Article 7, para. 2: "Upon the proposal of the Director of the Free Port, the Council of Government may permit the establishment of new manufacturing enterprises within the limits of the Free Port."

¤ Article 8 (authorities of the Free Territory as responsible for anti-smuggling regulations in the Free Port).

¤ Article 9, para. 1 (authorities of the Free Territory as responsible for fixing harbour dues in the Free Port).

¤ Article 11 (authorities of the Free Territory as empowered for regulating the passage of persons into and out of "the Free Port area").

¤ Article 14 (authorities of the Free Territory as empowered to apply health measures "within the boundaries of the Free Port").

¤ Various other provisions conferring powers upon the Governor and/or the Council of Government (both of which were organs of the Free Territory) in respect of administration of the Free Port (e.g., Art. 18, para. 1; Art. 20, para. 3; Art. 25).

Under the Peace Treaty (main part)

¤ Article 13, para. 3 (participation of the Director of the Free Port in Council of Government meetings).

In short, there was the territorial arrangement—the Free Territory which never fully achieved the form provided for under Annex VI—and there is the Free Port, an arrangement which seems in some sense to continue but which was integrated with the Free Territory in the treaty instrument that created it. It is hard to see how the administrative apparatus of the Free Port could be made operative today without radically re-configuring the administrative scheme—i.e., a full-fledged Free Port apparatus would require decoupling the Free Port from the Free Territory provisions of the Peace Treaty.

As considered above, the 1947 Italian Peace Treaty was intended under Article 21 to create a special international entity, not part of any existing State and having a number of the main attributes of independent statehood. It is well-known that the authorizations and

requirements under the Peace Treaty in connection with that entity were not put fully into effect; they certainly were not self-executing.[66] As such, the lapsing of the status of the Free Territory might be said to have led to a lapsing of the various other provisions which, being non-self-executing, could only have been implemented by acts of the Free Territory. Non-implementation of an obligation does not, as such, remove the obligation; but non-implementation over a long period in the absence of express objection well may have legal effects. It further might be said that, while the rights and obligations connected to the Free Port were never abrogated or suspended, the only organs which could have given those rights and obligations concrete expression do not exist and, their enabling treaty now superseded, are not to be brought into existence. This, in any event, is what Italy or another party, if objecting to a claim for the present-day observance of these provisions, would be likely to say.

(2) Severability of administrative apparatus and the obligation of customs-free treatment in the Free Port

As noted above with reference to the *Chagos Arbitration*, however, a legal obligation may exist to accord in general or as far as possible with particular adopted provisions. The situation that emerged in Trieste after 1947 made it impossible to accord with the Free Port provisions in all detail. The provisions that linked the Free Port's administration to the government of Trieste in particular could not be applied, because the government of Trieste did not exist in the form stipulated by the Peace Treaty. What could be done was to apply the Free Port provisions that are not linked to any particular governmental apparatus. That is to say, the actual government in Trieste could fulfil the obligation of customs-free treatment in the Free Port and associated obligations.

There is a difference between the provisions of the Peace Treaty that were intended to create parallel, and to the extent noted above entangled, apparatuses of administration for Territory and Port; and provisions specifying obligations in respect of the use of the Port which could be fulfilled by whatever governmental structure might be functioning in Trieste. As noted, Annex VIII specifies that the use of the Free Port is not to be subject to any customs duties or charges "other than those levied for services rendered" (Annex VIII, Article 5, para. 2). This is an obligation that would seem to attach to whomever administers the Free Port and under whatever administrative apparatus. Consistent with the view that the privileged treatment of goods transiting the Free Port is not dependent on the (largely non-functioning)

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66 See James Crawford, *Creation of States*, 2nd edn (Oxford: Oxford University Press, 2006) p. 447, a conclusion which follows from the practice.

administrative provisions of the Peace Treaty, the Peace Treaty generalizes the privilege: the status of the Free Port as a free zone is for the benefit not only of all the parties to the Peace Treaty but to all Central European States and, indeed, to States generally. The present-day administrative apparatus functioning in Trieste could just as well fulfil an obligation to respect that status as could any effective administration.

