

**THE RIGHT TO SELF-DETERMINATION:  
AN INTERNATIONAL CRIMINAL LAW PERSPECTIVE**

by

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## ABSTRACT

Recent events in East Timor and other regions have highlighted the dangers of leaving issues of self-determination unresolved for too long. Despite the fact that self-determination is one of the guiding principles of the UN Charter, many controversies over its precise meaning and application continue to preclude a coherent, comprehensive approach to the principle by States. This thesis analyses the main controversies over the right of all peoples to self-determination and suggests some conclusions as to the present status of this right under international law.

The author also analyses potential approaches to enforcing a legitimate right to self-determination and concludes that there appears to be no effective enforcement mechanism, unless one has the support of a sovereign State in advocating one's cause. Historically, realisation of this right has more often involved a successful campaign of violence or coercion against the party denying the right, and subsequent recognition by the international community of the legitimacy of the campaign. Clearly, this situation is not conducive to international peace and security.

The author argues that international criminal law may provide the only effective means of enforcing legitimate rights to self-determination at this time. This conclusion is drawn with reference to Professor M. Cherif Bassiouni's theory of five stages through which a human right evolves, from a mere aspiration, to a right whose breach attracts penal proscriptions. Bassiouni argues that, in international law, a human right becomes a suitable subject for international criminal law when effective enforcement modalities for that right have failed.

The thesis concludes with a suggestion that the right to self-determination may be one of the rights protected under the 1998 Rome Statute of the International Criminal Court, within the definition of the crime against humanity of "persecution" (article 7(1)(h) & (2)(g)).

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## Chapter One: Introduction

*"Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law."*<sup>1</sup>

Recent events in East Timor and other regions have highlighted the dangers of leaving issues of self-determination unresolved for too long. Despite the fact that self-determination is one of the guiding principles of the UN Charter, many controversies over its precise meaning and application continue to preclude a coherent, comprehensive approach to the principle by States. There is still no effective means of enforcing one's right to self-determination, if one lacks the support of a sovereign State in advocating one's cause. Historically, realisation of this right has often involved a successful campaign of violence against, or coercion of, the party denying the right, and subsequent recognition by the international community of the legitimacy of the campaign. Clearly, this situation is not conducive to international peace and security."<sup>2</sup>

Many of the most intractable international and internal conflicts this century all revolve around questions of self-determination, or problems that have been created by a particular approach to self-determination<sup>3</sup>. At the same time, the term "self-determination" has become synonymous for "secession", thereby sounding alarm bells whenever it is mentioned outside the context of decolonisation (as the latter was understood when the UN Charter was created). Thus, even where the concept of self-determination is relevant in the non-secessionist sense, the actual expression "self-

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<sup>1</sup> Preambular paragraph 3, *Universal Declaration of Human Rights*, 1948, UN Doc. A/1811.

<sup>2</sup> Cf. C. Tomuschat, "Self-Determination in a Post-Colonial World", [hereinafter Tomuschat, "Self-Determination"] in C. Tomuschat, ed., *Modern Law of Self-Determination*, (Dordrecht, Netherlands: Martinus Nijhoff Publishers, 1993) 1 at 18-19 [hereinafter: Tomuschat, "Modern Law"].

<sup>3</sup> For example: East Timor, Former Yugoslavia, Israel/Palestine, Northern Ireland, Sri Lanka, Tibet, and Western Sahara.

determination” is avoided, in order not to raise expectations and concerns.<sup>4</sup> Professor Morton Halperin and several colleagues recently suggested:

“Self-determination movements are decidedly not all alike or even similar to each other.

As a first step toward a modern approach, *governments must adopt a broader and less alarmist view of self-determination*. The full exercise of self-determination need not result in the outcome predicted by those who would discredit the principle - independent statehood for every single ethnic group. Rather, the full exercise of self-determination can lead to a number of outcomes, ranging from minority-rights protections, to cultural or political autonomy, to independent statehood. The principle of self-determination is best viewed as entitling a people to choose its political allegiance, to influence the political order under which it lives, and to preserve its cultural, ethnic, historical, or territorial identity. Often, although not always, these objectives can be achieved with less than full independence.”<sup>5</sup> [*my emphasis*]

This thesis will analyse the main controversies surrounding the right to self-determination in international law, and draw some conclusions as to its current status. It will also analyse the mechanisms that are currently available which potentially could provide a means of enforcing this right, and concludes that these are inadequate to address the majority of concerns of those agitating legitimately for self-determination. As the title of the thesis suggests, the right to self-determination will also be analysed from an international criminal law perspective. In other words, the thesis explores the possibility of providing criminal proscriptions for grave breaches of the right to self-determination, in much the same way as international criminal law in the twentieth century developed proscriptions for grave breaches of other important human rights, such as the rights to be free from torture, from persecution, and from egregious discrimination based on one’s race, ethnicity, nationality, or religious beliefs.<sup>6</sup>

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<sup>4</sup> For example, Security Council Resolution 1244 (1999) on the future of Kosovo, only provided for “provisional institutions for democratic and autonomous self-government”, and avoided mention of any possible right to internal self-determination for Kosovo Albanians. Cf. Chapter Six, below, on the rights of minority groups to self-determination.

<sup>5</sup> M.H. Halperin, D.J. Scheffer & P.L. Small, *Self-Determination in the New World Order*, (Washington, DC: Carnegie Endowment for International Peace, 1992) at 46.

<sup>6</sup> Cf. Discussion in Chapter Seven of the crimes prosecuted at the Nuremberg Tribunal, and the subsequent “criminalisation” of grave breaches of human rights throughout the twentieth century, leading up to the

This analysis will involve answering the following questions: (i) what does “a right to self-determination” mean in international law? ie. who holds such a right and what does it entail for them? (ii) what would constitute a “grave breach” of that right for them? (iii) how does any particular breach of a human right attract criminal sanctions? in what circumstances? who decides? (iv) could a “grave breach” of a right to self-determination ever be considered as warranting criminal sanction? why, or why not? what authority is there to suggest that a breach of the right to self-determination is or is not an appropriate area of concern for international criminal law?

As many writers have noted, there is considerable confusion as to the definition of a “right to self-determination”, and even less clarity as to who may assert this right as a matter of international law.<sup>7</sup> Professor Ofuathey-Kodjoe points out that the confusion largely stems from the tendency of many commentators to focus on the political or philosophical underpinnings of the concept, without placing it in a sufficiently pragmatic, normative context.<sup>8</sup> He insists that the right to self-determination *can* be defined with sufficient legal clarity, simply by analysing international practice and identifying the “implied core, or nexus, that represents that part of the practice that the states accept as binding.”<sup>9</sup> This process of analysis necessarily is an ongoing one. State practice in relation to claims of self-determination continues to take different forms in different contexts, depending upon many variables, not the least of which is the passage of time.<sup>10</sup> Between 1945 and 1966 alone, self-determination evolved from a “principle” guiding the development of “friendly relations among nations”,<sup>11</sup> to the

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drafting of the *Rome Statute of the International Criminal Court*, UN website on the International Criminal Court [hereinafter “ICC”], online: <[http://www.un.org/law/icc/statute/99\\_corr/cstatute.htm](http://www.un.org/law/icc/statute/99_corr/cstatute.htm)> (last visited 19 January 2000) [hereinafter: “Rome Statute”], which was adopted in July 1998, and will enter into force when sixty States have ratified it (article 126, Rome Statute) As at 12 December 2000, 26 States had ratified the Statute and 120 had signed, suggesting that the Statute may enter into force within the next few years: cf. UN website on the ICC, online: <<http://un.org/icc/>>.

<sup>7</sup> Cf. Select Bibliography, below.

<sup>8</sup> O. Ofuathey-Kodjoe, *The Principle of Self-Determination in International Law*, (New York: Transnational Publishers, 1977) at vii. See also T. Becker, “Self-Determination in Perspective: Palestinian Claims to Statehood and the Relativity of the Right to Self-Determination”, (1998) 32 Is. L. R. 301 at 301.

<sup>9</sup> Ofuathey-Kodjoe, *ibid*, at ix.

<sup>10</sup> For example, international support for the recent referendum held in East Timor, and recent developments in the peace process in Israel, represent significant policy shifts amongst the key players, in terms of recognising and enforcing the rights of persons living in “occupied territories”.

<sup>11</sup> Article 1.2, *Charter of the United Nations*

“right” of “all peoples ... to freely determine their political status and freely pursue their economic, social and cultural development.”<sup>12</sup> A contemporary understanding of this right thus requires some analysis of recent State practice and *opinio juris*, in order to assess its current status in international law.

However, it is also important to appreciate the philosophical and political origins of the principle of self-determination, in order to place in perspective current controversies over the right to self-determination. Ofuatye-Kodjoe does not deny that claims to self-determination are based on theoretical concepts. For example, his definition of the “beneficiary” of a right to self-determination, based on his analysis of State practice at the time, is “a self-conscious *politically coherent* community that is under the political subjugation of another community.”<sup>13</sup> [*emphasis in original*] The notion of the “self-consciousness” of a community is at least partly subjective, and implies that some form of existential analysis is required. Thus, an appropriate starting point for any discussion of self-determination is in philosophy. However, I hope to avoid the current trend amongst commentators to leave this most important of rights suspended in the abstract,<sup>14</sup> and will attempt to marry the philosophical with the normative as much as possible in the following chapters.

### *1.1 Literature review*

It is well beyond the scope of this thesis to attempt an exhaustive analysis of the evolution of the right to self-determination and its relationship with developments in international criminal law.<sup>15</sup> Therefore, in the chapters that follow, I will highlight only the major developments in this process, both in theory and practice, without necessarily elaborating on every development. In this way, I hope to identify key

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<sup>12</sup> Common article 1, *International Covenant on Civil and Political Rights* [hereinafter: “ICCPR”] and *International Covenant on Economic, Social and Cultural Rights* [hereinafter: “ICESCR”].

<sup>13</sup> Ofuatye-Kodjoe, *supra*, at 156. (nb. this book was published in 1977, more than twenty years ago, and thus Ofuatye-Kodjoe’s conclusions do not necessarily reflect the current state of the law).

<sup>14</sup> As Phillip Allott notes, “The impulse [of international lawyers] seems to be to abstract the idea in question from the frenzied dialectic of national and international politics, to launder it into a value-beyond-value, a value which can then be incorporated into a law-beyond-law”: P. Allott, “Self-determination - Absolute Right or Social Poetry?”, in Tomuschat, “Modern Law”, *supra*, 177 at 207.

<sup>15</sup> For further guidance, see “Select Bibliography”.

indicators of “the implied core”<sup>16</sup> that States consider as binding, as it has evolved over time to its present state, with respect to the following key questions: (i) Who holds the right?; (ii) What is the extent of that right in each instance?;<sup>17</sup> and (iii) What could constitute such a serious breach of that right in each instance, that it could attract a penal proscription?

There is a wealth of theoretical literature on the right to self-determination, which is also beyond the scope of this paper to analyse thoroughly. Suffice it to say, much of the literature is more concerned with what the right to self-determination *should* entail, rather than the actualities of State practice and *opinio juris*. On the other hand, in his article “Self-Determination - Absolute Right or Social Poetry?”, Professor Philip Allott suggests:

“Self-determination is a conventional name for a complex social phenomenon. That phenomenon is not difficult to analyse at a systematic level:

1. Human beings have desires about how they want to live together in society.
2. There are certain social systems available, at any particular time, to satisfy those desires.
3. Available social systems include sub-systems for determining participation in the system - who is a participant and on what terms.
4. The desires of human beings about how they want to live together in society, at any particular time, may not match available social systems, or may not match the determinations made by available social systems in the matter of participation.
5. In such a situation, a tension is created, which can generate very high levels of psychic and social energy, giving rise to secondary phenomena ranging from dissent and civil disobedience and martyrdom, discrimination and persecution, through civil war and terrorism, up to genocide and world war.

This way of analysing the social phenomenon of self-determination suggests an explanation of why self-determination generates high levels of psychic and social energy. Three things are interacting powerfully: desire, power, and ideas.”<sup>18</sup>

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<sup>16</sup> Ofuatey-Kodjoe, *supra*, at 156.

<sup>17</sup> As I will be arguing below, the extent of a right to self-determination varies according to the holder of that right.

<sup>18</sup> P. Allott, *supra*, at 177.

At a more legalistic level, the main theories on the right to self-determination initially address the question whether the right is restricted to the practice of decolonisation, or whether it extends beyond decolonisation, to encompass all situations where “the desires of human beings about how they want to live together in society ... may not match available social systems”. If it does extend beyond decolonisation, what does it entail?

The form of self-determination that prevailed throughout the era of decolonisation predominantly entailed the creation of independent sovereign States from former colonies of European powers. Thus, self-determination in this initial manifestation was associated almost exclusively with secession or some other form of new international status, which is now generally described as “external” self-determination. In more recent years, the concept of “internal” self-determination has received growing support, at least in theoretical terms.<sup>19</sup> The 1975 *Final Act of the Helsinki Conference on Security and Co-Operation in Europe* provided that “all peoples always have the right, in full freedom, to determine, when and as they wish, their *internal and external* political status, without external interference”.<sup>20</sup> [my emphasis] This has been interpreted to mean that all people are free to choose their form of governance, and in some instances to have a certain measure of autonomy within a sovereign State.<sup>21</sup>

Some authors find the external/internal dichotomy too simplistic for the multitude of situations where self-determination may be relevant. For example, Halperin et al have identified what they see as six different manifestations of the right to self-determination: (i) “Anti-Colonial Self-Determination”; (ii) “Sub-State Self-Determination”; (iii) “Trans-State Self-Determination”; (iv) “Self-Determination of

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<sup>19</sup> Cf. G.H. Fox, “Self-Determination in the Post-Cold War Era: A New Internal Focus?”, Book Review of *International Monitoring of Plebiscites, Referenda and National Elections: Self-Determination and Transition to Democracy* by Y. Beigbeder (1995) 16 Mich. J. Int'l L. 733.

<sup>20</sup> This formulation was subsequently incorporated into the *Vienna Declaration and Programme of Action* of 1993, which were adopted by 171 States. Cf. A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal*, 2nd. reprint, (Cambridge: Cambridge University Press, 1996) at 278-292 [hereinafter: Cassese, “Self-Determination”].

<sup>21</sup> Cf. Discussion below in Chapter Six on indigenous and minority rights to self-determination.

dispersed peoples”; (v) “Indigenous Self-Determination”; and (vi) “Representative Self-Determination”.<sup>22</sup>

This categorisation highlights one of the most vehement controversies within the international debates on the right to self-determination: who is entitled to claim this right? The relevant international treaties provide that “all peoples” have the right to self-determination.<sup>23</sup> But there is no single definition of “peoples” upon which all members of the international community agree. In the same way, there is considerable disagreement as to what is the scope of the right to self-determination in any given situation. Most commentators seem to agree that the right to secede (ie. the “full” exercise of a right to self-determination, or “external” self-determination) is only relevant in the context of decolonisation. However, a significant number of authors have suggested that other situations may lead to a right of secession, where all other means of protecting the human rights of a group have failed. For example, Professor Christian Tomuschat links/confuses persecution and genocide with grave breaches of self-determination, to suggest:

“It is with a great measure of caution that one should approach answering the question as to what situations exhibit the degree of gravity required to give rise to a right of self-determination to the benefit of a group within an existing State. On one hand, it is obvious that any State is under a basic obligation to protect the life and the physical integrity of its citizens. Therefore, if a State machinery turns itself into an apparatus of terror which persecutes specific groups of the population, those groups cannot be held obligated to remain loyally under the jurisdiction of that State. Genocide is the ultimate of all international crimes. Any government that engages in genocide forfeits its right to expect and require obedience from the citizens it is targeting. If international law is to remain faithful to its own premises, it must give the actual victims a remedy enabling them to live in dignity.”<sup>24</sup> [footnotes omitted]

Tomuschat is not the first commentator to suggest that grave breaches of the right to self-determination should fall within the ambit of international criminal law, but he is one of the few to do so. The

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<sup>22</sup> Halperin et al, *supra*, at 49-52.

<sup>23</sup> Cf. Discussion below in Chapter Five of the relevant international instruments that provide for a right to self-determination.

<sup>24</sup> Tomuschat, “Self-Determination”, *supra*, at 9.

International Law Commission ("ILC") tried to expand the concept of "crimes against peace" to include "colonial domination" in its 1954 *Draft Code of Crimes Against the Peace and Security of Mankind*.<sup>25</sup> [hereinafter "Draft Code".] However, after receiving comments from governments on a similar provision in the 1991 draft, the crime of "colonial domination and other forms of alien domination" was removed from the 1996 Draft Code.<sup>26</sup> At the same time, the ILC's *Draft Articles on State Responsibility* of 1974 still include "a serious breach of an international obligation of essential importance for safeguarding *the right of self-determination of peoples*, such as that prohibiting the establishment or maintenance by force of colonial domination" as an example of an international crime of State.<sup>27</sup> [my emphasis]

There is very little literature available which analyses these developments in any depth. Most commentators dismiss the concept of a crime of "colonial domination" or anything similar, as an historical quirk, arising from the frustration experienced by many liberation movements during the 1960's and 1970's, but without any application to today's realities.<sup>28</sup> Lyal S. Sunga actually devotes an entire section of a chapter to the crime of "colonial domination and other forms of alien domination".<sup>29</sup> He describes the historical development and significance of the principle of self-determination, and then analyses the debates over the 1991 Draft Code and subsequent government statements. He suggests that there were two competing voices within the ILC, as to the relevance of "colonial domination" or self-determination in the context of international criminal law. One side was arguing "that virtually all colonies had already emerged as independent entities and that the system of

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<sup>25</sup> Cf. D. Thiam, Special Rapporteur on the Draft Code of Crimes Against the Peace and Security of Mankind, *Crimes against Peace in the 1954 draft code*, UN Doc. A/CN.4/411 and Corr. 1 and 2 (in Ybk, 1988, v. II(1)); and ILC Report A/43/10, 1988, chp. IV (B), paras. 211-278.

<sup>26</sup> Cf. Discussion below in Chapter Seven, of the right to self-determination in international criminal law.

<sup>27</sup> Article 19(3), *Draft Articles on State Responsibility*, reprinted in S. Rosenne, ed., *The International Law Commission's Draft Articles on State Responsibility, Part 1, Articles 1-35*, (Dordrecht: Martinus Nijhoff Publishers, 1991).

<sup>28</sup> T.L.H. McCormack & G. Simpson, eds., *The Law of War Crimes: National and International Approaches*, (The Netherlands: Kluwer Law International, 1997) at 251. See also S. Williams, "The Draft Code of Offenses Against the Peace and Security of Mankind", in M.C. Bassiouni, ed., *International Criminal Law, Vol. 1: Crimes*, (New York: Transnational Publishers, 1986).

<sup>29</sup> L.S. Sunga, *The Emerging System of International Criminal Law - Developments in Codification and Implementation*, (The Netherlands : Kluwer Law International, 1997) at 90-104.

colonialism no longer existed. However, many ILC members of countries that formerly were colonised, insisted Article 18 [on colonial domination or any other form of alien domination] be retained. These members argued that because it is not inconceivable that new colonies might be created in future, the draft Code should cover future cases of colonial domination that may arise in addition to those situations still in existence.”<sup>30</sup>

Several Western governments provided commentaries that criticised the provision in question for vagueness, amongst other criticisms.<sup>31</sup> However, as Sunga points out, “Rather than to attempt to make the provisions on individual criminal responsibility for colonial domination in the 1991 draft Code more precise, the ILC took the radical step of deleting them entirely”,<sup>32</sup> even though the ILC’s own Commentary on the article suggested that “there is ample precedent in General Assembly Resolutions and the prior work of the Commission on State Responsibility to: 1) warrant the inclusion of the article in the Draft Articles and 2) justify the language used here.”<sup>33</sup> In another contemporaneous commentary on article 18, Ved P. Nanda provided a brief sketch of some of the concerns he perceived would arise in relation to article 18, then concluded: “I concur wholeheartedly with the Commission’s conclusion that there is “universal condemnation of colonialism and the need to eliminate all vestiges of it and any possibility of its revival. However, the Draft Code is not the place to fight the battle.”<sup>34</sup>

While the Draft Code may not have been the most appropriate mechanism for assisting with the enforcement of legitimate rights to self-determination, I argue in this thesis that proscribing grave breaches of the right to self-determination in some form is necessary, given the “enforcement crisis”

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<sup>30</sup> Sunga, *ibid*, at 103-104.

<sup>31</sup> *Comments and Observations of Governments on the Draft Code of Crimes Against the Peace and Security of Mankind adopted on First Reading by the International Law Commission at its 43rd. Session*, UN Doc. A/CN.4/448 of March 1993.

<sup>32</sup> Sunga, *supra*, at 104.

<sup>33</sup> V.P. Nanda, “Commentary on article 18”, in M.C. Bassiouni, *Commentaries on the International Law Commission’s 1991 Draft Code of Crimes Against the Peace and Security of Mankind*, Nouvelles Études Pénales, (France: érès, 1993) 229 at 229.

<sup>34</sup> Nanda, *ibid*, at 230.

currently facing the right.<sup>35</sup> Just as many of the provisions of the 1991 Draft Code were not included in the 1996 Draft Code, so many of the provisions of the latter were not included in the Rome Statute. But this does not mean that all the deleted provisions are not considered as international crimes. A summary of the ILC Report on the 1996 Draft Code states that the ILC “adopted the final text of a set of 20 draft articles ... with the understanding that, in order to reach consensus, the Commission had considerably reduced the scope of the Code. It is understood that the inclusion of certain crimes in the Code does not affect the status of other crimes under international law, and that the adoption of the Code does not in any way preclude the further development of this important area of law.”<sup>36</sup>

Thus, it is still appropriate to explore the possible avenues for proscribing grave breaches of the right to self-determination. However, in light of the wide acceptance given to the Rome Statute, the focus of my analysis will be on the crimes that will be within the jurisdiction of the proposed International Criminal Court, particularly the crime of aggression and the crime against humanity of “persecution”.<sup>37</sup>

### *1.2 Methodology*

There are very few available theoretical models for analysing the development of a human right and following its transformation into a concern of international criminal law, as Professor M. Cherif Bassiouni has pointed out.<sup>38</sup> Speakers at a recent symposium posited some different theories on how human rights evolve into norms, but they did not consider criminal matters.<sup>39</sup> Their differences of

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<sup>35</sup> Cf. Discussion in Chapter Six on the inadequacy of current enforcement mechanisms for those with a right to self-determination.

<sup>36</sup> United Nations, *Analytical Guide to the Work of the International Law Commission, 1949-1997*, (New York: United Nations, 1998) at 151-152, discussing the *Report of the ILC on the work of its 48th. Session, 6 May to 26 July 1996*, ILC Report, A/51/10, 1996, Ch.II, paras. 30-50.

<sup>37</sup> Cf. Article 5, Rome Statute, *supra*. The Statute was adopted by a non-recorded vote of 120 for, 7 against, and 21 abstentions: UN Press Release L/ROM/22, “UN Diplomatic Conference Concludes in Rome with Decision to Establish Permanent International Criminal Court”, 17 July 1998, online: <<http://www.un.org/icc/>>. Cf. Discussion below in Chapter Seven on the Rome Statute.

<sup>38</sup> M.C. Bassiouni, “The Proscribing Function of International Criminal Law in the Processes of International Protection of Human Rights”, (1982) 9 *Yale J. of World Public Order* 179 at 181 (hereinafter: Bassiouni, “Proscribing Function”).

<sup>39</sup> See generally, papers from Symposium on “Customary International Human Rights Law: Evolution, Status and Future”, in: (1995) *Ga. J. Int'l. & Comp. L.*

opinion mostly involved problems of “positivist” versus “natural law” views of human rights, rather than providing models of human right “evolution”.<sup>40</sup>

As a framework for my analysis, I will be adopting Bassiouni’s theory of human rights development, whereby a human right evolves through five stages, from a mere aspiration, to a right whose breach attracts penal proscriptions:

“Stage 1 - *The Enunciative Stage* - The emergence and shaping of internationally perceived shared values through intellectual and social processes.

Stage 2 - *The Declarative Stage* - The declaration of certain identifiable human interests or rights in an international document or instrument.

Stage 3 - *The Prescriptive Stage* - The articulation of these human rights in some prescriptive form in an international instrument (general or specific) generated by an international body; or the elaboration of specific normative prescriptions in binding international conventions.

Stage 4 - *The Enforcement Stage* - The search for, or the development of, modalities of enforcement.

Stage 5 - *The Criminalization Stage* - The development of international penal proscriptions.”

Bassiouni identifies the “*Enunciative Stage*” as the first step in the evolution of an international human right. He suggests that this stage is where various social and intellectual processes lead to the emergence and shaping of shared values amongst members of the international community. Once these common values are determined, then the international community can decide collectively how important these values are, and whether they are being protected sufficiently, in light of their relative importance. As Bassiouni points out, this entire process is analogous to the “evolution of social values and the development of civil prescription and penal proscriptions in any organised society.”<sup>41</sup> However, the international community’s approach is usually less structured or predictable than that of national or

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<sup>40</sup> Cf. Discussion below in this Chapter on the relevance of these theories of law to international human rights interpretation, particularly the right to self-determination.

<sup>41</sup> Bassiouni, “Proscribing Function”, *supra*, at 181-182.

regional legal systems, because the latter are generally far more homogeneous and thus involve fewer variables.

In addition, the issues involved in the theory and practice of self-determination have inspired more disagreement than agreement within the international community, when it comes to the “emergence and shaping” of values. Thus, describing the evolution of “shared values” is extremely complex when it comes to self-determination. Even today, different interest groups in the international community perceive their own diverse range of values as supporting the imperative to recognise various rights to self-determination.<sup>42</sup> This makes it particularly difficult to justify the inclusion of the right to self-determination within the ambit of international criminal law, the latter of which requires extreme precision and at least the appearance of being devoid of political implications, in order to appear “just”.

Bassiouni’s own theoretical analysis focuses on crimes that are mostly “against the person”<sup>43</sup>, which are far less controversial, because they all involve actual physical harm, of some kind, to a human being.<sup>44</sup> Such prohibitions are common to all cultures and legal systems, in varying degrees. However, as Bassiouni suggests, there “is no classification of rights according to the values sought to be advanced or effective enforcement modalities.” [footnote omitted]<sup>45</sup> His theory is that “the adoption of criminal proscriptions has not derived from an appraisal of the significance of the right sought to be preserved and protected; rather, it has been caused by the inadequacy of modalities of protection in the first four stages [through which a human right evolves]. Thus, the inadequacy of these modalities has

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<sup>42</sup> See Discussion in Chapter Six below.

<sup>43</sup> In illustrating his theory, Bassiouni uses the following crimes as examples: crimes against peace, war crimes, crimes against humanity, genocide, apartheid, slavery and slave-related practices, torture, unlawful human experimentation, piracy, hijacking, kidnapping of diplomats and the taking of civilian hostages, and unlawful use of the mails (to kill or inflict harm on anyone handling or receiving mailed materials): Bassiouni, “Proscribing Function”, supra, at 183-191.

<sup>44</sup> However, note my discussion below in Chapter Seven on the requirements to establish that a crime against humanity of persecution has been committed. It requires more than just the mere act of persecution, which may or may not involve physical harm to persons - there must be an additional element, most of which do involve some kind of physical harm (torture, disappearances, etc.).

<sup>45</sup> Bassiouni, “Proscribing Function”, supra, at 180.

compelled the transformation of the protected right into a prohibited crime. Therefore, international criminal proscriptions are the *ultima ratio* of enforcing internationally protected human rights.”<sup>46</sup>

In other words, the fact that the right to self-determination has always been controversial, does not mean it could never warrant modalities of protection such as international criminal proscription. There are, of course, those who believe that self-determination is actually one of the most important rights to be protected.<sup>47</sup> On the other hand, there are some who claim that “the legal right to self-determination has not reflected the revolutionary content of its political forbear. It has been unable to convert the grandiose and sweeping nature of its beginnings into a legal principle conducive to consistent practical application.”<sup>48</sup>

The application of the principle of self-determination has certainly been more prone to political considerations than many of the other human rights contained in the major international instruments. For example, the Universal Declaration of Human Rights<sup>49</sup> [hereinafter: “UDHR”] does not mention group rights, let alone self-determination,<sup>50</sup> despite the fact that the UN Charter explicitly states as one of the UN’s purposes, to “respect ... the principle of equal rights and self-determination of peoples”.<sup>51</sup> Yet, two years after the adoption of the UDHR, in 1950 the General Assembly recognised the right to self-determination as a fundamental human right,<sup>52</sup> and by 1952 the General Assembly had decided

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<sup>46</sup> Bassiouni, *ibid*, at 182.

<sup>47</sup> They point to the fact that it is article 1 in both the ICCPR and the ICESCR: cf. Cassese, “Self-Determination”, *supra*, at 47-59.

<sup>48</sup> Becker, *supra*, at 301.

<sup>49</sup> *Universal Declaration of Human Rights*, *supra*. Adopted by 48 states voting in favour and 8 abstaining (Saudi Arabia, South Africa, the Soviet Union, plus 4 East European states and a Soviet republic whose votes were controlled by the Soviet Union): H.J. Steiner & P. Alston, *International Human Rights in Context: Law, Politics, Morals*, (New York: Oxford University Press, 1996) at 119.

<sup>50</sup> Russia proposed that the following provision be included: “Every people and every nation has the right to national self-determination”, and then extended to people in non-self-governing territories. But their proposal was rejected. Cf. UN Doc. A/784, discussed in U.O. Umzurike, *Self-Determination in International Law*, (Connecticut: Archon Books, 1972) at 48.

<sup>51</sup> Article 1(2), UN Charter.

<sup>52</sup> Cf. GA Res. 521(V) 4 Dec. 1950, which “calls upon the ECOSOC to request the Commission on Human Rights to study ways and means which would ensure the right of peoples and nations to self-determination, and to prepare recommendations for consideration by the General Assembly”: discussed in G. Simpson, *The Right of Secession in International Law: A New Theory of Legitimacy*, (LLM Thesis, University of British Columbia 1989) [unpublished] at 56. See also Cassese, “Self-Determination”, *supra*, at 47-52, for discussion of differing political concepts of the right at the time (Soviet vs. Western states).

“to include in the International Covenant or Covenants on Human Rights an article on the right of all peoples and nations to self-determination in reaffirmation of the principle enunciated in the Charter of the United Nations.”<sup>53</sup> Clearly there were complex political machinations involved in this seemingly contradictory approach to the significance of the principle of self-determination, during these formative years for the United Nations.<sup>54</sup>

At the same time, Bassiouni himself once labelled war crimes and crimes against humanity as “political” crimes, which he envisaged would not be the “bread and butter cases” of an International Criminal Tribunal he proposed in 1992.<sup>55</sup> He thought that such a tribunal would deal mainly with transnational crimes such as international drug trafficking and money laundering. In response to Bassiouni's 1992 *Draft Statute for an International Criminal Tribunal*, Gianaris wrote in the same year: “While an international criminal court could and should eventually deal with both types of crimes, it does not appear feasible that countries would be willing to allow an international criminal court to hear such types of political cases which could also be dealt with in a non-criminal fashion and by other international organisations.”<sup>56</sup> Yet, the International Criminal Court will *only* have jurisdiction over these “political cases”: the only crimes presently within its jurisdiction are genocide, crimes against humanity, war crimes, and aggression.<sup>57</sup>

Thus, one should not jump to conclusions as to the suitability of the right to self-determination for the kind of analysis and progression towards an *ultimo ratio* that Bassiouni has propounded for human rights in general, simply because it has strong political overtones and thus did not appear in every significant human rights instrument. Clearly, Bassiouni has in mind the UDHR when he speaks of the “*Declarative Stage*” in the evolution of a human right or interest. Yet, as I will argue below, the

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<sup>53</sup> GA Res. 545 (V) of 5 February 1952. Discussed further in Umozurike, *supra*, at 49.

<sup>54</sup> See discussion in Chapters Four and Five below.

<sup>55</sup> M.C. Bassiouni, “The Need for an International Criminal Court in the New International World Order”, (1992) 25:2 *Vanderbilt J. of Transnational L.* 151 at 173.

<sup>56</sup> W.N. Gianaris, “The New World Order and the Need for an International Criminal Court”, (1992/93) 16 *Fordham Int. L. J.* 88 at 88-89, n. 1.

<sup>57</sup> Article 5, Rome Statute, *supra*. NB. Aggression will only be within its jurisdiction once a suitable definition is found: article 5(2).

principle of self-determination reached its "*Declarative Stage*" before the UDHR was ever adopted, in the form of the principle's inclusion in the Charter of the UN.<sup>58</sup> Therefore, while it is important to bear in mind the strong influence of politics in "shaping" the international community's views on self-determination, it is still a valid exercise to try and elaborate some of the "intellectual and social processes" that also shaped them. In this regard, the following observation from Professor Jordan Paust seems particularly pertinent: "There are no single sources or evidences of human rights law; no single set of participants; and no single arenas or institutional arrangements for the creation, invocation, application, change or termination of such law. Like all human law, it is full of human choice and rich in individual and group participation."<sup>59</sup>

Another complicating factor is that the right to self-determination has been identified as imposing upon States obligations *erga omnes*.<sup>60</sup> In other words, the right to self-determination is said to impose corresponding obligations on all States, regardless of their consent.<sup>61</sup> These unspecified obligations were first referred to in the *Barcelona Traction Case* of 1970, in an oft-quoted section of the judgment:

"In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.

Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person,

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<sup>58</sup> If there is any doubt about this, it is clear that the right to self-determination had definitely reached its "*Declarative Stage*" by 1960, when the *Declaration on the Granting of Independence to Colonial Countries and Peoples* (GA Res. 1514 (XV), 14 December 1960) was adopted by the General Assembly, recognising "the right of all peoples to self-determination", albeit some 12 years after most of the other important human rights were "declared" in the UDHR. Self-determination then "caught up" with the other rights, in a sense, through its inclusion in both the ICCPR and ICESCR. Some would even say that it eclipsed all the other rights at that time, by being given pride of place as common article 1 in both Covenants (cf. discussion in Chapter Five below).

<sup>59</sup> J. Paust, "The Complex Nature, Sources and Evidences of Customary Human Rights", (1995/96) Ga. J. Int'l & Comp. L. 147 at 147.

<sup>60</sup> Cassese, "Self-Determination", *supra*, at 133-141. Cf. *Case concerning East Timor (Portugal v. Australia)* [1995] ICJ Rep., at para. 29 [hereinafter: "East Timor case"].

<sup>61</sup> "*Erga omnes*" means: "binding on all others, regardless of consent. [L: in respect of all]", CCH Australia Limited, *The CCH Macquarie Dictionary of Law*, 2nd. ed., Sydney: CCH Australia Limited, 1993) [hereinafter: "CCH Dictionary"] s.v. "*erga omnes*".

including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law ...; others are conferred by international instruments of a universal or quasi-universal character.”<sup>62</sup>

However, the exact nature and extent of these obligations has never been clarified, despite the fact that the ICJ has considered them on a number of occasions.<sup>63</sup> As Judge Weeramantry noted in his dissenting opinion in the East Timor case:

“I am conscious ... that violation of an erga omnes right has not thus far been the basis of judicial relief before this Court. Yet the principles are clear, and the need is manifest for a recognition that the right, like all rights, begets corresponding duties. ... The erga omnes concept has been at the door of this Court for many years. A disregard of erga omnes obligations makes a serious tear in the web of international obligations, and the current state of international law requires that violations of the concept be followed through to their logical and legal conclusion. Partly because the erga omnes obligation has not thus far been the subject of judicial determination, it has been said that: “Viewed realistically, the world of obligations erga omnes is still the world of the “ought” rather than the “is”.”<sup>64</sup>

Those who advocate that all States have “universal jurisdiction” for international crimes, are basing this claim on a notion of *erga omnes* obligations with respect to international crimes. However, “universal jurisdiction” has yet to receive widespread support within the international community.<sup>65</sup> At present, there is considerable activity at the international level, to try and draft some principles concerning the right of States to intervene in another State for “humanitarian” purposes, following on from some of the controversies surrounding the bombing of Serbia by the members of NATO in

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<sup>62</sup> *Case concerning the Barcelona Traction, Light and Power Company, Limited*, Second Phase, [1970] ICJ Rep. 3 at 32, para. 34 [hereinafter: “Barcelona Traction case”].

<sup>63</sup> Cf. Two of the South West Africa cases: Preliminary Objections [1962] ICJ Rep. 319 and Second Phase [1966] ICJ Rep. 6; as well as the *Case concerning Northern Cameroons* [1963] ICJ Rep. 15; *Case concerning Nuclear Tests (Australia v. France; New Zealand v. France)* [1974] ICJ Rep. 253; *Case concerning United States Diplomatic and Consular Staff in Tehran* [1980] ICJ Rep. 3; *Case concerning Border and Transborder Armed Actions (Nicaragua v. Honduras) Jurisdiction and Admissibility*, [1988] ICJ Rep. 69.

<sup>64</sup> East Timor case, dissenting opinion of Justice Weeramantry, *supra*, at 59-60.

<sup>65</sup> Cf. Amnesty International, *Universal Jurisdiction: 14 Principles on the Effective Exercise of Universal Jurisdiction*, (London: Amnesty International, 1999).

1999.<sup>66</sup> Thus, it cannot be said at this point in time that there is any clear law on what kinds of *erga omnes* obligations the right to self-determination may impose upon *all* States.<sup>67</sup> Nor is it clear to what extent this right may be asserted *erga omnes*, particularly since the majority of the Court in the East Timor case appeared to be suggesting that even *erga omnes* rights and their corresponding obligations require a measure of acceptance before a State may be bound by them.<sup>68</sup>

It is also worth considering at this point the impact of some other concepts that were evolving at the same time as the principle of self-determination, and have continued to play an important role in its theory and practice. These influences are: (i) nationalism, and (ii) competing theories of international law and its sources. It is beyond the scope of the present analysis to discuss either of these perspectives in any depth.<sup>69</sup> But it is worth briefly reflecting upon how these influences have shaped current thinking on self-determination, even though they evolved as entirely separate fields of enquiry, at least initially.

### 1.3 Self-determination and nationalism

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<sup>66</sup> For example, the ICJ is currently in the middle of proceedings questioning the legality of such use of force. cf. *Case concerning Legality of Use of Force, (Yugoslavia v. Belgium) (Yugoslavia v. Canada) (Yugoslavia v. France) (Yugoslavia v. Germany) (Yugoslavia v. Italy) (Yugoslavia v. Netherlands) (Yugoslavia v. Portugal) (Yugoslavia v. Spain) (Yugoslavia v. United Kingdom) (Yugoslavia v. United States of America)*, Request for the Indication of Provisional Measures, Orders of 2 June 1999, online: <<http://un.org/icty/>> [hereinafter: "Yugoslavia case"].

<sup>67</sup> For some guidance, see generally A. de Hoogh, *Obligations Erga Omnes and International Crimes: A Theoretical Inquiry into the Implementation and Enforcement of the International Responsibility of States*, (The Hague: Kluwer Law International, 1996).

<sup>68</sup> Rebecca Kavanagh argued in 1996: "In ignoring the legal interest of the international community in the protection of *erga omnes* rights and obligations, the Court has in effect subordinated the protection of fundamental human rights to the national interest of a single state." R. Kavanagh, "Oil in Troubled Waters: The International Court of Justice and East Timor - Case Concerning East Timor (Australia v Portugal)", (1996) 18 Sydney L. Rev. 87 at 93.

<sup>69</sup> See for example: E. Y. Benneh, "Statehood, Territory, Recognition and International Law: Their Interrelationships" in E.K. Quashigah & O.C. Okafor, eds., *Legitimate Governance in Africa: International and Domestic Legal Perspectives*, (The Hague: Kluwer Law International, 1999) [hereinafter: "Quashigah & Okafor"]. For excellent analyses of the relationship between nationalism and self-determination, cf. R.J. Johnston, D.B. Knight & E. Kofman, eds., *Nationalism, Self-Determination and Political Geography*, (New York: Croom Helm, 1988), and M. Moore, *National Self-Determination and Secession*, (New York: Oxford University Press, 1998). As some interesting examples of the many different approaches to international law theory, cf. A. Anghie, "Francisco de Vitoria and the Colonial Origins of International Law", (1996) 5 Soc. & Legal Stud. 321; T. Franck, *Fairness in International Law and Institutions*, (New York: Oxford University Press, 1995); R. Higgins, *Problems & Process: International Law and How We Use It*, (New York: Oxford

The complex evolution of the principle of self-determination in international law is further problematised by its conflicted relationship with notions of State sovereignty and nationalism. Self-determination in the form of secessionist movements within nation states strikes at the very heart of concepts such as the sovereignty of States. These concepts are extremely important in understanding the nature of the international legal system today, which is traditionally viewed as the laws between sovereign states. However, the positivist view of international law initially distinguished between “civilised states and non-civilised states and asserted further that international law applied only to the sovereign states that composed the civilised ‘Family of Nations’.”<sup>70</sup> Thus, “nationalist” movements in “non-civilised” countries seeking to exercise a right to self-determination have met with mixed success over the years.<sup>71</sup> As Gerry Simpson suggests, “the relationship between nationalism and self-determination has been a paradoxical one. Nationalism has frequently been instrumental in creating the self in self-determination. On the other hand, nationalism has also been the single greatest force in opposition to self-determination since the 17th. century.”<sup>72</sup>

This continuing tension and contradiction was best illustrated by the international community’s various responses to the outbreak of ethnic violence in the Former Yugoslavia in the early 1990’s and the contemporaneous disintegration of the former Soviet Union. As Professor Thomas Franck points out, “When secession has been accomplished peacefully or by negotiated agreement, the international community and the United Nations have given rapid recognition to the successor states, as, most recently, in the case of the constituent republics of the former Soviet Union.”<sup>73</sup> At the same time, the United Nations has “encouraged anti-colonialist movements that struggled for release against the

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University Press, 1995) [hereinafter: Higgins, “Problems & Process”]; and M. Koskenniemi, “International Law in a Post-Realist Era”, (1995) 16 *Aus. Y.B. Int’l L.* 23.

<sup>70</sup> A. Anghie, “Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law”, (1999) 40 *Harv. J. Int’l L.* 4 [hereinafter: Anghie, “Colonialism”]; see also E. Evatt, “The Acquisition of Territory in Australia and New Zealand”, in C.H. Alexandrowicz, *Studies in the History of the Law of Nations*, (The Hague: Martinus Nijhoff, 1970) 16 at 17.

<sup>71</sup> Cf. Discussion in Chapter Six below.

<sup>72</sup> Simpson, *supra*, at 18.

<sup>73</sup> T. M. Franck, “Postmodern Tribalism and the Right to Secession”, [hereinafter: Franck, “Postmodern Tribalism”] in C. Brölmann et al, eds., *Peoples and Minorities in International Law*, (Dordrecht: Martinus

embrace of empire from Algeria to Indonesia”, thereby “embrac[ing] the secessionist cause”. However, on other occasions, the United Nations has “endorse[d] the sanctity of existing boundaries and the means necessary to enforce them ..., actively sid[ing] with the authorities seeking to prevent the success of a secessionist movement.”<sup>74</sup> On yet other occasions, as in the case of the rise of various nationalisms and the concomitant disintegration of the former Yugoslav Republic, Franck suggests that the international community “tr[ie]d to be neutral between the secessionistic dynamic and forces upholding static territorial integrity, ... while still asserting an interest in the maintenance of peace, negotiated conflict resolution, and adherence to human rights.”<sup>75</sup> Eventually, of course, the international community recognised the sovereignty of the new States that emerged as a result of the various arrangements for peace that were made, such as the “Dayton Peace Accord”.<sup>76</sup>

Nathaniel Berman suggests that such contradictory responses to various manifestations of what Franck describes as “the global phenomenon of *postmodern tribalism*”<sup>77</sup>, are based on “a variety of conceptual conundrums. Deference to nationalist desire might be enthusiastically welcomed *either* because of the vital energy it would bring *or* because of its fundamentally stabilising quality; alternatively, it might be merely grudgingly accepted *either* because of fear of consequences of repressing its energy *or* because of a minimisation of the consequences of acknowledging such moribund cultures. Finally, such deference might be rejected *either* because it would destabilise the legal system *or* because it would lodge an immutable source of inflexibility in the international system.”<sup>78</sup> [*emphases in original*]. Such dualistic thinking is equally apparent in the international

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Nijhoff Publishers, 1993) at 12.; see also J.D. van der Vyver, “Universality and Relativity of Human Rights: American Relativism”, (1998) 4 Buff. Hum. Rts. L. Rev. 43 at 54.

<sup>74</sup> Franck, “Postmodern Tribalism, *supra*, at 4. The examples provided by Franck are Katanga, Cyprus, Mayotte “and elsewhere”.

<sup>75</sup> Franck, *ibid*. Cf. Franck’s five point summary of “the reaction of the system - European Community, CSCE and United Nations”, and all its qualified approaches to the right of secession, *ibid*, at 19-20.

<sup>76</sup> *General Framework Agreement for Peace in Bosnia and Herzegovina*, initialled 21 November 1995, signed 14 December 1995, online: <<http://www.ohr.int/gfa/gfa-home.htm>>.

<sup>77</sup> Franck, “Postmodern Tribalism, *supra*, at 3.

<sup>78</sup> N Berman, “A Perilous Ambivalence: Nationalist Desire, Legal Autonomy, and the Limits of the Interwar Framework”, (1992) 33:2 Harv. Int’l L. J. 353 at 377 [*hereinafter*: Berman, “Nationalist Desire”].

community's ambivalent attitude toward the right to self-determination generally, which some commentators argue arises from "the tension between its political origins and its legal manifestation."<sup>79</sup>

#### *1.4 Self-determination and theories of international law*

It is also important to note the views of many international law commentators, who point out that "The Law of Nations" upon which current international laws are based in large part, is a construct of only a small group of European countries, who arrogated to themselves the right to prescribe laws for the entire world, in order merely to validate the realisation of their own self-serving territorial and political ambitions, mostly during the late nineteenth and early twentieth century.<sup>80</sup> This perspective is particularly relevant in any discussion on the principle of self-determination, because self-determination is so closely related to the control of territory and to addressing the various legacies of colonialism.<sup>81</sup> In fact, Professor Antony Anghie argues that "the colonial confrontation is central to an understanding of the character and nature of international law" in general.<sup>82</sup> He identifies positivist jurisprudence as the driving force behind colonial expansion, with its emphasis on the "primacy of the state" - meaning a "sovereign" European-style state only<sup>83</sup> - and describes how the particular system of values advocated by positivism reached their peak influence towards the end of the nineteenth century.

Anghie also points out that "the universality of international law is a relatively recent development. It was not until the end of the nineteenth century that a set of doctrines was established as applicable to

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<sup>79</sup> Becker, *supra*, at 301, citing M. Koskenniemi, "National Self-Determination Today: Problems of Legal Theory and Practice", (1994) 43 Int'l & Comp. L. Q. 241 at 245-9 [hereinafter: Koskenniemi, "National Self-Determination"]; and Ofuatey-Kodjoe, *supra*, at 10-11.

<sup>80</sup> The first author to make such a claim is probably Richard Falk, in "Historical Tendencies, Modernizing and Revolutionary Nations, and the International Legal Order", (1962) 8 How. L. J. 128 at 133-35; see now Anghie, "Colonialism", *supra*, at 1; M. wa Mutua, "Why Redraw the Map of Africa: A Moral and Legal Inquiry", (1995) 16 Mich. J. Int'l L. [hereinafter: Mutua, "Why Redraw"] at 1120: "Though today it is the main currency regulating international relations, international law or the law of nations is a development out of exclusively European historical circumstances."

<sup>81</sup> Cf. I. Brownlie, *Principles of Public International Law*, 4<sup>th</sup> ed., (Oxford: Clarendon Press, 1990) at 521-552.

<sup>82</sup> Anghie, "Colonialism", *supra*, at 5. However, note that he then goes on to state: "but ... the extent of this centrality cannot be appreciated by a framework that adoptes as the commencing point of its inquiry the problem of how order is created among sovereign states. In attempting to demonstrate this centrality I have focused instead on how order is created among entities characterized as belonging to entirely different cultural systems."

all states, whether these were in Asia, Africa, or Europe.”<sup>84</sup> Previously, there was a range of views amongst international law publicists, as to how territory could be controlled and acquired.<sup>85</sup> Dr. Barbara Wells suggests that the two main “threads” that “come forward again and again through five hundred years of discussion and struggle over the disposition of lands and peoples ... are the question of cession, usually following conquest, and the view that territorial and political rights of peoples are inalienable and inherent because they are given either by natural or divine law.”<sup>86</sup>

In the sixteenth century, the so-called “Spanish School”<sup>87</sup> of international law scholars was dominated by “the natural law philosophies of Renaissance European theorists, which were in some measure, although not entirely, sympathetic to indigenous peoples’ existence as self-determining communities in the face of imperial onslaught ... Within a frame of thinking traditionally linked to the rise of modern international law, prominent European theorists questioned the legality and morality of claims to the ‘New World’ and of the ensuing, often brutal, settlement patterns”.<sup>88</sup> However, the influence of these Spanish theorists was minimal, as evidenced by the extent of colonial expansion during this era.

In 1758, the Swiss jurist, Emer de Vattel, wrote *Le Droit des Gens*, which was subsequently translated into English as *The Law of Nations*. Vattel has been held responsible in large part for influencing European notions of their superior claim to title in “lands which the savages have no special need of and are making no present and continuous use of”.<sup>89</sup> Vattel argued that States had no right to settle on and lay claim to lands that were being used by the native population. However, his concept of “using” land involved each community fulfilling its obligation “to cultivate the land that has fallen to its share

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<sup>83</sup> Ibid, at 2.

<sup>84</sup> Ibid, at 1.

<sup>85</sup> It is beyond the scope of this paper to address international jurisprudence from non-European traditions.

<sup>86</sup> B.J. Wells, *United Nations Decisions on Self-Determination* (Ph.D. Thesis, New York University 1963), Authorized Reprint, (Ann Arbor, Michigan: University Microfilms, 1966) at 6-7.

<sup>87</sup> Said to include Vitoria, Domingo de Soto, Francisco Suarez and Bartolome de Las Casas (cf. discussion below in Chapter Two).

<sup>88</sup> S. James Anaya, *Indigenous Peoples in International Law*, (New York: Oxford University Press, 1996). Bartolome de Las Casas estimated that by the middle of the sixteenth century, fifteen million natives in South and Central America had been massacred by the conquistadors: in F. Wilmer, *The Indigenous Voice in World Politics*, (California: Sage Publications, Inc., 1993) at 95.

because 'the whole world is destined to feed its inhabitants' and this cannot be achieved today without intensive cultivation - the clearing of forest, tillage and the managed rotation of crops and pasture."<sup>90</sup>

Therefore, according to these standards, any native population that was not actively involved in such cultivation could legitimately be dispossessed of their land, either by force, through necessity, or by formal means such as a treaty ceding territory to the colonising power.

In the 1920's, a British publicist, M.F. Lindley, argued that there had in fact been a "persistent preponderance of juristic opinion in favour of the proposition that lands in the possession of any backward peoples who are politically organised ought not to be regarded as if they belonged to no one",<sup>91</sup> in other words recognising the territorial rights of indigenous people, even though they did not organise their societies in the same way as the Europeans who came into contact with them. He cited as examples Vittoria, Grotius, Pufendorf and several others from the "natural law" tradition, whose views were "against regarding backward territory as *res nullius*".<sup>92</sup> One of the earliest proponents of such a view was Erasmus who, in the early sixteenth century "condemned title acquired by conquest, distinguishing between authority over men and beasts and contending that all power over men should rest on the consent of those concerned."<sup>93</sup> A century later, Grotius developed this idea further, arguing that:

"In the alienation of a part of the sovereignty, it is also required that the part which is to be alienated consent to the act. For those who united to form a state, contract a certain perpetual and immortal society, in virtue

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<sup>89</sup> E. de Vattel, *The Law of Nations, or, Principles of the Natural Law Applied to the Conduct and Affairs of Nations and Sovereigns*, vol. 3, trans. C. Fenwick, (Washington: Carnegie Institution, 1916) Book I, Chapter XVIII s.209, at 85, quoted in Evatt, *supra*, at 40.

<sup>90</sup> E. de Vattel, *The Law of Nations, or, Principles of the Natural Law Applied to the Conduct and Affairs of Nations and Sovereigns*, vol. 3, trans. C. Fenwick, (Washington: Carnegie Institution, 1916) Book I, Chapter VII, at 37-38, quoted in P. Moloney, "Colonisation, Civilisation and Cultivation: Early Victorians and the Extension of Their World", ("Law and Freedom" Conference of the Australian and New Zealand Law and History Society, Newcastle, Australia, June 1999) [unpublished] at 4.

<sup>91</sup> M.F. Lindley, *The Acquisition and Government of Backward Territory in International Law - Being a Treatise on the Law and Practice Relating to Colonial Expansion*, (New York: Negro Universities Press, 1926), in G.C. Marks, "Indigenous Rights and the Origins of International Law", ("Law and Freedom" Conference of the Australian and New Zealand Law and History Society, Newcastle, Australia, June 1999) [unpublished] at 5.

<sup>92</sup> Evatt, *supra*, at 17. *Res nullius*, which came to be replaced by the term *terra nullius*, means "no-one's thing; a thing without an owner": CCH Dictionary, *supra*, s.v. "*res nullius*".]

<sup>93</sup> Wells, *supra*, at 7, footnote omitted.

of their being integrant parts of the same; whence it follows that these parts are not under the body in such a way as the parts of a natural body, which cannot live without the life of the body, and therefore may rightly be cut away for the utility of the body ... And in like manner, on the other hand, a part has not a right to withdraw from the body, except evidently it cannot otherwise preserve itself: for, as we have said, in every thing of human institution the case of extreme necessity is to be excepted, which reduces the matter to mere Natural Law ... And hence it may be sufficiently understood, why, in this matter, the part has a greater right to protect itself than the body has over a part; because the part uses a right which it had before the society was formed, and the body does not.”<sup>94</sup>

Another century after Grotius wrote this, Lindley’s analysis also pointed to extensive State practice over many centuries, whereby European States rarely relied on the doctrine of *terra nullius*<sup>95</sup> in order to assert dominion over lands occupied by people who were perceived as less “civilised” than themselves.<sup>96</sup> Instead, they predominantly relied on conquest, and/or the formal cession of sovereignty by the native population.<sup>97</sup>

However, the latter approach sat uneasily with the superior, positivist view taken of the indigenous peoples with whom the nineteenth century Imperial Powers had been concluding treaties since at least

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<sup>94</sup> Wells, *ibid*, at 8, quoting H. Grotii, *De Jure Belli et Pacis*, trans. William Whewell (Cambridge: Cambridge University Press, 1853) at 342-3.

<sup>95</sup> “... territory belonging to no state, ie. territory not inhabited by a community with a social and political organisation. In international law, effective occupation is the traditional mode of extending sovereignty over terra nullius.” CCH Dictionary, *supra*, s.v. “*terra nullius*”].

<sup>96</sup> The occupation of Australia by Great Britain in the eighteenth century is one of the more obvious exceptions to this trend. But note Evatt’s comments, *supra*, at 18-19: “There is a practical explanation for this, for although a State might prefer to obtain some form of consent where there is an organised community with a recognised chief, this was impossible in the case of Australia, inhabited by scattered unorganised tribes.” [only in the sense that they were unorganised as amongst the various tribes, not that the individual tribes themselves were unorganised] No such excuse can be given for the treatment of the native peoples of British Columbia, who were also never involved in formally “ceding” their territories to the British by way of a treaty. As one commentator points out, “Consequently, having never been defeated in war, and having never sold any land, the Indians of British Columbia could not understand why white settlers should simply be allowed to take possession of land which the Indians felt they owned by right of occupation and use.”: R.J. Surtees, *The Original People*, (Toronto: Holt, Rinehart and Winston of Canada, 1971) at 62, quoted in C. Jefferson, *Conquest by Law*, (Ottawa: Aboriginal Corrections Unit, Ministry of the Solicitor General, Government of Canada, 1994) at 110.

<sup>97</sup> For example, *Treaty of Waitangi*, Confederation of the United Tribes of New Zealand and Her Majesty the Queen of England, 6 February 1840. However, on the circumstances surrounding the conclusion of this treaty and its questionable legitimacy at international law, see Evatt, *supra*, at 18, & 40-42. For a discussion on how the differences between the English version of this treaty and its Maori translation have caused various problems in the interpretation of the treaty’s provisions, cf. J-F. Tremblay & P-G. Forest, *Aboriginal Peoples and Self-Determination: A few aspects of government policy in four selected countries*, (Québec: Secrétariat aux affaires autochtones, Gouvernement du Québec, 1993) at 37.

the fifteenth century.<sup>98</sup> As Anghie rightly concludes, “the fundamental premises of positivism, when extended to their logical conclusion, implicitly suggested that treaties with non-Europeans were impossible [as the latter’s] ... understanding of law was so fundamentally different from that of the Europeans that the two parties existed in incommensurable universes.”<sup>99</sup> However, by the end of the nineteenth century, so many of these treaties were in force and were being accorded the weight of law by all parties, that international stability would have been severely challenged if anyone dared to question the validity of any of these treaties. Thus it was that the Conference of Berlin was convened in 1885, to “legalise”<sup>100</sup> the system of acquisition of title in Africa by European powers concluding treaties with native populations.<sup>101</sup>

The logical outcome of this Conference should have been that the African parties to the treaties would then have been recognised as sovereign States, if they were perceived as having the requisite authority to enter into international treaties. However, this was not the outcome. As Anghie explains, not only were African peoples not consulted at all on the suitability of the borders being negotiated,<sup>102</sup> but their “exclusion was reiterated and intensified in a more complex way by the positivist argument that African tribes were too primitive to understand the concept of sovereignty and, hence, were unable to cede it by treaty.”<sup>103</sup> He points to Oppenheim’s influential *International Law* text of 1912, which stated that any cession of territory by a “native” population fell outside of the Law of Nations.<sup>104</sup> Yet the European participants at the Conference of Berlin used the treaties that had been concluded with

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<sup>98</sup> Anghie, “Colonialism”, supra, at 38.

<sup>99</sup> Anghie, *ibid*, at 39. Note Lindley’s comments in this regard: “It is difficult to see how, having regard to the universality of the practice of grounding a colonial protectorate upon an agreement with the local authority, and to the importance attached by the European Powers to these agreements in their relations *inter se*, the requirement for such an agreement can be regarded otherwise than as a rule of law.”: supra, quoted in Evatt, supra, at 41.

<sup>100</sup> Mutua, “Why Redraw”, supra, at 1127, 1130-31.

<sup>101</sup> This undertaking was unnecessary in relation to continents where territories had been “ceded” by the native population only to one Imperial Power, or where subsequent wars had left only one Imperial Power in control of the territory, as was the case in many parts of North America.

<sup>102</sup> I take up this theme again in Chapter Five, more specifically on the issue of how the right to self-determination evolved.

<sup>103</sup> Anghie, “Colonialism”, supra, at 58.

<sup>104</sup> Cf. Anghie, *ibid*, at 58, n. 209.

the “natives” as the basis for determining their claims to sovereignty in territory thus ceded, representing “a fundamental irony for positivist jurisprudence.”<sup>105</sup>

In addition, instead of improving the status of Africans in the international sphere, the Conference of Berlin merely opened the door for further exploitation of the continent’s resources by the imperial powers and expansion of the system of “protectorates”, whereby African peoples “ceded” sovereignty over their lands, in return for the “protection” of an imperial authority.<sup>106</sup> The *Treaty of Berlin*, which was negotiated at the Berlin Conference, purported to impose obligations on “All the Powers exercising sovereign rights or influence in the aforesaid territories ... to watch over the preservation of the native tribes, and improve their moral and material well-being, and help in suppressing slavery and especially slave trade.”<sup>107</sup> However, these obligations were only sporadically observed, as European powers continued to use their military advantage to conquer more territory within their respective “spheres of influence” as delineated at the Berlin Conference, even into the early years of the twentieth century.<sup>108</sup> In addition, Professor Makau wa Mutua points out that most of the “treaties of protection” were concluded “after a war, through coercion, intimidation, deceit, or any combination thereof.”<sup>109</sup> He cites the example of King Jaja of Opobo, a Nigerian Ibo, who “was denied trading rights even after assurances that “protection” would leave his country still under his government.”<sup>110</sup>

The influence of positivism only began to wane towards the middle of the twentieth century, as certain powerful members of the international community became increasingly disillusioned by positivism’s unrelenting insistence that sovereign States were not accountable for actions undertaken in the name of “conquest”, or for their treatment of their own “subjects”, both of which attitudes manifested

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<sup>105</sup> Anghie, *ibid*, at 61.

<sup>106</sup> M. wa Mutua, “Putting Humpty Dumpty Back Together Again: The Dilemmas of the Post-Colonial African State”, Book Review of *Collapsed States: The Disintegration and Restoration of Legitimate Authority* by I. W. Zartman, ed. (1995) 21 *Brook. J. Int’l L.* 505 at 518 [hereinafter: Mutua, “Humpty Dumpty”].

<sup>107</sup> Article 6, *Berlin Act*, 1885, quoted in Umozurike, *supra*, at 28.

<sup>108</sup> Mutua, “Why Redraw”, *supra*, at 1131.

<sup>109</sup> *Ibid*.

<sup>110</sup> *Ibid* at 1133.

themselves in the some of the worst atrocities of both World Wars.<sup>111</sup> In retrospect, the Allied Powers' condemnation and punishment of Nazi authorities for their treatment of Jews, in the form of the Nuremberg Trials, was a clear turning point in the return to international jurisprudence of some kind of "natural" limit on the powers of a State.<sup>112</sup>

However, those who initially drafted the *Charter for the International Military Tribunal at Nuremberg*<sup>113</sup> [hereinafter: Nuremberg Charter] represented the views of only four countries: the United States, Great Britain, the Provisional Government of France, and the U.S.S.R. These countries had fought together against the Nazis, and the Nuremberg Charter was subsequently adhered to by nineteen more of their war-time allies.<sup>114</sup> Thus, many commentators have argued that the Nuremberg Trials were merely indicative of "victor's justice", and did not represent a universal consensus on international humanitarian or human rights law at the time.<sup>115</sup> For example, in finding that "crimes against peace" and "war crimes" had been committed, the judges of the Nuremberg Tribunal relied mostly on peace and war crimes treaties to which Germany was a party.<sup>116</sup> However, there were no such concrete sources of law for the concept of "crimes against humanity" at that time. Bassiouni claims that "There

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<sup>111</sup> Cf. Discussions below in Chapters Three and Four.

<sup>112</sup> A. D'Amato, "Human Rights as Part of Customary International Law: A Plea for Change of Paradigms", (1995/96) Ga. J. Int'l & Comp. L. 47 at 47. Note, however, his observation that some jurists continue to rely exclusively on treaty provisions for any evidence of a human rights norm (at 97 - referring to Weisburd's paper from the same Symposium, supra). See also Koskenniemi's observation that a similar shift is reflected in the domestic sphere: M. Koskenniemi, "The Politics of International Law", in Steiner & Alston, supra, at 56-57. And see Marks, supra, who argues that current principles of international law actually evolved from the solutions that Western colonial powers arrived at in the early days of colonisation, in response to the "problem" of dealing with the indigenous peoples' rights. Thus, he and other authors claim that a return to natural law principles is a return to the origins of international law itself.

<sup>113</sup> Reprinted in: B.B. Ferencz, *An International Criminal Court, A Step Toward World Peace - A Documentary History and Analysis, Vol. 1, Half a Century of Hope*, (London: Oceana Publications, 1980) at 470.

<sup>114</sup> Australia, Belgium, Czechoslovakia, Denmark, Ethiopia, Greece, Haiti, Honduras, India, Luxembourg, the Netherlands, New Zealand, Norway, Panama, Paraguay, Poland, Uruguay, Venezuela, and Yugoslavia.

<sup>115</sup> Cf. M.C. Bassiouni, *The Statute of the International Criminal Court: A Documentary History*, (New York: Transnational Publishers, Inc., 1998) at 8 [hereinafter: Bassiouni, "Documentary History"].

<sup>116</sup> For example, the 1899 and 1907 *Hague Conventions for the Pacific Settlement of International Disputes*, the 1928 *Pact of Paris* (Kellog-Briand Pact), as well as the 1925 *Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous Gases and Bacteriological Methods of Warfare*, the 1929 *Geneva Convention on the Treatment of Prisoners of War*, and the 1936 *London Procès-Verbal Relating to the Rules of Submarine Warfare*, set forth in Part IV of the *Treaty of London* of 22 April, 1930.

was indeed nothing under existing international law that would have justified these charges.”<sup>117</sup> But most commentators would agree that *something* had to be created to deal with the worst atrocities of the Nazi regime, to characterise clearly unconscionable behaviour as illegal behaviour, despite the lack of a precedent. There was, after all, no precedent for the Holocaust. Thus, the influence of pure positivism began to wane, as the international law of “human rights” began to take its initial shape.<sup>118</sup>

However, positivism has not entirely relinquished its hold over the key policy and law makers in the international sphere, by any means. Throughout the remainder of the twentieth century, the various institutions within the United Nations have striven to identify and codify, as “objectively” as possible, what “the law” is concerning human rights. At the same time, the number of members of the United Nations grew rapidly in the early years of the organisation, introducing a range of different perspectives and values to its work. The extensive debates between representatives of different cultures and legal systems in the early years of the UN, even over the most fundamental principles,<sup>119</sup> made it clear that an “objective” view of human rights and their sources in law, was a fiction at the time.

Today, many years later, in addition to the *opinio juris* that was finally agreed to in the form of the UDHR, the ICCPR, and the ICESCR, we can evaluate which aspects of State practice are consistent with that *opinio juris*, with the benefit of many years of observation, and thus draw some conclusions as to what exactly the customary law on human rights is at present, in many instances. For example, many commentators now agree that the UDHR has become binding customary law in its own right.<sup>120</sup>

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<sup>117</sup> M. C. Bassiouni, “Nuremberg : Forty Years After”, in American Society of International Law, *Proceedings of the 80th Annual Meeting, Washington D.C., 9-12 April, 1986*, 59 at 62 [hereinafter: Bassiouni, “American Society Proceedings”].

<sup>118</sup> Note that the Nuremberg Charter provided the basis of the Nuremberg Principles, which were widely supported by the international community in 1950: *Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal*, 29 July 1950, UN GAOR Supp. (No. 12) at 11, UN Doc. A/1316.

<sup>119</sup> Cf. Cassese, “Self-Determination”, *supra*, at 47 & 51, who describes the debate over “political” vs. “economic” rights, which culminated in the creation of two International Human Rights Covenants (ICCPR and ICESCR) instead of the one that was envisioned once the UDHR was finalised.

<sup>120</sup> Cf. R.B. Lillich, “The Growing Importance of Customary International Human Rights Law”, (1995/96) 25 Ga. J. Int’l & Comp. L. 2 at 2-6.

On the other hand, Professor Weisburd claimed in the 1990's that human rights obligations still only arose from existing treaties, not from merely declaratory instruments, nor from any other "customary" norms that impose the same obligations on non-States Parties.<sup>121</sup> But this perspective denies the reality of the twentieth century's experience with the evolution of human rights norms, which derived initially from the retrospective recognition of certain limited human rights standards in the Nuremberg judgment, and only subsequently did consistent State practice ensue, such that customary human rights norms could truly be said to have crystallised.<sup>122</sup> In other words, applying the same conceptual framework, there may be some human rights norms that do not yet appear in treaties but, with sufficient time and the requisite elements of consistent *opinio juris* and State practice, may yet be accepted as binding customary law norms.

In addition, as noted by the International Court of Justice [hereinafter: "ICJ"] in the cases between Nicaragua and the United States,<sup>123</sup> even where State practice appears to be inconsistent with *opinio juris* in many respects - as in the case of prohibitions on the use of armed force in the UN Charter - if the *opinio juris* is strong enough, it may provide sufficient evidence of customary international law.<sup>124</sup> The approach of the ICJ in those cases could be seen as an elaborate, positivist attempt to justify a "natural law" proposition, that aggressive wars are "wrong" - by expanding the definition of *opinio juris* to include non-binding international instruments.<sup>125</sup> The many criticisms of their approach, however, suggest that the decision was never entirely successful in swaying the positivists.<sup>126]</sup>

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<sup>121</sup> A.M. Weisburd, "The Effect of Treaties and Other Formal International Acts on the Customary Law of Human Rights", (1995/96) 25 Ga. J. Int'l & Comp. L. 99 at 141.

<sup>122</sup> cf. Lillich, *supra*, at 10-13.

<sup>123</sup> *Case concerning Military and Paramilitary Activities in and against Nicaragua (Jurisdiction and Admissibility)* (1984) ICJ Rep. and *Merits* (1986) ICJ Rep. [hereinafter "Nicaragua Case"].

<sup>124</sup> cf. H.C.M. Charlesworth, "Customary International Law and the Nicaragua Case" (1991) 11 Aus. Y.B. Int'l L. 6.

<sup>125</sup> The *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, annexed to GA Res. 2625 (XV), 24 October 1970 [hereinafter: "Friendly Relations Declaration"] is the instrument most often cited in the Nicaragua case and subsequently. Cf. Discussion below in Chapter Five.

<sup>126</sup> cf. B. Simma & P. Alston, "The Sources of Human Rights Law: Custom, *Jus Cogens*, and General Principles", (1992) Aus. Y.B. Int'l L. 82 at 106, for a strong criticism of the ICJ's approach to customary international law in these cases.

When ICJ Vice-President Weeramantry used a similar approach at an interim stage in the recent ICJ case on the legality of the use of force by NATO in Yugoslavia, he found himself dissenting from the more positivist views of his brethren on the bench.<sup>127</sup> Justice Weeramantry argued:

“Whatever the reason for the aerial bombing which is now in progress, and however well-intentioned its origin, it involves certain fundamentals of the international legal order - the *peaceful* resolution of disputes, the overarching authority of the United Nations Charter and the concept of the international rules of law. The applicability of these principles, whether individually or in combination, produces a situation in which at least a *prima facie* case has been made out of the existence of circumstances justifying the issue of interim measures, pending a fuller consideration by the Court of the complex legal issues involved. This Application highlights in classic form one of the most ancient and valued attributes of the judicial process - the power and obligation of a court to do what lies within its power to promote the peaceful settlement of disputes by such interim measures as may be necessary pending the final determination of the case before the Court. It is also a time-honoured attribute of the judicial mission that courts should, within the limits of the judicial function, do what they can to prevent the escalation of the conflict between the litigating parties.”<sup>128</sup> [*emphasis in original*]

However, the majority held that the Court lacked *prima facie* jurisdiction to entertain Yugoslavia’s Application, based on technical issues concerning the timing of Yugoslavia’s acceptance of the jurisdiction of the ICJ in relation to “the existence of a specific dispute”.<sup>129</sup>

The growing positivist influence on lawmaking in the latter part of the twentieth century has proven particularly catastrophic for the developing jurisprudence on the right to self-determination and the means to enforce it. In 1975, the ICJ in its Advisory Opinion on *Western Sahara*,<sup>130</sup> had already taken a liberal view of some aspects of the international instruments under consideration in the *Nicaragua* case, and minimised existing State practice on the issue of whether a “peoples” should be consulted on

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<sup>127</sup> Yugoslavia case, *supra*. See also *Complaint to the International Criminal Tribunal for the Former Yugoslavia* (Professor Michael Mandel, Osgoode Hall Law School, Toronto, Canada et al., May 6, 1999) online: <<http://jurist.law.pitt.edu/icty.htm>>, which alleged (unsuccessfully) that NATO members committed war crimes during their bombing campaign in Serbia.

<sup>128</sup> Dissenting opinion of Justice Weeramantry, Yugoslavia case, *supra* paras. 3-5.

<sup>129</sup> Cf. Yugoslavia case, *supra* paras. 21-32, 41, 43, 47. However, note the Declaration made by Judge Koroma, who disputes the tenability of the proposition concerning the existence of the dispute.

<sup>130</sup> *Advisory Opinion of Western Sahara*, [1975] ICJ Rep. 32, para. 55, discussed in Cassese, *supra*, at 88 [hereinafter “Western Sahara case”].

whether they wished to have political independence.<sup>131</sup> The Court concluded: “The validity of the principle of self-determination, defined as the need to pay regard to the freely expressed will of the peoples, is not affected by the fact that in certain cases the General Assembly has dispensed with the requirement of consulting the inhabitants of a given territory. Those instances were based either on the consideration that a certain population did not constitute a ‘people’ entitled to self-determination or on the conviction that a consultation was totally unnecessary, in view of special circumstances.”<sup>132</sup>

The decision of the ICJ in the 1986 “Frontier Dispute Case” involving the doctrine of *uti possidetis* was evidence of another move towards pure positivism.<sup>133</sup> By 1995, after significant changes had been made to the bench of the ICJ, the majority opinion came down heavily in favour of a purely positivist approach in the East Timor case.<sup>134</sup>

This is significant because it suggests that the very basis of international law, which has formed the basis of the exercise of the right to self-determination, is questionable, thus leading to many of the current controversies over the practical application of the right. These issues also go to the gravity of any crime that may be identified, and whether self-determination is a suitable topic for international criminal law at all.

### *1.5 Overview of Chapters*

The arrangement of Chapters in this thesis is based largely upon Bassiouni’s five stages, as described above. However, the first substantive Chapter (Chapter Two) provides an initial analysis of the philosophical and political basis of the principle of self-determination, in order to set the scene for later developments of the principle. The second substantive Chapter (Chapter Three) then addresses Bassiouni’s first stage: the “*Enunciative Stage*” of self-determination. Chapters Four and Five

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<sup>131</sup> Cassese, “Self-Determination”, supra at 88-89.

<sup>132</sup> Western Sahara case, supra at 33, para. 59.

<sup>133</sup> *Case concerning the Frontier Dispute (Burkina Faso v Republic of Mali)*, [1986] ICJ Rep., 554 [hereinafter “Frontier Dispute case”].

<sup>134</sup> Discussed below in Chapter Six, in the discussion on the enforcement of the right to self-determination.

analyse stages two and three, respectively, namely the "*Declarative Stage*" and the "*Prescriptive Stage*".

Chapter Six analyses the current status of the right to self-determination in international law, as well as current mechanisms for its enforcement (the "*Enforcement Stage*"). Finally, Chapter Seven explores the potential for future criminal proscription for severe breaches of the right to self-determination (the "*Criminalisation Stage*"). The thesis concludes with the suggestion that the right to self-determination may be relevant to the crime against humanity of "persecution", as defined under the Rome Statute. Under article 7(1)(h) & (2)(g), "persecution" is defined as "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity ... in connection with any act referred to in ... paragraph [(1)] or any crime within the jurisdiction of the Court". The author suggests that the right to self-determination is one of the "fundamental rights" envisaged by those who drafted article 7, or which should have been envisaged by them. Thus, the right to self-determination appears to have reached the "*Criminalisation Stage*", which will become more apparent when the ICC commences an investigation for such a crime.

## Chapter Two:

### The Philosophical and Political Basis of the Principle of Self-Determination.

In the English-speaking world, the "principle of self-determination" is widely regarded as having been "fathered" by US President Woodrow Wilson, when he included a reference to the "principle of national self-determination" in his famous "Fourteen Points" speech on principles for a "fair and just peace", in 1918.<sup>135</sup> In an earlier speech, in 1917, he had stated:

"No peace can last or ought to last, which does not accept the principle that governments derive all their just powers from the consent of the governed, and that no right anywhere exists to hand peoples about from sovereignty to sovereignty as if they were property."<sup>136</sup>

However, the "principle of self-determination" had a much lengthier incubation period than this sequence of events may suggest. The word "*selbstbestimmung*", from which the English term derives, was being used by radical German philosophers as early as the 1840's.<sup>137</sup> Even in political terms, the right of all nations to self-determination was advocated by socialist congresses from at least 1886<sup>138</sup> and in 1916 Vladimir Lenin had championed this right for all colonised peoples, as the cornerstone of his programme of socialist internationalism:

"The right of nations to self-determination implies exclusively the right to independence in the political sense, the right to free political separation from the oppressor nation. Specifically, this demand for political democracy implies complete freedom to agitate for secession and for referendum on secession by the seceding nation."<sup>139</sup>

The import of the principle into global politics represented the culmination of a range of philosophical and political trends that eventually gained currency due to the exigencies of the international political

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<sup>135</sup> M. Moore, *supra*, at 2-3. Cf. Discussion below on the Wilsonian concept of "self-determination".

<sup>136</sup> J.B. Scott, ed., *Official Statements of War Aims and Peace Proposals*, (1921) at 52, in M.C. van Walt van Praag, *Tibet and the Right to Self-Determination*, (Dharamsala, India: Information Office, Central Tibetan Secretariat, 1979) at 5. Note van Walt van Praag's observation that this statement was obviously influenced by the philosophies of Locke, Rousseau, Mill and Jefferson. Cf. Chapter Three below for more discussion on this point.

<sup>137</sup> Ofuatey-Kodjoe, *supra*, at 21.

<sup>138</sup> Sunga, *supra*, at 92.

<sup>139</sup> V. Lenin, *The Significance of the Right to Self-Determination and its Relation to Federation*, 22 *Collected Works* (Jan.-Feb. 1916), in Sunga, *ibid* at 143-148. Cf. Discussion in Chapter Three below on the socialist concept of "self-determination" and its limited application.

situation in the late nineteenth and early twentieth centuries.<sup>140</sup> Thus, in order to understand what was meant by those who introduced the political concepts of “self-determination” to the world stage in the early twentieth century, it is necessary first to examine its diverse philosophical and political origins, in order to understand how the relevant “intellectual and social processes” had managed to shape self-determination into an “internationally perceived shared” value by this time.<sup>141</sup>

In this Chapter, I will analyse the basis of the principle of self-determination, identifying both its political and its philosophical roots. I will then discuss how the ideas behind this principle were shaped and guided by a range of circumstances, over many regions of the world, from the time of Aristotle, to the beginning of the first World War.

### *2.1 Self-determination and “freedom”*

Dr. Ian Brownlie suggests that the “ideological roots of self-determination are to be found in at least three distinct but related concepts which can be traced in the history of Western philosophy.”<sup>142</sup> He identifies these as: (i) free will; (ii) egalitarianism; and (iii) “social contract” theories, whereby the acceptance of “the authority of the monarch” by her/his subjects was supposed to be conditional upon the performance by the monarch of certain duties to look after them.<sup>143</sup> Since ancient times, variants on each of these ideas have manifested themselves in diverse political and social forms, and faced periods of both broad support and attempts to suppress them, depending upon the influence of their respective supporters at any given time, with the twentieth century no exception.<sup>144</sup> Thus, the “values” underlying the “principle of self-determination” are a farrago of often contradictory ideas.

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<sup>140</sup> Ofuatey-Kodjoe, *supra*, at 22.

<sup>141</sup> Bassiouni, “Proscribing Function”, *supra*, at 181.

<sup>142</sup> I. Brownlie, “An Essay in the History of the Principle of Self-Determination”, in Alexandrowicz, *supra*, 90 at 91. Note Brownlie’s assertion: “The writer is not competent to refer to developments in other philosophies, but as a matter of progenitive political influence, both simple, and indirect in the form of counter-products and contradictory derivatives such as marxism, it is Western philosophy that is most relevant to the enquiry.” (*ibid.*) It is beyond the scope of this paper to explore this assertion any further.

<sup>143</sup> *Ibid.* As Brownlie points out, the most influential theorists who propounded the “social contract” theory and its related concepts were Grotius, Hobbes, Locke, Paine, and Rousseau.

<sup>144</sup> As one example, witness the changing attitudes of the Roman Catholic Church to the concept of “free will”, from the time of the Spanish Inquisition to the Second Vatican Council in the 1960’s: cf. generally, the Vatican website, online: <<http://www.vatican.va>>.

One of the greatest problems faced by those who agitate for “self-determination”, is its relationship with the “idea of freedom”, which is itself difficult to define with any clarity.<sup>145</sup> To many, self-determination *is* freedom, the ultimate and greatest freedom, encompassing all other forms of freedom. This is what gives self-determination such appeal to those who seek it, and reservations to those who are asked to grant it to others. Absolute freedom of any one party is usually at the expense of another party, and because assertions of the right to self-determination are frequently made in absolute terms, they give the unfortunate impression that self-determination of any kind is necessarily a grave threat to order and stability in a society.<sup>146</sup>

Yet “freedom” is one of the highest values that human beings aspire to.<sup>147</sup> While *individual* freedom may only be a Judao-Christian, or “Western” value,<sup>148</sup> the freedom of a *community* to determine its own destiny is supported by both Western and non-Western philosophical and religious traditions. For example, note the wide-ranging acceptance given by a broad range of culturally diverse States to the *International Convention on the Elimination of all Forms of Racial Discrimination*.<sup>149</sup>

Aristotle was the earliest Western philosopher known to have advocated “political liberty”, by which he meant that all citizens have a right “to rule and be ruled in turn”,<sup>150</sup> as long as they “live according to the rule of the constitution; for it is their salvation.”<sup>151</sup> Of course, he did not extend this idea to slaves or to

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<sup>145</sup> M. J. Adler, *The Idea of Freedom: A Dialectical Examination of the Conceptions of Freedom*, (New York: Doubleday & Co., 1958).

<sup>146</sup> In fact, as discussed previously, self-determination today is most often associated in people’s minds with egregiously violent ethnic conflicts that have left many communities destabilized and anything but “free”.

<sup>147</sup> However, note Erich Fromm’s thesis that human beings also fear freedom, in E. Fromm, *Escape from Freedom*, (New York: Rinehart & Co., 1941), and George Bernard Shaw’s famous statement: “Liberty means responsibility. That is why most men dread it.”

<sup>148</sup> See generally, T. Franck, “Is Personal Freedom a Western Value?”, (1997) 91 Am. J. Int’l Law, 593 [hereinafter Franck, “Freedom”].