(3) Subsisting obligations of Italy

The Free Port provisions created obligations owed by Italy to a number of States—and, perhaps, as well as to the inhabitants of Trieste, a point which will be considered in closing below. Distinct from the obligations relating to the administrative apparatus, there is no clear explanation as to how it would be that these obligations have lapsed. Moreover, that a number of States besides the parties to the Memorandum of Understanding and the Treaty of Osimo are beneficiaries of the Free Port provisions casts doubt on the conclusion in the 2013 judgment that no other party has a legal interest in Trieste (the third point summarized above).[67]

As noted, the Italian port authority seems to understand that Trieste is a port under a special legal régime.[68] The recent decisions of Italian courts have already been noted. Such practice (administrative and judicial) would seem to indicate an acceptance, on Italy's part, of the continued existence of obligations arising originally under the Peace Treaty. Acknowledgement of the existence of an obligation does not amount to accordance with the obligation. Whether there is a breach of the provisions in the Peace Treaty on the port depends on how Italy at present treats the port, a matter of fact that self-determination activists in Trieste have sought to put in issue. How Italy receives complaints about the matter, and indeed about the status of Trieste in general, leads to a final point—the rights of inhabitants in Trieste to make their case in respect of the status of the territory and its Port.

VI. Freedom of Speech and Other Civil and Political Rights

Self-determination activists in Trieste have met objections from authorities in recent years in connection with gatherings and pronouncements concerning the territory and port.[69] There is no doubt that the freedom of expression embodied in Article 10 of the European Convention is not absolute. In applying Article 10, the ECtHR is willing to accept, to a certain extent, interference in the freedom of expression that is aimed to protect the territorial integrity of the State. This follows from paragraph 2 of Article 10, which recognizes that authorities may

67 Cross-reference.
68 http://www.porto.trieste.it/eng/port/free_port_area
69 http://www.movimentotriestelibera.net/wp/archives/6220

subject the freedom of expression "to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety…". Separatist propaganda has been restricted in some States, and the European Court has determined the restriction to be justified in light of the right to preserve territorial integrity. Interference has been judged unsound when it has been disproportionate and not "necessary in a democratic society." These points were developed initially in cases brought against Turkey.[70]

More recently, in a case concerning independentist political speech in Moldova, *Kommersant Moldovy v Moldova*, the Court held as follows:

> **"b. Legitimate aim**
>
> 35. The interference could be considered to have pursued the legitimate aims of protecting the national security and territorial integrity of the Republic of Moldova, given the sensitive topic dealt with in the impugned articles and the sometimes harsh language used.
>
> **c. "Necessary in a democratic society"**
>
> 36. The Court considers that the domestic courts did not give relevant and sufficient reasons to justify the interference, limiting themselves essentially to repeating the applicable legal provisions. In particular, the courts did not specify which elements of the applicant's articles were problematic and in what way they endangered the national security and the territorial integrity of the country or defamed the President and the country.
>
> 37. In fact, the courts avoided all discussion of the necessity of the interference. The only analysis made was limited to the issue of whether the articles could be considered as good faith reproductions of public statements for which the applicant could not be held responsible in accordance with the domestic law.
>
> 38. In light of the lack of reasons given by the domestic courts, the Court is not satisfied that they 'applied standards which were in conformity with the principles embodied in Article 10' or that they 'based themselves on an acceptable assessment of the relevant facts' (see *Jersild*, cited above, § 31)."[71]

So domestic courts must give reasons for any limitation placed by national law on freedom of expression, if a determination by those courts upholding such limitation is to be held valid under the European Convention. "[P]rotecting the national security and territorial integrity" of

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[70] *Zana* v. *Turkey*, ECtHR, 25 November 1997, paras. 55-56; *Ceylan* v. *Turkey*, ECtHR, 8 July 1999, para. 28 (accepting government's position that restrictions were to preserve territorial integrity, noting that "there was a separatist movement having recourse to methods relying on the use of violence").