<sup>149</sup> For example, China (acceded in 1981), Cambodia (ratified in 1983), Egypt (ratified in 1967), India (ratified in 1968), Indonesia (acceded on 25 June 1999), Islamic Republic of Iran (ratified in 1968), Japan (acceded in 1995), Mongolia (ratified in 1969), Namibia (acceded in 1982), and Nepal (acceded in 1971). The Convention had 77 signatories and 155 parties, as at 25 September 1999 (for full list, cf. UN Treaty database, online <<http://www.un.org/Depts/Treaty>>).

<sup>150</sup> W.D. Ross, ed., *The Works of Aristotle*, vol. X (*Politica*), trans. B. Jowett (Oxford: Oxford University Press, 1921) at Book VI, Ch. 2, 1317b 1-2, in Adler, *supra*, at 332.

<sup>151</sup> W.D. Ross, *ibid*, at Book V, Ch. 9, 1310a 25-36, in Adler, *ibid*.

women at the time, because he viewed political liberty as a relative right, based on social status, not an absolute right for all human beings.<sup>152</sup>

According to one view, subsequent thinking on the issue can be reduced to three, non-exclusive categories of theories of freedom:<sup>153</sup> (i) that everyone has a *circumstantial* ability to act as s/he wishes, in other words the exercise of this freedom depends upon the existence of the appropriate circumstances to facilitate such exercise (sometimes referred to as “self-realisation”);<sup>154</sup> (ii) that everyone has an *acquired* ability to live as s/he ought, also known as “self-perfection”,<sup>155</sup> or “collective freedom”<sup>156</sup> (that is, having “attained a certain state of mind or character”,<sup>157</sup> which is not necessarily attainable by all, the individual and/or the society can freely develop its own moral/paradigmatic values, but once again the free exercise of these values depends upon the availability of conducive circumstances); and (iii) that everyone has a *natural* ability to determine for her/himself what s/he wishes to do or to become, but clearly is dependent upon circumstances to provide the opportunity then to act according to those wishes (sometimes referred to as “self-determination” in the philosophical sense)<sup>158</sup>.

In each case, the right circumstances must be present in order to allow the exercise of the freedom. This is essentially what those who are seeking self-determination are concerned with: provision of contingencies for the exercise of freedom/s. Without such contingencies, one does not have true freedom, even if one has the “acquired” and/or “natural” freedoms described above.

As suggested by Frederic L. Kirgis, Jr. in 1994, in the legal context different “degrees of self-determination” may be appropriate, depending upon the amount of freedom that the group or entity has

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<sup>152</sup> W.D. Ross, *ibid*, at Book I, Ch. 5-6, 13, in Adler, *ibid*, at 331. Similar criticisms can be levelled at those who drafted the *American Constitution* and *Bill of Rights*, neither of which documents attempted to address the rights of African slaves to be free in the new federation, nor the rights of women to equality. Cf. Discussion below, this Chapter.

<sup>153</sup> Adler, *ibid*, at 592-4. Note that this view is based on an analysis of Western philosophical traditions only.

<sup>154</sup> This is the view taken by, eg. Bentham, Hobbes, Kelsen, Mannheim and Voltaire: cf. Adler, *ibid*, at 592.

<sup>155</sup> This perception has been championed by a diverse group of theorists, including Plato, Seneca, Marcus Aurelius, Saint Thomas Aquinas, and John Locke: cf. Adler, *ibid*, at 250, 553-555, 592-594.

<sup>156</sup> This variant of acquired self-perfection was suggested by Comte, Engels, Marx, and Nietzsche: cf. Adler, *ibid*, at 592.

<sup>157</sup> Adler, *ibid*, at 250.

<sup>158</sup> Such a view has been taken by, eg. Aristotle (within the limits described above viz-a-viz slaves and women versus citizens), Saint Augustine, Cicero, Descartes, Epicurus, Maimonides, Rousseau, and Sartre: cf. Adler, *ibid*, at 592-3.

already.<sup>159</sup> For example, a group or entity that has a significant amount of freedom does not require as much of an alteration in circumstances as a group or entity that has little or no freedom. In the latter case, full autonomy or secession may be the only means of providing the right circumstances for the group or entity to exercise any freedom.<sup>160</sup>

Clearly there must be a balance between competing claims for freedom. Theories on how to achieve this balance vary widely, according to the theorist's view of the innate qualities of human beings. As Martti Koskenniemi elaborates, there are two competing approaches to this aspect of the principle of self-determination, essentially reflecting the dichotomy between positivist and natural law theories.<sup>161</sup> The first is what he terms the "classical, or Hobbesian, conception of self-determination. It starts from the assumption that the authentic expression of human nature in primitive communities is something essentially negative - that unless it can be channelled into formally organised States, whatever natural bonds exist will not prevent a *bellum omnium*."<sup>162</sup> The emphasis of this approach is on the *procedures* for enforcing participation in the conduct of the State, and on maintaining the territorial inviolability of States.<sup>163</sup> It presupposes that complete intolerance of all those who are not in the group is *always* the motive for that group to seek greater independence, rather than a simple desire to provide the group with sufficient freedom to maintain its own values and traditions, in order then to live more securely and harmoniously with its neighbours.<sup>164</sup>

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<sup>159</sup> F. Kirgis, "The Degrees of Self-Determination in the United Nations Era", (1994) 88 Am. J. Int'l Law 304 at 308-310.

<sup>160</sup> As I will discuss in further detail below (Chapter Six), many commentators have suggested that parts of General Assembly Resolution 2625 (XXV) of 24 October 1970 (the "Friendly Relations Declaration") support this view of self-determination as a relative right. The "Friendly Relations Declaration" only appears to prohibit secessionist activities in "States conducting themselves in compliance with the principle of equal rights and self-determination of peoples ... and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour": paragraph 7, "The principle of equal rights and self-determination of peoples".

<sup>161</sup> Koskenniemi, "National Self-Determination", *supra*, at 249. Cf. Discussion in Chapter One (Introduction), on how this dichotomy has manifested itself in terms of international law itself.

<sup>162</sup> Koskenniemi, "National Self-Determination", *ibid*.

<sup>163</sup> For example, cf. M. Eisner, "A Procedural Model for the Resolution of Secessionist Disputes", (1992) 33 Harv. Int'l L. J. 407.

<sup>164</sup> For example, in 1992, then UN Secretary-General Boutros-Boutros Ghali warned: "if every ethnic, religious or linguistic group claimed statehood, there would be no limit to fragmentation, and peace, security, and well-being for all would become even more difficult to achieve": UN Doc. A/47/277; S/24111, 17 June 1992.

By contrast, the second approach identified by Koskenniemi emphasises the *end* that is to be achieved: “whether [the exercise of popular will] participates in the natural life-form appropriate for each nation as an authentic (and not artificial) community.”<sup>165</sup> As one example of this approach, Brownlie has argued that the “core” of the principle of self-determination “consists in the right of a community which has a distinct character to have this character reflected in the institutions of government under which it lives.”<sup>166</sup> Koskenniemi calls this the “romantic or ... rousseauesque approach. ... For it, the primitive is good, something that was tragically lost in the political struggles that organised themselves into the State and that must now be resuscitated so as to escape the legitimisation crisis of the modern State and the malaise of (Western) civil society.”<sup>167</sup> One writer has labelled the current manifestation of this approach “postmodern tribalism”, clearly trying to evoke positivist concerns over “primitive” behaviour and the need to repress it.<sup>168</sup> These two competing approaches can also be characterised as the philosophical difference between freedom *from* (eg. oppression) and freedom *to* (do and/or be whatever one wishes).<sup>169</sup>

Differing philosophical approaches to the law and to “freedom” over the centuries have been reflected in corresponding changes in the practices and attitudes of those in power, particularly in relation to the way that indigenous communities the world over have been perceived and treated by European

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<sup>165</sup> Koskenniemi, “National Self-Determination”, *supra*, at 250. For example, cf. Gerry Simpson’s “critical variables” that should be taken into account when assessing the legitimacy of a right to secede, and which include moral, economic, political and legal factors: Simpson, *supra*, at 245-258.

<sup>166</sup> Brownlie, *supra*, at 90.

<sup>167</sup> Koskenniemi, *supra*, at 250.

<sup>168</sup> Thomas Franck, who coined the term “postmodern tribalism”, writes derisively: “Tribalism, in its postmodern form, is not - as it once was perceived - the exclusive property of so-called backward peoples. It is now openly flaunted everywhere, unapologetically, with zealously raised arms and firearms. It manifests itself in efforts to break up, equally, the old nations of Europe (such as the Union of Scotland with England and Wales), the nineteenth century nations of the Americas (such as Quebec’s pursuit of secession from Canada) and the newest nations of the third world (such as the Karen effort to secede from Myanmar). Postmodern tribalism seeks to promote both a political and a legal environment conducive to the breakup of existing sovereign states. It promotes the transfer of defined parts of the populations and territories of existing multinational or multicultural states in order to constitute new uninational and unicultural - that is, postmodern tribal - states.”: Franck, “Postmodern Tribalism”, *supra*, at 3-4. Note that Franck’s comments need to be viewed in the context of what was happening at the time that he presented this paper in Europe in 1992, namely, the break-up of the Former Republic of Yugoslavia. Croatia and Slovenia had declared their independence from the Yugoslavian Federation in 1991 and were contending with an aggressive Serbian response. Bosnia-Herzegovina followed this lead in 1992, sparking the Bosnian-Serb uprising against the other ethnic groups in Bosnia, which continued through to 1995, when the Dayton Agreement was signed. Cf. Discussion below in Chapter Six, and V. Morris & M.P. Scharf, *An Insider’s Guide to the International Criminal Tribunal for the Former Yugoslavia*, Vol. 1, (New York: Transnational Publishers, 1995).

<sup>169</sup> Koskenniemi, “Self-Determination”, *supra*, at 250.

nations.<sup>170</sup> For example, witness the prevalence of the Aristotelian/Christian idea of a “just war”, whereby “superior” people had a duty to bring “enlightenment” to the “unenlightened” world, by forceful means if need be.<sup>171</sup> During the era of colonisation, European monarchs believed that they had a God-given right to acquire territory through conquest, in order to bring “salvation” to the peoples of that territory. If they won a battle, it was seen as the will of God in operation, thereby justifying their actions, no matter how barbaric these were.<sup>172</sup>

## 2.2 The rise of “natural law” theories

In the sixteenth century, Francisco de Vitoria and Bartolome de Las Casas, two Spanish priests, tried to suggest that there were some limits on the right of the “civilised” world to treat their newly conquered, “uncivilised” subjects in any way they chose.<sup>173</sup> They argued that the “Indians of America” - newly “discovered” by Columbus<sup>174</sup> - had some “basic” forms of governance, which suggested that they possessed at least a small amount of “reason” and therefore warranted treatment as human beings, not mere animals, “for they have polities which are orderly arranged and they have definite marriage and magistrates, overlords, laws and workshops, and a system of exchange, all of which call for the use of reason.”<sup>175</sup> Vitoria then went on to suggest that both the Indians and the Spanish were bound by a “universal natural law”, *jus gentium*, by reason of the fact that they both possessed reasoning ability.<sup>176</sup> However, as Anghie points out, although this perspective was the first attempt to suggest that the Spanish monarchy had some “universal natural law” obligations to treat the Indians with some dignity,

<sup>170</sup> Cf. Discussion in Chapter One (Introduction) as well.

<sup>171</sup> Cf. C.R. Beitz, “Covert Intervention as a Moral Problem”, in J.H. Rosenthal, *Ethics and International Affairs: A Reader*, (Washington, DC: Georgetown University Press, 1995) 171 at 175-176; and Wilmer, *supra*, at 95.

<sup>172</sup> Note the similarities between the Christian “just war” concept, and the Islamic “jihad”, or “Holy War”, which provided a similar means of justification for Muslim territorial conquests.

<sup>173</sup> Cf. J.B. Scott, *The Spanish Origin of International Law: Francisco de Vitoria and his Law of Nations*, (Oxford: Clarendon Press, 1934); G.C. Marks, “Indigenous peoples in International law: The Significance of Francisco de Vitoria and Bartolome de Las Casas”, (1993) *Aus. Y.B. Int’l L.* 1; and A. Anghie, “Francisco de Vitoria and the Colonial Origins of International Law”, (1996) 5 *Soc. & Leg. Studies* 321 [hereinafter Anghie, “Vitoria”].

<sup>174</sup> On the doctrine of “discovery” cf. S.H. Venne, *Our Elders Understand Our Rights: Evolving International Law Regarding Indigenous Peoples*, (Penticton, British Columbia: Theytus Books, 1998) at 8-10; and Lindley, *supra*, at 129-132.

<sup>175</sup> F. de Vitoria, *De Indis Et Ivre Belli Relectione* (1557), trans. Nys and Bate, (Washington: Carnegie Institute, 1917) at 127, para. 333, quoted in A. Anghie, “Universality and the Concept of Governance in International Law”, in Quashigah & Okafor, *supra*, at 24 [hereinafter Anghie, “Universality”].

“the “universal” standard is revealed, upon further scrutiny, to be an idealised European standard which is projected onto the Indians. Once brought into the realm of the universal natural law, the Indians are bound by a series of doctrines which they must almost inevitably violate because these doctrines reflect the standards and realities of European societies.”<sup>177</sup> As Anghie argues further, the Indians were punished for failing to observe such “fundamental principles of natural law” as the right of the Spanish to travel wherever they wished on Indian lands. The punishment usually consisted of waging a war, which Vitoria argued was a “just war”, and therefore in his view sufficient legal basis for completely dispossessing the Indians of their land and acquiring sovereignty over them when the militarily superior Spanish invariably won the war.<sup>178</sup>

Las Casas differed slightly from Vitoria in his views on the validity of such means of acquiring territory, and in 1550, in response to a growing number of reports on the “horror of colonisation”,<sup>179</sup> the King of Spain established a “Council of the Indies” to debate the moral and legal issues that were involved. Of course, no indigenous people were invited to participate, since they “were not seen as legitimate peoples in the eyes of the Spanish.”<sup>180</sup> Instead, Las Casas represented their views to the Council, arguing against the views of another eminent jurist, Juan Gins de Sepulveda, who based his case for treating Indians as animals largely on some of the teachings of the Bible.<sup>181</sup> Ultimately, the Council decided that the most important objective of colonisation was to bring their version of Christianity to the Indians, by all available means. This included killing any unbaptised Indians, if necessary, and acquiring as much of their territory as possible.<sup>182</sup> Thus, Vitoria’s and Las Casas’ more humane approaches had no influence at the time, and the European conquest of the entire “uncivilised” world continued unabated.<sup>183</sup>

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<sup>176</sup> Anghie, “Universality”, *ibid.*

<sup>177</sup> Anghie, *ibid.*, at 25.

<sup>178</sup> Anghie, *ibid.*, at 25-26.

<sup>179</sup> Venne, *supra*, at 5.

<sup>180</sup> J.C. Mohawk, “Indians and Democracy: No One Ever Told Us”, at 50, in Venne, *ibid.*, at 7, n.28.

<sup>181</sup> Venne, *ibid.*, n.26.

<sup>182</sup> Mohawk, *supra*, at 7.

<sup>183</sup> In recent years, various scholars have again focussed on the ideas of Vitoria and Las Casas, to highlight the hypocrisy and injustice of colonial treatment of indigenous peoples in the Americas, arguing that it continues to affect the way indigenous people are viewed and treated today. For example, cf. D. Sanders, “The Re-Emergence of Indigenous Questions in International Law”, (1983) 1 *Can. Hum. Rts. Y.B.* 3 [hereinafter: Sanders, “Indigenous Questions”]. Cf. Discussion of indigenous rights to self-determination, below in Chapter Six.

However, the connection between monarchs and their so-called “divine rights” was subsequently challenged by another group of influential European philosophers from what is now known as the “natural law” tradition, although the emphasis of writers such as Hobbes and Locke was on the rights of “civilised” individuals to be free from tyranny.<sup>184</sup> They asserted that such individuals should be at the centre of society, not the monarch.<sup>185</sup> Rousseau, who was highly influential during the French Revolution, then took this idea further, suggesting that individual liberty, once attained, should then evolve into a sense of responsibility towards one’s community, or an ongoing collective “sovereignty” of the people.<sup>186</sup>

However, these writers did not challenge the way that colonised peoples were being treated by their new “sovereigns”. While drawing upon some of these natural law propositions, another influential European jurist, Emer de Vattel, also expounded a theory that “ownership” of land could be distinguished from “sovereignty” over that land.<sup>187</sup> Ownership, in his view, was the right to use and to dispose of a designated portion of land for the supply of one’s necessities, and entailed an obligation to cultivate the land so as to make the best use of it. His idea of “sovereignty” is the basis of our current conception of that term: total control over a defined territory, which may include land “owned” by different peoples. In Vattel’s view, each sovereign “nation” was obliged to exploit the natural resources of its territory to the fullest, in order to attempt to sustain its entire population thereby.<sup>188</sup> Thus, colonising nations could justify their claims to the resources of any land where indigenous groups were not taking full advantage of its agricultural potential.<sup>189</sup>

By the late 1700’s, this emphasis on “developing” the land was married with Hobbesean notions of “civilisation” versus “barbarism”.<sup>190</sup> Not only was the land to be cultivated, but so were the “primitive”

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<sup>184</sup> See also Chapter One (Introduction).

<sup>185</sup> Simpson, *supra*, at 16. And note that Hobbes distinguished between the rights of “civilised” peoples and those of “barbarians”, in much the same way as Aristotle had argued that different rights attached themselves to citizens as opposed to slaves.

<sup>186</sup> J.J. Rousseau, *The Social Contract*, (1762), in Simpson, *ibid*, at 16-17.

<sup>187</sup> He was influenced greatly by Grotius, Pufendorf, and Locke. Cf. Discussion above on the influence of Vattel’s theories on international law, in Chapter One (Introduction).

<sup>188</sup> See generally, de Vattel, *supra*.

<sup>189</sup> Note that this emphasis on developing the resources of the world is merely an extension of the “just war” philosophy, also arising out of Christian ideology.

<sup>190</sup> T.C. Patterson, *Inventing Western Civilization*, (New York: Monthly Review Press, 1997).

peoples of the world. They were to be “freed” from their “backward” ways, not just in the religious sense. The extent to which they asserted control over the land they lived on determined how “advanced” they were, in the minds of many positivist theorists at the time, as well as the many explorers who were influenced by such theorists.<sup>191</sup> Thus, when Captain James Cook of England arrived in Australia in 1788, he was able to conclude quickly that the Australian Aborigines were not “in possession” of their land, as he understood that concept, because he could perceive no attempt on their part to manipulate it in any way. Further, he lacked the ability to appreciate the complexities of traditional Aboriginal laws and customs regarding land ownership, and claimed it for Great Britain, as *terra nullius*, or “land of no-one”.<sup>192</sup> Similar theories and policies had driven and justified global colonial expansion and, in particular, the slave trade in Africa, for many centuries.<sup>193</sup> By contrast, treaties conferring various benefits in return for land were concluded between many colonial powers and those groups who exhibited forms of governance that were more familiar to Western eyes, such as the British *Royal Proclamation* of 1763,<sup>194</sup> the *Treaty of Waitangi* between the British and the Maori people of New Zealand, and many treaties between European powers and African tribes.<sup>195</sup>

### 2.3 *The American and French Revolutions*

To some extent, the American and the French Revolutions were driven by “natural law” theories of the right of “civilised” peoples to determine under whose sovereignty they should live.<sup>196</sup> In both cases,

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<sup>191</sup> For example, Adam Smith in Scotland, Turgot in France, and later James Lorimer in Britain.

<sup>192</sup> This situation was not remedied until 1992, when the High Court of Australia finally rejected the application of the doctrine of *terra nullius* to Australia, in the case of *Mabo v Queensland (No.2)* (1992) 175 CLR 1.

<sup>193</sup> The slave trade was justified by claims that the Africans were not really “humans”.

<sup>194</sup> Which confirmed the boundaries between British colonies and indigenous territories in the aftermath of the British/French war of 1755-1763 in the Americas. As Venne points out, this Proclamation “refers to Indigenous Peoples as “Nations”, as distinct societies with their own forms of political organization with whom treaties had to be negotiated ... [and with] an inalienable right to their lands.”: Venne, *supra*, at 8, n.34.

<sup>195</sup> Cf. Discussion in Chapter One (Introduction).

<sup>196</sup> Umozurike points out that John Locke’s natural law theories were highly influential both on Thomas Jefferson (“the greatest leader of the American Revolution”) and on the French philosophers Montesquieu and Rousseau, who “influenced the commoners as well as the younger nobles” to revolt against the French monarchy: Umozurike, *supra*, at 6-11. However, some writers argue that the American Revolution was based merely on the “philosophy” that the states involved did not want British rule, rather than any belief in the inherent rights of humankind: cf. D. Cameron, *Nationalism, Self-determination and the Quebec Question*, (Canada: Macmillan, 1974).

these revolutions were an explicit rejection of the “divine right” of monarchs or other oppressive rulers to dictate the destiny of the people in their territory.<sup>197</sup>

However, the focus in the American Revolution was more on individual liberty,<sup>198</sup> as conceived by Locke, than on the community-oriented views of Rousseau that inspired the French Revolution.<sup>199</sup> The new American federation focused predominantly on building its national identity by strengthening the ties between the states that had already joined the Union, and encouraging other states to follow, but *not* through forceful means. It also recognised the right of each state to maintain its own identity through self-government.<sup>200</sup> In addition, the American *Declaration of Independence* of 1776 emphasised that there was an *ongoing* right to challenge the legitimacy of any government that purported to control people’s destinies: “Governments ... deriv[e] their just Powers from the Consent of the Governed, ... [and] whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it and to institute new Government, laying its Foundation on such Principles and organising its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness.”<sup>201</sup> As pointed out previously, however, the “Right of the People” to overthrow oppressive regimes did not extend to slaves or to the indigenous people of North America at the time, who were not considered “civilised” enough to be able to exercise such rights wisely.<sup>202</sup> Instead, the new American Constitution simply handed control of the “Indian nations” to the new Congress.<sup>203</sup>

By contrast, all those living in French colonial territories were initially awarded the same rights as those living in France itself, according to a revolutionary decree promulgated just after the *Declaration des droit*

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<sup>197</sup> A. Rigo Sureda, *The Evolution of the Right of Self-Determination: A Study of United Nations Practice*, (Leiden, The Netherlands: A. W. Sijthoff International Publishing Company, 1973) at 17.

<sup>198</sup> Which focus was then applied to each existing state, as if it were an “individual”.

<sup>199</sup> Simpson, *supra*, at 16.

<sup>200</sup> However, the differing attitudes of various states towards slavery at the time of federation, were ultimately “homogenised” through forceful means, during the American Civil War.

<sup>201</sup> In Umozurike, *supra*, at 8.

<sup>202</sup> Some would argue that it still does not apply to minority groups in America, particularly indigenous groups: cf. discussion below in Chapter Six.

<sup>203</sup> For a discussion on how this was later interpreted by the US Supreme Court as a recognition of the “preconstitutional sovereignty” of native Americans, which had been lost through conquest, cf. R.J. Perry, *From Time Immemorial: Indigenous Peoples and State Systems*, (Austin, Texas: University of Texas Press, 1996) at 95.

*de l'homme et citoyen*,<sup>204</sup> which stated: "all men, without distinction of colour, domiciled in the French colonies are French citizens and enjoy all the rights assured by the Constitution."<sup>205</sup> But by 1792, another decree imposed the death penalty on anyone who tried to cede any part of France's territory. Thus, the indigenous peoples of the French colonies clearly were not supposed to agitate for *their* choice of sovereign.

In the same way, the new French nation also proceeded to deny any right of self-determination even to other "civilised" peoples who were successfully conquered by Napoleon Bonaparte and his army. The *Declaration des droit de l'homme et citoyen* guaranteed the rights of French citizens to equality and to self-government, and initially inspired the holding of plebiscites in various neighbouring regions, to give the people there a choice on whether or not to join the new French Republic.<sup>206</sup> However, in 1792, a plebiscite was held in Belgium that only allowed French-sympathisers to vote, signalling the end of genuine free choice as to one's sovereign, by *all* the peoples of a territory that was being considered for acquisition by the French Republic.<sup>207</sup> In fact, Dr. Umozurike Oji Umozurike argues that the principle behind the idea of the plebiscite "was abused, for it became an end in itself, being used to justify the annexation of territory that belonged to another sovereign."<sup>208</sup> Thus, France's embrace of nationalism and its own "liberty" superseded any concerns it may have had over the application of the same standards of freedom it had enjoyed, to other peoples who were forced to join the French Republic.

#### 2.4 Latin American decolonisation and "uti possidetis"

By the beginning of the nineteenth century, Spanish and Portuguese control over their southern American territories was so complete that they decided it was safe to grant autonomy to their representatives in these territories. However, the authorities of the New Spain wanted more than just autonomy; they wanted complete independence. Thus, the various Latin American countries were

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<sup>204</sup> *Declaration of the Rights of Man and Citizen*, 1789.

<sup>205</sup> In Umozurike, *supra*, at 10.

<sup>206</sup> Plebiscites were held in the papal enclaves of Avignon and Venaissin in 1791, in Savoy in 1792, and in Nice in 1793: Umozurike, *ibid*, at 10-11.

<sup>207</sup> Simpson, *supra*, at 19.

<sup>208</sup> Umozurike, *supra*, at 11.

formed, as a result of both revolutions and via a host of bilateral treaties and new constitutions.<sup>209</sup> It was decided that the boundaries of these new countries should follow the boundaries established during the colonisation period, a concept that has come to be known as “*uti possidetis*”, which literally means “as you now have in your possession”.<sup>210</sup> This was intended to avoid future territorial disputes between the new nations, based on any historical attachments to territory which pre-dated colonisation.

In relation to the indigenous peoples of these territories, immediately prior to independence a protectionist policy had been in place which “served to recognise, marginalize and separate the indigenous societies while, in many cases, also giving them territorial and cultural space sufficient for their survival and reproduction.”<sup>211</sup> However, the move to independence “radically changed”<sup>212</sup> the status and situation of the Latin American indigenous peoples. It is beyond the scope of this paper to discuss how independence separately affected the wide range of different indigenous groups throughout the continent of what is now Latin America.<sup>213</sup> However, José Bengoa, Director of the Special Committee on Indigenous Peoples in Chile, suggests that “liberal” views on the equality of all peoples, which came from the “French tradition of enlightenment”, translated into a general policy of “formal equality” throughout Latin America, which has persisted to the present day.<sup>214</sup> He argues that this ideology was responsible for the assimilation and destruction of many indigenous cultures, while those cultures that “did not disappear survived because they had maintained a hostile attitude towards colonisation and in many cases defended their resources and lands by the use of arms.”<sup>215</sup>

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<sup>209</sup> Cassese, “Self-Determination”, supra, at 190.

<sup>210</sup> Cf. Chapter One and also discussion below in Chapter Five of how this concept was then also applied during the decolonisation of Africa.

<sup>211</sup> J. Bengoa, “Indigenous development and autonomy”, in L. van der Vlist, ed., *Voices of the Earth: Indigenous Peoples, new partners & the right to self-determination in practice*, (Amsterdam: The Netherlands Centre for Indigenous Peoples, 1994) 30 at 31.

<sup>212</sup> Bengoa, *ibid*.

<sup>213</sup> For some discussion of this, including on the way that this period impacted on the present situation of indigenous peoples in Latin America, see eg. I. Acosta G., “The case of the Pech in Honduras”; E. Pereira & A. Da Cruz, “Indigenous peoples of the Brazilian Amazon; struggle for autonomy”; E. Potiguara, “Indigenous peoples of northeast Brazil; double discriminated peoples”; L. Maldonado & M. A. Carlosama, “A new relationship between peoples” (which discusses the situation of the Quichua people in Ecuador); and A. Morales Guerrero, “Economic, social, and cultural rights of the Kuna people of Panama”; all in van der Vlist, supra (all papers and/or presentations from the Voices of the Earth Conference, held in 1993 in the Netherlands). See also R. Perry, supra, at 57-65, on the situation in Mexico.

<sup>214</sup> Bengoa, supra, at 31.

<sup>215</sup> Bengoa, *ibid*, at 32.

By the end of the nineteenth century, Bengoa suggests that indigenous peoples in Latin America had separated themselves into two kinds of groups, both of which were at a significant disadvantage within the larger community. The first group, who were largely situated in agricultural areas and came to take part in "the forced labour system (peonaje), ... became part of the most impoverished social class within Latin American countries, in general the poor peasantry."<sup>216</sup> They have maintained some of their distinctive traditional clothing, languages, and festivities to this day, but Bengoa argues that they "were not ethnically recognized by the larger societies and the states, who conjoined them under the social group of peasants."<sup>217</sup> The other kind of group "took refuge" in "relatively inaccessible geographical areas" after independence, rather than face assimilation, and thus managed to preserve more of their traditional beliefs and customs. However, as Bengoa argues, these peoples have always been "viewed by the higher levels of society with suspicion and disregard ... [and they] are considered "primitive"" by comparison.<sup>218</sup>

### *2.5 The "scramble for Africa"*<sup>219</sup>

While the British, French, Spanish and Portuguese governments had dominated the colonisation of the Americas, the continent of Africa was claimed by a larger range of European nations, all competing for access to the resources of the lands: Great Britain, France, Germany, Belgium, Portugal, Italy, and Spain all claimed territory in Africa. As one commentator has suggested:

"Africa, in the rhetorical metaphor of imperial jingoism, was a ripe melon awaiting carving in the late nineteenth century. Those who scrambled fastest won the largest slices and the right to consume at their leisure the sweet, succulent flesh. Stragglers snatched only small servings or tasteless portions; Italians, for example, found only deserts on their plates."<sup>220</sup>

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<sup>216</sup> Ibid.

<sup>217</sup> Ibid.

<sup>218</sup> Ibid. Some of these groups continue to this day to agitate for greater recognition of their rights to control the land with which they managed to stay connected, eg. the Mayan people of Chiapas, Mexico, some of whom formed part of the "Zapatista Army of National Liberation": cf. Perry, *supra*, at 80-83.

<sup>219</sup> cf. Mutua, "Why Redraw", *supra*, at 1126.

<sup>220</sup> C. Young, "The Heritage of Colonialism", quoted in Mutua, "Why Redraw", *ibid*, at 1126, n.38.

By the mid-1800's, the various European powers with territory in Africa, mostly won by force and/or deceit,<sup>221</sup> decided to carve the continent up between themselves peacefully, rather than resort to hostilities.<sup>222</sup> This agreement was manifested in the 1885 *Treaty of Berlin*,<sup>223</sup> which divided Africa mostly according to European political and economic interests, rather than in accordance with tribal boundaries or any other issues relevant to the original inhabitants. As Mutua points out, "only Botswana, Burundi, Egypt, Ethiopia, Lesotho, Madagascar, Morocco, Rwanda, Swaziland, and Tunisia have any meaningful pre-colonial territorial and political identity."<sup>224</sup> In other words, *all* of the current West African nations, and *most* of those in eastern, central and southern Africa are creations of their European colonisers.

No Africans were consulted as to the appropriateness or otherwise of the method of dividing up their territory.<sup>225</sup> Yet the colonial powers purported to act at least partially in what they argued were the best interests of the African peoples as a whole, attempting to "stabilise" the continent for its peoples by imposing ineluctable borders around lands that were the subject of disputes between tribes. As Siba N'Zatioula Grovogui states:

"... the Berlin regime reasserted Western superiority and facilitated the conquest and exploitation of Africans. It effected Africa's marginality and subordination to Europe by articulating African otherness in a new system of signs that posited African disorders in the cultural and political spheres as a key justification for European political control. The formal colonisation of Africa was construed as the means to African spiritual and political salvation, economic regeneration, and civilisation."<sup>226</sup> [footnote omitted]

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<sup>221</sup> For example, Germany managed to conclude treaties in the 1880's with the Herero, Baster, and Nama peoples of South West Africa/Namibia, by deceiving them into believing that some of their sovereign rights would be protected under the new system of German colonial administration. The Basters had a system of laws that even the Europeans could recognize, yet the Germans arrogated to themselves full sovereignty over the three territories, on the premise that the land was *terra nullius*. It was on this basis that Germany then defended the territory against British claims: cf. J. Dugard (ed.), *The South West Africa/Namibia Dispute: Documents and Scholarly Writings on the Controversy Between South Africa and the United Nations*, (Berkeley: University of California Press, 1973) at 20-22.

<sup>222</sup> Although Britain and Germany continued to threaten one another with the use of force over ownership of South-West Africa until 1890, when they finally concluded the *Anglo-German Agreement* of 1890, which defined the boundaries of German South-West Africa: Dugard, *ibid*.

<sup>223</sup> *General Act of the Berlin Conference*, 26 February 1885. Cf. Discussion in Chapter One (Introduction).

<sup>224</sup> Mutua, "Why Redraw", *supra*, at 1115, n.6.

<sup>225</sup> See generally D.C.J. Dakas, "The Right to Self-Determination in the African Post-Colonial Context: Partition or Perish?", (Berkeley-Stanford Joint Conference on Africa, Stanford University, U.S.A., 24 April 1999) [unpublished].

<sup>226</sup> S. N'Zatioula Grovogui, *Sovereigns, Quasi Sovereigns, and Africans*, (Minneapolis: University of Minnesota Press, 1996) at 69.

As the plethora of recent conflicts across the African continent has demonstrated, many disputes between different tribes or ethnic groups were not resolved in this manner, but were simply driven underground until the process of decolonisation gave them the opportunity to resurface.<sup>227</sup> In addition, as UN Secretary-General Kofi Annan has suggested, “[t]he character of the commercial relations instituted by colonialism also created long-term distortions in the political economy of Africa.

Transportation networks and related physical infrastructure were designed to satisfy the needs of trade with the metropolitan country, not to support the balanced growth of an indigenous economy.”<sup>228</sup>

This idea of the colonial powers, that only they knew what was in the best interests of the so-called “backwards” peoples of the world, persisted into the twentieth century. Only they thought they knew what circumstances should be provided to “primitive” people in order to give them true freedom from their “primitive” tendencies.<sup>229</sup> Such thinking was behind policies such as taking indigenous children in former British colonies away from their families and giving them a European-style upbringing, in order to provide them with more opportunities for “advancement” in a Western culture.<sup>230</sup> This practice continued into the 1960’s in Australia, affecting generations of indigenous people.<sup>231</sup> Very little consideration was given to the emotional cost of such practices, which now appears to have outweighed most of the benefits that these children may have received. Those who believe that all people have a “natural” ability to determine for themselves what is in their own best interests, and will only be free if

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<sup>227</sup> K. Annan, “The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa”, *Report to the United Nations Security Council*, 16 April 1998, paras. 8-15, online: <<http://www.un.org/ecosocdev/geninfo/afrec/sgreport/report.htm>>.

Recent ethnic strife in the Balkans suggests that any carving up or amalgamation of territory without first consulting the inhabitants, as happened there after World War II, creates a time bomb of some kind. Cf. Discussion of the situations in Kosovo, and discussion on Africa and *uti possidetis*, in Chapters Five and Six below.

<sup>228</sup> Annan, *ibid*, at para. 9.

<sup>229</sup> This view coincides with that of philosophers who only recognize the “acquired” freedom of self-perfection, not the “natural” freedom of self-determination, eg. Saint Ambrose, Marcus Aurelius, Bosanquet, Epictetus, Plato, Plotinus, Seneca, and Spinoza: Adler, *supra*, at 592.

<sup>230</sup> Practised in different forms in Australia, Canada, and the United States: cf. J-F. Tremblay & P-G. Forest, *supra*.

<sup>231</sup> Although the Australian Minister for Aboriginal Affairs recently tried to deny that even one “generation” of Aboriginal people had been thus affected: J. Herron, “A generation was not stolen”, *The Sydney Morning Herald*, (4 April 2000) 15.

they are allowed to pursue these self-determined interests, seem to have been vindicated, in this context at least.

### 2.6 The "postcolonial" legacy

A swelling chorus of writers argues that a "postcolonial" attitude still prevails today in many former colonies and in international affairs generally. For example, Grovogui writes:

"In a very subtle way, the West is still assumed to possess intellect, reason, science, and wisdom. In contrast, it is still feared or suspected that the immature, unreformed other(s) may act through instinct and confusion. In short, the others may still need guidance, even against their own volition. Then as now, however, the aim of international law has been to justify or facilitate Western hegemony and its power to exploit the other(s)."<sup>232</sup>  
[footnote omitted]

In a similar vein, Taiaiake Alfred of the Rotinohshonni people of North America states:

"In the past 500 years, our people have suffered murderous onslaughts of greed and disease. Even as history's shadow lengthens to mark the passing of that brutal age, the Western compulsion to control remains strong. To preserve what is left of our cultures and lands is a constant fight. ... The collective struggle for indigenous self-determination is truly a fight for freedom and justice."<sup>233</sup>

These themes will be taken up in more depth in later Chapters, as they are highly relevant to the current status of the right to self-determination and current controversies over the application of this right.<sup>234</sup> For example, some authors have argued that self-determination is only relevant in the colonial context and, since "decolonisation" has now been achieved, self-determination is no longer a useful principle with any practical legal application in the international context.<sup>235</sup> Postcolonial authors would reply that, while there has been formal "decolonisation", in the form of transferring sovereignty to new governments in Africa, or recognising the legal status of indigenous peoples within former British

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<sup>232</sup> N'Zatioula Grovogui, *supra*, at 42. See also, eg. A. Anghie, " 'The Heart of My Home': Colonialism, Environmental Damage, and the Nauru Case", (1993) 34 *Harv. Int. L. J.* 445 at 505.

<sup>233</sup> T. Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto*, (Ontario: Oxford University Press, 1999) at xi.

<sup>234</sup> Cf. Chapters Five and Six.

<sup>235</sup> For example, cf. R. Emerson, "Self-Determination", (1971) 10 *Am. J. Int'l L.* 459 at 464-5; and M. Halberstaum, "Nationalism and Self-Determination: The Arab-Israeli Conflict", (1994) 24 *N.Y.U.J. Int'l L. & Pol.* 573.

colonies, “colonial” attitudes are still hampering the full exercise of self-determination by formerly colonised peoples. For example, as Professor June McCue pointed out in 1999:

“In the context of colonisation, both the colonizer and the colonised have to decolonize in tandem before the colonial regime can truly be de-centered or dismantled and different legal cultures can co-exist. This requires the voice of the colonizer to be subjective about their relationship with indigenous peoples, to be complicit and accountable for creating masks of oppression that continue to suffocate indigenous peoples.”<sup>236</sup>

UN Secretary General Kofi Annan also pointed out in his 1998 report to the Security Council on *The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa*:

“The difficult relations between State and society in Africa owe much to the authoritarian legacy of colonial governance. Because there was little need to seek political legitimacy, the colonial State did not encourage representation or participation. The result was often social and political fragmentation, and a sometimes weak and dependent civil society. A number of African States have continued to rely on centralised and highly personalized forms of government and some have also fallen into a pattern of corruption, ethnically based decisions and human rights abuses. Notwithstanding the holding of multiparty elections in a majority of African countries, much more must be done to provide an environment in which individuals feel protected, civil society is able to flourish, and Government carries out its responsibilities effectively and transparently, with adequate institutional mechanisms to ensure accountability.”<sup>237</sup>

Many African scholars are also questioning the assumptions that were made about the suitability of “Western” modes of governance for the African situation. For example, many of the essays in the book *Legitimate Governance in Africa: International and Domestic Legal Perspectives*, seek to address “the appropriateness of traditionally accepted liberal democratic conceptions and practices in bringing about a lasting era in Africa in which legitimate governance and political stability thrives.”<sup>238</sup> In the Introduction to this book, the two editors, Edward Kofi Quashigah and Dr. Obiora Chinedu Okafor, point out that “most of the *liberal democratic* concepts, institutions, and customs ... developed in societies that are, and have been, relatively *homogenous* in terms of the degree of social distance observable among their inhabitants. It is also well known that these same conceptual tools have been and continue to be

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<sup>236</sup> J. McCue, *Indigenous Legal Theory Perspectives*, (L.L.M. Thesis, University of British Columbia, 1999) [unpublished] at 25.

<sup>237</sup> Annan, *supra*, at para. 71.

*superimposed* on the social fabric of the intensely *fragmented* polities that form post-colonial African states.”<sup>239</sup>

These authors are not content simply to “blame” the impact of colonialism for all of their current concerns over the status of their respective peoples. Most of them are looking for constructive ways to address the legacy of colonialism, to “look beyond ... [Africa’s] colonial past for the causes of current conflicts”<sup>240</sup> and, at the same time, to question the “admittedly potent but obviously simplistic *determinist* temptation” to attribute the rest of Africa’s problems “to the peculiarities of the African *psyche* and/or the *authoritarian* orientation of African leaders.”<sup>241</sup>

Such voices were not heard at the time that the principle of self-determination was being “shaped” into an “internationally perceived shared value”, at the turn of the twentieth century, as they were considered to come from the “uncivilised” sector of the international community at that time. Now, almost 100 years later, their views are finally gaining some currency, and leading many to question the representativeness of the supposedly “internationally perceived shared values” that shaped the evolution of the principle of self-determination. Thus, it is appropriate to keep these previously marginalised voices in mind throughout the following analysis of that final “shaping” process.

### 2.7 *The first World War*

Gerry Simpson has argued “that prior to the First World War, self-determination could more readily be described as a strategy than a principle, capable, like all strategies of being discarded should it fail to further the vital interests of the major powers.”<sup>242</sup> He bases this assessment on the inconsistent application of the principle by the French after their Revolution, as discussed above,<sup>243</sup> on the repressive

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<sup>238</sup> Quashigah & Okafor, *supra*, at 9.

<sup>239</sup> *Ibid* at 9-10 [*emphasis in original*]. A footnote to this statement suggests further: “Even though all states are contrived political formations, African states are widely recognised to be the most contrived of all. Cf. C. Young, *The African Colonial State in Comparative Perspective*, (New Haven: Yale University Press, 1994); and Mutua, “Why Redraw”, *supra*, at 10, n.9.

<sup>240</sup> Annan, *supra*, at para. 12.

<sup>241</sup> Quashigah & Okafor, *supra*, at 9 [*emphasis in original*].

<sup>242</sup> Simpson, *supra*, at 20. Many authors argue that this view is still relevant to the application of the principle throughout the twentieth century: cf. discussions in later Chapters.

<sup>243</sup> In Chapter One (Introduction).

approach by the US and France towards Mexican “self-determination” in the mid-nineteenth century,<sup>244</sup> and on the way that the new Soviet Union incorporated more than 100 nations “with varying degrees of voluntarism”<sup>245</sup> after the 1917 Bolshevik Revolution, despite the fact that both Marx and Lenin had previously advocated “the right of nations to self-determination [which] implies exclusively the right to independence in the political sense, the right to free political separation from the oppressor nation.”<sup>246</sup>

In relation to the “nationalist dilemma of the Bolsheviks in 1917”,<sup>247</sup> which gave rise to such a contradictory approach to national self-determination, Isaac Deutscher later commented: “The Leninists still believed that socialism demanded equality between nations; but they also felt that the reunion of most, if not all, of the Tsar’s dominions under the Soviet flag served the interests of socialism.”<sup>248</sup>

Another interesting example of the contradictory attitudes of imperial powers towards the principle of self-determination prior to World War I, is the formation of Albania and the separation of Kosovo<sup>249</sup> under a separate, “foreign” sovereignty under the *Florence Protocol* of 1913. Until 1912, ethnic Albanians predominantly lived within the “vilayet” (province) of Prishtina in the Ottoman Empire. However, the most influential force in that Empire since 1908 had been the “Young Turks”, who wished to impose Turkish nationalism on all Ottoman subjects, to the extent of closing schools that used any other language than Turkish. In some senses, the Young Turks were exercising a form of their own “self-determination”, since they were attempting to strengthen the Ottoman Empire and its Turkish identity. However, the Albanians protested forcefully against this policy, and in 1912 they were granted a measure

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<sup>244</sup> Cf. Perry, *supra*, at 62, describing how the United States “acquired” Texas from Mexico in 1845, and how the French had taken advantage of political instability in 1838 to blockade the port of Velacruz, in an attempt to extort compensation from the Mexican government for damage caused to French citizens in a civil riot.

<sup>245</sup> I. Bremmer, “Post-Soviet nationalities theory: past, present, and future”, in I. Bremmer & R. Taras, eds., *New States, New Politics: Building the Post-Soviet Nations*, (Cambridge: Cambridge University Press, 1997) 3 at 3.

<sup>246</sup> Lenin, *supra*, in Sunga, *supra*, at 143-148.

<sup>247</sup> Bremmer, *supra*, at 6.

<sup>248</sup> I. Deutscher, *Stalin: A Political Biography*, 2nd ed. (New York: Oxford University Press, 1967) at 243, in Bremmer, *ibid*, at 6.

<sup>249</sup> Note that I am using the term “Kosovo” as it is understood in the present day context of recent events in that part of Serbia where Muslim “Kosovo-Albanians” appear to form the largest ethnic group (Kosovo-Albanians have boycotted every Yugoslavian census for the last twenty years, so there are no accurate records of the exact percentage of the population that they comprise: O. Antic, “*Kosovar Independence*”: *Muenzel’s Biased Pro-Greater Albania Approach*, at para. 4, online: Jurist <<http://jurist.law.pitt.edu/antic.htm>> (last visited October 1999). At the beginning of the twentieth century, there was no such distinct “Kosovar” territory within the Ottoman Empire.

of local autonomy. This led in part to the First Balkan War of 1912, when Montenegro, Serbia, Bulgaria, and Greece declared war on the Ottoman Empire, at least in part as a reaction to the granting by the Ottoman authorities of autonomy to Albania.<sup>250</sup> However, the four aggressors claimed that they were trying to liberate all "Balkan" peoples, including the Albanians, from Ottoman control - another attempt to exercise a form of self-determination on their part.

Eventually the First Balkan War ended with the *London Peace Treaty* of 1913, negotiated at the insistence of the European powers, between the four aggressors and the Ottoman Empire, in which the latter ceded sovereignty over the former, according to the approximate territorial borders of those four countries today. The territory of the previously autonomous province of Albania was not part of the treaty, but its fate was instead left to the six major European powers: the Austro-Hungarian Empire, Great Britain, France, Germany, Italy, and Russia. The decision they arrived at was approached from a similar set of values and guiding principles as had guided the carving up of Africa in the 1885 *Treaty of Berlin*. In other words, the right of the peoples to determine under whose sovereignty they should live was not taken into account, and borders were imposed that divided ethnic groups and forced them to co-exist as a minority within the territory of a nation dominated by a different ethnic group, rather than allowing peoples of the same ethnic group to remain under the same sovereignty - all to appease more powerful nations' political concerns and to protect their national interests. The European powers decided that Albania should be ruled by a foreign prince, with the assistance of an international police force, and an "International Control Commission" formed by the powers. The borders of the new Republic were determined in accordance with the strong wishes of Russia, which did not want a strong Muslim country so close to its borders. These borders left half of all Albanians to live outside of Albania, in either Montenegro or Serbia, and that was how the ethnic Albanian-dominated area known as "Kosovo" was created, which has received so much international attention in recent years.<sup>251</sup>

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<sup>250</sup> F. Muenzel, *What Does Public International Law Have to Say About Kosovar Independence?*, at para. 2, online: Jurist <<http://jurist.law.pitt.edu/simop.htm>> (last visited October 1999). Professor Dr. Muenzel claims that the four aggressors, who were all neighbours of Albania, wanted to partition it between themselves, rather than allow it to survive as a separate country.

<sup>251</sup> Cf. Discussion below on the fate of Albania after the First World War, and in Chapter Six on Kosovo in the context of the right to self-determination of minorities.

Of course, the aggressors in the First World War also paid scant regard to any theories on the right of peoples to determine under whose sovereignty they would live. Proscriptions against "aggressive wars" had been set out in the 1899 and 1907 *Hague Conventions for the Pacific Settlement of International Disputes*, and the 1928 *General Treaty for the Renunciation of War* (also known as the *Pact of Paris* or the *Kellog-Briand Pact*). But these treaties were ignored by the German Kaiser and his allies, and State practice at the time still predominantly supported the use of conquest as a means of acquiring territory, even if the *opinio juris* supporting the opposite view was steadily growing.<sup>252</sup>

### 2.8 Conclusion

As we have seen from this Chapter, the principle of self-determination was merely nascent by the beginning of the twentieth century. Various forms of some of its underlying principles had manifested themselves intermittently. But it had yet to materialise as a recognisable principle with relatively consistent application.

Some may argue that self-determination remains an unrealised principle. It certainly has not lived up to its potential for liberating all of humanity from all situations of oppression and discrimination.

However, as we will see in the next Chapter, some of the ideas relating to "self-determination", that had been bubbling away prior to the twentieth century, came to the fore in that century, in ways that no-one could ever have dreamed of.

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<sup>252</sup> Cf. P.J.I.M. De Waart, *Dynamics of Self-Determination in Palestine: Protection of Peoples as a Human Right*, (Leiden, The Netherlands: E.J. Brill, 1994) at 43.

### Chapter Three:

#### The “*Enunciative Stage*” of the Principle of Self-Determination

As we have seen from the previous Chapter, various aspects and manifestations of the principles underlying the concept of “self-determination” were already emerging in national and international affairs, long before the term “self-determination” came to international political prominence during the First World War.<sup>253</sup> In this Chapter, I will discuss how these concepts and successive events subsequently shaped the “*Enunciative Stage*” of the principle of self-determination in international human rights law.

Bassiouni identifies the “*Enunciative Stage*” of an international human right as the time when such “intellectual and social processes” combine and emerge in the form of “internationally perceived shared values.”<sup>254</sup> In this Chapter, I will outline how the aftermath of the First World War, with the creation of the League of Nations and its various responsibilities towards non-State entities, was the first real opportunity for “self-determination” to emerge as a truly international value, even though it sometimes meant different things to different actors, as we will see. I conclude my discussion with an analysis of the ways that “free will”, “equality”, and “the consent of the governed”<sup>255</sup> have frequently been applied inconsistently, drawing upon the material in the previous Chapter, and showing how such inconsistencies continued right through to the outbreak of the Second World War, after which there was another significant shift in the development of the principle of self-determination.

During the First World War, President Woodrow Wilson of the United States made his famous speech to the US Congress, supporting the rights of all the occupied nations and oppressed minorities in Europe at the time, said to be the basis of the current right of all peoples to self-determination<sup>256</sup>:

"No peace can last or ought to last, which does not accept the principle that governments derive all their just powers from the consent of the governed, and

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<sup>253</sup> Cf. Discussion in Chapter Two.

<sup>254</sup> Bassiouni, “Proscribing Function”, *supra*, at 181.

<sup>255</sup> Cf. Discussion in Chapter Two.

<sup>256</sup> Cf. Discussion in Chapter Two. Note, however, the discussion below of America’s repressive policy towards socialist regimes, despite the fact that many of these reflected the “Consent of the Governed”.

that no right anywhere exists to hand peoples about from sovereignty to sovereignty as if they were property."<sup>257</sup>

Michla Pomerance argues that Wilson's conception of "self-determination" at this time had evolved from his belief in the right of all peoples to select its own form of governance ("internal" self-determination, based on democratic ideals<sup>258</sup>), which "in the context of the war, ... came to subsume "external" self-determination as well: the right of every people to "choose the sovereignty under which they shall live," [and] to be free of alien masters".<sup>259</sup>

Yves Beigbeder suggests further that Wilson's views were influenced by the eighteenth century philosopher Immanuel Kant, who argued in his "Perpetual Peace", that permanent global peace could only be achieved if democratically governed nations made a compact with one another.<sup>260</sup> Kant believed that democracies were inherently more peaceful nations than those with any other form of governance, since, "[i]f the consent of the citizens is required in order to decide that war should be declared ... nothing is more natural than that they would be very cautious in commencing such a poor game, decreeing for themselves all the calamities of war."<sup>261</sup> Wilson, who served as the chairman of the committee which drafted the Covenant of the League of Nations, was initially against any non-democratic nations joining the League. He argued: "Only free people can hold their purpose and their

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<sup>257</sup> In van Walt van Praag, *supra*, at 5. Note van Walt van Praag's observation that this statement was obviously influenced by the philosophies of Locke, Rousseau, Mill and Jefferson. Cf. this Chapter, below, for more discussion on this point.

<sup>258</sup> Successive American governments did not (and still do not) believe that the right to self-determination also entails a right to choose a *non*-democratic government instead, as their numerous interventions across the globe in socialist countries demonstrates. In particular, see the "Nicaragua case" (discussed in Chapter One), and the wars in Vietnam and Korea (referred to in Chapter Six). In addition, note the US' lack of response to the invasion of East Timor by Indonesia in 1975, which was clearly in violation of international law. Yet because the East Timorese allegedly were supportive of a communist form of government, US foreign policy at the time was to let the Indonesians retain control over the territory: A. Moreira, "The invasion of East Timor by Indonesia", in Catholic Institute for International Relations & International Platform of Jurists for East Timor, eds., *International Law and the Question of East Timor*, (London: Catholic Institute for International Relations & International Platform of Jurists for East Timor, 1995) 290 at 294.

<sup>259</sup> M. Pomerance, *Self-Determination in Law and Practice*, (The Hague: Martinus Nijhoff Publishers, 1982) at 1 [hereinafter: Pomerance, "Self-Determination"].

<sup>260</sup> Y. Beigbeder, *International Monitoring of Plebiscites, Referenda and National Elections: Self-determination and Transition to Democracy*, (Dordrecht, The Netherlands: Martinus Nijhoff Publishers, 1994) at 75.

<sup>261</sup> H. Reiss, *Kant's Political Writings*, (Cambridge: Cambridge University Press, 1970) in Beigbeder, *ibid*, at 23.

honour steady to a common end and prefer the interests of mankind [sic] to any narrow interest of their own.”<sup>262</sup>

### 3.1 *The Aftermath of the First World War*

Wilson’s views on the illegitimacy of a “government which is not controlled by the will and vote of its people”<sup>263</sup> were only adopted to some extent by the other victors when it came to determining how to deal with all the oppressed “nationalities” that emerged from the war. As Pomerance points out, the Versailles Peace Conference was the “first major testing ground for ... [Wilson’s] package of ideas ..., and it was there that the deceptively simple and just-sounding principle of self-determination was exposed in all its intricacy and intractability.”<sup>264</sup> The most difficult task was determining who the “self” was that had acquired the right of self-determination. Wilson had used numerous terms when describing how the principle of self-determination should work, such as “peoples”, “provinces”, “population concerned”, “national elements”, and “nations”.<sup>265</sup> As mentioned previously, he also supported a right to both “internal” self-determination (democratic governance) and “external” self-determination (secession), but failed to elaborate any principles as to which manifestation of the principle was most relevant to each case.

As many authors have noted, nationalism was one of the major driving forces behind the First World War and the resultant breakup of the four empires of east and central Europe.<sup>266</sup> Most significantly in terms of the evolution of the principle of self-determination, prior to and during the war, claims for

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<sup>262</sup> Quoted in G. A. McCurdy, “The League of Free Nations”, *The League of Nations Union*, Series 2, Pamphlet 3 (London: 1919-20), in Beigbender, *ibid*, at 76. However, the Covenant says nothing about only “democratic” nations being allowed to join. And note that the communist/totalitarian USSR was admitted to the League of Nations in 1934.

<sup>263</sup> H. Foley, *Woodrow Wilson’s Case for the League of Nations*, (New Jersey: Princeton University Press, 1923) at 64-65, in Beigbender, *ibid*, at 76.

<sup>264</sup> M. Pomerance, “Self-Determination”, *supra*, at 2.

<sup>265</sup> S. N. Léger, “*People and “Minority”*: From Theory to Reality, (L.L.M. Thesis, Faculty of Law, UBC 1999) [unpublished] at 42.

<sup>266</sup> Cf. Ofuately-Kodjoe, *supra*, at 22-23; and see the discussion in Chapter One on the vexed relationship between nationalism and self-determination generally.

independence by groups describing themselves as “nationalities”,<sup>267</sup> were regarded as internal matters for each empire to address. However, at the conclusion of the war, these claims had to be addressed by the victors, and thus they came to have international status, as they concerned the right of those groups to form their own independent states. Thus, the principle of self-determination was conceived at this time as the right of secession from an existing state by “nationalities” within the state, whatever these “nationalities” were exactly.<sup>268</sup>

However, ultimately “the principle of external self-determination was applied only in a few exceptional cases by the victorious Allies of World War I, for whom secret treaties, strategic, political and economic interests, historic claims had more priority and importance than any genuine democratic concern for allowing the territories’ inhabitants to express their wishes in free plebiscites. States preferred to make their decision by conquest or by negotiation among the major Powers.”<sup>269</sup> During the war, numerous secret treaties had been negotiated, promising certain parts of captured territories to a particular future victor.<sup>270</sup> As a result, a compromise had to be reached as to which ethnic, religious or other groups in Europe were entitled to full nationhood, which ones should be consulted in the form of a plebiscite, and which would remain as minorities within other territories, without any consultation. When the political map of Europe was redrawn by the Allies, Austria, Hungary,<sup>271</sup> Czechoslovakia, Finland, Estonia, Latvia, Lithuania, and Poland emerged in their own right, and Yugoslavia, Greece, and Rumania extended their borders. Only five plebiscites were held between 1919 and 1921, in

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<sup>267</sup> There has been much debate about the exact definition of “nationality”, which Ofuatey-Kodjoe argues has never satisfactorily been resolved, as all of the ethnic groups claiming to be “nations” with a right to a separate existence at this time “were vastly dissimilar from the point of view of size, level of national and political consciousness, and territorial consciousness.” [footnote omitted] Clearly there had to be some limit as to which ones were viable “nations”, “otherwise it was possible for individual households to argue that they had the right to independence.”: Ofuatey-Kodjoe, *supra*, at 24-25.

<sup>268</sup> Ofuatey-Kodjoe, *ibid*, at 24.

<sup>269</sup> Beigbeder, *supra*, at 79.

<sup>270</sup> Beigbeder, *ibid*, at 80.

<sup>271</sup> Note, however, that Austria and Hungary, as well as all the other nations defeated in the war, “were convinced that self-determination had been denied to them at the Peace Conference”, as their territory was consistently reduced in size, leaving large numbers of their nationals under the control of other nations: T.D. Musgrave, *Self-Determination and National Minorities*, (New York: Oxford University Press, 1997) at 57.

accordance with the various Peace Treaties or the Venice Protocol,<sup>272</sup> and the League of Nations later supervised the Saar plebiscite in 1935, which was actually a requirement of the Peace Treaty of Versailles. Proposals for plebiscites in Alsace-Lorraine, Austria, the Aalands Islands, and Vilna<sup>273</sup> were rejected by either the Allies or the League, and the 1945 *Treaty of Neuilly* made no provision for plebiscites at all. Thus, Wilson's insistence that "the settlement of every question, whether of territory, of sovereignty, of economic arrangement, or of political relationship, [should be] upon the basis of the free acceptance of that settlement by the people immediately concerned"<sup>274</sup> was largely ignored.

In addition, this compromise did not represent a clear delineation of the legal rights of those various peoples. Ofuatey-Kodjoe suggests that three competing theories were in operation at the Versailles Peace Conference: (i) "*the plebiscite theory*, ... based on the definition of a nationality as a group of peoples with a common subjective attachment to the same state";<sup>275</sup> in other words, a plebiscite must be held to ensure "the continuing political consent of the inhabitants to be members of the state";<sup>276</sup> in accordance with democratic principles; (ii) "*the national determinism theory* [which is] based mainly on nationality defined as an ethnic community"<sup>277</sup>, that is, "one nation: one state", and thus cannot accommodate differing views amongst the population of that state; and (iii) "*the national equality theory* [which] is based on nationality defined essentially on the basis of a common territory and nationalistic outlook."<sup>278</sup>

Thus, the final outcome was that not every national group was allowed to choose its sovereign. The Swedish-speaking people of the Aaland Islands tried to reunite with Sweden after their territory was transferred from Russia to the new state of Finland. However, they were treated as nearly every minority group has been since then: they were denied any right to self-determination that would the

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<sup>272</sup> Schleswig (1920), Allenstein and Marienwerder (1920), Klagenfurt Basin (1920), Upper Silesia (1921), and Sopron (1921).

<sup>273</sup> A city claimed by both Lithuania and Poland.

<sup>274</sup> S. Wambaugh, *A Monograph on Plebiscites*, (New York: Oxford University Press, 1920) at 11, in Beigbeder, *supra*, at 80.

<sup>275</sup> Ofuatey-Kodjoe, *supra*, at 36

<sup>276</sup> *Ibid*, at 31.

<sup>277</sup> *Ibid* at 36.

disrupt the territorial integrity of the state that they happened to find themselves in through no fault of their own. Upholding this outcome, the International Committee of Jurists in their *Advisory Opinion on the Aaland Islands Question* stated: "To concede to minorities either of language or of religion, or to any fractions of a population, the right of withdrawing from the community to which they belong, because it is their wish or their good pleasure, would be to uphold a theory incompatible with the very idea of the State as a territorial entity."<sup>279</sup> They further held that, "Although the principle of self-determination of peoples plays an important part in modern political thought, especially since the Great War, ... [it] cannot be considered ... as a positive rule of the Law of Nations."<sup>280</sup>

And so the first limit on the principle of self-determination was decided: a minority group within the territory of a different national group within Europe had no *right* to choose its own sovereign.<sup>281</sup>

### 3.2 Post-war developments in the Communist States

On the other hand, the recently formed Communist "Republics" appeared to recognise explicitly the right of their constituent national "autonomous States" to choose their own sovereign. For example, the Chinese Soviet Republic's 1931 Constitution provided that each of its "national minorities"<sup>282</sup> had the "right to complete separation from China, and to the formation of an independent state for each

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<sup>278</sup> Ibid, at 36.

<sup>279</sup> This Committee of three Jurists had been appointed by the Council of the League of Nations in 1920, and their report was adopted subsequently by the Council, then forwarded to a Commission of Rapporteurs, who were to recommend a programme of action. Cf. Commission of Rapporteurs' Report, Council Doc. B.7 21/68/106 (1921), discussed in-depth in Cassese, "Self-Determination", supra, at 27-31.

<sup>280</sup> Commission of Rapporteurs' Report, *ibid*.

<sup>281</sup> Justice Rosalyn Higgins of the ICJ (as she is now) maintained in 1994 that that was still the case under international law then. She believed that the right to self-determination attached to all the peoples of a State collectively, not to any subgroup of the population separately: Higgins, "Problems and Process", supra, at 121-128. Cf. Discussion of minority rights to self-determination in Chapter Six, below.

<sup>282</sup> Note that the Chinese conception of a "nationality" or "minzu", comes "from an attempt to apply Stalin's four stages of social evolution - the clan (*rod*), tribe (*plemya*), nationality (*narodnost*), and nation (*natsiya*) - to the Chinese situation, in which *natsiya* was linked with the emergence of capitalism and *narodnost* referred to a precapitalist formation. *Minzu* from the beginning was taken to mean "nation" but the intermediary formation was problematic", and eventually it came to describe both the Han people, who had already "satisfied all the criteria of Stalin's definition of a nation, being a stable community historically constituted by a common language, territory, economic life, and psychological formation expressed in a common culture", plus all the various other ethnic groups in China that are recognised today (fifty-six "nationalities" are officially recognised by the present Chinese government): N. Tapp, "Minority Nationality in China: Policy

national minority. All Mongolians, Tibetans, Miao,<sup>283</sup> Yao,<sup>284</sup> Koreans, and others living on the territory of China shall enjoy the full right to self-determination, i.e., they may either join the Union of Chinese Soviets or secede from it and form their own state as they may prefer.”<sup>285</sup> The Constitutions of the Soviet Union and of the new Federal Republic of Yugoslavia also contained similar “out” clauses for various territories, but these were never exercised until towards the end of the twentieth century.<sup>286</sup>

But as early as March 1932, in accordance with the new Chinese Constitution, the leaders of Fengtien, Kirin, Heilungkiang, and Jehol Provinces, and the Harbin Special District, as well as various Mongolian representatives, representing thirty million people in total, proclaimed the establishment of a new State of Manchukuo, which stretched between the Mongolian Soviet Republic and Korea. The relevant part of the Proclamation stated: “Manchuria<sup>287</sup> and Mongolia had been in the past a separate

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and Practice”, in R.H. Barnes, A. Gray, & B. Kingsbury, *Indigenous Peoples of Asia*, (Michigan: The Association for Asian Studies, 1995) 195 at 196 & 198.

<sup>283</sup> The “Miao” people are actually a collection of three different “cultural and linguistic groups widely separated by geography and relatively powerless for that reason. ... Subgroups of the Miao and Yao, however, are represented by populations outside China, in Southeast Asia, and contacts with these outsiders have led to the emergence of rudimentary nationalist sentiments that consequently are carefully controlled [in the present era].” Tapp, *ibid*, at 202.

<sup>284</sup> The Yao people are actually a sub-group of the “Miao” peoples, who are also known as the “Miao-Yao”. Tapp, *ibid*.

<sup>285</sup> C. Brandt, B. Schwartz, & J.K. Fairbank, *A Documentary History of Chinese Communism*, (New York: 1967) at 220-224, in van Walt van Praag, *supra*, at 190-191.

<sup>286</sup> In addition, Bremmer claims that only 53 of the more than 100 Soviet “nations” were allowed to be “identified with a particular territory and so afforded rights by virtue of their national status - the so-called “titular” nationalities. Fully half or more of the Soviet Union’s national groups had *no* political recognition as nations.” Of these 53 “titular nationalities”, only 15 were designated as “union republics, with a right to secede. (Bremmer, *supra*, at 8) [*emphasis in original*] Under Stalin’s rule, national rights were eroded further, as Russia began to dominate the other republics. For example, Chechens, Germans, Kalmyks, and Crimean Tatars “were deported by the hundreds of thousands to Central Asia and Siberia, punished *qua* nations for crimes against the Soviet Union.” (Bremmer, *ibid*, at 7, n.23)

<sup>287</sup> The Manchurian people had conquered China in 1644, but were overthrown in 1911. Tapp claims that they “are in fact a mixed group of Mongolian origin, now largely Han-speaking but having developed and retained a fierce sense of ethnic distinctiveness.” (*supra*, at 200).

state detached from China proper.<sup>288</sup> By necessity of the present situation we are in a position to strive for national independence.<sup>289</sup> Interestingly, the Proclamation also contained the following provision:

“There shall be no discrimination among those people who now reside within the territory of the new state with respect to race and creed, including the races of the Hans, Manchus, Mongols, Japanese and Koreans; nationals of other countries may upon application as permanent residents acquire equal treatment with others and their rights shall be guaranteed thereby.”<sup>290</sup>

Only Japan recognised the Statehood of the new territory, although Soviet Russia extended a form of *de facto* recognition.<sup>291</sup> China did not recognise “Manchukuo’s” independence. The Government of Japan launched a campaign to try and encourage Western countries, particularly the United States, to recognise the State of Manchukuo. In a leaflet published in 1933 in New York, by the Japanese Chamber of Commerce, they point out:

“Was not the freedom of Cuba from Spain won by the United States? Were not the Secession States of Europe assisted to independence by the Allied Powers?

Why is it that whenever an event occurs in Asia that directly parallels events in the Western World, Europeans and Americans seem to be outraged? The assistance provided the new state of Manchukuo parallels in every respect the assistance given to Cuba by the United States. Yet, we are told that it was an act of humanity to help Cuba win her freedom. Why is it not an act of humanity to help Chinese in Manchuria to win their freedom?”<sup>292</sup>

This campaign was not successful. However, in 1945, the Government of China allowed a referendum on independence to the peoples of “Outer Mongolia”,<sup>293</sup> in which the majority voted in favour of

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<sup>288</sup> Mongolia had achieved independence in 1912, and this was recognised in a series of treaties with Russia and China. However, in 1919 the Chinese government formally cancelled Mongolia’s independence. In 1921, the Mongolians regained their independence, with the assistance of the Soviet Union, forming the “Mongolian Soviet Republic”, which was not, however, recognised by China.

<sup>289</sup> *Proclamation of the Establishment of Manchukuo*, 1 March 1933, in Japanese Chamber of Commerce, *Manchukuo: The Founding of the New State in Manchuria*, (New York: Japanese Chamber of Commerce, 1933) at 5 [hereinafter: “Manchukuo”].

<sup>290</sup> “Manchukuo”, *ibid*, at 5.

<sup>291</sup> *Ibid*, at 37.

<sup>292</sup> *Ibid*, at 3. Those who were attempting to create the State of Manchukuo were alleging that the Chinese government was using profits from the lucrative soya bean crops from the region, to fund its military expenses, and allowing the farmers of those soya beans to become completely impoverished. (at 1-2)

<sup>293</sup> As mentioned previously, the Mongolian people were a more distinctive “national” group than the Manchus, and the 1931 Constitution had specifically provided the right of self-determination to “Mongolians”, not to Manchus.

independence. At the same time, China did not actually recognise the independence of the “Mongolian Peoples Republic” until 1950,<sup>294</sup> and between 1945-1950 the Chinese government did not list this Republic as one of its “non-self-governing territories” as it should have, in accordance with article 73 of the UN Charter.<sup>295</sup> It was clear that China would have preferred that what it perceived as the “autonomous states” of Mongolia, Tibet and Turkestan, would choose to unite voluntarily with China in a federal communist republic.

Given subsequent claims by Tibet, in particular, that it never was an “autonomous state” of China,<sup>296</sup> and the tardiness of China in recognising Mongolia’s independence, it is not clear whether the Chinese Constitution of 1931 can be said to have advocated “minority” rights of secession, in any strict sense.

### *3.3 Minority Protection Treaties*

Instead of gaining an independent state, the rights of many of the “national minorities” within Europe were outlined in special Minority Protection treaties, whereby the governing authority in a country promised to protect their “minority” populations, sometimes as a condition of a Peace Treaty,<sup>297</sup> sometimes as a condition of admittance to the League of Nations,<sup>298</sup> and otherwise in a special minority treaty in the case of newly formed or enlarged states.<sup>299</sup> In all cases, the “minority” had a right of recourse to the Permanent Court of International Justice to determine any questions of a legal nature, which at the time was “an entirely novel idea, and ... considered to be of paramount importance for the protection of minorities.”<sup>300</sup> As Nathaniel Berman suggests:

“Many writers thought that international law had undergone a fundamental transformation by turning its attention to nationalism after World War I. They saw nationalism as a vital, yet dangerous, force which demanded a departure from the exclusive preoccupation with sovereignty characteristic of pre-World War I

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<sup>294</sup> Official note from Zhou Enlai to A. Vyshinsky, Minister of Foreign Affairs of the U.S.S.R., 14 February 1950, in van Walt van Praag, *supra*, at 192, n. 27.

<sup>295</sup> Cf. Discussion below on article 73 and “non-self-governing territories”, in Chapter Five.

<sup>296</sup> The Tibetans expelled all Chinese forces from Tibet in 1912, and then proclaimed the independence of Tibet.

<sup>297</sup> In the cases of Austria, Hungary, Bulgaria, and Turkey.

<sup>298</sup> In the cases of Albania, Lithuania, Latvia, Estonia, and Iraq.

<sup>299</sup> As in the cases of Poland, Czechoslovakia, Romania, Yugoslavia, Greece, and Danzig.

<sup>300</sup> Musgrave, *supra*, at 46.

positivism. Yet, precisely because of its explosive force, nationalism was seen as requiring the development of unprecedentedly autonomous and experimental international legal theory, doctrines, and institutions.”<sup>301</sup> [footnotes omitted]

The League of Nations guaranteed all the rights of the minorities enumerated in the treaties, which included equality before the law, freedom of religion, and the right to life and liberty, without distinction as to birth, nationality, language, race, or religion. However, the League only guaranteed the rights of persons belonging to “racial, religious, or linguistic” minorities.<sup>302</sup> Each State was required to give preference to all minority treaty obligations, if there was ever any conflict with national laws. Minorities could also submit petitions to the League Council; however, they did not have standing, as such, before the Council. Their petition merely brought the matter to the attention of the Council, which could then decide whether or not to pursue the matter. In addition, the minorities treaties conferred rights on the individual members of a minority group, not on the group as such. The Council allowed a group to present a petition, but the Council’s decision was intended to protect the individual rights of the members of that group.

All of these features combined, led to dissatisfaction amongst both the minorities and those entrusted with the protection of their rights. The states with obligations to protect minorities felt that this was a threat to their internal stability, an intrusion on their sovereignty, and thus in violation of the principle of equality of states. They regularly mistreated their minorities, leading to 204 petitions by minorities to the League Council between 1930-1931.<sup>303</sup> In 1935, the Permanent Court of Justice issued two opinions that Berman argues illustrated a lack of attention to the “dilemma inherent in modernist jurisprudence”, caused by the tension between the desire to allow formerly repressed “nationalities” to assert their identity, and the need for “an unprecedented international legal authority.”<sup>304</sup> In the *Minority Schools in Albania Case*,<sup>305</sup> the majority of the Court held that Albania’s Declaration of its

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<sup>301</sup> Berman, “Nationalist Desire”, supra, at 354-355.

<sup>302</sup> Musgrave, supra, at 44.

<sup>303</sup> Ibid, at 55.

<sup>304</sup> Berman, “Nationalist Desire”, supra, at 375.

<sup>305</sup> 1935 P.C.I.J. (ser. A/B) No. 64.

commitment to protect its minorities, made as a condition of acceptance into the League of Nations, required it “to ensure a genuine and effective equality, not merely a formal equality”,<sup>306</sup> to all of its citizens. This meant that a 1933 Albanian constitutional amendment, which would have abolished all private schools, was in violation of the need “to ensure for the minority elements suitable means for the preservation of their racial peculiarities, their traditions, and their national characteristics ... [T]here would be no true equality between a majority and a minority if the latter were deprived of its own institutions, and were consequently compelled to renounce that which constitutes the very essence of its being a minority”.<sup>307</sup> Most significantly, the Court recognised that the subjective “importance to the State” of creating a formally equal system of schooling (ie. no special treatment for minorities), was not as decisive a factor as the subjective importance to the minority of maintaining their own schools, which the Court itself would adjudicate.<sup>308</sup>

By contrast, the same Court in the same year held that a new Danzig penal provision that relied in part on the concept of “sound popular feeling (*nach gesundem Volksempfinden*)”,<sup>309</sup> was too subjective and gave too much authority to the “prejudiced dictates of the Nazi *Volk*”<sup>310</sup>. The Court felt that “deference to the *Volk's* views would rob the judge of the necessary exercise of sound judicial discretion”,<sup>311</sup> even though in the *Minority Schools in Albania Case* they had argued that deference to the minorities’ views was essential and did not in any way interfere with judicial discretion. Clearly, the subjective view by the Court of the political leanings of the particular group in question was more

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<sup>306</sup> Ibid, at 15.

<sup>307</sup> Ibid, at 17.

<sup>308</sup> Berman, “Nationalist Desire”, supra, at 371.

<sup>309</sup> Article 1, *Creation of law by the application of penal laws by analogy decree*, quoted in 1935 P.C.I.J. (ser. A/B) No. 65, at 45. The full text of the article is: “Any person who commits an act which the law declares to be punishable or which is deserving of penalty according to the fundamental conceptions of a penal law and sound popular feeling shall be punished. If there is no penal law directly covering an act, it shall be punished under the law of which the fundamental conception applies most nearly to the said act.” (cf. Berman, “Nationalist Desire”, supra, at 373 & especially at 374, n. 84, where he discusses the similarities between this law and certain aspects of the subsequent Nuremberg Charter, which were challenged, unsuccessfully, on the very grounds raised by the PCIJ in this decision.)

<sup>310</sup> Berman, “Nationalist Desire”, supra, at 374.

<sup>311</sup> Ibid.

important in the latter case, rather than the Court's claim to be acting "objectively".<sup>312</sup> Berman suggests that the Court could only conceive of "nationalist passion" as either "simply irrational", or as "a source of the authentic, the unique, the original", depending on the circumstances, and on their particular political persuasions, and provided no real guidance to the international community at the time as to how to deal even-handedly and consistently with the rights of *all* minority groups to "ensure ... suitable means for the preservation of their racial peculiarities, their traditions, and their national characteristics".<sup>313</sup>

The minorities subject to the treaty protection regime ultimately resented the limitations on their status under international law, which limited their effective recourse to the Council, and by 1938-1939, when the Council received only four petitions, the regime of minority protection had all but collapsed, and not just in the context of the rise of Nazism during these same years. The worst example of the failure of the Minority Protection Regime was of course Nazi Germany's abhorrent treatment and persecution of Jews and other minorities, which was only halted when Germany was finally defeated by the Allies in 1945. However, as is well-documented elsewhere, the primary motivation of the Allies in entering the war was not to protect victimised German minorities, but rather to prevent Germany from conquering any further territory.

#### *3.4 The League of Nations and the Mandate system*

In 1931, after a series of Imperial Conferences involving delegates from both the British Government and from Britain's various independent "Dominions", the Parliament of the United Kingdom passed the *Statute of Westminster*,<sup>314</sup> which provided greater autonomy to the former British colonies of Australia, Canada, Ireland, Newfoundland, New Zealand, and South Africa, such that Britain's *Colonial Laws Validity Act* of 1865 would not apply to laws made in these territories, from the date of entry into force

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<sup>312</sup> Note also the decision in the *Rights of Minorities in Upper Silesia (Minority Schools) Case* of 1928, where the Permanent Court took the view that identity could not be "objectively" determined: 1928 P.C.I.J. (ser. A) (Judgments) No. 12, in Berman, "Nationalist Desire", *supra*, at 379, n.92.

<sup>313</sup> *Minority Schools in Albania Case*, *supra*.

of the Statute. It also abolished appeals to the British Privy Council from certain of these territories, and made some other legal adjustments in relation to regulation-making and defence issues.

However, the right of all “nations” to self-determination played itself out quite differently when it came to the peoples living in the still-dependent colonies of the European powers. With respect to the right of peoples living in German colonies in Africa, Lloyd George had made the following statement in 1917: “When we come to settle who must be the future trustees of those uncivilised lands, we must take into account the sentiments of the peoples themselves”.<sup>315</sup> A year later, he pointed out: “The natives live in their various tribal organisations under chiefs and councils who are competent to consult and speak for their tribes and thus represent their wishes and interests in regard to their disposal. The general principle of self-determination is, therefore, as applicable in their cases as in those of European occupied territories.”<sup>316</sup> However, when the Allies sat down at the Versailles Peace Conference to implement this “general principle”, the peoples in the German colonies were never actually consulted at all, just handed over to the newly formed League of Nations, because they “were supposedly unable to stand by themselves.”<sup>317</sup> No reference was ever made at this Conference to the rights of the people in other European colonies, such as those under British control at the time. Nor was Britain prepared to address the concerns of the Irish people, despite supporting the rights of many other ethnic minorities in Europe.<sup>318</sup> Wilson later explained such hypocrisy away by saying: “We were sitting there with the pieces of the Austro-Hungarian Empire in our hands ... We were sitting there with various dispersed assets of the German Empire in our hands ... but we did not have our own dispersed assets in our hands

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<sup>314</sup> 52 and 53 Vict. c. 63.

<sup>315</sup> Speech made in Glasgow in June 1917, one month after Wilson’s speech, quoted in Umozurike, *supra*, at 17.

<sup>316</sup> Statement made in January 1918, quoted in Umozurike, *ibid*.

<sup>317</sup> Umozurike, *ibid*, at 22. This is a recurring theme across the globe. For example, cf. *Clarity Act* (Bill C-20, 2000), Canadian Federal Government, which purports to determine the basis upon which the province of Quebec may secede from the rest of Canada.

<sup>318</sup> As noted by one commentator: “The most ardent British advocate of the principle of self-determination found himself, sooner or later, in a false position. However fervid might be our indignation regarding Italian claims to Dalmatia and the Dodecanese it could be cooled by a reference, not to Cyprus only, but to Ireland, Egypt, and India. We had accepted a system for others which, when it came to practice, we should refuse to apply to ourselves.”: H. Nicolson, *Peace making 1919*, (London, 1933) at 193, quoted in Umozurike, *supra*, at 21.

... and therefore we had often, with whatever regret, to turn away from questions that ought some day to be discussed and settled and upon which the opinion of the world ought to be brought to bear.<sup>319</sup>

Wilson remained concerned that unsatisfactorily resolved claims to self-determination would jeopardise the peace that was to be at the heart of the new League of Nations. Thus, he suggested the following wording for article 10 of the League's Covenant, which was intended to promote the stability of the League:

“The Contracting Powers unite in guaranteeing to each other political independence and territorial integrity; but it is understood between them that such territorial readjustments, if any, as may in the future become necessary *by reason of changes in present racial conditions and aspirations or present social and political relationships, pursuant to the principle of self-determination*, and also such territorial readjustments as may in the judgment of three fourths of the Delegates be *demanded by the welfare and manifest interest of the peoples concerned, may be effected, if agreeable to those peoples*; and that territorial changes may in equity involve material compensation. The Contracting Powers accept without reservation the principle that the peace of the world is superior in importance to every question of political jurisdiction or boundary.”<sup>320</sup> [*my emphasis*]

Ultimately, this attempt to suggest that League members remain receptive to legitimate claims to self-determination in the future was not supported,<sup>321</sup> and the term “self-determination” was not even included in the League's Covenant. However, Wilson continued to advocate a “right of revolution” which he said was “sacred”,<sup>322</sup> despite also insisting that the League would have the final decision on any such claims.<sup>323</sup>

The newly formed Soviet Union took advantage of this obvious inconsistency, to champion the right of all colonised peoples to “self-determination”, as part of Lenin's programme of socialist internationalism. By this it meant that colonised peoples should be equally free to reject Western

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<sup>319</sup> Presidential Address of September 4, 1919, quoted in M. Pomerance, “The United States and Self-Determination: Perspectives on the Wilsonian Conception,” (1976) 70 Am. J. Int. L., 1 at 9 [hereinafter Pomerance, “The US and Self-Determination”].

<sup>320</sup> D. Hunter Miller, *The Drafting of the Covenant*, Vol. 2 (New York: Putnam's, 1928) at 12-13, in Pomerance, “The US and Self-Determination”, supra, at 7.

<sup>321</sup> It was especially opposed by Britain: Cassese, “Self-Determination”, supra, at 23.