[71] *Kommersant Moldovy* v. *Moldova*, ECtHR, Judgment, 9 January 2007, paras. 35-38.

the State are valid reasons, provided, of course, that the measures of protection are "necessary" in the sense of paragraph 2 of Article 10 and "proportionate to the legitimate aims pursued."[72]

In most situations, a State holds a wide discretion to determine when a measure is necessary to protect national security and territorial integrity.[73] In the matter of Trieste, however, a special consideration might well apply. If the question arose whether the European Convention would protect self-determination activists in Trieste when they draw public attention to their arguments that Italy has not fully respected the international legal obligations in respect of Trieste and its inhabitants, the special consideration is this: real questions of public international law remain open in respect of the Peace Treaty and the later disposition of Trieste. This is so especially in connection with the Free Port; and even in respect of the territory as a whole an authoritative international decision resolving the matter never has been adopted. Where *bona fide* international law questions remain open, it is not persuasive for a State to argue that it has discretion to suppress an examination of those questions because the answers may not be to its liking.

This does not mean that a State is subject to a compulsory settlement process for every dispute. There exists no general international dispute settlement mechanism among States, much less a general court to hear cases brought by self-determination groups against States. The European Convention however would seem to protect freedom of expression by individuals who call for a closer look at Trieste's international rights.

The European Convention is a specific regional convention. At the same time, the integration of the European Convention into general public international law has been emphasized in recent practice:

> "[T]he provisions of the Convention cannot be interpreted and applied in a vacuum. Despite its specific character as a human rights instrument, the Convention is an international treaty to be interpreted in accordance with the relevant norms and principles of public international law… [T]he Court has never considered the provisions of the Convention as the sole framework of reference for the interpretation of the rights and freedoms enshrined therein. On the contrary, it must also take into account any relevant rules and principles of international law applicable in relations between the Contracting Parties."[74]

It would be a curious position for the European Court of Human Rights to take if it agreed that

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72 *Zana* v. *Turkey*, para. 62.

73 *Zana* v. *Turkey*, para. 55 ("…with due regard to the circumstances of each case and a State's margin of appreciation…").

74 *Cyprus* v. *Turkey*, ECtHR, Application no. 25781/94, Judgment (just satisfaction), 12 May 2014, para. 23:

Italy or Slovenia may prevent individuals in territory they control from drawing attention to a situation which on a reasoned view might constitute a breach of public international law and which at least in certain respects presents *bona fide* questions. These questions remain open in the ways noted in this chapter. At least in relations among States, to express a legal position, even if an authoritative decision maker later rejects it, does not in itself constitute a breach of international law. The process of claim is inherently not an unfriendly act,[75] and negative systemic consequences would follow from a prohibition against plausible argument in support of claim.[76]

That the questions remain open does not mean that the merits of a self-determination claim for Trieste are clear. Far from it. The seeming acquiescence of the Security Council and of individual States having a legal interest in the matter well might prove a powerful solvent of any self-determination claim arising out of Trieste. Moreover, self-determination activists in Trieste would have to show that the 1947 settlement was more than a convenience for the victorious Allies but also constituted international rights under which the inhabitants of the territory are a self-determining group. The salient point is not that the questions, if put to the test, would necessarily be answered one way or the other. The salient point is, instead, that, in a formal proceeding at the international level, the questions have not been tested. The questions of the Free Territory of Trieste, of its Free Port, and of any special rights of the inhabitants there have been addressed in national courts, but not as yet in an international court or tribunal. To the extent that those questions subsist, they are international law questions. It would seem a valid interest of the inhabitants of that territory to discuss and debate the questions in a pacific manner. A human rights law that recognizes its own relation to the wider body of relevant rules and principles of international law would give appropriate protection to that interest.

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75 *Annuaire de l'Institut de droit international*, vol. 58-II, 1959, p. 381; UN GA res. 3232 (XXIX), 12 November 1974, para. 6.

76 See *Republic of the Philippines* v. *People's Republic of china (South China Sea Arbitration)* (Mensah, Presiding; cot, Pawlak, Soons & Wolfrum, Arbitrators), Award, 12 July 2016, p. 281 (para. 705).