<sup>322</sup> R. Stannard Baker & W.E. Dodd, eds., *The Public Papers of Woodrow Wilson*, vol. 5, (New York and London: Harper, 1925-1927) at 632, in Pomerance, “The US and Self-Determination”, supra, at 7.

democracy and capitalism, in favour of socialist or communist-style governance in an independent state.<sup>324</sup> In fact, Lenin later wrote, "the right to self-determination cannot and must not serve as an obstacle to the exercise by the working-class of its right to dictatorship".<sup>325</sup> However, the definition of the right to self-determination in the socialist context was narrowed progressively, as successive regimes tried to weaken any threats to the "internationalisation"<sup>326</sup> of socialism, and to their own form of "nation-building". Stalin only advocated support for "the principle of self-determination where it is directed at or against feudal, capitalist and imperialist states."<sup>327</sup> As happened with the French, the soviet socialists realised that a broad application of the principle of self-determination would undermine their own new-found liberty and authority too much.

Nevertheless, all members of the newly-formed League of Nations managed to agree that some attention should be paid to colonial claims for independence. Thus, the principle of self-determination was associated with decolonisation of one kind or another, from its introduction into global politics. The Wilsonian interpretation of it provided the basis for the League of Nations' Mandate and Trustee system, which determined that the Mandated Powers had an obligation - albeit a paternalistic one - to protect "the well-being and development" of the peoples in the Mandated territories, and to tutor them

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<sup>323</sup> Stannard Baker & Dodd, *ibid*, at 617, in Pomerance, *ibid*, at 7.

<sup>324</sup> It is significant that such a position was being advocated only a year after the *Treaty of Berlin* (*supra*) was concluded. Socialism's support for a right to self-determination was as much an attack on European imperialism as on the oppression of the working class within Europe. While the early socialists were not exactly concerned about the rights of African peoples *per se*, they were eager to encourage the spread of communism, and saw the disenfranchised Africans as potentially receptive to the idea of proletariat-style revolution and the overthrow of Western capitalist/imperialist colonial regimes. The philosophy they espoused was that all peoples should be free to choose a communist or socialist style of governance if that is what they wanted. In fact, as Nelson Mandela observed in his autobiography, communism appealed to a great many Africans, because of the analogies that could be drawn between the oppressed working classes and the oppressed African people: N. Mandela, *Long Walk to Freedom*, 1st ed., (Boston: Little, Brown, 1994) at 113.

<sup>325</sup> I.V. Lenin, *The Right of Nations to Self-Determination*, (New York: International Publishers, 1951) in Simpson, *supra*, at 27.

<sup>326</sup> The original idea of Marx was that communism would "transcend national boundaries and attitudes", facilitating what he described as "internationalism." He was opposed to nationalism and self-determination, because he believed they would set up obstacles in the way of the "natural" progress of internationalization. However, Lenin and Stalin both drew upon ideas of nationalism and self-determination to facilitate the spread of communism, as a somewhat more pragmatic application of the principle of internationalism. But they did not support a right to self-determination *away* from communist principles. The only autonomy allowed, once a nation had joined the socialist "fold", was within the confines of a multinational State, such as the USSR: Simpson, *supra*, at 26-28.

in political advancement, as part of the "sacred trust of civilisation", since these peoples were "not yet able to stand by themselves under the strenuous conditions of the modern world".<sup>328</sup>

However, Wilson's attitude towards decolonisation was far less generous than Lenin's, requiring that the colonial power's interests be given equal weight:

"A free, open-minded, and absolutely impartial adjustment of all colonial claims, based upon a strict observance of the principle that in determining all such questions of sovereignty *the interests of the population concerned must have equal weight with the equitable claims of the government whose title is to be determined.*"<sup>329</sup> [my emphasis]

One of the more controversial Mandates of this era was the British Palestine Mandate.<sup>330</sup> Prior to the war, the Ottoman Empire had controlled all of what came to form this Mandate, which consisted of the independent "Sanjak" (district) of Jerusalem and the Sanjaks of Balka (Nablus) and Acre, which all formed part of the vilayet of Beirut.<sup>331</sup> In addition, an area known as "Transjordan", which was east of the Jordan River, belonged to the Ottoman vilayet of Syria.<sup>332</sup> During the war, Great Britain had sought the support of the Arabs living in all Ottoman-held territories, promising to "support the independence of the Arabs in all the regions within the limits demanded by the Sherif of Mecca".<sup>333</sup> After Britain had conquered Palestine, British Foreign Secretary Lord Balfour sent what became known as the "Balfour Declaration" to Baron Rothschild, informing the World Zionist Organization that Britain wished to establish a homeland for Jewish people in that territory, which would not

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<sup>327</sup> J. Stalin, *Marxism and the Colonial Question*, (New York: International Publishers), in Simpson, *ibid*, at 27.

<sup>328</sup> Article 22, *Covenant of the League of Nations*. Note Ofuatey-Kodjoe's comment that this article "is a legal purist's nightmare, and unsurprisingly, it has attracted a variety of contradictory interpretations." (*supra*, at 88).

<sup>329</sup> W. Wilson, *Public Papers: War and Peace*, (1927) at 155-62, in L.S. Sunga, *supra*, at 27.

<sup>330</sup> Note that it is beyond the scope of this paper to provide an in-depth analysis of the controversies surrounding this Mandate and its legacy. For some guidance, see generally: W.T. Mallison & S.V. Mallison, *The Palestine Problem in International Law and World Order*, (Essex: Longman Group, 1986) [hereinafter: Mallison, "Palestine Problem"]; H. Cattam, *Palestine and International Law: The Legal Aspects of the Arab-Israeli Conflict*, (London: Longman Group, 1973); and Becker, *supra*.

<sup>331</sup> De Waart, *supra*, at 101, n.13.

<sup>332</sup> *Ibid*, n. 14.

<sup>333</sup> British Government, *Correspondence between Sir Henry McMahon and Sherif Hussain of Mecca*, Cmd 5957 (1939), 50, in Cassese, "Self-Determination", *supra*, at 232.

“prejudice the civil and religious rights of existing non-Jewish communities”.<sup>334</sup> At the same time, England and France negotiated a declaration supporting “the complete and definite emancipation of the [Arab] peoples and the establishment of national governments and administration deriving their authority from the initiative and free choice of the indigenous populations”.<sup>335</sup> However, Lord Balfour later wrote a memorandum in reference to this declaration, outlining Britain’s thoroughly contradictory policy towards the principle of self-determination:

“Palestine should be excluded from the terms of reference because the Powers [have] committed themselves to the Zionist programme, which inevitably excluded numerical self-determination. Palestine present[s] a unique situation. We are dealing not with the wishes of an existing community but are consciously seeking to re-constitute a new community and definitely building for a numerical majority in the future.”<sup>336</sup>

Subsequently, the gist of the Balfour Declaration was included in the 1922 Mandate for British Palestine, in preference to the various documents that supported Arab independence. Instead, articles 15, 16 and 18 of the Mandate granted a very limited amount of recognition to the rights of the peoples of the whole territory to freedom of conscience and free exercise of worship, supervision over religious and eleesymony bodies of all faiths, and the prohibition of discrimination, respectively.<sup>337</sup> Not surprisingly, however, as the number of Jewish immigrants increased to their newly established “homeland”, outbreaks of violence between the two groups escalated and in 1936 the British formed the Palestine Royal Commission, which recommended that Palestine be partitioned into an Arab state and a Jewish state. Neither group supported this idea, and to this day they are still negotiating an acceptable arrangement to “share” the territory amicably between them.<sup>338</sup> The Jews believed that the right to self-determination of the Palestinians had been satisfied in 1921, by the creation of Transjordan, which comprised approximately three quarters of the total territory of the Palestine

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<sup>334</sup> Cassese, *ibid*, at 232.

<sup>335</sup> *Ibid*, at 233.

<sup>336</sup> British Government, Public Records Office, Foreign Office no. 371/4183, 1919, in Cassese, “Self-Determination”, *supra*, at 233.

<sup>337</sup> Cf. De Waart, *supra*, at 101.

Mandate and went on to become the independent state of Jordan in 1946.<sup>339</sup> However, the Arabs living in the remaining territory of the Mandate, such as those living on the west bank of the Jordan River, were still left without a choice as to their sovereign. As Antonio Cassese rightly points out, "The legacy of Great Britain's twin obligations in Palestine has been one of permanent strife."<sup>340</sup>

### 3.5 *The demise of the League of Nations*

The outbreak of the Second World War brought an abrupt end to the League of Nations and all its attendant systems of "Trusteeship" and "protection" of "dependent" peoples. All attention was focused once more on Europe and on the right to self-determination of those whom the Nazis had conquered. The principle of self-determination was at the forefront in the *Atlantic Charter* of 1942, which enunciated the fundamental principles of American and British policy which were to apply once the war was over. The Charter was also signed by twenty-two allied governments, who all declared:

"First, their countries seek no aggrandisement, territorial or other; Second, they desire to see no territorial changes that do not accord with the freely expressed wishes of the peoples concerned; Third, they respect the right of all peoples to choose the form of government under which they live, and they wish to see sovereign rights and self-government restored to those who have been forcibly deprived of them ..."<sup>341</sup>

However, British Prime Minister Winston Churchill had earlier made it clear that he didn't see the *Atlantic Charter* as applying to British colonies, only to the "states and nations of Europe now under the Nazi yoke".<sup>342</sup> Once again, the finest rhetoric was designed to protect the rights of those peoples whom the war's victors considered "civilised", while the rest of the so-called "uncivilised" world was again at the mercy of the vagaries of war and the political and economic concerns of the ultimate

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<sup>338</sup> For example, cf. R. Dunn, "Peres and Arafat reach truce amid spiralling violence", *Sydney Morning Herald*, online: <<http://smh.com.au/news/specials/intl/mideast/index.html>>.

<sup>339</sup> Cassese, "Self-Determination", *supra*, at 236.

<sup>340</sup> *Ibid*, at 233. [*footnote omitted*]. Cf. Discussions in Chapters Four, Five and Six, below, on the longstanding effects of this legacy.

<sup>341</sup> Issued as a Joint Declaration of Eight Points on 14 August 1941, later reissued as the annex to the Declaration by the United Nations of 1 January 1942, 204 L.N.T.S. 382, in Sunga, *supra*, at 39.

<sup>342</sup> Sunga, *supra*, at 95-96.

victors.<sup>343</sup> The “right of *all* peoples to choose the form of government under which they live” was a long way from being realised.

### 3.6 Conclusions

Some may argue that the principle of self-determination had reached Bassiouni’s “*Declarative Stage*”,<sup>344</sup> when the terminology of the Atlantic Charter was supported by so many different nations. The “*Declarative Stage*” involves the “declaration of certain identifiable interests or rights in an international document or instrument.”<sup>345</sup> However, many of those who supported the Atlantic Charter envisaged a very limited application of the principle, as Winston Churchill’s comments demonstrate, so that most colonised peoples would be left out of the Charter’s vision. In addition, the term “self-determination” was not endorsed in the earlier Covenant of the League of Nations and, as the previous analysis demonstrates, the practical application of the principle between the wars was sporadic, at best. Thus, the principle of self-determination could not accurately be characterised as an “interest or right” that was capable of useful definition by 1942. It was merely reaching the culmination of its “*Enunciative Stage*”.

So, what conclusions can be drawn from the emergence of this principle in world affairs in the early twentieth century? What “internationally perceived shared values” could we say that it represented? What forms of “liberty, equality, and fraternity” had proven acceptable to the international community to this point?

At the outset, it must be said that there are no easy answers to these questions. The principle of self-determination was then, just as it is now, a very mixed bag of ideas. Nevertheless, some conclusions

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<sup>343</sup> Cf. B.S. Chimni, who points to what he describes as the “barbarian/civilized dichotomy which characterize[s] imperialist international law ... [and suggests] that the western powers ‘could go ahead [comfortably] and kill, bomb, and destroy, since what would be being attacked was really negligible, brittle with no relationship to books, ideas, cultures, and no relation either ... to real people’. ... In brief, the conclusion suggests itself that like in the colonial period, the laws of war are seen as imposing few constraints where the non-European world is concerned.”: B.S. Chimni, “Marxism and International Law: A Contemporary Analysis”, 6 February 1999, *Economic and Political Weekly*, 337 at 345.

<sup>344</sup> Bassiouni, “Proscribing Function”, *supra*, at 181.

<sup>345</sup> *Ibid.*

can be drawn as to the major points of agreement and disagreement prior to the conclusion of World War II, when the principle was receiving its final “polish”, before becoming an “identifiable interest or right” that was included in an international document and given widespread support.<sup>346</sup>

As we have seen, the concepts of free will, equality, and “social contract” played an important part in the evolution of the principle, as Dr. Brownlie pointed out. However, the application of these concepts was always qualified in some way, to the detriment of a particular group, throughout human history. Free will and equality are actually irreconcilable ideals in the first place, if they are taken to their extremes. An individual’s perception of her/his right to complete freedom may interfere with the right of another individual to equal treatment, and vice versa. Therefore these concepts must of necessity be qualified in some way, if the society is not to be torn apart by their competing claims. This is why the “social contract”, or the concept of “fraternity” are intended to provide the balance; theoretically, individual deference to the “greatest good” of a society provides its own reward, as the term “greatest good” implies. But who has the right to decide what the “greatest good” is for a particular community? Do *all* members of *every* society have the right to determine what the “greatest good” would be for their particular society? Or does some external, “superior” entity have the right to determine what is best for certain societies, after having determined that those societies have not “evolved” sufficiently to be able to make such a determination?

### 3.6.1 “Free will”

The analysis throughout this chapter demonstrates clearly that the right to “liberty”, or free will, has generally only been granted to peoples who were considered sufficiently “civilised” or “developed”, in the eyes of those who made the rules on how one comes to be considered “civilised” or “developed”. The latter’s ideas flow from the theory that the ability to exercise true freedom is something that one

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<sup>346</sup> As I will be discussing in more detail below, I am treating the inclusion of the principle of self-determination in the 1945 UN Charter as its “*Declarative Stage*”.

acquires, and only if one attains the appropriate “state of mind or character”.<sup>347</sup> This view presupposes that human beings do not have a “natural ability” to determine what is best for themselves, contrary to the views of philosophers such as Rousseau and Descartes,<sup>348</sup> and “natural law” theorists such as Erasmus, Grotius, and Las Casas.<sup>349</sup> If one is seen to be driven merely by instinct (the “primitive”), as opposed to “reason”, then the prevailing view has been that more “rational” beings are naturally entitled to control and repress these “primitive” tendencies. This argument would be sustainable if there were some objective standard of “reason”, which took into account a representative range of views on the subject. For example, to take a more modern example, how was dropping a nuclear bomb on a densely-populated city in 1945 any less “barbaric” than using a “primitive” weapon to defend one’s fellow citizens? Also by way of illustration, consider that some of the original “centres of human civilisation” were in Arab centres such as Persia and Mesopotamia, yet the Arab inhabitants of the Middle East have largely been treated as “uncivilised” since Christianity first asserted its dominance over Europe. This is all the more ironic, given that Jesus Christ was actually from the Middle East, not Europe.

Some colonisers, such as Vitoria and Las Casas, were able to see that the natives of the Americas, Africa, Asia, and Oceania were people of reason. In 1917, Lloyd George had tried to argue that the “natives [in German colonies in Africa] live in their various tribal organisations under chiefs and councils who are competent to consult and speak for their tribes”.<sup>350</sup> However, for the most part, the European world failed to comprehend the intricacies and complexities of these societies, which had evolved without reference to the same narrow perceptions and interests as those held by the “Western” world, and in vastly different physical climates. Only in the latter part of the twentieth century have

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<sup>347</sup> That is, the “acquired ability” to live as one ought, advocated by Plato and Locke, et al. (cf. Discussion in Chapter One (Introduction), and Adler, *supra*, at 250).

<sup>348</sup> Cf. Discussion above in Chapter One (Introduction) and Adler, *supra*, at 592-3.

<sup>349</sup> Cf. Discussion above in Chapter One (Introduction), *supra*.

<sup>350</sup> Sunga, *supra*, at 24.

the majority of anthropologists and others been able to appreciate the high level of organisation of many of these societies, which could not have survived if the people concerned lacked reason.<sup>351</sup>

Yet the categorisation of groups as more or less “civilised”, in the eyes of European powers, has been highly influential in terms of the evolution of the principle of self-determination. Historically, the right to exercise free will has only been granted to the “civilised”. Those considered “uncivilised” have not even been consulted on issues of paramount importance, such as the Spanish mistreatment of the indigenous people of the Americas,<sup>352</sup> the carving of Africa into “nations” that conformed mostly to European economic interests,<sup>353</sup> the creation of a “Jewish homeland” in the midst of an Arab population,<sup>354</sup> and the carving of traditional ethnic Albanian territory into several entities after World War I, to suit Russia’s national interests.<sup>355</sup>

More recently, “nationalism” has been linked to the “primitive”, and thus the use of plebiscites to ascertain the views of “nationalities” after World War I was very token. Instead, those who had physical control of the various territories divided them up according to their needs and interests, including their need to break up some of the larger “nationalities” in an attempt to keep them from challenging their power in the new Europe.<sup>356</sup> As the increasing mistreatment of minority groups throughout Europe between the wars demonstrates, the right to “free will” of minorities was also rejected by many States, in practice.

This need of those in power, to control humanity’s allegedly “primitive” urges, has been reinforced by the growing dominance of “positive” theories on what “law” is.<sup>357</sup> Positivists such as Hobbes<sup>358</sup> and

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<sup>351</sup> For example, cf. L.I. Rigney, *Internationalisation of an Indigenous Anti-Colonial Cultural Critique of Research Methodologies: a guide to indigenist research methodology and its principles* (Adelaide, Australia: Flinders University of South Australia, 1997).

<sup>352</sup> Council of the Indies of 1550.

<sup>353</sup> Berlin Conference of 1885.

<sup>354</sup> British Palestine Mandate of 1922.

<sup>355</sup> Florence Protocol of 1913.

<sup>356</sup> For example, no plebiscite was held in Austria, as the Allies did not want an “Anschluss” at this point: Beigbender, *supra*, at 81.

<sup>357</sup> Cf. Discussion in Chapter One (Introduction).

<sup>358</sup> *Ibid.*

Kelsen<sup>359</sup> start from the assumption that human nature is inherently “bad” and must be controlled by “stable” structures and procedures. In international law terms, this has translated into an emphasis on sovereignty, rather than rights, and an insistence in some quarters that “law” is an entirely “objective” form of adjudicating disputes, therefore treaties must also be honoured no matter whether there was equal bargaining power on both sides during the treaty negotiations. Thus we have the doctrine of *uti possidetis*, and the Berlin Conference of 1885, purporting to try and create “stability” in regions where the original inhabitants had been exploited and mistreated by those who now claimed to be acting in their “best interests”. The denial of the wishes of the Swedish minority in the *Aaland Islands Case* in 1921 is another example of a positivist concern to avoid any future disputes as to the “natural” borders of a recently-formed State, by insisting that a State is “a territorial entity”, not an organisation of people consenting to live together as a unit.<sup>360</sup>

The tension between law’s “subjectivity” and “objectivity” has been the focus of the modern Critical Legal Studies (CLS) movement, and thus I will not attempt to address it in any detail here. The CLS movement is generally highly critical of the following assumptions about “law”, which have supported what they describe as the “myth of legal reasoning”: (i) “legal reasoning” is a purely objective process, (ii) carried out by apolitical, impartial arbiters, (iii) using quasi-scientific methods, (iv) which can be learned by anyone with sufficient “ability” and appropriate training, no matter what their background, (v) in order to determine the “truth” and make “correct” decisions at all times and in all cases.<sup>361</sup> Instead, CLS scholars emphasise that law is made by people, not robots, and thus can never be separated entirely from the intrinsic complexities of human cognitive behaviour and experience. In their view, law “provides only a wide and conflicting variety of stylised rationalizations from which courts pick and choose”, depending on the particular judge’s “social and political judgments”.<sup>362</sup> This struggle to rationalise and “objectify” such subjective judgments is apparent in the 1935 Permanent

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<sup>359</sup> H. Kelsen, *General Theory of Norms*, trans. by M. Hartney, (Oxford: Clarendon Press, 1991).

<sup>360</sup> Cf. Discussion in Chapter One (Introduction).

<sup>361</sup> See generally, eg. D. Kairys, ed., *The Politics of Law, A Progressive Critique*, (New York: Pantheon Books, 1982).

Court of International Justice decision in the *Danzig Legislative Decrees Case*, where the Court argued that “sound popular feeling” could not be determined subjectively by the group in question, even though in the *Minority Schools in Albania Case* of the same year, the same Court had argued that the “essence” of a minority group could only be determined subjectively by that particular group.<sup>363</sup> Critical legal scholars do not deny that subjectivity should have a role in determining “legal” issues, but they resent positivism’s insistence on trying to deny that any such subjectivity could be involved in such a “stable” institution as “the Law”.

The rise of Nazism relied on similar “myths” about the objective superiority of a particular race of humans and their institutions, and thus their right to control and even destroy “inferior” beings. It is interesting to note that Dr. Sigmund Freud’s psychological theories on the “undesirable” innate qualities of humans and the need for strong external controls<sup>364</sup> were being promulgated during the interwar years, thereby reinforcing many of the tenets of Nazism. As another German psychoanalyst, Dr. Karen Horney, pointed out in the late 1940’s:

“[T]here is a wide divergence of opinion about the desirability or necessity of a disciplinary inner control system for the sake of insuring moral conduct. ... Broadly speaking, there are three major concepts of the goal of morality which rest upon these different interpretations of essential human nature. Superimposed checks and controls cannot be relinquished by anyone who believes - in whatever terms - that man is by nature sinful or ridden by primitive instincts (Freud). The goal of morality must then be the taming or overcoming of the *status naturae* and not its development.

The goal must be different for those who believe that there is inherent in human nature both something essentially “good” and something “bad”, sinful, or destructive. It will center upon the insurance of the eventual victory of the inherent good, as refined, directed, or reinforced by such elements as faith, reason, will, or grace - in accordance with the particular dominating religious or ethical concept. Here the emphasis is not exclusively upon combatting and suppressing evil, since there is also a positive program. Yet the positive program rests either upon supernatural aids of some sort or upon a strenuous ideal of reason or will, which in itself suggests the use of prohibitive and checking inner dictates.

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<sup>362</sup> Kairys, *ibid*, at 3.

<sup>363</sup> Cf. Discussion in Chapter One (Introduction).

<sup>364</sup> Freud’s basic premise was that the human psyche was comprised of three “identities”: the “id”, “ego” and “superego”. In his view, the “superego” was the positive moralising force in the human being, which drew on societal values to control the “instinctive” and therefore undesirable urges of the “id”, to create a healthy “ego” (self-identity).

Lastly, the problem of morality is again different when we believe that inherent in man are evolutionary constructive forces, which urge him to realize his given potentialities. This belief does not mean that man is essentially good - which would presuppose a given knowledge of what is good or bad. It means that man, by his very nature and of his own accord, strives toward self-realisation, and that his set of values evolves from such striving. Apparently he cannot, for example, develop his full human potentialities unless he is truthful to himself; unless he is active and productive; unless he relates himself to others in the spirit of mutuality. ... He can grow, in the true sense, only if he assumes responsibility for himself. ...

You need not, and in fact cannot, teach an acorn to grow into an oak tree, but when given a chance, its intrinsic potentialities will develop. Similarly, the human individual, given a chance, tends to develop his particular human potentialities.”<sup>365</sup>

[sic]

Horney was initially a strong advocate of Freud's theories, and she taught at the Berlin Psychoanalytic Institute from 1918 to 1932.<sup>366</sup> However, she came to question the allegedly “positive” influence of the “superego”, which was supposed to help a person conform to the values of the society, when that society consistently undervalued and demeaned half of its membership, namely women.<sup>367</sup> The same challenge could be taken up by those judged to be “uncivilised” by the “Western world”. Notably, Horney's theories were never accepted by the psychoanalytic community, and were instead taken up by the “behavioural” school of psychology.<sup>368</sup>

However, even Wilson and Lenin believed that a society had to reach a certain level of “development”, before it should be allowed to exercise its free will, thus assuming that all societies evolved from a more “primitive” model than each of these statesmen advocated. Of course, their respective views were completely contradictory. Wilson attempted to curtail the freedoms of *non*-democratic communities, by denying them any right to self-determination or membership in the League of Nations, while Lenin believed that true freedom could *only* be expressed in societies that rejected democracy and capitalism - only “enlightened” proletariats were sufficiently capable of rejecting capitalism and

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<sup>365</sup> K. Horney, *Neurosis and Human Growth: The Struggle Toward Self-Realization*, (New York: W.W. Norton & Company, 1950) at 14-15, 17.

<sup>366</sup> Horney, *ibid*, rear cover notes.

<sup>367</sup> M. Westkott, *The Feminist Legacy of Karen Horney*, (New Haven, Massachusetts: Yale University Press, 1986) at 3.

<sup>368</sup> *Ibid*.

forming effective societies. Neither of these politicians accepted that self-determination should be granted to communities that were not open to their political views.

In much the same way, even natural law theories turned into a rationale for denying freedom to “primitive” peoples, as discussed above in the context of Vitoria’s views on “Indian” rights to self-determination.<sup>369</sup> In addition, de Vattel argued that more “civilised” nations had a “natural” right to claim land that was not being exploited adequately.<sup>370</sup> This twist came about through a combination of the influence of the acquired freedom of self-perfection and the circumstantial freedom of self-realisation on the “natural” view of freedom - because “uncivilised” societies could not defend or “cultivate” their territory adequately, or they gave it away (even though they may not have been aware of the inequity of the trade-off), then they “lost” their natural right to freedom.

In recent years, even some disadvantaged groups have tried to distinguish themselves from other groups or individuals whose identities and culture have not survived as well, for whatever reason, as happened in Latin America after independence.<sup>371</sup> This is the least defensible aspect of the “natural” law view that the “authentic”/ “primitive” is “good”. It presupposes that the “authentic” identity of a group means: completely unchanged by historical circumstances. For example, there are arguments that the “traditional” right of certain Aboriginal groups in Australia to hunt certain animals, could never accommodate the right of these people to use guns for hunting, instead of the “traditional” weapons. It has also manifested itself in arguments as to what percentage of “blood” one must have, before one can claim membership of certain indigenous groups in Canada, the US, and Australia. This approach merely replicates the same discriminatory systems that have disadvantaged these groups in the first place, by trying to insist that identity with a group is necessarily “objective”, not subjective.

### 3.6.2 *Equality*

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<sup>369</sup> Cf. Discussion in Chapter One (Introduction).

<sup>370</sup> Ibid.

<sup>371</sup> Cf. Discussion in Chapter One (Introduction).

The right to “equality” has also been qualified by reference to subjective criteria such as social status (in the case of Aristotle, slaves, and women), one’s choice of political institutions (democratic versus socialist), and one’s level of “civilisation”, or “reason”. In addition, the right to “equal” treatment was heavily influenced by one’s objective ability to defend one’s culture and territory, even to the extent of the “unequal” treatment of those who may have wished to stay within German territories after World War I but were not consulted. In this regard, note also the attitude of Lord Balfour in relation to the issue of “equality” in Arab-dominated territories: “We are not dealing with the wishes of an existing community but are consciously seeking to re-constitute a new community and definitely building for a *numerical majority* [of Jews] in the future.”<sup>372</sup> [*my emphasis*] In other words, Lord Balfour perceived that the wishes of the future numerical majority should take precedence over the views of any minority group, in order to achieve the right “balance of power” in the new “Jewish homeland”.

Both democracy and socialism are based on ideals of “equality”, although of course they manifest themselves in vastly different institutional structures and methods of achieving “equality”. Even within democracies, many have argued that not all people are treated equally, even if there is a formal equality. Majority rule must be tempered by some deference to the minority’s views, if the minority is to maintain its identity, as the Permanent Court of Justice decided in the *Minority Schools in Albania Case*.<sup>373</sup>

In recent years, there has been increasing criticism of the “liberal” theory of equality and democracy, which tends to favour formal equality over actual equality. “Liberalism” is a variant on the natural law view of people’s “natural” ability to develop themselves. “Liberals” believe that by creating “equal” opportunities for everyone to exercise their freedom (the “level playing field” concept), this will result in equal status for everyone, given sufficient time. However, this theory presupposes that everyone starts from a sufficiently “equal” position in the first place, which is rarely the case, even in most modern democracies. It also does not take into account that different circumstances within a

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<sup>372</sup> Cf. Discussion above, this Chapter.

particular society may be more or less conducive to the exercise of different people's natural abilities. Some indigenous groups in Latin America survived only because they withdrew from the rest of society and vigorously defended their territory, after "protectionist" policies were abolished, rather than face the inevitable assimilation that took place amongst other Latin American indigenous groups. Even today, societal prejudices, based on such factors as the colour of one's skin or eyes, invariably hamper the progress of members of certain racial or religious groups to levels of authority in democratic societies (most Western democracies have yet to elect a non-white, non-Christian President or Prime Minister<sup>374</sup>). The emphasis on "individual liberty" over "fraternity" in such societies tends to place individual interests higher than those of the society as a whole, thereby leading to large inequities in terms of power and financial distribution, because not every individual starts off "equal".

The same arguments have been made in relation to the unequal distribution of economic wealth and political power in the context of global affairs. For example, many commentators have criticised the insistence of the "developed" world on "free trade" policies, when there is such a disparity of wealth and negotiating power between them and the rest of the world. A "G77" summit of leaders, representing 80 per cent of the world's population, met in April 2000 and drafted a resolution calling for "a new Global Human Order." This new Order would allow these developing countries to "participate on an equal footing in decisions which affect them", and force developed countries to "open their markets to farm and textile products from the South". The members of the Summit were particularly critical of the policies of the International Monetary Fund and the World Bank, which had made loans to many developing countries conditional on certain institutional restructuring. As the Prime Minister of Belize pointed out during the Summit, "They told us these measures would stabilise our economy. Instead, they have stabilized poverty."<sup>375</sup>

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<sup>373</sup> Cf. Discussion in Chapter One (Introduction).

<sup>374</sup> Women are also notably absent from the highest positions of power in "liberal" democratic societies: for example, cf. photo of 149 world leaders taken at UN Millenium Summit, 6-8 September, 2000, in W.R. Pace & J. Stoyles, "Summit Shows Depth of ICC Support", (2000) 16 *The International Criminal Court Monitor*, 1.

<sup>375</sup> Associated Press and Reuters News Agency, "Third World leaders call for sharing of wealth", *The Globe and Mail* (15 April 2000) A25.

It is also interesting to analyse the most “peaceful”, and thus theoretically the most “successful”, examples of co-habitation of a territory by peoples of different ethnic origins, from the point of view of “equality”. “Multicultural” policies in the context of democratic societies appear to encourage the most tolerance for individual differences, and thus appear to provide the best circumstances for the free expression of one’s “authentic” identity.<sup>376</sup> However, in order to maintain the “equilibrium” of such societies, their various institutions must be dynamic, not static, responding to regular shifts in the balance of various powers, as the population grows and evolves, in order to find the most appropriate balance between “good” to one versus “harm” to another. This dynamism is most worrying to positivists, particularly when it manifests itself in what they like to call “judicial activism”, which they claim threatens to disrupt the fabric of society.<sup>377</sup>

In addition, there are some contradictory aspects of the most “successful” multicultural societies, namely Australia, Canada, Great Britain, New Zealand, and the United States of America. All of these countries have had their share of violent internal conflicts in the past, based on disputes over territory between different groups. The current internal stability of these countries is based on the historical *complete military dominance* by one particular group (or two groups - British and French - in the case of Canada<sup>378</sup>) of all the other groups, and the resultant “hegemony” of a particular set of ideals and values, which has never been successfully challenged since the military dominance was achieved. This “hegemony” is particularly pronounced in the United States, which has a “melting pot” policy rather than a true “multicultural” policy that tolerates and encourages difference.<sup>379</sup> Australia’s recent

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<sup>376</sup> In comparison to the problems of Europe and other continents where hostilities have been waged throughout the twentieth century, between different inhabitants of the same territory. For example, cf. B. Laghi, “Chirac applauds Canadian harmony”, *The Globe and Mail* (7 September 1999) A4.

<sup>377</sup> For example, cf. J. Tibbetts, “Critics of judicial activism kept from Supreme Court anniversary ‘love-in’”, *The Vancouver Sun* (28 September 2000) A7.

<sup>378</sup> Although there is continuing tension between the British and the French descendants within Canada, that erupted into violence in the 1960’s. One author recently identified the “unifying idea of the Canadian experience” as follows: “We are the children of the expelled, the persecuted, the abandoned and the marginal. We are the remnants of empires and the refugees of lost causes.”: M. Starowicz, “Ignore the past at your peril”, *The Globe and Mail* (20 September 2000) A11.

<sup>379</sup> Cf. J.A. Sigler, *Minority Rights: A Comparative Analysis*, (Westport, Connecticut: Greenwood Press, 1983) at 17-27. Note also the recent US Justice Department study which found “wide racial and geographic disparities in the federal government’s requests for death penalties”, such that “[m]inorities were far more

multicultural policies are also in direct contrast to the "white Australia" immigration policy that prevailed until the 1970's, which consolidated "white" hegemony, especially in relation to any historical claims to territory.<sup>380</sup>

By contrast, most of the twentieth century's civil wars have occurred in countries where there are still two or more groups with enduring competing historical claims to territory, powerful enough to launch a campaign of violence against those who currently control the territory, in order to attempt to redress past deprivations and/or injustices. As Professor Jay Sigler has pointed out: "For most of human history, population movements have brought dissimilar peoples into the same territories. Intergroup conflict has been the rule, not the exception."<sup>381</sup> Thus, the "successful" cases of multiculturalism rely on the fact that *most* of the population has *no* historical claim to territory, particularly any territory which has been taken from them in the past, and which could be the cause of disputes.

They also rely on the fact that those groups with the only, or the longest-standing, historical claims to territory in the majority of these countries, have been almost completely subjugated by superior firepower, introduced diseases, unfair treaties and/or economic policies, and in some cases the complete denial of citizenship rights.<sup>382</sup> As an Australian priest, Father Ted Kennedy, wrote recently: "We must all remember that not one of these good things that we non-Aboriginal Australians enjoy today - benefits that are the envy of the world, which seem to sparkle the more in the Australian sunlight - not one of these good things has been attained without the wrenching distress and grieving, starvation and dying of Aboriginal people in the past."<sup>383</sup> There has been some recognition of this fact

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prevalent among those recommended for the death penalty than their proportion in the population.": Associated Press, "Minorities majority on U.S. death row", *The Globe and Mail* (15 September 2000) A13.

<sup>380</sup> Cf. T. Garton Ash, "Australia: A mixed legacy of mixing cultures", *The Globe and Mail* (15 September 2000) A15, who writes: "... Australian multiculturalism is built on a deep post-imperial bedrock of political, legal and even social mono-culture. Comparable stories can be told for English Canada or the United States. However much the descendants of white settlers may, and probably should, feel retrospective shame, these countries are still the best examples we have of functioning multicultural societies - and their limits."

<sup>381</sup> Sigler, *supra*, at 16.

<sup>382</sup> Australian Aborigines were not considered to be "citizens", and thus were denied voting and other rights, until 1967.

<sup>383</sup> T. Kennedy, *Who is Worthy?* (Sydney: Pluto Press, 2000), excerpt reprinted as "Our savage moment of truth", *The Sydney Morning Herald* (17 April 2000) at 30.

in most of the postcolonial countries, in the form of granting some form of autonomy to groups with historical claims to certain territory.<sup>384</sup> However, most of these groups continue to struggle for “equal” treatment with those who have a weaker or non-existent historical claim to the territory. The situation is particularly difficult for the Aborigines of Australia, and the indigenous people of Canada’s British Columbia, as most of these peoples do not even have a treaty to rely on if their rights are taken away. Nor does Australia have a Bill of Rights or anything similar to protect the rights of the country’s original inhabitants, unlike Canada. Thus, the current Federal Australian Government of Prime Minister John Howard was able to give preference to “pastoral lease” holders over “native title” holders in the 1998 “Wik” amendments to Australia’s *Native Title Act*, despite the fact that the former had a very tenuous “historical” claim to their “territory”.<sup>385</sup>

In other words, even today the international community has yet to come up with a model of peaceful governance and self-determination that truly provides real “equality” to *all* of its citizens, where the territory is inhabited by peoples of different ethnic origins.

### 3.6.3 *The “social contract”, or “consent of the governed”*

The French and American Revolutions demonstrated the rise of the theory that the authority of any governing body rests on the “consent of the governed”. Thus, various limits were set by “the people” on the rights of those who governed them, most notably in the context of democracy, where governments remain accountable to “the governed” through regular elections and consultations. However, for many centuries, only “civilised” peoples were deemed to be “entitled” to set such limits on their “governors”, and on each other, once they were in power. The “uncivilised” peoples of the world, such as slaves and indigenous peoples, clearly were not perceived as eligible to participate in the

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<sup>384</sup> Cf. Discussion in Chapter Six, below.

<sup>385</sup> Cf. *Native Title Amendment Act 1998*, No.97, 1998 (Commonwealth of Australia), which was adopted to clarify some aspects of the decision of the High Court of Australia in *The Wik Peoples v The State of Queensland & Ors; The Thayorre People v The State of Queensland & Ors* (1996) 141 ALR 129.

“social contract”, as evidenced by their widespread mistreatment and complete subjugation throughout the centuries.

Vitoria’s idea of a “universal natural law” had provided some hope to the indigenous peoples of the Americas that they could seek adequate protection under such a noble “social contract”. However, as discussed above, the projection of European standards and interests onto the “uncivilised” world, predominantly because of the former’s superior firepower, allowed the imperial powers to set the terms of any “social contract” they entered into. This is particularly evident in the treatment of non-Europeans who entered into treaties with European powers, yet were never accorded the appropriate legal status thereafter.<sup>386</sup>

In more recent times, such as in the Minority Treaty Protection regime, the intermittent upholding of this democratic “contract” to recognise the rights of the governed has ameliorated some of these concerns. The language of the League of Nations Covenant also reveals an attempt to recognise a form of “sacred trust” to protect “the well-being and development” of the peoples in the Mandated territories, until they were “able to stand by themselves under the strenuous conditions of the modern world”.<sup>387</sup> However, Wilson’s insistence that “the interests of the population concerned must have *equal* weight with the *equitable* claims of the government whose title is to be determined”<sup>388</sup> also suggests that he fancied there was equal bargaining power between the governed and the government in every case, which was completely erroneous. This dichotomous and paternalistic approach to “uncivilised” peoples’ eligibility for protection and political independence ultimately was replicated in the widespread mistreatment of minorities and in the minimisation of their right to be consulted consistently by means of plebiscite.

### 3.6.4 “Internationally perceived shared values” in practice

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<sup>386</sup> Cf. Discussion in Chapter One (Introduction).

<sup>387</sup> Article 22, *Covenant of the League of Nations*.

<sup>388</sup> W. Wilson, *Public Papers: War and Peace*, (1927) at 155-62, in Sunga, *supra*, at 92.

In summary, by the time of the Second World War, both of the major political theories of the time significantly limited the right to free will and equality, to those peoples who were considered sufficiently "developed". In other words, these were perceived as relative rights only. In addition, the most powerful States reserved to themselves the right to determine which peoples were sufficiently "developed" to be able to claim these "rights". The standard of "development" was the only serious point of contention at this time: most democratic States believed that a democratic form of governance and/or the renunciation of disruptive "nationalist passions" were the only indicators of sufficient "development", while socialist States believed that "development" could manifest itself in any form of governance *other* than capitalist, imperialist, liberal democracies. However, ultimately, socialism did not allow much free will to those who had joined their fold.

There was also considerable confusion as to how best to implement "equal rights", especially in the democratic context: whether equality meant providing the same "level playing field" for everyone, or whether some consideration should be given to providing a range of "circumstances" to different groups within which they could practice "freedom", in recognition of existing limits on their access to freedom within various societal constraints. It was also unclear if the "subjective" views of a minority group should be taken into account, and if so, to what extent. For the most part, these decisions were made "objectively" by external actors, without consulting the group in question.

In terms of the right to adequate protection by the government (the "social contract"), there was an apparent acceptance by both political viewpoints that majority rule had to be tempered to some extent by some form of protection or autonomy of minorities, as well as the less "developed". However, this sentiment did not manifest itself in consistent practice. In addition, consultation (the "consent of the governed") was treated not as a right, but more as a "privilege" that each group had to earn, by following the "rules" of the most powerful States. The "greatest good" of any society was only ever determined by "developed", or more powerful societies. There was also some deference to the view that the *size* of a "developed" group would influence their right to be consulted as to their future. At

the same time, those governments that had effectively subjugated all competing historical claims to their territory insisted that it was possible for different "nationalities" to co-exist peacefully on unequal terms on the same territory, despite their irreconcilable and vigorous historical claims to that territory. At the same time, "sovereignty" and "stability" were emphasised.

However, in practical terms, these disparate values did translate into some tangible developments in terms of the principle of self-determination:

- (i) general recognition of the right of certain groups to manage their own affairs without external interference, and to be consulted as to their wishes, particularly "the removal of conscious and recognizable [political] communities from foreign domination, restoring their destiny into their own hands, as far as was possible, within the framework of a stable international community"<sup>389</sup>;
- (ii) general recognition of the right of other groups, who may have a "psychological or historical basis"<sup>390</sup> for their sense of community, yet were interspersed within the political territory of another group, to have some form of "cultural autonomy"<sup>391</sup> and "equality";
- (iii) general recognition of the right of "less developed" groups to be put under the "tutelage" and "protection" of more advanced States, with a view to eventual self-management, once they had "developed the necessary consciousness of community and the capacity for self-government."<sup>392</sup>
- (iv) general recognition of the need to have some kind of international enforcement mechanism/s for minority groups who did not feel their rights were being protected adequately by their governments;
- (v) recognition of the need to have two kinds of international enforcement mechanisms for minority rights: the Permanent Court of International Justice for the resolution of "legal" issues, and recourse by minorities to the Council of the League of Nations for the resolution of all other issues, such as "political" issues; and

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<sup>389</sup> Ofuatey-Kodjoe, *supra*, at 94 & 95.

<sup>390</sup> *Ibid*, at 95.

<sup>391</sup> *Ibid*.

<sup>392</sup> *Ibid*, at 96.

(vi) eligibility for membership of the League of Nations ultimately was *not* based on the political persuasion of the particular member, but sometimes it was based on the member's apparent commitment to protect its minorities.

As we will see below, each of these developments has continued to manifest itself in different forms in the ensuing years.

## Chapter Four:

### The “*Declarative Stage*” of the Principle of Self-Determination

Bassiouni describes the “*Declarative Stage*” of the principle of self-determination as “the declaration of certain identifiable human interests or rights in an international document”.<sup>393</sup> In this Chapter, I argue that this stage occurred when the “principle of self-determination” was included as one of the guiding principles of the United Nations Charter of 1945.<sup>394</sup> It had not previously appeared in a truly international document prior to that. At the same time, I will demonstrate how the principle continued to be applied inconsistently, despite growing *opinio juris* upholding the principle as a right, and wide support for the principles for the protection of minorities that were established by the Nuremberg Tribunal.

In general terms, most of the human rights that are widely recognised by the international community are contained in the 1948 *Universal Declaration of Human Rights* (UDHR). However, during the negotiations for this Declaration, conflicts between different country representatives as to the meaning of “self-determination” prevented the inclusion of the “right to self-determination” in the UDHR.<sup>395</sup> However, at the same time, article 28 of the UDHR upholds a form of the principle of self-determination: “Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised.” As mentioned in Chapter One (Introduction), whatever your view of the right to freedom is, the right *circumstances* must be present in order to allow the exercise of true freedom, as article 28 seems to acknowledge.

Despite failing to materialise as an enunciated “right” in the UDHR, the “principle of self-determination” had previously become an “identifiable human interest in an international document”, arguably with even more legitimacy than any right in the UDHR, when it was included as one of the guiding principles of the UN Charter of 1945, most notably in article 1(2):

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<sup>393</sup> Bassiouni, “Proscribing Function”, *supra*, at 181-182.

<sup>394</sup> In Article 2(1), discussed below.

“The Purposes of the United Nations are: ... (2) To develop friendly relations among nations based on respect for *the principle of equal rights and self-determination of peoples*, and to take other measures to strengthen universal peace”. [my emphasis]

The inclusion of this terminology was not uncontroversial, as many authors have noted. The Soviet Union wanted to use “right” instead of “principle”, in accordance with their political agenda, but many State representatives argued that this would be the equivalent of endorsing “international anarchy”.<sup>396</sup> Thus, “principle” was the preferred compromise, and several of the Charter’s other provisions make it clear that this “principle” was to be exercised within a stable international system that prohibited the use of force, and provided “trusteeship” and other such supervisory mechanisms for “non-self-governing territories”, until they were able to develop the capacity for “self-government” and “independence.”<sup>397</sup> As Cassese points out, “the principle enshrined in the UN Charter boils down to very little; it is only a principle suggesting that States should grant *self-government* as much as possible to the communities over which they exercise jurisdiction.”<sup>398</sup> It does not impose any obligations as such on Member States, although articles 55 and 56 taken together seem to suggest that Members should take some kind of action to “respect” and “promote” the principle.<sup>399</sup> Cassese concludes:

“In spite of all these limitations and shortcomings, the fact remains that this was the first time that self-determination had been laid down in a multilateral treaty - a treaty, one should add, that had been conceived of as one of the major pieces of

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<sup>395</sup> Cf. Discussion in Chapter One (Introduction) as to why self-determination was not included within the UDHR.

<sup>396</sup> Statement of the delegation of Colombia, Debates of the First Committee of the First Commission of the San Francisco Conference, 14-15 May and 1 & 11 June, 1945, Library of the Palais des Nations, Geneva [unpublished microfilmed minutes] 15 May, at 20, in Cassese, “Self-Determination”, supra, at 39-40.

<sup>397</sup> See especially articles 73 & 76, UN Charter.

<sup>398</sup> Cassese, “Self-Determination”, supra, at 42 [footnote omitted].

<sup>399</sup> Article 55 provides: “With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations *based on respect for the principle of equal rights and self-determination of peoples*, the United Nations shall promote: (a) higher standards of living, full employment, and conditions of economic and social progress and development; (b) solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.” [my emphasis] Article 56 then provides: “All Members pledge themselves to take joint and separate action in co-operation with the Organisation for the achievement of the purposes set forth in Article 55.”

legislation of the new world community. Thus, the adoption of the UN Charter marks an important turning point; it signals the maturing of the political postulate of self-determination into a *legal standard of behaviour*.<sup>400</sup> [my emphasis]

#### 4.1 Minority rights after the Second World War

At a more tangible level, the most dramatic evidence of the international community's recognition of their collective failure to protect minorities adequately both before and during the war, was the inclusion of "crimes against humanity" in the *Charter of the International Military Tribunal at Nuremberg* ("Nuremberg Charter") in 1945.<sup>401</sup> Those who drafted the Nuremberg Charter recognised that the abhorrent treatment by the Nazis of the Jews was a "crime against humanity", not just a matter for international civil litigation (such as the right of minorities to have recourse to the Permanent Court of International Justice), or purely political solutions (such as the right of minorities to petition the League of Nations Council).<sup>402</sup>

Despite being criticised as "victors' justice" in the eyes of many scholars,<sup>403</sup> the International Military Tribunal at Nuremberg ("Nuremberg Tribunal") undoubtedly set a new and promising standard in prosecuting individuals for international crimes, and for using the international Rule of Law to address gross injustices to minority groups. For the first time in known history, a non-military court, created under an international treaty, gave defeated leaders the chance to defend their actions in the forum of a trial, instead of merely facing extra-judicial executions based on untested allegations.<sup>404</sup>

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<sup>400</sup> Cassese, "Self-Determination", supra, at 43.

<sup>401</sup> Article 6(c). "Crimes against humanity" were also included in article 5(c), *Charter of the International Military Tribunal for the Far East*, and article II(1)(c), *Control Council Law No. 10 (Punishment of Persons Guilty of War Crimes Against Peace and Against Humanity)*, 20 December 1945, (signed by France, Union of Soviet Socialist Republics, United Kingdom, and the United States of America), *Official Gazette of the Control Council for Germany*, No. 3, Berlin, 31 January 1946, reprinted in B.B. Ferencz, *An International Criminal Court, A Step Toward World Peace - A Documentary History and Analysis, Vol. 1, Half a Century of Hope*, (London: Oceana Publications, Inc., 1980). Cf. Fuller discussion in Chapter Seven of "crimes against humanity".

<sup>402</sup> The Nazis also targetted other minority groups, such as "gypsies", Communists, and Catholics, but the Jewish populations of the German-occupied territories were the most profoundly affected group overall.

<sup>403</sup> Bassiouni, "Documentary History", supra, at 8.

<sup>404</sup> The latter of which option the British government preferred in order to deal with the Nazi leaders, but they were won over by the Americans.

The Allies were particularly motivated to make amends for their previous failed attempt to deter the German leadership at the Leipzig Trials of 1921, which had allowed the Nazis to continue to pursue their genocidal policies unabated. The Leipzig Trials have widely been acknowledged as a "sham",<sup>405</sup> focusing predominantly on mistreatment of shipwrecked survivors of submarine incidents and prisoners of war, rather than on the conduct of hostilities.<sup>406</sup> So, those who set up the Nuremberg Tribunal were determined to condemn unequivocally the actions and attitudes of the Nazis, to make sure that Germany would *never* again terrorise the European continent.<sup>407</sup>

One of the first arguments raised by the defendants at the Nuremberg Tribunal was of course the maxim *nulla poena sine lege, nullem crimen sine lege*.<sup>408</sup> The defendants argued that those who drafted the Nuremberg Charter had only recently "created" the crimes they were charging, *ex post facto*, and were arbitrarily exercising an elaborate form of the usual "victors' justice". However, the judges of the Tribunal held that "The [Nuremberg] Charter is not an arbitrary exercise of power on the part of victorious Nations, but in the view of the Tribunal, ... it is the expression of international law existing at the time of its creation ; and to that extent is itself a contribution to international law."<sup>409</sup>

The indictment alleged that "[The] methods and crimes constituted violations of international conventions, of internal penal laws, [and] of the general principles of criminal law as derived from the criminal law of all civilised nations".<sup>410</sup> Critics of the Tribunal's verdict were particularly opposed to the idea of uncodified "general principles" of "civilised nations" forming the basis of international

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<sup>405</sup> A.G. Karibi-Whyte, "International Criminal Court: Developments and Future", (1998) May, *The Reformer*, 3 at 4.

<sup>406</sup> Cf. U.S. Department of the Army Pamphlet No. 27-161-2, II International Law 221-22 (1962) in J.J. Paust et al (eds.), *International Criminal Law: Cases and Materials*, (Durham, North Carolina: Carolina Academic Press, 1996).

<sup>407</sup> The trials were only part of an overall arrangement to de-Nazify Germany and bring its peoples back to "civilization" (cf. Karibi-Whyte, *supra*).

<sup>408</sup> "*Nulla poena sine lege*" means: "no punishment without law", ie. "conduct cannot be punished as criminal without legal authority." "*Nullum crimen sine lege*" means: "no crime without law", ie. there must be a pertinent criminal law in existence at the time that the alleged crime was committed, in order to establish criminal responsibility for the particular act or omission: CCH Dictionary, *supra*, s.v. "*nulla poena sine lege*", "*nullum crimen sine lege*".

<sup>409</sup> Judgment, "Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 - 1 October 1946", (Nuremberg, Germany : International Military Tribunal, Nuremberg, 1947) reprinted in Ferencz, *supra*, at 475.

criminal prosecutions, arguing that there was no way for the accused to have ascertained the criminality of their actions.<sup>411</sup> The Tribunal dismissed this claim, pointing to the existence of a number of relevant conventions and stating that the defendants "must have known that they were acting in defiance of all international law when in complete deliberation they carried out their designs of invasion and aggression."<sup>412</sup> In addition, the concept of "crimes against humanity", in the context of the Holocaust, appears to be one of the few occasions where these so-called "general principles" of "civilised nations" *would* seem to reflect the concerns of *all* of humanity, not just those who considered themselves to be the only "civilised" ones (except for the worst proponents of Nazism's policies, of course).

Some authors have suggested that while "crimes against peace" and "war crimes" may have been "valid" crimes at the time, "crimes against humanity" did not actually exist as such at that stage.<sup>413</sup>

However, the Nuremberg Charter took the cautious approach in its definition of "crimes against

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<sup>410</sup> Indictment, reprinted in Ferencz, *ibid* at 474.

<sup>411</sup> As mentioned previously, Berman argues that this aspect of the Tribunal's judgments was almost a direct contradiction of the Permanent Court of International Justice's decision in the 1935 case, *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City*, 1935 P.C.I.J. (ser. A/B) No. 65, where the Court failed to uphold a penal provision that was based on an assessment of "sound popular feeling (*nach gesundem Volksempfinden*): Berman, "Nationalist Desire", *supra*.

<sup>412</sup> Judgment, reprinted in Ferencz, *supra*, at 478. Note that the Allied and Associated Powers were able to obtain the complete and unconditional surrender of the German Reich, and thus were able to exercise sovereign legislative power over all the major Nazi leaders, unlike the surrender of the Japanese, which involved allowing the civilian government to continue to operate. This distinction brought the *International Military Tribunal for the Far East* [hereinafter: "Tokyo Tribunal"] into some disrepute, because there was not a well-established basis for setting up an international tribunal on the territory of a sovereign power in order to try its leaders. This was noted by the Indian judge sitting on the Tokyo Tribunal, Dr. Rahadbinod Pal, who caused considerable controversy by producing a lengthy dissenting opinion acquitting the accused on all counts. Justice William O. Douglas, of the United States Supreme Court, concurred subsequently with Justice Pal's political characterization of the Tokyo Tribunal, stating, "[the Tribunal] took its law from its creator and did not act as a free and independent tribunal to adjudge the rights of petitioners under international law. As Justice Pal said, it did not therefore sit as a judicial tribunal. It was solely an instrument of political power.": *Hirota v. MacArthur*, 338 U.S. at 215, where Justice Douglas outlines his reasons for refusing to hear the appeal of the Tokyo defendants. And cf. E.S. Kopelman, "Ideology and International Law: The Dissent of the Indian Justice at the Tokyo War Crimes Trial", (1991) 23 N.Y.U. J. Int. L. & Pol. 373, for an excellent analysis of Justice Pal's "almost schizophrenic" vacillation between such pure positivism and a "radical Third World perspective" (at 378).

<sup>413</sup> Bassiouni, "American Society Proceedings", *supra*, at 62.

humanity”, of incorporating fairly well-recognised “war crimes” “against ... civilian populations”,<sup>414</sup> and then linking the “crime against humanity” of “persecutions” to the other two crimes, effectively creating a specialised category of “war crimes”, in order to remove any suggestion that the Allies had “invented” a new crime:

“(c) Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian populations, before or during the war; or persecutions on political, racial or religious grounds *in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.*”<sup>415</sup>  
[my emphasis]

The judges of the Tribunal respected this requirement of a nexus between the “crime against humanity” of “persecutions” and the commencement of hostilities in 1939. But in the Judgment, they took the opportunity to condemn the “policy of terror” carried out by the German government prior to 1939, citing the “persecution of Jews” and the “persecution, repression and murder” of its political opponents as the most “revolting and horrible ... crimes”, but regrettably beyond the Tribunal’s jurisdiction.

Partly in response to this gap in the Tribunal’s jurisdiction, the United Nations subsequently drafted the *Convention on the Prevention and Punishment of the Crime of Genocide* [hereinafter: “Genocide Convention”].<sup>416</sup> The “crime of genocide” does not require a nexus with armed conflict,<sup>417</sup> even though the crime of genocide “was intended to embody “crimes against humanity””.<sup>418</sup> However, article II of the Convention creates its own set of obstacles to successful prosecutions, by requiring proof of an

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<sup>414</sup> Which were subsequently included in the fourth Geneva Convention of 12 August 1949: *Geneva Convention relative to the Protection of Civilian Persons in Time of War (IV)*, Treaty Series No. 39, Cmnd. 550.

<sup>415</sup> The other crimes with which there had to be a connection, were “crimes against peace” and “war crimes” - article 6(a) & (b), respectively. Note that article 6 also provided: “Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.”

<sup>416</sup> Adopted 9 December 1948, 78 U.N.T.S. 277, 28 I.L.M. 763 (entered into force 12 January 1951). Cf. M.C. Bassiouni, *Crimes Against Humanity in International Criminal Law*, (The Netherlands: Martinus Nijhoff Publishers, 1992) at 538 [hereinafter: Bassiouni, “Crimes Against Humanity”].

<sup>417</sup> Article I.

<sup>418</sup> M.C. Bassiouni, *International Criminal Law Conventions and Their Penal Provisions*, (New York: Transnational Publishers, 1997) at 270. [hereinafter: Bassiouni, “Criminal Law Conventions”]. NB. Bassiouni points out that the crime of genocide does not successfully embody crimes against humanity, “even though there is an overlap between the two categories of crime” which is “nowhere addressed.” (ibid.)

“intent to destroy, in whole or in part, a national, ethnical, racial or religious group”.<sup>419</sup> Not only is such an “intent to destroy” a group extremely difficult to prove, but political and social groups are not protected by this Convention,<sup>420</sup> and a “national” group is not defined sufficiently to protect “national” minority groups within sovereign “nations”.<sup>421</sup> In addition, the “Genocide Convention” envisaged that prosecutions of such crimes would be carried out by a permanent “international penal tribunal”,<sup>422</sup> which the International Law Commission was charged with researching in 1948,<sup>423</sup> and such a tribunal has yet to materialise.<sup>424</sup> So “genocidaires” and those who have committed “crimes against humanity” since the Nuremberg Trials, have largely gone unpunished.<sup>425</sup>

Nevertheless, the “criminalization” of gross mistreatment of minority groups in these documents was an important step forward for the international community, in delimiting the powers of governments and majority populations in this regard, and reinforcing *some* respect for the “social contract” as it applied to *all* members of a society. Due to a lack of enforcement mechanisms, most minority groups are still unable to insist that those in power uphold their part of this “contract” in all its respects.<sup>426</sup>

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<sup>419</sup> Cf. M. Lippman, “The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later”, (1998) 15:2 *Arizona J. Int. & Comp. L.* 415.

<sup>420</sup> Thus, Pol Pot and the Khmer Rouge were able to avoid being accused of “international crimes”, because (a) the target of their “genocidal” policies was a particular social and/or political sector of an otherwise homogeneous society, in national, ethnic, racial and political terms; and (b) there was no armed conflict to provide the necessary nexus at the time to establish that a “crime against humanity” had been committed. Cf. S. Ratner & J.S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, (New York: Oxford University Press, 1997) at 227-283.

<sup>421</sup> Bassiouni, “Criminal Law Conventions”, *supra*, at 245.

<sup>422</sup> Article VI.

<sup>423</sup> GA Res 260 B (II) of 9 December 1948.

<sup>424</sup> It is beyond the scope of this thesis to outline the many reasons why it has taken so long for the international community to create a permanent international criminal tribunal. For some guidance, cf. M.C. Bassiouni, “Documentary History”, *supra*, at 1-39, and note the 1998 “Rome Statute”, *supra*, which will create such a Court once 60 States have ratified this Statute: cf. discussion in Chapter One (Introduction).

<sup>425</sup> The most notable exceptions are those who have been charged in relation to the recent atrocities in the Former Yugoslavia and Rwanda, under either the *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, 25 May 1993, S.C. Res. 827, U.N. S.C.O.R., 48th. Sess., 3217th mtg., at 1-2, UN Doc. S/RES/827 (1993), 32 I.L.M. 1159, or the *Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994*, 8 November 1994, S.C. Res. 955, U.N. S.C.O.R., 49th Sess., 3453rd mtg., UN Doc. S/RES/955 (1994), 33 I.L.M. 1598.

<sup>426</sup> Cf. Discussion below in Chapter Six.

#### 4.2 Article 73 and the "principle of self-determination"

Article 73 of the UN Charter requires those countries administering "territories whose peoples have not yet attained a full measure of self-government" to undertake certain responsibilities, with a view to promoting "to the utmost, ... the well-being of the inhabitants of these territories". These responsibilities include:

- "a. to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;
- b. to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement;
- c. to further international peace and security;
- d. to promote constructive measures of development, to encourage research, and to cooperate with one another ... ; and
- e. to transmit regularly to the Secretary-General for information purposes, ... statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible other than those territories to which Chapters XII and XIII apply."<sup>427</sup>

These measures obviously were intended to compensate for the centuries of abuse that many of these peoples had suffered under their respective colonial regimes. Clearly, the idea was that "self-government" is a desirable thing for *all* peoples, as long as they are considered sufficiently "advanced" by UN members, and that the UN would monitor the fulfilment by States of their responsibilities to "advance" those under their administration. In addition, administering States are required "to take due account of the political aspirations of the peoples", apparently with only two exceptions: taking into account (i) "the particular circumstances of each territory and its peoples" and (ii) their "stage of advancement". Of course, this language left the way wide open for justifications similar to those made during the Versailles Peace Conference, for denying certain groups of peoples the right to be consulted as to their political future. But the requirement for transmission of relevant information to the UN provided a modest amount of accountability for administering States, in the sense that ostensibly the

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<sup>427</sup> Chapter XII of the Charter concerns the International Trusteeship System, and Chapter XIII concerns the Mandate system, both of which were legacies of the League of Nations system.

UN was intended to monitor how “advanced” the peoples were in “objective” rather than “subjective” terms (“information of a technical nature”).

However, nowhere in the Charter is there any definition of “self-government”, whereby those territories yet to attain its “full measure” could immediately be identified. Nor is there any definition of a sufficient level of “advancement”, to clarify which territories are ready to be granted “self-government”. Nevertheless, by 1946 the General Assembly had accepted the voluntary declarations of seven States (Australia, Belgium, France, the Netherlands, New Zealand, the United Kingdom, and the United States) that they were administering 74 non-self-governing territories between them, and the required information in relation to these territories began to be transmitted to the UN.

Problems with this voluntary approach manifested themselves very quickly. Within a few years of the enactment of article 73, there were several disputes between States as to whether they were actually administering the territories they claimed to be,<sup>428</sup> and many disputes as to whether a particular State was justified in ceasing to transmit information on a territory because it claimed that the territory was no longer “non-self-governing”.<sup>429</sup> In other words, the same tendency from historical times of the imperial powers, to assume that they knew what was best for the peoples of their colonial territories, without even consulting them, threatened to make a mockery of the whole scheme.

In 1949, a majority of members of the UN insisted that the UN intervene, to assert its sole right to determine whether a territory had “developed self-government” or not, rather than leaving the decision with the administering territory. In response, the UN passed a resolution, over the objections of the administering States, creating an Ad Hoc Committee on Information, which was to “examine the factors which should be taken into account in determining whether any territory is or is not a territory whose people have not yet attained a full measure of self-government.”<sup>430</sup> This resolution also stated,

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<sup>428</sup> For example, the Soviet Union challenged the Netherlands’ claim that it held sovereignty over Indonesia: Ofuatey-Kodjoe, *supra*, at 114, n. 57.

<sup>429</sup> For example, in 1947 the United Kingdom took Malta off the list of its non-self-governing territories, and France removed Guadelupe, Guyana, Martinique, and Reunion: Ofuatey-Kodjoe, *supra*, at 114.

<sup>430</sup> GA Res. 334 (IV), 2 December 1949.

*inter alia*, "it is within the responsibility of the General Assembly to express its opinions on the principles which have concerned or which may in the future guide the Members concerned in enumerating the territories for which the obligation exists to transmit information under article 73(e) of the Charter."

By 1952, the Ad Hoc Committee had devised a suggested list of factors that needed to be taken into account in determining whether "a full measure of self-government" had been achieved or not. The factors were in three categories, with no suggestion as to the amount of weight that each should be given: (1) factors "indicative of the attainment of independence"; (2) factors "indicative of the attainment of other systems of self-government"; and (3) factors "showing free association of a territory with all or any part of its metropole or other country", including: "(a) general factors (political advancement, opinion of the population, geographic considerations, ethnic and cultural considerations); (b) legal or constitutional nature of the association; (c) considerations with respect to status of the territory (legislative representation, citizenship of territory's inhabitants, eligibility of officials from the territory to public offices of the central authority); and (d) internal constitutional conditions (universal suffrage and free, periodic elections characterised by an absence of undue influence; scope of territorial legislative rights of the inhabitants; method of choosing local officials)."<sup>431</sup> The Committee subsequently revised these factors, to make it clear that any association of territory must be on an "equal" basis with the metropole or other country.<sup>432</sup>

By 1952, information on 15 of the 74 "non-self-governing territories" was no longer being transmitted by the administering powers, because the latter claimed that these territories had now achieved "the full measure of self-government". This caused significant consternation amongst the UN members who were not administering powers, because of the potential for abuse by self-serving administrations, particularly in relation to access to a territory's natural resources. But the relevant administering

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<sup>431</sup> A.H. Leibowitz, *Colonial Emancipation in the Pacific and the Caribbean: A Legal and Political Analysis*, (New York: Praeger Publishers, 1976) at 195.

<sup>432</sup> *Report of the Ad Hoc Committee on Factors (Non-Self-Governing Territories)*, UN Doc. A/2428, Agenda Item 33, Annexes, General Assembly Official Documents, 8th. Sess. (1953), at 5 *et seq.*

powers asserted that they had fulfilled all of their obligations in respect of the administration of these territories.<sup>433</sup>

Early in 1952, the majority of members of the General Assembly again managed to overcome the objections of the administering powers, and passed two resolutions, together representing “significant advances to clarify and strengthen the legal nature of the principle [of self-determination]”, as part of “a process of clarifications and refinements that culminated in the incorporation of the right of self-determination in the two Human Rights Conventions and the exhaustive definitions in Resolution 1541 (XV) (1960) of both the group entitled to the right and the ways in which the right may be exercised.”<sup>434</sup> The first of these resolutions requested the Ad Hoc Committee on Information to expand on the earlier study of the factors upon which to assess whether the “full measure of self-government” had been attained by a “non-self-governing-territory.”<sup>435</sup> The second resolution called on the UN Human Rights Commission to include the “right to self-determination” in the draft Human Rights Covenant it had been working on since 1950.<sup>436</sup>

In December 1952, the General Assembly adopted two more resolutions that helped to clarify and interpret the “principle of self-determination”, and to develop the concept of the “right to self-determination”, as well as further angering those administering powers opposing greater UN involvement in the decolonisation process. In Resolution 648 (VII),<sup>437</sup> the Assembly provisionally approved some of the recommendations of the Ad Hoc Committee, agreeing that there were three methods by which a territory could attain “a full measure of self-government”: (i) “the attainment of independence”; (ii) “the attainment of other separate systems of self-government”; and (iii) “the free

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<sup>433</sup> Leibowitz, *supra*, at 194-195.

<sup>434</sup> Ofuately-Kodjoe, *supra*, at 115.

<sup>435</sup> GA Res 567 (VI), 18 January 1952.

<sup>436</sup> GA Res 545 (VI), 8 February 1952, which was largely supported by socialist countries and newly independent former colonies. Those who voted against this resolution were: Australia, Belgium, Canada, France, The Netherlands, New Zealand, Turkey, the United Kingdom, and the United States. Chile, China, Colombia, Cuba, Denmark, Ecuador, Israel, Norway, Peru, and Sweden abstained. Note that the Soviet Union had proposed in 1950 that such a right be included in the Human Rights Covenant, but the Third Committee of the General Assembly had rejected it. Cf. Cassese, “Self-Determination”, *supra*, at 48-50.

<sup>437</sup> Adopted 10 December 1952.

association of a territory with other component parts of the metropolitan or other country.” The same resolution established a second Ad Hoc Committee, to define “a full measure of self-government”, in relation to article 73, as well as to enunciate principles to determine what “features” would “guarantee” the “principle of self-determination”, and what would constitute the “manifestation of the freely expressed will of the peoples in relation to the determination of their national and international status”.<sup>438</sup>

Less than a week later, General Assembly resolution 637A (VII)<sup>439</sup> again endorsed the inclusion of the “right to self-determination” in the draft Human Rights Covenant, in response to the conflicts over its inclusion that had taken place during the year within the Human Rights Commission.<sup>440</sup> This resolution further provided that all UN members should “uphold the principles of self-determination of peoples and nations”,<sup>441</sup> and that administering powers in particular must recognise and promote the right of the peoples of the trust territories to self-determination, by helping “to prepare them for complete self-government or independence”, and allowing them to express their will freely by means of plebiscites or other recognised democratic means, preferably under the auspices of the UN.<sup>442</sup> By the end of this year, the General Assembly had also passed several resolutions recognising the “right” of certain territories to “self-determination”, including Eritrea,<sup>443</sup> Morocco, Tunisia, and Algeria.<sup>444</sup>

The administering powers continued to claim that only they had the right to determine whether a territory under their administration had achieved “self-government” or not. They also opposed the inclusion of the term “self-determination” as a “right” in any document. However, the other UN members argued to the contrary on both points, asserting that the administering powers “had entered a

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<sup>438</sup> Cf. Ofuatey-Kodjoe, *supra*, at 116.

<sup>439</sup> Adopted 16 December 1952.

<sup>440</sup> Cassese, *supra*, at 50, n. 40.

<sup>441</sup> Note Ofuatey-Kodjoe’s analysis, *supra*, at 117, where he points out that the inclusion of “nations” along with “peoples” represented a “truly remarkable” advance in the development of the concept of self-determination.

<sup>442</sup> Cf. Ofuatey-Kodjoe’s analysis, *supra*, at 117-119.

<sup>443</sup> GA Res. 390 (V), 2 December 1950.

<sup>444</sup> GA Res. 611 (VII), 17 December 1952; and GA Res. 612 (VII), 19 December 1952.

bilateral obligation from which they could not free themselves unilaterally”,<sup>445</sup> and that the UN Charter clearly envisaged that “the principle of self-determination” included the “right” to be free of colonial domination. The Western States had relented to some extent earlier in the year, with the US delegation conceding to the UN Economic and Social Council in March 1952 that the principle of self-determination as envisaged by the Charter included “internal self-determination”, through the “promotion of self-government”.<sup>446</sup> However, the US was also concerned to point out that “the problem of self-determination is a universal one - one of significance for all States and not only States administering non-self-governing territories”.<sup>447</sup> By this they were intending to infer that socialist republics, such as the Soviet Union, should also respect the right of *their* various constituents to choose independence if they wished, rather than holding on to all of their territories against the will of some of them, while at the same time criticising the administering powers for denying “self-government” to their respective territories.

At the General Assembly’s eighth session in 1953, all of these matters came to a dramatic head, consistent with the Cold War being fought out in this era on such “minor” ideological matters as the definition of “self-government”. The Second Ad Hoc Committee tabled its report on the factors to be taken into account when determining whether or not a territory was “non-self-governing”, and it was adopted without amendment, as an annex to General Assembly Resolution 742 (VIII), *Factors which should be taken into account in deciding whether a territory is or is not a territory whose people have not yet attained a full measure of self-government*.<sup>448</sup> These factors are extensive and relatively detailed, reflecting much of the same material that was produced by the first Ad Hoc Committee, particularly the wide range of relevant factors in relation to the assessment of the “free association” of a territory with another country.<sup>449</sup>

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<sup>445</sup> Leibowitz, *supra*, at 196.

<sup>446</sup> Cassese, “Self-Determination”, *supra*, at 46, n. 31.

<sup>447</sup> Cassese, *ibid*, at 46, n. 31.

<sup>448</sup> Adopted 27 November 1953.

<sup>449</sup> Some of these factors will be discussed in greater detail in Chapter Five, below.

Particular concerns were then expressed in the General Assembly over the removal by the respective administering powers of the Netherland Antilles, Surinam, and Puerto Rico, from the list of "non-self-governing territories" about which information should be transmitted.<sup>450</sup> The president of the Independence Party of Puerto Rico and a representative of the Nationalist Party of Puerto Rico both attempted to make oral statements to the Fourth Committee of the General Assembly, but the US delegation pointed out that "elections, referenda, and other democratic steps" had already been carried out in Puerto Rico, such that "the people of Puerto Rico have achieved a full measure of self-government through a compact entered into by mutual consent between Puerto Rico and the United States."<sup>451</sup> The US narrowly won a vote to deny the two representatives the right to make statements.<sup>452</sup>

However, the US had failed to provide the Puerto Ricans with the option of choosing "independence" in the referendum they had held, and various delegates expressed concerns over other aspects of the arrangement whereby the United States retained substantial powers over Puerto Rican affairs.<sup>453</sup> Eventually, the US won the vote allowing it to cease transmitting information on Puerto Rico, again by a very narrow margin, this time 24 in favour, 17 against, and 17 abstentions.<sup>454</sup> However, a couple of years later, the US and its supporters failed to prevent the inclusion of the "right to self-determination" in the two Human Rights Covenants, despite their objections that these Covenants were intended to provide only for individual rights, not group rights, and that all sorts of catastrophes would ensue.<sup>455</sup>

It seems ironic now that the basis of the US' concerns was that its views were not being taken into account adequately in international fora, because a numerical majority of States had opposed it on

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<sup>450</sup> Leibowitz, *supra*, at 195.

<sup>451</sup> *United States Department of State Bulletin*, Vol. XXIX, No. 746 (12 October 1953) at 499, in Leibowitz, *ibid*, at 198-199.

<sup>452</sup> The vote result was 25 in favour, 19 against, and 11 abstentions. (Leibowitz, *ibid*, at 199.)

<sup>453</sup> Cf. Leibowitz, *ibid*, at 200.

<sup>454</sup> For the full list, see Leibowitz, *ibid*, at 200-201. Interestingly, the Netherlands, New Zealand, and the United Kingdom all voted *against* the US.

<sup>455</sup> The Human Rights Commission decided in 1954 to separate its work into two separate Covenants, and the common article in both of these Covenants was adopted in 1955: Cassese, "Self-Determination", *supra*, at 47 & 51.

certain issues. Yet, at the same time, it had failed to accept the same kinds of objections by two Puerto Rican political parties, who were claiming that the views of the majority that had prevailed in the US-sponsored referendum did not adequately represent the views of all the population (not to mention that the most important question had not been asked, namely, do Puerto Ricans want independence?). No doubt the US justified its grievances by differentiating the Puerto Ricans, as well as its socialist and Third World opponents, as “uncivilised”, and therefore not worthy of “equal” consideration, in line with previous practice.

Thus, the “principle of self-determination” became highly politicised from its early days in international affairs, as both sides of the Cold War conflict tried to use it to gain an advantage over the other, without ever honouring it fully within their own sphere of influence.

#### *4.3 The end of the British Palestine Mandate*

Meanwhile, Germany's atrocious mistreatment of the Jews during World War II had provoked increased support for the creation of a Jewish state in Palestine, predominantly as a means of compensation and reparation. In 1947, the newly formed United Nations decided to adopt a second *Palestine Partition Plan*, which envisaged a Jewish and an Arab State, as the British had suggested previously, but with a substantially larger Jewish State than before. The city of Jerusalem was to be a *corpus separatum*, this time to be administered by the United Nations. Both new States were to consist of three separate pieces of land, each surrounded by the territory of the other State, and united economically. As the Special Committee devising the plan stated:

“The basic premise underlying the partition proposal is that the claims to Palestine of the Arabs and Jews, both possessing validity, are irreconcilable. ... Regardless of the historical origins of the conflict, the rights and wrongs of the promises and counter-promises ... there are now in Palestine some 650,000 Jews and some 1,200,000 Arabs ... , separated by political interests which render difficult full and effective cooperation among them ... Only by partition can these conflicting aspirations find substantial expression”.<sup>456</sup>

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<sup>456</sup> Quoted in M. Eisner, "Jerusalem: An Analysis of Legal Claims and Political Realities", (1994) 12:2 Wisconsin Int. L. J. 221 at 226-227.

The Jews pragmatically agreed to accept the Partition Plan as the best possible solution available at the time, even though they would have preferred to have Jerusalem as their capital. Not surprisingly however, the Arabs rejected the proposal, and threatened to use force to prevent its implementation.<sup>457</sup> The latter also requested the UN General Assembly to refer a number of questions of law, at the heart of the whole dispute, to the new International Court of Justice for an Advisory Opinion. But a slim majority of States in the General Assembly voted against this course of action.<sup>458</sup> The questions of law included, *inter alia*:

- “(a) Whether the indigenous population of Palestine has not an inherent right to Palestine and to determine its future constitution and government;
- (b) Whether the pledges and assurances given by Great Britain to the Arabs during the First World War ... concerning the independence and future of Arab countries at the end of the war did not include Palestine;
- (c) Whether the Balfour Declaration, which was made without the knowledge or consent of the indigenous population of Palestine, was valid and binding on the people of Palestine, or consistent with the earlier and subsequent pledges and assurances given to the Arabs;
- ... [and]
- (f) Whether a plan to partition Palestine without the consent of the majority of its people is consistent with the objectives of the Covenant of the League of Nations, and with the provisions of the Mandate for Palestine”<sup>459</sup>.

The British and UN Palestine Partition plans were based on an interesting array of values and perspectives on “equality”. They represented an attempt to impose prospective, formal and arithmetical equality, rather than contemporaneous, substantive or proportionate equality, expecting that in future Jews would greatly outnumber Arabs in the respective territories. As the UN Committee that recommended the partition pointed out, the solution did not take into account “the historical origins of the conflict, [or] the rights and wrongs of the promises and counter-promises [made in the past]”.<sup>460</sup> The plans resisted any attempt to interrogate the origins of the conflict, to ensure that they were not merely perpetuating injustices created long ago. They were ostensibly a “compromise between Jewish

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<sup>457</sup> K. Armstrong, *Jerusalem: One City, Three Faiths*, (New York: Alfred A. Knoff, 1996) at 386.

<sup>458</sup> Cattan, *supra*, at 47.

<sup>459</sup> Cattan, *supra*, at 47-49.

<sup>460</sup> Eisner, *supra*, at 227.

and Palestinian claims of self-determination",<sup>461</sup> devised without any genuine attempt to assess the legitimacy of either of these claims, from a legal point of view.

The principle of "self-determination" implies that the "self" will have some say in the "determination", but the Arab views on the UN proposal were ignored and the Jewish reservations went unheeded, so neither of the concerns of the most important "selves" were considered adequately. Clearly, one side's views had to be preferred, in order to reconcile the "irreconcilable". However, the sacrifice envisaged by the two Partition Plans was incredibly unrealistic. Both plans represented the ultimate positivist "fantasy": that the conflict would somehow be contained or defused, or even solved, by creating borders through law; that the Arabs and Jews would feel morally obliged to respect these borders, over and above their "other-worldly" duties to protect their respective Holy Places and historical claims to territory. In this sense, the proposals are similar to the solution proposed for the baby in the Judgment of Solomon: the territory clearly could not withstand being carved up in this way, even though a strictly mathematical analysis of the situation might dictate such an approach. A minority of those on the relevant UN Committee recognized this, but they were ignored, most likely because they were not Great Powers<sup>462</sup>. Imbalances in the world order at the time also played their part in the conflict, as in other parts of the world.

Conflicts between Arabs and Jews escalated throughout 1947 and 1948, but the British refused to intervene, despite their status as the Mandate protectorate, with the corresponding duty to "protect" the peoples under the Mandate. The British Mandate expired in May 1948, and they simply withdrew their personnel, leaving Jerusalem to the warring parties and a small delegation of UN representatives, who had arrived to start implementing the "internationalisation" of Jerusalem envisaged by the Partition Plan.<sup>463</sup>

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<sup>461</sup> Eisner, *ibid*, at 228.

<sup>462</sup> They were India, Iran and Yugoslavia, all relative newcomers to the so-called "civilized" world of European dominated world affairs.

<sup>463</sup> Cf. Armstrong, *supra*, at 387.

However, the new State of Israel was proclaimed by Ben Gurion the day before the British left, and the new State was recognized immediately by the United States and the Soviet Union. Jordan and the other Arab States sent troops into Jerusalem to defend the Arab inhabitants and their Holy Sites, and war raged until July 1948, when the UN was able to organise a truce. By this stage, Israel had gained control over West Jerusalem, and Jordan controlled the rest of the city. Both Israel and Jordan ignored a General Assembly Resolution<sup>464</sup> which called on them to hand Jerusalem over to the international community, instead formalising their respective territorial claims in the Armistice Agreements of 16 March 1949.<sup>465</sup>

At the same time, the Palestinian Arabs were furious that Jordan had simply incorporated East Jerusalem and the West Bank of the Jordan into its territory, rather than allowing the Palestinians to form their own state.<sup>466</sup> Many Palestinian Arabs were displaced by the Israeli acquisition of West Jerusalem, and approximately 750,000 of these refugees fled to various surrounding Arab states, where many of them have remained to this day, living in refugee camps.<sup>467</sup> Jews were also expelled in large numbers from East Jerusalem and the Walled City, and they mostly crowded into West Jerusalem.

During the hostilities, Israel had seized more territory than the UN Partition Plan would have allowed them. But most UN members were really only concerned about the "illegal" occupation by both Israel and Jordan of Jerusalem. General Assembly Resolution 303 maintained that the boundaries of "the City of Jerusalem shall include the present municipality of Jerusalem plus the surrounding villages and towns", consistent with the Palestine Partition Resolution.<sup>468</sup> However, the Security Council failed to take any action to enforce any of the relevant General Assembly Resolutions, "for political reasons".<sup>469</sup>

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<sup>464</sup> GA Res 303, 9 December 1949.

<sup>465</sup> Cf. Armstrong, *supra*, at 387.

<sup>466</sup> Egypt had held on to the Gaza Strip for the Arabs, and subsequently created a trusteeship over it. Note also that Eisner points out, "Transjordan annexed the West Bank through a series of steps that held at least the trappings of democratic self-determination.": Eisner, *supra*, at 229, n. 40.

<sup>467</sup> Cf. W.T. & S.V. Mallison, *An International Law Analysis of the Major United Nations Resolutions Concerning the Palestine Question*, (New York : United Nations, 1979) at 174-187 [hereinafter: Mallison, "International Law Analysis"].

<sup>468</sup> First operative paragraph.

<sup>469</sup> Eisner, *supra*, at 229.

The Secretary-General of the UN at the time, Trygve Lie, later called this failure one of "the most disheartening head-in-the-sand moments of the Chamberlain appeasement era."<sup>470</sup> The only action taken by the international community was to adopt a policy of non-recognition of either Jordan's annexation of East Jerusalem<sup>471</sup> or Israel's assertion of sovereignty over West Jerusalem.<sup>472</sup>

Israel was prepared to negotiate a permanent peace agreement with all the other Arab States, but they refused to recognise Israel as being endowed with the requisite authority to conclude such an agreement, despite Israel's acceptance into the UN in 1949.<sup>473</sup> A UN Palestine Conciliation Commission was created to try and bring the parties together, which allowed the Arabs to explain that they wished the Jews to withdraw behind the lines drawn in the Partition Resolution before they would consider a permanent truce, and even then they would never recognise the State of Israel. Various Arab guerrilla organisations formed<sup>474</sup> in order to prevent the Israelis from feeling secure and stable in their new territory. Several Jewish Holy Sites in the Arab parts of Jerusalem were also desecrated, and Jews were not allowed to visit the Wailing Wall inside the Walled City for the next twenty years. The Israelis retaliated with "frequently asymmetrical" force,<sup>475</sup> not just in the new Jordanian territories in Jerusalem but also in the established territories of Arab governments who allowed Arab guerrillas to organise themselves on their territory. Clearly this was a form of punishment, as well as self-defence.<sup>476</sup>

It is interesting to note that the Arabs living in the Palestine Mandate were never referred to as anything other than "refugees" or "inhabitants" in UN declarations and resolutions prior to December

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<sup>470</sup> Quoted in Eisner, *ibid.*

<sup>471</sup> Although Britain and Pakistan recognized it: Eisner, *ibid.*, at 230.

<sup>472</sup> For a discussion of the legal implications of non-action in this context, cf. A. Cassese, "Legal Considerations on the International Status of Jerusalem", [hereinafter Cassese, "Jerusalem"] in H. Köchler (ed.), *The Legal Aspects of the Palestine Problem, With Special Regard to the Question of Jerusalem*, (Wien: Wilhelm Braumüller Ges. m.b.H., 1981) at 147.

<sup>473</sup> Eisner, *supra*, at 231.

<sup>474</sup> Including the Palestine Liberation Organization in 1964.

<sup>475</sup> Eisner, *supra*, at 232.

<sup>476</sup> Cattani, *supra*, at 121.

1969, when they were first described as the “people of Palestine”.<sup>477</sup> Thus, while the controversial process of defining a “non-self-governing-territory” was being carried out in the General Assembly, even those with the best intentions did not foresee at that stage that the Arabs living under the administration of Israel were entitled to any form of “self-government”. That is why it is so difficult for many commentators today to accept that the Palestinian Arabs may have a right to form their own sovereign State.<sup>478</sup>

#### 4.4 *The “Liberation” of Tibet and Mongolia*

In February 1949, the Communists gained control over all of China’s territories, including Mongolia, but not Tibet.<sup>479</sup> A year later, however, after capturing Tibet, they recognised the independence of the Mongolian Peoples Republic. Their intention initially was to “unify” all of China, including “liberating” significant territories that bordered on China, such as Tibet and Mongolia, even though both those territories had considered themselves independent from China since 1912. Since Mongolia was not considered a threat to the People’s Liberation Army, it was allowed to gain its independence, as it was also under the watchful eye of its other Communist neighbour, the Soviet Union.<sup>480</sup>

The government of Tibet responded to the Communist takeover of China, by closing down the Chinese Mission in Lhasa, and giving “an official and friendly send-off” to the Mission’s Chinese employees.<sup>481</sup>

In late 1949, the Chinese Communist army marched into the Dalai Lama’s home town of Amdo, prompting the Tibetan government to write a letter to Mao Zedong, pointing out that Tibet was an “independent Country whose political administration had never been taken over by any Foreign

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<sup>477</sup> GA Res. 2535 (XXIV) B, 10 December 1969, which reaffirmed “the inalienable rights of the people of Palestine” and requested the Security Council to enforce the relevant resolutions that had previously been ignored. Earlier, in 1968, the General Assembly had “affirmed the inalienable rights of all inhabitants who have left their homes as a result of the outbreak of hostilities in the Middle East”: GA Res. 2443 (XXIII), 19 December 1968.

<sup>478</sup> For example, cf. Becker, *supra*.

<sup>479</sup> Cf. Discussion in Chapter Three, as to whether Tibet was actually a territory of China at this stage.

<sup>480</sup> Cf. Minority Rights Group International, ed., *World Directory of Minorities*, (United Kingdom: Minority Rights Group International, 1997) at 632.

<sup>481</sup> van Walt van Praag, *supra*, at 89.

Country”.<sup>482</sup> Copies of this letter were also sent to the British, United States, and Indian governments, who had all previously expressed various forms of support for Tibet’s stand against China, without formally recognising the sovereignty of Tibet. However, none of these governments wished to engage in open hostilities with China, and instead resorted to various diplomatic efforts, but were significantly hampered by the threat of both China’s and Russia’s veto powers in the Security Council.<sup>483</sup> The government of India organised for a delegation of Tibetans to initiate negotiations with the Chinese Ambassador in New Delhi, which led to the Tibetans deciding to go to Beijing to try and negotiate a peace treaty.<sup>484</sup> However, while negotiations were continuing at the diplomatic level, in November 1950 the People’s Liberation Army launched a full-scale invasion of Eastern Tibet, claiming to be freeing “three million Tibetans from imperialist oppression.”<sup>485</sup>

The United States and Britain expressed their support for India’s subsequent condemnation of the invasion, but considered that India should take responsibility for initiating any military action against China. However, India’s national self-interest in maintaining relatively peaceful relations with its largest neighbour ultimately caused it to abandon any plans to free Tibet.<sup>486</sup> The Tibetan government then sought the assistance of the United Nations, but the invasion of Korea by China overshadowed the issue of Tibet’s plight during General Assembly deliberations at the time. However, the US continued

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<sup>482</sup> L/P&S/12/4232, Tibetan Foreign Office to Chairman Mao Zedong, 2 November 1949, in van Walt van Praag, *ibid*, at 91.

<sup>483</sup> van Walt van Praag, *ibid*, at 92.

<sup>484</sup> NCNA, 21 November 1950, Letter from the Government of India to the Government of the PRC, 26 October 1950, in van Walt van Praag, *ibid*, at 143.

<sup>485</sup> van Walt van Praag, *ibid*, at 142. The “imperialists” in question were the religious order of Tibetan Buddhists, headed by the Dalai Lama, who was also the political leader of Tibet, and who the Chinese claimed was imposing feudal imperialism on the Tibetan population. In 1958, a Tibetan language newspaper issued by the Chinese stated: “The position of the reactionary religious leaders is interlinked with that of autocratic feudal lords. They are engaging themselves in conspiracy. They put obstacles in the way of the liberation of the working people, hence they are the rocks on the path of progress. Unless they are destroyed completely liberation is not possible.” *Karzey Nyinrey Sargypur* (16 November 1958) 1, in International Commission of Jurists Legal Inquiry Committee on Tibet, *Tibet and the Chinese People’s Republic*, (Geneva: International Commission of Jurists, 1960) at 18 [hereinafter: “ICJ Inquiry on Tibet”].

<sup>486</sup> “Nehru’s Note on China and Tibet”, 18 November 1950, in van Walt van Praag, *ibid*, at 143. India was also concerned to distance itself from the US’s interference in the Korean war, which also commenced in 1950.

to express support for Tibet, and in December 1950 the Department of State included the following statement in an *Aide Memoire* to the British Embassy:

“The United States, which was one of the early supporters of the principle of self-determination of peoples, believes that the Tibetan people has the same inherent right as any other to have the determining voice in its political destiny. It is believed further that, should developments warrant, consideration could be given to recognition of Tibet as an independent State. The Department of State would not at this time desire to formulate a definitive legal position to be taken by the United States Government relative to Tibet. It would appear adequate for present purposes to state that the United States Government recognises the de facto autonomy that Tibet has exercised since the fall of the Manchu Dynasty, and particularly since the Simla Conference. It is believed that, should the Tibetan case be introduced into the United Nations, there would be an ample basis for international concern regarding Chinese Communist intentions towards Tibet, to justify under the United Nations Charter a hearing of Tibet’s case in either the U.N. Security Council or the U.N. General Assembly.”<sup>487</sup>

In February 1951, while the Tibetan government was still waiting for such sentiments to transform into material forms of assistance, and with Chinese Communist forces still occupying Eastern Tibet, the Dalai Lama sent a fifteen-person delegation to Beijing to try and negotiate a peace deal on behalf of the government. These negotiations resulted in an “Agreement of the Central People’s Government and the Local Government of Tibet on Measures for the Peaceful Liberation of Tibet”,<sup>488</sup> which effectively authorised the Chinese to enter the rest of Tibet without further resistance, and to assume control over Tibet’s external affairs. As many authors have noted, the Tibetan delegation was left with little option but to sign this agreement, or they would have invoked a full-scale military invasion of the rest of Tibet. In other words, the Agreement was signed under duress, and the Dalai Lama was secretly counselled by the US government to repudiate it.<sup>489</sup> However, in September 1951, the Chinese military forces assumed control over the rest of Tibet, and the Dalai Lama decide to acquiesce in the Agreement, “in order to save my people and country from the danger of total destruction.”<sup>490</sup> The 1954

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<sup>487</sup> US Department of State to British Embassy, *Aide Memoire*, 30 December 1950, in van Walt van Praag, *ibid*, at 146.

<sup>488</sup> Cf. Appendix 25, van Walt van Praag, *ibid*, at 337-340. This Agreement was also known as the “Seventeen-Point Agreement”.

<sup>489</sup> Steere to the Secretary of State, 11 July 1951, transmitting secret letter to the Dalai Lama, in van Walt van Praag, *ibid*, at 149.

<sup>490</sup> Statement by the Dalai Lama on 20 June 1959, quoted in *The New York Times* (21 June 1959), in van Walt van Praag, *ibid*, at 149.

Constitution of China formally abolished Tibet's status as a "special" autonomous region, which had been part of the Seventeen Point Agreement, and the Chinese State Council immediately adopted a "Resolution on the Establishment of the Preparatory Committee for the Autonomous Region of Tibet", which was intended "to further integrate the administration of Tibet with that of the PRC."<sup>491</sup>

The US claimed in 1959 that they had "never recognized the pretensions to sovereignty over Tibet put forward [*sic*] by the Chinese Communist regime."<sup>492</sup> However, neither they nor the British interfered to prevent the subsequent persecution of the Tibetans by the Chinese, which the International Commission of Jurists claimed in 1960 was the equivalent of "genocide" against a religious group.<sup>493</sup> Between 1951-1959, the Commission found that there was evidence establishing "four principal facts in relation to genocide:

- (a) that the Chinese will not permit adherence to and practice of Buddhism in Tibet;
- (b) that they have systematically set out to eradicate this religious belief in Tibet;
- (c) that in pursuit of this design they have killed religious figures because their religious belief and practice was an encouragement and example to others;
- (d) that they have forcibly transferred large numbers of Tibetan children to a Chinese materialist environment in order to prevent them from having a religious upbringing."<sup>494</sup>

The Chinese government also had a policy of forcing Han people to migrate in large numbers to Tibet, "in an attempt to change the demographic profile of the region, and thus ensure the integration of Tibet into the mainstream of Chinese politics."<sup>495</sup> The Tibetan people became increasingly rebellious during this period, culminating in the 1959 "Tibetan National Uprising", which was violently quelled by the Chinese, resulting in the deaths of thousands of Tibetan men, women, and children. The Dalai Lama and many Tibetans fled Tibet at this point, establishing a "government-in-exile" in India. However, no "States have yet recognised this "government".

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<sup>491</sup> van Walt van Praag, *ibid*, at 161.

<sup>492</sup> Transcript of press and radio news conference, 11 September 1959, in van Walt van Praag, *ibid*, at 169.

<sup>493</sup> "ICJ Inquiry on Tibet", *supra*, at 3.

<sup>494</sup> *Ibid*, at 3.

<sup>495</sup> Minority Rights Group International, *supra*, at 605.

In October 1959, continuous pressure from a growing number of governments at the General Assembly finally resulted in that body passing a resolution condemning China's denial of "the fundamental human rights and freedoms of the people of Tibet".<sup>496</sup> However, the Security Council lacked the necessary consensus to intervene in any way, despite the fact that China's mistreatment of Tibetans worsened in the years following the uprising. Notably, the term "self-determination" was not included in the 1959 General Assembly resolution on Tibet. It wasn't until December 1961, after several other significant resolutions affirming the "right of all peoples" to self-determination had been passed, that the General Assembly recognised the "right to self-determination" of the Tibetan people.<sup>497</sup>

#### 4.5 Conclusions

Despite all these apparent inconsistencies in practice, a significant number of "non-self-governing territories" did manage to achieve "self-determination" during this era, and many were admitted to membership in the United Nations as new States.<sup>498</sup> Notably absent from this list were a large number of other African, Caribbean, and Pacific Island territories, which were still being "administered" by colonial powers. Clearly something more had to be done to turn self-determination into a prescribed right, which would create concomitant obligations upon those with the power to grant this right to their dependent peoples. In the next Chapter, we will see how the prescription of the "right to self-determination" in several international documents in the 1960's did help to move along the process of decolonisation more rapidly than in the first 15 years following the establishment of the UN.

However, at this point it is interesting to note how the international community was still struggling with the unwillingness of the "Great Powers" to relinquish any form of control, by actually creating effective enforcement mechanisms for those who had grievances about the abuse of their rights. If the

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<sup>496</sup> GA Res. 1353 (XIV), 21 October 1959.

<sup>497</sup> GA Res. 1723 (XVI), 20 December 1961. Article 2 of this resolution states: The General Assembly "Solemnly renews its call for the cessation of practices which deprive the Tibetan people of their fundamental human rights and freedoms, including their right to self-determination".

<sup>498</sup> For example, Indonesia (1949), Eritrea - federated with Ethiopia (1952), Cambodia (1955), Laos (1955), Libya (1955), Ghana (1956), Morocco (1956), Tunisia (1956), Malaysia (1957), and Guinea (1958).

UN had been allowed to intervene more in the decolonisation process, particularly in determining whether a territory had achieved the "full measure of self-government" or not, would not more administering powers have been encouraged to release their dependent territories more quickly and more equitably? If the Palestinian Arabs had been allowed to ask the advisory opinion of the International Court of Justice about their legal status, might not we be closer to arriving at a solution to the continuing crisis in the Middle East? If there had been an international penal tribunal in 1959, would the Chinese have been able to continue with their genocidal policies towards the Tibetans? In addition, although the "Permanent Five" members of the Security Council had been entrusted with the maintenance of "international peace and security" under the UN Charter, two of these members, the Soviet Union and China, were responsible for some of the worst post-war atrocities towards peoples within their purview. "Free will", "equality", and the "social contract", were still a long way from being realised.

## Chapter Five:

### The “*Prescriptive Stage*” of the Right to Self-Determination

This Chapter contains an analysis of the “*Prescriptive Stage*” of the right to self-determination.<sup>499</sup>

This stage is where the particular human right is articulated “in some prescriptive form in an international instrument (general or specific) generated by an international body” or elaborated in the form of “specific normative prescriptions in binding international conventions.”<sup>500</sup> In this Chapter, I argue that the right to self-determination reached the “*Prescriptive Stage*” when it was articulated in the *Declaration on the Granting of Independence to Colonial Countries and Peoples* of 1960,<sup>501</sup> and subsequently elaborated as a normative right in common article 1 of the two 1966 covenants on human rights.<sup>502</sup>

As a conclusion to this Chapter, I will analyse briefly some of the immediate effects of this elevation of the principle of self-determination to a “right” of “all peoples”, in the context of different regions of the world.

#### 5.1 *The 1960 resolutions on self-determination*

Most commentators agree that certain events in 1960 marked a significant turning point in the evolution of the “principle of self-determination” into the “right to self-determination”. In that year, two particular resolutions were passed by the General Assembly within a day of each other, that each clarified how the “principle of self-determination” should work in practice. Resolution 1514 (XV), otherwise known as the *Declaration on the Granting of Independence to Colonial Countries and Peoples*, provided, *inter alia*:

“*Mindful* of the determination proclaimed by the peoples of the world in the Charter of the United Nations to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large

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<sup>499</sup> Bassiouni, “Proscribing Function”, *supra*, at 182.

<sup>500</sup> *Ibid.*

<sup>501</sup> GA Res. 1514 (XV) of 14 December, 1960 [hereinafter: the “Colonial Declaration”].

<sup>502</sup> ICCPR and ICESCR, *supra*.

and small and to promote social progress and better standards of life in larger freedom,

...

*Recognising* the passionate yearning for freedom in all dependent peoples and the decisive role of such peoples in the attainment of their independence, *Aware* of the increasing conflicts resulting from the denial of or impediments in the way of the freedom of such peoples, which constitute a serious threat to world peace,

...

*Believing* that the process of liberation is irresistible and irreversible and that, in order to avoid serious crises, an end must be put to colonialism and all practices of segregation and discrimination associated therewith,

...

*Convinced* that all peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory, *Solemnly proclaims* the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations;

And to this end

*Declares that:*

1. The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.

2. All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

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4. All armed action or repressive measures of any kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected.

5. Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.”<sup>504</sup>

Resolution 1541 (XV), adopted the following day, included an Annex entitled *Principles Which Should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the Information Called for under Article 73e of the Charter*.<sup>505</sup> These principles include, *inter alia*:

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<sup>503</sup> Article 3 is discussed below.

<sup>504</sup> The “Colonial Declaration” was adopted on 14 December 1960 by a vote of 89 to 0, with nine abstentions: Australia, Belgium, Dominican Republic, France, Portugal, Spain, Union of South Africa, the United Kingdom, and the United States.

<sup>505</sup> Adopted 15 December 1960, by a vote of 69 to 2 (Portugal and Union of South Africa), with 21 abstentions (including some socialist countries) [hereinafter: “the Article 73e Resolution”].

*Principle I.* The authors of the Charter of the United Nations had in mind that Chapter XI should be applicable to territories which were then known to be of the colonial type. ...

*Principle II.* Chapter XI of the Charter embodies the concept of Non-Self-Governing Territories in a dynamic state of evolution and progress towards a "full measure of self-government". As soon as a territory and its peoples attain a full measure of self-government, the obligation ceases. Until this comes about, the obligation to transmit information under Article 73e continues.

...

*Principle IV.* *Prima facie* there is an obligation to transmit information in respect of a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it.

*Principle V.* Once it has been established that such a *prima facie* case of geographical and ethnical or cultural distinctness of a territory exists, other elements may then be brought into consideration. These additional elements may be, *inter alia*, of an administrative, political, juridical, economic or historical nature. If they affect the relationship between the metropolitan State and the territory concerned in a manner which arbitrarily places the latter in a position or status of subordination, they support the presumption that there is an obligation to transmit information under Article 73e of the Charter.

*Principle VI.* A Non-Self-Governing Territory can be said to have reached a full measure of self-government by:

- (a) Emergence as a sovereign independent State;
- (b) Free association with an independent State; or
- (c) Integration with an independent State.<sup>506</sup>

Both resolutions were supported by almost all UN members at the time, although most of the administering powers abstained from voting on them, unwilling actively to support declarations advocating more rapid decolonisation, but clearly trying to avoid further antagonising the rest of the international community by actively opposing them. However, Portugal and the Union of South Africa actively voted against the Article 73e Resolution.<sup>507</sup>

Nevertheless, these two resolutions represented major steps forward in the movement towards independence for all colonial and other "non-self-governing territories". Seventeen newly independent States had been accepted for membership by the United Nations during that year.<sup>508</sup> But there were

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<sup>506</sup> Other principles set out how to determine if a territory has "freely" chosen "free association" and "integration".

<sup>507</sup> Cf. Cassese, "Self-Determination", *supra*, at 71.

<sup>508</sup> Cameroon, Senegal, Togo, Madagascar, Zaire, Somalia, Dahomey (now Benin), Niger, Upper Volta, Ivory Coast, Chad, Central African Republic, People's Republic of the Congo, Cyprus, Gabon, Mali, and Nigeria: H.G. Espiell, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of

still more than thirty “non-self-governing” territories waiting for independence. The General Assembly already had tried various means of putting pressure on certain individual administering powers to speed up the process of decolonisation in certain territories.<sup>509</sup> These two new Resolutions were intended to provide “a set of general standards specifying the principle of self-determination enshrined in the UN Charter, with special regard to colonial peoples”,<sup>510</sup> and thus to remove potential sources of disputes as to interpretations of the obligations of those administering such peoples.

However, as Ofuatey-Kodjoe points out, there were several significant contradictions between these two documents.<sup>511</sup> The Article 73e Resolution, consistent with previous interpretations of article 73e, provided that Non-Self-Governing Territories may reach a “full measure of self-government” by three different means: independence, “free association with an independent State”, or “integration” into an independent State.<sup>512</sup> But the Colonial Declaration described the granting of “complete independence and freedom” to *all* Non-Self-Governing Territories as the *only* way to bring to an end “the subjection of peoples to alien subjugation, domination and exploitation” which was the result of “colonialism and all practices of segregation and discrimination associated therewith”.

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Minorities, *The Right to Self-Determination: Implementation of United Nations Resolutions*, UN Doc. E/CN.4/Sub.2/405/Rev.1, 1980, at 46, notes 14-30. Note, however, that many of these new States were formed as a result of complex negotiations and previous manoeuvring by the colonial powers and certain powerful groups within the territories, as well as the UN General Assembly (which monitored certain plebiscites), whereby sometimes several plebiscites had to be held in the same territory, which had the effect of restricting the choices of some populations. For example, the northern part of the British Cameroons initially voted to postpone consideration of its political future, rather than voting to join Nigeria - the only two options presented - while the southern part was able to choose between joining Nigeria, or forming the independent republic of Cameroun (they overwhelmingly supported the latter option). The northern part subsequently was forced to vote between joining Nigeria or Cameroun, and it voted for the former, although the majority of *all* those living in British Cameroons (ie. the two parts) had actually voted for joining Cameroun: M. Shaw, *Title to Territory in Africa: International Legal Issues*, (New York: Oxford University Press, 1986) at 112-113. Note also that Mali and Senegal were previously constituent parts of the Mali Federation, formed in January 1959, but subsequently they became separately independent and were recognised as such when they sought membership in the United Nations: Shaw, *ibid*, at 213-214.

<sup>509</sup> For example, in 1959 the General Assembly had passed Resolution 1413 requesting Belgium to provide a timetable for the independence of “Ruanda-Urundi”, after an outbreak of fighting between the Tutsi and Hutu tribes in the region: Shaw, *ibid*, at 113-114.

<sup>510</sup> Cassese, “Self-Determination”, *supra*, at 72.

<sup>511</sup> Ofuatey-Kodjoe, *supra*, at 120-123. See also Cassese, “Self-Determination”, *supra*, at 71-74.

<sup>512</sup> Discussed in Chapter Four, *supra*.

In reality, however, as Ofuately-Kodjoe suggests, subsequent State practice continued to support the *three* methods of providing self-determination for their dependent territories. For example, in 1962 the New Zealand Minister for Island Territories requested the semi-autonomous Legislative Assembly for the Cook Islands to decide between the following options: (i) complete independence from New Zealand; (ii) annexation and integration into New Zealand; (iii) joining at some future point an as-yet-undefined "Polynesian federation"; and (iv) maintaining internal self-government, with continued "free association" with New Zealand.<sup>513</sup> The Legislative Assembly voted by a large majority for the latter option, although article 41 of the Cook Islands Constitution provides that a two-thirds majority of the Assembly can vote in the future to change this arrangement.<sup>514</sup>

Another important difference between these two resolutions was their respective underlying philosophies. The Article 73e Resolution still envisaged that many Non-Self-Governing Territories remained in a "dynamic state of evolution", whereby they may not necessarily be "advanced" enough for full self-government. By contrast, article 3 of the Colonial Declaration stated: "Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence", and article 5 further demanded that "immediate steps" be taken "to transfer all powers" to the peoples of *all* Non-Self-Governing Territories, "without any conditions or reservations, in accordance with their freely expressed will and desire".

Clearly, these two Resolutions were based on different ideas of what true "freedom" is and how one acquires it. The Colonial Declaration describes "the process of liberation" as "irresistible and irreversible". It also describes "freedom" as "an inalienable right" of "all peoples", to "freely determine their political status and freely pursue their economic, social and cultural development", thus advocating the *natural* idea of freedom, as the ability of *all* human beings to determine their destiny for

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<sup>513</sup> Cf. Leibowitz, *supra*, at 137. The New Zealand government had already allowed the Cook Islands to have its own Legislative Council in 1947, in response to demands from the "Cook Islands Progressive Association", which had formed in 1945 to address the economic concerns of Cook Islanders: Leibowitz, *ibid*, at 135-136.

<sup>514</sup> Leibowitz, *ibid*, at 137-138. Note, however, that many criticisms were levelled at the New Zealand Government for "the limited degree of power accorded the Cook Islands under the association", and for

themselves, without need of external guidance.<sup>515</sup> However, the Article 73e Resolution continued to support the more widely-accepted view of freedom as something that one *acquires*, only when one has attained a certain state of being (“advancement”).<sup>516</sup> As discussed in Chapter Three, the right to equality and the right to be protected under the “social contract” have also been similarly qualified throughout history by the so-called “civilised” world’s largely self-serving characterisation of what “civilised” means.

Not surprisingly, these philosophical differences manifested themselves in a growing number of disputes between “dependent peoples” and their “administering powers” throughout the 1960’s and 1970’s, as to what kind of “freedom” they were entitled to.<sup>517</sup> Tal Becker has recently suggested that these two Resolutions were also adopted in order to resolve “a conflict as to self-determination’s centre of gravity. While socialist states used the principle to further their political agenda and undermine Western colonial interests, Western states adopted a “self-determination as democracy” stance to threaten internal socialist structures.”<sup>518</sup> Thus, these Resolutions were also used as weapons in the Cold War, as each side struggled to impose its own political ideology on the vast number of peoples suddenly “free” to shape their own political destiny for the first time in several hundred years.

### *5.2 Some immediate results of the new approach*

In 1961, a year after the adoption of the two aforementioned Resolutions, the phrase “right to self-determination” was used for the first time in a General Assembly resolution condemning China’s invasion of Tibet, and upholding the rights of the Tibetan peoples.<sup>519</sup> However, this did not lead to China’s acknowledgement that it should begin transmitting information about Tibet in accordance with

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applying undue pressure on the Cook Islands Legislative Assembly: P. Allen, “Self-Determination in the Western Indian Ocean”, (1966) 560 I.C. at 390-392, in Ofuatey-Kodjoe, *supra*, at 123, n. 86.

<sup>515</sup> This view is supported by, eg. Grotius and Rousseau: cf. Chapters Two and Three, *supra*.

<sup>516</sup> This view is supported by, eg. Locke and Marx (although each had a different idea of what constituted the appropriate level of “advancement”): cf. Chapters Two and Three, *supra*.

<sup>517</sup> Cf. Discussion in Chapter Six on the right of “national liberation movements” to use force.

<sup>518</sup> Becker, *supra*, at 314.

<sup>519</sup> GA Res. 1723 (XVI), adopted 20 December 1961. Cf. discussion in Chapter Four, *supra*, concerning previous General Assembly positions on this issue.

article 73e of the UN Charter. It seems that China exercised sufficient power in the Security Council to be able to argue successfully that Tibet was *not* an independent State prior to the invasion, and therefore was not a “non-self-governing territory” within the context of colonialism.<sup>520</sup>

In much the same way, India annexed the Portuguese-administered territory of Goa, Damao, and Din in 1961, without sanction. Most of the Security Council condemned India’s actions, with some delegates even referring to the “principle of self-determination” and the need to take into account the “will of the peoples” concerned.<sup>521</sup> However, the Soviet Union used its Security Council veto to block a resolution submitted by France, Turkey, the United Kingdom, and the US, which would formally have condemned India’s disregard for the “principle of self-determination”. Thus, the “right to self-determination” was flagrantly disregarded in this instance.<sup>522</sup>

In the same year, only three Non-Self-Governing Territories achieved independence and were admitted to membership of the United Nations: Mauritania, Sierra Leone, and Western Samoa.<sup>523</sup> At the end of that year, the General Assembly established a 17-member committee to examine the application of the

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<sup>520</sup> As will be discussed below in Chapter Six, now that self-determination has also been recognised as a right outside of the colonial context, there are strong arguments to suggest that the Tibetan people are still entitled to exercise their right to choose their own sovereign, whether or not China was correct in asserting that Tibet was not an independent State in 1950: A. Dulaney, “Resolving claims of self-determination: A proposal for Integrating Principles of International Law with specific application to the Tibetan people”, (Conference of International Lawyers on Issues Relating to Self-Determination and Independence for Tibet, London, 6-10 January 1993) in R. McCorquodale & N. Orosz, eds., *Tibet: The Position in International Law*, (London: Edition Hansjörg Mayer & Serindia Publications, 1994) at 115.

<sup>521</sup> These States were Ceylon (as it then was), Chile, Ecuador, the United Arab Republic, and the United States: Cassese, “Self-Determination”, *supra*, at 81.

<sup>522</sup> By contrast, after Indonesia annexed the Netherlands-administered territory of West Irian (also known as “West Papua”) in 1961, the UN insisted that Indonesia hold a plebiscite to ascertain the wishes of the population (although India sided with Indonesia in rejecting a UN-sponsored plebiscite). This plebiscite appeared to favour integration with Indonesia. However, the actual “plebiscite” was a public consultation between Indonesian authorities and 1,026 “specially selected” delegates, who met over 2 weeks in well-controlled “representative” councils that all voted unanimously to remain with Indonesia: Beigbeder, *supra*, at 139-142. Given the tenacity of the “Free Papua Movement” (OPM), which was formed in 1965, and a report in 1990 by the Anti-Slavery Society that alleges the Indonesian occupation has resulted in 300,000 deaths and 15,000 refugees, it seems that the plebiscite did not represent the “freely expressed will of the peoples” at all: A. Gray, “The Indigenous Movement in Asia”, in Barnes et al, *supra*, 35 at 47 & 53. Note also recent developments in West Papua, including the recognition by the Pacific Islands Forum of the volatility of the situation, in its *Biketawa Declaration* of October 2000, signed in the Republic of Kiribati. Cf. G. Dyer, “West Papua shaping up to be next East Timor”, *The New Zealand Herald* (25 October 2000) A13.

<sup>523</sup> Espiell, *supra*, at 46, notes 31-32, 34. For a discussion of the various conflicts and problems that had delayed the independence of Mauritania, cf. Shaw, *supra*, at 120-123.

Colonial Declaration “and to make recommendations on the progress and extent of its application.”<sup>524</sup>

These 17 members came from a range of colonial and “decolonised” countries and regions, as well as representing both the Western and socialist perspectives on decolonisation: Australia, Cambodia, Ethiopia, India, Italy, Madagascar, Mali, Poland, Syria, Tanganyika (now part of the United Republic of Tanzania), Tunisia, the Soviet Union (USSR), the United Kingdom, the United States, Uruguay, Venezuela, and Yugoslavia.<sup>525</sup>

In 1962, the “General Assembly noted that, with few exceptions, the provisions of the [Colonial] Declaration had not been carried out, and that repressive measures, including armed action, continued to be taken against dependent peoples.”<sup>526</sup> Therefore, the “Special Committee on Decolonization” was established formally, comprising representatives from the above countries plus seven new ones: Bulgaria, Chile, Denmark, Iran, Iraq, Ivory Coast, and Sierra Leone. This Committee then became known as the “Special Committee of 24”,<sup>527</sup> and subsequently assumed the work of the Committee on Information in monitoring the progress of Non-Self-Governing Territories towards a “full measure of self-government”.<sup>528</sup>

However, the UN was not involved in monitoring every plebiscite or other process by which Non-Self-Governing Territories achieved independence. Sometimes the administering power made the decision to grant a certain territory independence, sometimes without even consulting those agitating for

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<sup>524</sup> Leibowitz, *supra*, at 201.

<sup>525</sup> Leibowitz, *ibid*, at 201-202.

<sup>526</sup> United Nations, *The United Nations and Decolonization - History*, at para. 6, online: <<http://www.un.org/Depts/dpi/decolonization/history.htm>> (date accessed: 4 August 2000).

<sup>527</sup> Leibowitz, *supra*, at 202.

<sup>528</sup> At the same time, the Trusteeship Council established under the UN Charter (representing the United States, China, France, the Russian Federation, and the United Kingdom) retained its responsibilities throughout most of the rest of the twentieth century. In November 1993, the Council oversaw the last plebiscite to be held in the last remaining Trust Territory, Palau, by which the people of Palau voted by a slim majority to associate with the United States: Trusteeship Council, Press Release TR/2420, “Trusteeship Council Hopes Palau - Last Trust Territory - Will Achieve Independence in Near Future”, 18 January 1994, online: <[gopher://gopher.undp.org:70/00/uncurr/press\\_releases/TR/94\\_01/2420](http://gopher://gopher.undp.org:70/00/uncurr/press_releases/TR/94_01/2420)> (date accessed: 30 January 1999). In November 1994, the Trusteeship Council formally suspended its operations, and decided to meet in the future “only on an extraordinary basis, as the need arose”: Trusteeship Council, Press Release TR/2424, “Trusteeship Council Formally Suspends Operations with Independence of Palau - Last Remaining UN Trust Territory”, 1 November 1994, online: <[gopher://gopher.undp.org:70/00/uncurr/press\\_releases/TR/94\\_11/2424](http://gopher://gopher.undp.org:70/00/uncurr/press_releases/TR/94_11/2424)> (date accessed: 30 January 1999).

independence.<sup>529</sup> As Beigbeder notes: "UN monitoring of self-determination electoral processes was therefore not adopted, or accepted as a general rule, but only in specific cases. The reasons for non-requesting, or rejecting international monitoring was usually the wish of the administering authority to retain full power over the transition period to independence, to identify and legitimize the new leaders and control the emerging political processes".<sup>530</sup> He suggests that the motives of the administering powers frequently involved trying to guarantee their own continuing access to the former dependent territory's natural resources.

In addition, even in those plebiscites monitored by the UN, only the *male* adult population of a territory was entitled to vote, not the female adult population. This is despite the fact that women's suffrage had been recognised in many European and other States earlier in the twentieth century, and the fact that women in many Non-Self-Governing Territories had been actively involved in politics during the colonial period, particularly in the political processes leading to plebiscites in various parts of Africa.<sup>531</sup> Thus, the apparent "consent of the governed" was not necessarily derived from a representative sample of "the governed", for the most part. Women's universal suffrage in colonial territories largely met with the same obstacles that had faced the "uncivilised" world in trying to assert its right to be consulted as to its "sovereign": women were not considered "advanced" enough to be able to make a well-informed determination for themselves.<sup>532</sup>

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<sup>529</sup> Beigbeder, *supra*, at 129. As examples of Non-Self-Governing Territories that attained independence without UN monitoring of the relevant electoral processes, he cites India and Pakistan (1947), Belgian Congo (1960), Algeria (1962), and Guinea-Bissau (1973): *ibid*, at 130.

<sup>530</sup> Beigbeder, *ibid*, at 130.

<sup>531</sup> For example, cf. W. Muigai, "Apolitical versus Political Feminism: The Dilemma of the Women's Movement in Kenya", in Quashigah & Okafor, *supra*, at 67, which describes how in 1952 the "first formally organized Kenyan women's group", the MYWO, was formed, which "was the product of the colonial administration's purported effort to improve the life of women" but was actually "formed to deflect the women from the political struggle of the African people", suggesting that this potential influence was a real cause of concern to the colonial power (at 87).

<sup>532</sup> Note that women in the political sphere in many former colonies are still trying to shake off such condescending treatment. For example, cf. S. Tamale, "Towards Legitimate Governance in Africa: The Case of Affirmative Action and Parliamentary Politics in Uganda", in Quashigah & Okafor, *supra*, at 235.

Later in 1962, the General Assembly passed Resolution 1803 (XVII), which contained the *Declaration on Permanent Sovereignty Over Natural Resources*.<sup>533</sup> This Declaration was intended to clarify the meaning of “freely determine” one’s “economic development”, in order to balance the rights of Third World countries to develop their natural resources, with the need of potential foreign investors to have some form of security when investing in those countries. It provided that peoples subject to colonial rule or foreign domination have the right freely to dispose of their natural wealth and resources, as long as this is done “in the interest of the national development and of the well-being of the people”.<sup>534</sup> Cassese points out that this restriction also applies to the colonial or foreign power, such that “any use or exploitation of natural resources of a territory under colonial or foreign domination, carried out by the colonial or foreign Power without acting in the exclusive interest of the people at issue, amounts to a gross infringement of the right of peoples to self-determination.”<sup>535</sup>

### 5.3 *The human rights covenants and self-determination*

In 1966, the General Assembly adopted the two covenants on human rights that had been under negotiation in one form or another since before the Universal Declaration of Human Rights was adopted in 1948.<sup>536</sup> Common article 1 of both the ICCPR and the ICESCR provides that:

“1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic

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<sup>533</sup> Adopted 14 December 1962, by a vote of 87 votes to 2 (France and South Africa), with 12 abstentions (mostly socialist countries, plus Burma and Ghana): Cassese, “Self-Determination”, supra, at 100.

<sup>534</sup> Ex operative paragraph 1.

<sup>535</sup> Cassese, “Self-Determination”, supra, at 100. Note, however, that Cassese was only able to reach such a conclusion after analysing a significant amount of State practice that took place after the Declaration was adopted (his book was published in 1995). He then refers (at n. 102) to several recent articles on Israel’s economic policies in the Occupied Territories, which support his contention that the foreign power’s (ie. Israel’s) exploitation of water and land in those territories amounts to a “gross infringement” of the right to self-determination of the people of the Occupied Territories (which right was only recognised in 1970).

<sup>536</sup> Cassese argues that, even before the UDHR was drafted, certain UN members always intended to prepare binding treaty provisions based on the general principle of respect for human rights that is provided under the Charter: Cassese, “Self-Determination”, supra, at 47. Cf. Discussion on the drafting of the UDHR, in Chapter Four.

co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realisation of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.”

These words were the subject of lengthy debates, prior to the adoption of the two Covenants, and there are still many disputes in the international community today as to the meaning of some of the words. Many Western States had tried to create “technical” arguments as to why there should be no such provision for a “collective right” in a Covenant for individual human rights, while the socialist and Third World countries supported its inclusion, but took a range of positions on the preferred scope of the provision.<sup>537</sup> Cassese suggests that the Western powers were really more concerned about “their colonial interests, or ... fear[ful] that the paragraph relating to the free disposition of natural resources imperilled foreign investments and enterprises in developing countries”, rather than genuinely being concerned about mixing different types of rights together.<sup>538</sup> In the end, he argues, the attempts by the Western States to insist that self-determination went beyond the colonial situation, and thus should be kept out of a human rights Covenant, only served to broaden the scope of the article.<sup>539</sup>

Cassese suggests that the following are the key elements of the negotiated language of common article 1 of the ICCPR and ICESCR:

(i) self-determination is a *continuing* right, which entitles people to “choose their legislators and political leaders free from any manipulation or undue influence from the *domestic* authorities”, in other words freedom from despotism, and some kind of right to representative government, consistent with the very vague guarantees of political and civil rights in the ICCPR,<sup>540</sup>

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<sup>537</sup> Cassese, “Self-Determination”, *ibid*, at 48-52.

<sup>538</sup> *Ibid*, at 50.

<sup>539</sup> *Ibid*, at 52.

<sup>540</sup> *Ibid*, at 53. He argues that the right is “continuing” by virtue of the fact that the phrase “shall have the right” was finally changed to “have the right”, thus providing for a permanent right (at 54). As for the right to representative government, Cassese points out that the Human Rights Committee has interpreted this to include even single-party systems of government: *ibid*, at 63.

(ii) self-determination means “freedom from outside interference”, in other words freedom from invasions or other forms of foreign intervention or occupation;<sup>541</sup>

(iii) “the right to control and benefit from a territory’s natural resources lies with the inhabitants of that territory”, by virtue of the fact that they have the right to choose their political leaders, who are thus accountable to the people;<sup>542</sup> and

(iv) peoples of non-self-governing and trust territories have the right freely to decide their international status, in accordance with the principles set out in the Article 73e Resolution.<sup>543</sup>

The most controversial term in the article is, without a doubt, “peoples”.<sup>544</sup> Nowhere in the Covenants is this term defined, even though the Covenants were clearly envisaging that such “peoples” would include some of those from territories other than non-self-governing or trust territories, and hence expands to some extent upon previous understandings of that term. Cassese contends that the language of the article suggests that the following “peoples” are entitled to *external* self-determination, in the form of determining their international status:

(i) “entire populations living in independent and sovereign States”;

(ii) “entire populations of territories that have yet to attain independence”; and

(iii) “populations living under foreign military occupation.”<sup>545</sup>

At the same time, consistent with the minimal democratic guarantees in other parts of the ICCPR, Cassese points out that most States supported the idea that all “peoples” living in sovereign States had a right to determine their domestic political institutions, in other words, *internal* self-determination. Again, such a right was to attach to *all* the peoples of a given territory, not to any particular group

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<sup>541</sup> Cassese, *ibid*, at 55.

<sup>542</sup> *Ibid*, at 55-57. Note, however, article 47, ICCPR and article 25, ICESCR, which both provide: “Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilise fully and freely their natural wealth and resources”, which Cassese argues means “that in cases of expropriation or nationalization of the natural resources of a people, the duty to pay compensation, if any, is governed by the rules of customary international law currently in force”: *ibid*, at 57.

<sup>543</sup> Cassese, *ibid*, at 57-58.

<sup>544</sup> See generally J. Crawford, ed., *The Rights of Peoples*, (New York: Oxford University Press, 1988).

within the territory over and above the rights of the rest of the population of that territory. However, India lodged a reservation to this article when it ratified both Covenants, stating that the right to self-determination pertains “only to the peoples under foreign domination” and clarifying that it did not apply “to sovereign independent States or to a section of a people or a nation - which is the essence of national integrity.”<sup>546</sup> The Netherlands, France, and the Federal Republic of Germany all lodged objections to India’s reservation, arguing that “all peoples” includes people within sovereign States.<sup>547</sup> Furthermore, as will be discussed below, State practice tends to support Cassese’s interpretation, that peoples within sovereign States have a limited right to *internal* self-determination.

However, neither of the two Covenants entered into force until 1976, some ten years after they were adopted by the General Assembly.<sup>548</sup> Therefore, their provisions did not become binding until that time, and thus, disputes as to the meaning of common article 1 were merely academic at this time. Nevertheless, the inclusion of the “right to self-determination” in a treaty that was intended to be binding on all parties in the near future, was an important example of strong *opinio juris* in this area of international law.

#### 5.4 *Minority rights*

Another significant development in 1966 was the adoption of article 27 of the ICCPR, which provides:

“In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion or to use their own language.”<sup>549</sup>

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<sup>545</sup> Cassese, “Self-Determination”, *supra*, at 59.

<sup>546</sup> United Nations, *Human Rights, Status of International Instruments*, UN Doc. ST/HR/5, 1987, 9.

<sup>547</sup> Halperin et al, *supra*, at 22-23.

<sup>548</sup> The ICCPR entered into force on 23 March 1976, while the ICESCR entered into force on 3 January 1976.

<sup>549</sup> Note that there is no corresponding right for minorities in the ICESCR.

As many authors have noted, this provision had a lengthy and turbulent negotiating history, which had some common features with the negotiating history of the right to self-determination.<sup>550</sup> As mentioned previously, the UDHR did not provide for any group rights, and many States were reluctant to see any form of group rights in the ICCPR. However, in 1947, the newly-formed “Sub-Commission on Prevention of Discrimination and Protection of Minorities” [hereinafter: “Sub-Committee on Minorities”] had suggested the following text for inclusion in the UDHR:

“In States inhabited by well-defined ethnic, linguistic or religious groups which are clearly distinguished from the rest of the population and which want to be accorded differential treatment, persons belonging to such groups shall have the right as far as compatible with public order and security to establish and maintain their schools and cultural or religious institutions, and to use their own language and script in the press, in public assembly and before the courts and other authorities of the states if they so choose.”<sup>551</sup>

Socialist States were generally very supportive of such a provision containing detailed elaborations as to the limits and extent of any such minority rights. However, many Latin American countries, as well as the United States and Australia, emphasised the need for immigrant groups to assimilate to their new environment, not to maintain their own culture.<sup>552</sup> In addition, the Latin American States suggested that indigenous groups should not be considered as minorities at all, but as “an integral part” of their relevant societies.<sup>553</sup> Thus, the issue of “minority rights” was left to one side when the UDHR was being finalised, and the eventual wording of article 27, ICCPR, was “formulated in an extremely cautious, vague manner.”<sup>554</sup>

Some of the major flaws that have been identified in the wording of article 27 are:

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<sup>550</sup> For example, cf. H. Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights*, (Philadelphia: University of Pennsylvania Press, 1990); P. Thornberry, *International Law and the Rights of Minorities*, (Oxford: Oxford University Press, 1991); and Brölmann et al, *Peoples and Minorities in International Law*, supra.

<sup>551</sup> UN Doc. E/CN.4/52, at 9.

<sup>552</sup> A. Spiliopoulou Åkermark, *Justifications of Minority Protection in International Law*, (The Hague: Kluwer Law International, 1996) at 124. Cf. Discussion in Chapter Three, as to the restricted application of the concept of “equality” in relation to assimilationist policies.

<sup>553</sup> Spiliopoulou Åkermark, *ibid*, at 124, n. 25.

<sup>554</sup> M. Nowak, “The Right to Education”, at 485, in Spiliopoulou Åkermark, *ibid*, at 124.

(i) it unnecessarily restricts the range of groups that may need protection within a society, for example, the rights of people who belong to national, racial, political, social or cultural groups within a larger population are not addressed in this article;<sup>555</sup>

(ii) it provides for *individual* rights only and fails to provide any protection for a collective or group as such, speaking only of the rights of “*persons* belonging to such minorities” who are seeking to exercise their rights “in community with the other members of their group”, *not* “groups” or even “in community with ... their group”; and

(iii) it does not provide *positive* rights for people belonging to minorities, unlike the 1947 formulation by the Sub-Committee on Minorities, and the decision of the Permanent Court of International Justice in the *Minority Schools in Albania Case*.<sup>556</sup> Article 27 merely stipulates that States must not *deny* the specific “rights” listed within the article. Thus, there is no actual *positive* obligation on States to protect minority rights in general terms. The State only has the obligation to ensure that, where it seems that a person from one of the groups mentioned is being denied one or more of its enunciated rights, the State must *prevent* the further denial of that person’s rights.<sup>557</sup>

Several months before the ICCPR was adopted, the General Assembly adopted another important treaty protecting minority rights: the *Convention on the Elimination of all Forms of Racial*

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<sup>555</sup> Note that the 1948 “Genocide Convention”, *supra*, discussed in Chapter Four, applies to crimes of genocide against “national, ethnical, racial or religious” groups. Also, the *Convention on the Elimination of all Forms of Racial Discrimination*, adopted earlier in 1966 and discussed further below, provides protection against any discrimination “based on race, colour, descent, or national or ethnic origin” (article 1, C.E.R.D., adopted 7 March 1966). More recently, article 7(1)(h) of the “Rome Statute” provides that the crime against humanity of persecution involves the severe denial of the rights of “any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender ... , or other grounds that are universally recognized as impermissible under international law” (see also article 7(2)(g) & (3)). This provision was drafted to take into account the wide range of minority rights that have been violated on a wide scale in various regions of the world, since the drafting of article 27, which failed to protect any of them. Cf. Discussion in Chapter Seven on crimes against humanity and self-determination.

<sup>556</sup> Cf. Discussion of this case in Chapter Three, *supra*.

<sup>557</sup> Spiliopoulou Åkermark points out the important distinction between prohibition of *discrimination*, and recognition of the *rights* of minorities, including the place of “affirmative action”, *supra*, at 23-28. Cf. Discussion in Chapter Six on the “rights” of minority groups.

*Discrimination* [hereinafter the “CERD”].<sup>558</sup> This Convention was also influenced by the developments in 1960 with respect to the right to self-determination of colonised peoples. Its fourth preambular paragraph makes explicit reference to the General Assembly’s support for the Colonial Declaration, and its condemnation of “colonialism and all practices of segregation and discrimination associated therewith.” Article 1 of the Convention defines “racial discrimination” as “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin”. However, as with article 27, ICCPR, the CERD does not provide any *positive* rights to people being discriminated against in such a manner. But it does create more of an obligation on States to ensure that they “prohibit and ... eliminate all forms of racial discrimination” and to “guarantee the right of everyone” to many of the rights contained in the ICCPR.<sup>559</sup>

In addition, article 1(4) allows a State to take “special measures” - such as affirmative action - “for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms”. Further, article 2(2) allows States to take “special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms.” In other words, the Convention recognises that “groups” may have “rights”, and that “equality” does not necessarily result from the “liberalist” view of the “level playing field”.<sup>560</sup>

On the latter point, Professor Douglas Sanders has pointed out that some groups who are not actually suffering from discrimination, but whose unique group identity is being threatened with extinction through processes such as cultural assimilation, are not provided for adequately by the usual regimes

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<sup>558</sup> Note that the General Assembly had previously adopted the *Declaration on the Elimination of all Forms of Racial Discrimination*, GA Res. 1904 (XVIII), 20 November 1963.

<sup>559</sup> Article 5, CERD. Note that these rights are individual, not group, rights.

<sup>560</sup> Cf. Discussion in Chapter Three, *supra*, criticising the “liberal” view of “equality”, which assumes that all groups are equally well-equipped to maintain their identity within pluralist societies.

for minority protection.<sup>561</sup> He calls such groups “collectivities”, and suggests that there are several persuasive arguments for protecting their “right to cultural survival”, including: (a) political stability; (b) consistency between political rhetoric and the reality of “pluralist” societies; and (c) it facilitates the “adaption and evolution within the minority”. As he argues, “[i]f a group feels threatened, it will resist accommodation and adaptation. Tolerance may, indeed, be the sophisticated route to minority assimilation.”<sup>562</sup> As an example of such “cultural rights” existing in practice and being reasonably well protected, he cites the Québécois Francophone minority within Canada, which was granted provincial autonomy and thus was able “to control matters relevant to its cultural survival, including language, religion, education, and French civil law. To simply recognise the right of individual Francophones to speak French or follow the cultural norms of their traditions would have defeated the collectivity. French would have lost out in the linguistic marketplace of North America.”<sup>563</sup>

Professor Antony Anghie has also taken up this theme of recognising the “right to cultural identity” as a way of decreasing ethnic unrest and violence.<sup>564</sup> He “maintains that ethnic violence is the dramatic expression of the struggle for cultural survival.”<sup>565</sup> As he suggests, “culture is not merely some ornamental aspect of an individual’s existence that can be readily dispensed with or displayed on ceremonial occasions, but integral to the self-concept and social functioning of individuals and the communities of which they form a part.”<sup>566</sup> However, he acknowledges that “cultural identity” is not something that can be defined easily. There is a strong subjective element to it, which needs to be

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<sup>561</sup> D. Sanders, “Collective Rights”, (1991) 13 Hum. Rts. Q. 367 at 376-378.

<sup>562</sup> Sanders, *ibid*, at 375.

<sup>563</sup> Sanders, *ibid*, at 382.

<sup>564</sup> Anghie claims that “the vocabulary of neutrality and its legal counterpart, non-discrimination, may merely conceal a systematic cultural subordination of minorities which can foster violence.”: A. Anghie, “Human Rights and Cultural Identity: New Hope for Ethnic Peace?” (1992) 33 Harv. Int’l L. J. 341 at 352 [hereinafter: Anghie, “Cultural Identity”]. Cf. S. James Anaya, “The Capacity of International Law to Advance Ethnic or Nationality Rights Claims”, (1991) 13 Hum. Rts. Q. 403 at 408-409: “In applying the principle of self-determination to the context of contemporary ethnic autonomy claims within the human rights approach, other evolving human rights concepts come into play - especially the concept of cultural integrity.”

<sup>565</sup> Anghie, “Cultural Identity”, *supra*, at 341.

<sup>566</sup> *Ibid*, at 352.

taken into account, as the Permanent Court of International Justice acknowledged in several of its cases.<sup>567</sup> Therefore, he suggests that:

“the recognition of the right [to cultural identity] should be regarded as providing minorities with a status in international law as part of a system which could require states to engage in negotiations with the minority in question in order to resolve their differences. Crucial and difficult questions will have to be resolved in each situation as to how to balance the interests of states and minorities, what can be reasonably required of the state given its political and economic situation and so forth. Given that such negotiations commonly occur in the midst of long standing ethnic hostilities, agreements arrived at may be dictated more by the exigencies of continuing violence than by the need for a stable framework for the future. But particularly against a backdrop of violence, the difficulties of negotiation should not preclude the attempt to articulate the right.”<sup>568</sup>

In 1994, the ICCPR Committee on Human Rights recognised this growing trend in scholarship on minority rights, and disseminated the following “General Comment” on article 27:

“Para. 6.1: A state party is “under an obligation to ensure that the existence and the exercise of [the rights declared by Article 27] are protected against their denial or violation. Positive measures of protection are, therefore, required ... also against the acts” of non-state actors.

Para. 6.2: Although the rights protected are individual, they depend on the ability of the minority group to maintain its own culture. “Accordingly, positive measures by State may also be necessary to protect the identity of a minority” and the rights of its members.”<sup>569</sup>

However, such General Comments are not binding on States Parties. Therefore, States are not under any legal obligation to recognise the “right” of a minority to cultural identity or survival.

### 5.5 Self-Determination in Africa and “*uti possidetis*”

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<sup>567</sup> *The Rights of Minorities in Upper Silesia (Minority Schools) Case* (1928), and the *Minority Schools in Albania Case* (1935), discussed supra in Chapter One (Introduction).

<sup>568</sup> Anghie, “Cultural Rights”, supra, at 352. Cf. Discussion of minority “rights” to self-determination in Chapter Six.

<sup>569</sup> ICCPR Committee on Human Rights, *General Comment No. 23 on Article 27 of the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.5, 26 April 1994, quoted in Steiner & Alston, supra, at 992. Note that this Committee is not a judicial organ, and its views are not legally binding. However, as Spiliopoulou Åkermark remarks: “The objectiveness and thoroughness of the Committee’s work have resulted in strengthening the authority of its views.” (supra, at 155).

Decolonization continued at a slow but steady pace across the African continent throughout the rest of the 1960's, with fifteen new African States being admitted to UN membership between 1962-1969.<sup>570</sup> For the most part, the boundaries of the new States followed those set during the 1885 Berlin Conference.<sup>571</sup> However, the administering powers continued to rearrange the borders of some of the territories to which they were considering granting independence, sometimes right up until independence was granted, and without consistent consultation with the inhabitants. For example, Spain created Equatorial Guinea by merging the island of Fernando Po with mainland Rio Muni in 1963. In a referendum held in 1968 the majority of Fernando Po voted against independence. But the United Nations had demanded that Equatorial Guinea had to remain as one territorial unit, so the people of Fernando Po were forced to become independent of Spain, as an integral part of the new State of Equatorial Guinea, when the majority of people of Rio Muni voted in support of independence.<sup>572</sup>

Such manoeuvring on the part of administering powers brought back the need to reconsider the doctrine of *uti possidetis*, or "territorial integrity". This doctrine had its origins in the early nineteenth century, when Spain granted independence to many of its colonies in the Americas, basing the new territorial borders on those established during the colonial period.<sup>573</sup> This practice was formalised in numerous bilateral treaties and in some of the constitutions of the new countries. As Franck points out: "When the rule of the conquistadors gave way to dozens of independent states, *uti possidetis* became a useful, even a necessary, way to avoid perpetual war based on conflicting claims of historically-based title. *Uti possidetis* promoted peace and stability by requiring all the new players to play the cards as

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<sup>570</sup> Algeria, Burundi, Rwanda, Uganda, and the United Republic of Tanzania in 1962; Kenya in 1963; Malawi and Zambia in 1964; Gambia in 1965; Botswana and Lesotho in 1966; Mauritius in 1967; and Equatorial Guinea and Swaziland in 1968. Eight other Non-Self-Governing Territories, predominantly from the Caribbean, Asia, and the Pacific, also achieved independence and were admitted to UN membership during this period: Barbados, Cook Islands, Jamaica, Singapore, Southern Yemen, Malta, Nauru, and Trinidad & Tobago: Espiell, *supra*, at 46, notes 30 & 32-56.

<sup>571</sup> Cf. Discussion on the *Treaty of Berlin*, *supra*, in Chapters One and Two.

<sup>572</sup> Shaw, *supra*, at 115.

<sup>573</sup> Cf. Discussion in Chapter Two.

they had been dealt by Madrid: fair or unfair, historically accurate or frivolous.”<sup>574</sup> By 1959, the two Latin American judges of the International Court of Justice in the *Case concerning Sovereignty over Certain Frontier Land*<sup>575</sup> had asserted that the practice had crystallised into a general principle of international law.

Unfortunately, the Spanish Americas were the only locale where this theory actually worked in practice. The doctrine of *uti possidetis* was also applied to the African continent, yet historically-based conflicts over territory still rage throughout Africa today.<sup>576</sup> The Organization of African Unity [hereinafter: “OAU”) adopted a resolution in 1964, pledging themselves “to respect the borders existing on their achievement of national independence”, in accordance with *uti possidetis*.<sup>577</sup> Most non-African scholars have assumed that this OAU Resolution settled the matter once and for all.<sup>578</sup> However, much of the relevant African scholarship has pointed to the significance of an earlier “All-African Peoples Conference”,<sup>579</sup> which specifically had rejected the artificial frontiers, and called for a reassessment of “the colonial mutilation of African geo-political landscape.”<sup>580</sup> Thus it is questionable whether the OAU Resolution was an expression of the will of the African people generally, and thus

<sup>574</sup> Franck, “Postmodern Tribalism”, supra, at 6.

<sup>575</sup> [1959] ICJ Rep. at 240 and 255.

<sup>576</sup> For example, the border between Eritrea and Ethiopia is still a site of conflict, and many commentators point out that current inter-ethnic conflicts such as those in Liberia, Congo (formerly Zaire), Rwanda, Burundi and Sudan arise out of unresolved historical disputes. For example, cf. C.R. Ezetah, “Legitimate Governance and Statehood in Africa: Beyond the Failed State and Colonial Self-Determination” [hereinafter: Ezetah, “Legitimate Governance”], in Quashigah & Okafor, supra, at 419. For a general discussion of the destructive legacy of colonialism in Africa, cf. Mutua, “Humpty Dumpty”, supra.

<sup>577</sup> *Cairo Resolution on Border Disputes among African States*, adopted by the Assembly of Heads of State and Government of the Member States of the Organization of African Unity [hereinafter: “OAU Resolution”].

<sup>578</sup> For example, cf. Cassese, “Self-Determination”, supra, at 191-193; and M.W. Zacher, “The Territorial Integrity Norm: International Boundaries and the Use of Force”, (2001) Spring, International Organization, [forthcoming] at 21-22. Note, however, Cassese suggests that two States may agree mutually to modify their borders in future, and this should be done only after consultation with the populations concerned: Cassese, “Self-Determination”, supra, at 193.

<sup>579</sup> Held in Accra, Ghana, in December 1958. Cf. Ezetah, supra, at 447-8, & 452-3.

<sup>580</sup> Mutua, “Humpty Dumpty”, supra, at 69, n. 122.

relevant to their self-determination, or whether it was a self-serving act by the "African colonial elite" who had every reason to preserve their new power base, as Ezetah argues.<sup>581</sup>

One particularly divisive situation was the declaration of independence by the "sovereign State of Biafra", from the Eastern Region of Nigeria, in May 1967. This declaration followed two coups in Nigeria in 1966, and a subsequent decree that purported to decentralise Nigeria and create twelve new States, out of the 250 different ethnic groups then living in Nigeria.<sup>582</sup> There had been widespread massacres of Ibo people in the North of the country, causing the rest of them to flee to their traditional homelands in the Eastern Region.<sup>583</sup> The military government of the Eastern Region sought guarantees that the federal Nigerian Government would protect the Ibo people from future violence. But when this was not forthcoming, the Eastern Region Government refused to continue paying revenue to the federal government. The latter responded by placing a severe economic boycott on the region. Two months after Biafra declared its independence, a civil war commenced, lasting nearly three years, and resulting eventually in Biafra's surrender.<sup>584</sup>

In the meantime, seven African States recognized the State of Biafra, with the Ivory Coast reprimanding the "inexplicable guilty indifference of the whole world towards the massacres", and Zambia stating that "it would be morally wrong to force anyone into unity founded on bloodshed".<sup>585</sup> However, in September 1967, the OAU declared that it would not condone secession even under such circumstances, out of respect for the sovereignty of Nigeria and the territorial integrity principle.<sup>586</sup> The OAU attempted to mediate between the two sides as the civil war continued, with the UN declaring

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<sup>581</sup> Ibid, at 77. Cf. Mutua, "Why Redraw", supra, where he argues that most of the current borders within the African continent need to be reassessed, in order to address past injustices and to bring genuine stability to the continent.

<sup>582</sup> Economic Intelligence Unit, *EIU Country Profile - Nigeria 1996-97*, at 17, in C.R. Ezetah, "International Law of Self-Determination and the Ogoni Question: Mirroring Africa's Post-Colonial Dilemma", (1997) 19 *Loy. L. A. Int'l & Comp. L. Q.* 811 at 813 [hereinafter: Ezetah, "Ogoni question"].

<sup>583</sup> Professor Saxena estimates that over one million Ibos fled from the North, but that "nearly thirty thousand never reached their tribal homelands.": J.N. Saxena, *Self Determination: From Biafra to Bangla Desh*, (Delhi: University of Delhi, 1978) at 31.

<sup>584</sup> Shaw, supra, at 208.

<sup>585</sup> *Africa Research Bulletin*, May 1968, at 1073, in Shaw, *ibid*, at 209.

<sup>586</sup> Stremblau, *The International Politics of the Nigerian Civil War 1967-70*, at 93, in Shaw, *ibid*, at 208.

that regional organisations should manage local conflicts, rather than it.<sup>587</sup> But Biafra refused to accept the OAU's insistence that it re-unite with Nigeria, even though such re-unification allegedly was "in the supreme interest of Africa" and would ensure "all forms of security to all citizens".<sup>588</sup> Nigeria was the ultimate military victor, and the Ibo people have remained part of Nigeria since they surrendered in January 1970.

More recently, the Ogoni people from the Rivers state of Nigeria have also agitated unsuccessfully for independence from the Nigerian federation, based on similar grounds as the "Biafrans' liberation grounds - political domination, economic exploitation, and egregious human rights violations."<sup>589</sup> The UN Rapporteur for the CERD session on Nigeria in 1993, pointed to "the overwhelming evidence of Ogoniland's ecological devastation and the government's violent repression of the Ogoni struggle",<sup>590</sup> which later included the internationally publicised execution of Ken Saro Wiwa in 1999. The Rapporteur suggested that the Ogoni people "believe that they are being subjected to a slow, but steady process of environmental genocide," caused by widespread oil prospecting and spillages since oil was first discovered there in 1958.<sup>591</sup> In 1992, the Ogoni requested that the military government of Nigeria grant them secession, in order to ensure their survival as a group.<sup>592</sup> However, even if the Nigerian government had granted them their wish, it is unlikely that most of the rest of the international community would have accepted the new territory's sovereignty, given continued support for *uti possidetis* in Africa, even though it clearly hasn't brought stability to the African continent.

There is still considerable controversy as to the legal status and application of the principle of *uti possidetis* today, in relation to claims for self-determination.<sup>593</sup> In fact, *uti possidetis* and self-determination have always had a curious relationship, with the former effectively denying the full

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<sup>587</sup> *United Nations Monthly Chronicle*, Aug.-Sept. 1968, at 104, in Shaw, *ibid*, at 209.

<sup>588</sup> Cervenka, *The Unfinished Quest for Unity*, at 105, in Shaw, *ibid*, at 210.

<sup>589</sup> Ezetah, "Ogoni question", *supra*, at 811-812.

<sup>590</sup> Ezetah, *ibid*, at 818-9.

<sup>591</sup> *Ibid*, at 814-815.

<sup>592</sup> *Ogoni Bill of Rights*, in Ezetah, "Ogoni", *ibid*, at 817-818.

<sup>593</sup> Cf. Discussion in Chapter Six on the creation of Bangladesh, and the application of the doctrine in the Former Yugoslavia.

exercise of the latter. Yet, as Franck notes, *uti possidetis* and self-determination now seem to have been “synthesized into a doctrine of decolonization”, largely for convenience’s sake.<sup>594</sup> Even the International Court of Justice was forced to concede in the Frontier Dispute case between Burkina Faso and Mali, that “at first sight [the principle of *uti possidetis*] conflicts outright with another one, the right of peoples to self-determination.”<sup>595</sup> But the Court then went on to suggest: “The essential requirement of stability in order to survive, to develop and gradually to consolidate their independence in all fields, has induced African States judiciously to consent to the respecting of colonial frontiers, and to take account of it in the interpretation of the principle of self-determination of peoples.”<sup>596</sup> In other words, acceptance of the doctrine of *uti possidetis* by the Heads of State of the OAU was construed erroneously by the Court as an expression of the wishes of all the African people.

As noted by the eminent jurist Dr. Ian Brownlie, the OAU Resolution actually was not binding, and subsequent State practice suggests that the doctrine is only a “rule of regional customary international law binding on those States which have unilaterally declared their acceptance of the principle of the *status quo* as at the time of independence”.<sup>597</sup>

#### 5.6 *Developments in Israel during the 1960’s*

When the Colonial Declaration was being drafted, there was considerable debate and discussion as to whether the Palestinians were a “peoples” of a “Non-Self-Governing Territory”, with a corresponding “right to self-determination”. However, the General Assembly did not recognise the Palestinians as having such a right until 1970, three years after Israel’s occupation of more Arab territory during the 1967 Arab-Israeli war.

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<sup>594</sup> Franck, “Postmodern Tribalism”, *supra*, at 5.

<sup>595</sup> “Frontier Dispute case”, *supra*, at 566.

<sup>596</sup> *Ibid*, at 566-567.

<sup>597</sup> I. Brownlie, *African Boundaries - A Legal and Diplomatic Encyclopedia*, at 11, in Cassese, “Self-Determination”, *supra*, at 191-192.

I do not propose to enter the controversial debate as to who initiated the hostilities in the 1967 war. "Self-defence" was invoked by all sides, whether it be pre-emptive or reactive.<sup>598</sup> During the war, Israel annexed all of Jerusalem, as well as other territory previously occupied by Jordan and Egypt. The capture of the Western Wall of the temple (the Wailing Wall) was a particularly profound emotional experience for the Jewish soldiers, as the Jordanians had not allowed them to worship there for the past 20 years. As Armstrong reflects:

"It was a dramatic and unlooked-for return that seemed an almost uncanny repetition of the old Jewish myths. Once again, the Jewish people had struggled through the threat of extinction; once again they had come home. The event evoked all the usual experiences of sacred space. ... It presaged an end to violence, dereliction, and separation. It was what other generations might have called a return to paradise."<sup>599</sup>

The USSR tried unsuccessfully to convince other Security Council members to declare that Israel's pre-emptive strikes on Egypt and Syria constituted "aggression", as provided for in the UN Charter. But the other Security Council members would only agree to pass Resolution 242, which emphasised "the inadmissibility of the acquisition of territory by war and the need to work for a just and lasting peace in which every state in the area can live in security," in accordance with the principle of, *inter alia*: "(i) Withdrawal of Israeli armed forces from territories occupied in the recent conflict".<sup>600</sup> It is significant that this resolution does not specify "all" or "the" territories, nor does it mention Jerusalem. The Israeli Knesset subsequently introduced legislation to integrate the two major sections of the city and to extend full civilian government over East Jerusalem. The UN responded with a series of resolutions, all condemning Israel's attempts "to alter the status of Jerusalem". The international community still appeared to perceive of Jerusalem as "theirs", in accordance with the *Palestine*

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<sup>598</sup> For one view of the "legality of anticipatory self-defence", cf. I. Brownlie, "The United Nations Charter and the Use of Force, 1945-1985", in A. Cassese, ed., *The Current Legal Regulation of the Use of Force*, (Dordrecht, The Netherlands: Martinus Nijhoff Publishers, 1986) 491 at 498-500 [hereinafter Cassese, "Use of Force"].

<sup>599</sup> Armstrong, *supra*, at 399-400.

<sup>600</sup> SC Res 242 of 22 November 1967.

*Partition Plan*. However, to this day, Israel has failed to comply with Security Council Resolution 242 and all subsequent resolutions reaffirming it.<sup>601</sup>

The *Palestine National Charter* was created in 1968, and contained such controversial provisions as article 9:

“Armed struggle is the only way to liberate Palestine. Thus it is the overall strategy, not merely a tactical phase. The Palestinian Arab people assert their absolute determination and firm resolution to continue their armed struggle and to work for an armed popular revolution for the liberation of their country and their return to it. They also assert their right to self-determination and sovereignty over it.”

Even more controversial is the stated purpose of the Palestine Liberation Organization [hereinafter: “PLO”] under this Charter: to eliminate Zionism in Palestine.

In 1973, the Arab States invaded Israel, in order to try and claim back the territory seized by Israel in 1967. But they were eventually forced back to post-1967 positions. This attack merely served to consolidate Israel's desire to give “security” a higher priority than “justice” in the administration of its occupied territories. Despite further Security Council resolutions calling for Israel to withdraw from these territories, the international community again failed to act in any way to enforce its interpretation of the relevant law.<sup>602</sup>

### 5.7 Conclusions

It is not clear whether the declaration of the “right to self-determination” in several significant international documents actually made any difference at all to State practice during the 1960's. The process of decolonisation continued slowly across the southern half of the globe, with varying degrees of consultation with the affected peoples, but this was consistent with State practice prior to 1960. Those who challenged the legitimacy of the new arrangements were quickly stifled, even if they had

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<sup>601</sup> However, SC Res 242 has been accepted by Israel as the basis for peace talks since 1993: cf. discussion below in Chapter Six.

<sup>602</sup> Some members of the international community have tried to express their disapproval by refusing to base their diplomatic missions to Israel within Jerusalem, but not all States have followed this policy.

never been consulted as to their wishes. At the same time, numerous territories still awaited the exercise of their right to "self-determine", particularly those in the Caribbean and the Pacific region. Clearly the international community had to take further steps to ensure that this right could be exercised by all those entitled to do so.

## **Chapter Six:**

### **The Current Status of the Right to Self-Determination**

During the twentieth century, the developing jurisprudence and practice concerning the “right to self-determination” in international law have both been well documented, since this right first appeared in article 2 of the “Colonial Declaration” of 1960.<sup>603</sup> In this Chapter, I intend only to highlight with very broad brush strokes the major developments and controversies concerning the right to self-determination in the intervening years. Consistent State practice in certain areas of the application of the principle allows us to draw some conclusions as to which aspects of the right to self-determination are well “settled” in terms of customary international law. I will also highlight where certain aspects of this right have yet to become “settled” principles, either because of inconsistent State practice, or because some areas of State practice and/or *opinio juris* are still in a nascent stage.

I intend to conclude this Chapter by providing some suggested answers to the following key questions:

- (i) Who currently holds the right to self-determination in international law?
- (ii) What is the current extent of that right in each instance?<sup>604</sup>
- (iii) What could constitute a serious breach of that right in each instance in the current context? and
- (iv) What mechanisms currently exist for the enforcement of this right by those who hold it?

This Chapter then concludes with the argument that limited mechanisms exist to enforce this right effectively, making the “right” currently more of an ideal, and also suitable for consideration in the context of international criminal law mechanisms, in accordance with Bassiouni’s theory on how human rights become the subject of international penal proscriptions.<sup>605</sup>

#### *6.1 The “enforcement stage” of the right to self-determination*

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<sup>603</sup> GA Res 1514(XV), 14 December 1960.

<sup>604</sup> As I will be arguing in this Chapter, the extent of a right to self-determination varies according to the holder of that right.

The fourth stage of a human right under Bassiouni's theory, namely the "*Enforcement Stage*", involves the "search for, or the development of, modalities of enforcement".<sup>605</sup> As we have seen, just because the right to self-determination had been prescribed in several binding international conventions and General Assembly resolutions in 1960, this did not lead automatically to widespread acceptance of the exercise of this right by "all peoples". Thus, a search was begun for the means to enforce and also to limit this right in various contexts. In this section, I will change the structure of my analysis somewhat, from the predominantly historical/chronological approach I have taken to this point in the thesis. Instead, I will adopt a more thematic approach, based on the following "themes" in State practice that I have identified:

- (a) decolonisation;
- (b) "alien domination"/occupation/annexation;
- (c) federal constitutional rights to secede;
- (d) indigenous self-determination;
- (e) secessionist/separatist movements and minority rights; and
- (f) non-democratic rule/apartheid, and the right of *all* peoples to *internal* self-determination.

Within each of these "themes", I will continue to take a relatively chronological approach. However, each of these areas of State practice has evolved at different rates, and raised different concerns for all those involved, which do not necessarily reflect upon the other areas of State practice. Therefore, it is more appropriate to address each of these "themes" separately from one another, while still drawing relevant analogies where appropriate.

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<sup>605</sup> Bassiouni, "Proscribing Function", *supra*, at 182, discussed in *1.2 Methodology*, Chapter One (Introduction).

<sup>606</sup> Bassiouni, "Proscribing Function", *ibid.*

As mentioned previously, Bassiouni describes this fourth stage of the evolution of a human right, as “the search for, or the development of, modalities of enforcement”.<sup>607</sup> Professor Jacques Derrida suggests that any law must be enforced if it is to be “law”:

“The word ‘enforceability’ reminds us that there is no such thing as law (*droit*) that doesn’t imply *in itself, a priori, in the analytic structure of its concept*, the possibility of being ‘enforced’, applied by force. There are, to be sure, laws that are not enforced, but there is no law without enforceability, and no applicability or enforceability of the law without force, whether this force be direct or indirect, physical or symbolic, exterior or interior, brutal or subtly discursive and hermeneutic, coercive or regulative, and so forth.”<sup>608</sup> [*emphasis in original*]

In his opinion, “justice” is something “other” than law, something beyond law.<sup>609</sup> On this view, merely enforcing the law may not bring “justice” to those seeking self-determination, particularly if the “force” required to enforce the law would require more violence, as seems likely in the current political climate in many regions. However, at least identifying the relevant law and the relevant enforcement mechanisms for that law is a good starting point.

Bassiouni points out that “international criminal law remains one of the most effective enforcement mechanisms for internationally protected human rights”, largely because “penal proscriptions criminalizing human rights violations stigmatize the violators in a manner that is likely to have a deterrent effect.”<sup>610</sup> At the same time, a significant number of different enforcement mechanisms have already been created for the protection of human rights, most of which are relevant to the issue of self-determination. As examples, Bassiouni lists the following: (i) “world public opinion”, as promulgated via the UN and its various organs, and through its “processes of fact-finding, discussion, debate, and

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<sup>607</sup> Ibid, at 181.

<sup>608</sup> J. Derrida, “Force of Law: The ‘Mystical Foundation of Authority’”, in D. Cornell et al (eds.), *Deconstruction and the Possibility of Justice*, (New York: Routledge, 1992) 1 at 6.

<sup>609</sup> He explains that justice, in his view, is “... infinite, incalculable, rebellious to rule and foreign to symmetry, heterogeneous and heterotropic ... How are we to reconcile the act of justice that must always concern singularity, individuals, irreplaceable groups and lives, the other or myself *as other*, in a unique situation, with rule, norm, value or the imperative of justice which necessarily have a general form, even if this generality prescribes a singular application in each case? If I were content to apply a just rule, without a spirit of justice and without in some way inventing the rule and example for each case, I might be protected by law (*droit*), my action corresponding to objective law, but I would not be just.” [*emphasis in original*] (ibid, at 17).

censure”; (ii) the UN Security Council; (iii) the UN General Assembly; (iv) the International Court of Justice; (v) the UN Commission on Human Rights and Sub-Commissions on the Protection of Minorities and the Prevention of Discrimination; (vi) the role of non-governmental organisations, as “watchdogs, providers of information and data, and as suppliers of inspection and observation teams in connection with specific deprivations of human rights or other related issues”; (vii) several specialised agencies and organisations that monitor specific areas of international criminal law, such as the International Narcotics Control Board, the International Labour Organization, and the International Committee of the Red Cross; and (viii) regional systems of human rights enforcement, such as the Inter-American Commission for Human Rights.<sup>611</sup>

Bassiouni stresses that such enforcement mechanisms should be explored first, and an analysis made of the policies affecting their successes and failures, before the *ultima ratio* of penal proscriptions are contemplated. As he notes: “The contemporary trend in international criminalization seems to follow a pattern similar to the trend in national policies. When other social and legal (non-penal) means of control fail, the tendency is to resort to criminalization without much regard to underlying policies and the effectiveness of enforcement.”<sup>612</sup>

Thus, this section of my thesis will focus on the “policy” issues that make the right to self-determination often so difficult to enforce, as well as the relative effectiveness of many of the enforcement mechanisms that have been created, relevant to the issue of self-determination. As mentioned in the introduction to this Chapter, this section will focus separately on different areas where the right to self-determination has developed in different ways, in terms of State practice, and thus has raised several different issues concerning enforcement.<sup>613</sup> However, there is also an inevitable overlap

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<sup>610</sup> Bassiouni, “Proscribing Function”, *supra*, at 200. In a footnote, he refers the reader generally to: M.C. Bassiouni & Derby, “An Appraisal of Torture in International Law and Practice: The Need for an International Convention for the Protection and Suppression of Torture”, (1977) Rev. I.D.P. 17.

<sup>611</sup> Bassiouni, “Proscribing Function”, *ibid*, at 202-205.

<sup>612</sup> *Ibid*, at 200. [*footnotes omitted*]

<sup>613</sup> Note that it is beyond the scope of this paper to address the “pros and cons” of each and every situation involving claims for self-determination, or every potential enforcement mechanism that may be relevant to the

between the different areas of focus chosen, due to the fact that more than one argument may sometimes be advanced with respect to the right of certain territories to self-determination, particularly the most intractable cases such as East Timor, Palestine, Tibet, and Western Sahara.<sup>614</sup> The relevant aspects of each of these claims is discussed wherever it is considered most appropriate, in terms of identifying consistent “themes” in State practice.

These themes are as follows:

6.2 “*Self-Determination as the Right to Decolonization*”, which focuses on the rights of “dependent” peoples living in territories that the UN has recognised as having a right to determine their international status, ie. a right to *external* self-determination;<sup>615</sup>

6.3 “*Self-Determination as the Right to Territorial Integrity*”, which focuses on two situations - one is where an independent, sovereign State is invaded or occupied by another State, the other is where a sovereign State has invaded or occupied a territory that may or may not have achieved “decolonisation”, and perhaps is not yet firmly established as a sovereign independent State; questions of the right to *external* self-determination under such circumstances are analysed;<sup>616</sup>

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right to self-determination generally. Those enforcement mechanisms chosen for discussion and analysis here are the ones with the most potential to have a significant impact, in the author’s view.

<sup>614</sup> Each of these territories had a slightly uncertain status in international law when it was occupied by another power, and thus clear answers as to their current status in international law are not always available.

<sup>615</sup> As discussed below, there are now only 17 Non-Self-Governing Territories remaining, and no Trust or Mandate territories. Other territories that claim to be Non-Self-Governing but are not recognised as such by the Special Committee on Decolonization, will be discussed in other sections.

<sup>616</sup> In the latter situation, the focus is on the following territories: East Timor, Eritrea, Goa, Pakistan and India (various territories disputed at various times, including Kashmir), Palestine, Vietnam, West Irian, and Western Sahara. A full list would also include Falklands (Malvinas) Islands and Sri Lanka (the latter in the context of secessionist claims by the Tamil population of the north of the country), which will not be discussed in this context, due to space constraints. Some of these have been described as “neo-colonial” situations. For example, General Assembly Resolution 2787 (XXVI) of 6 December 1971, concerning the “inalienable rights of the Palestinians and other peoples”, includes in its preamble the following paragraph: “*Confirming that colonialism in all its forms and manifestations, including the methods of neo-colonialism, constitutes a gross encroachment on the rights of peoples and the basic human rights and freedoms*”. [my emphasis] However, this term has never been defined, and thus does not seem to add any further clarification to the issues involved in the rights of the people of these territories.

6.4 *"National Constitutional Rights to Self-Determination"*, which focuses on former and current Socialist and Communist federations, and the right of their constituent republics to *external* self-determination (including China's official Autonomous Regions, such as Tibet);

6.5 *"The Right of Indigenous Peoples to Self-Determination"*, which analyses their right to both *external* and *internal* self-determination;

6.6 *"Minority Rights to Self-Determination"*, which analyses their right to both *external* and *internal* self-determination; and

6.7 *"The Right of All Peoples to Internal Self-Determination"*, which focuses on the self-determination rights of all peoples, particularly those living within territories that do not have democratic or otherwise representative governments, such as peoples subject to military rule, foreign "intervention", apartheid, or the imposition of Islamic law upon non-Islamic populations.

## 6.2 *Self-Determination as the Right to Decolonisation*

With only a few notable exceptions, the "decolonisation" process predominantly has been successful, in terms of relatively consistent State practice - although it has taken a long time.<sup>617</sup> Between 1945 and 1979, 70 territories achieved independence and 4 territories chose other means of determining their international status.<sup>618</sup> The second to last African territory to achieve independence was Namibia, which was in 1990.<sup>619</sup> As at 4 August 2000, there were only 17 Non-Self-Governing Territories that had been brought to the attention of the Special Committee on Decolonization, and were still awaiting the exercise of their right to self-determination: American Samoa, Anguilla, Bermuda, British Virgin Islands, Cayman Islands, East Timor, Falkland Islands (Malvinas), Gibraltar, Guam, Montserrat, New Caledonia, Pitcairn, St. Helena, Tokelau, Turks and Caicos Islands, United States Virgin Islands, and

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<sup>617</sup> Note, however, that the original inhabitants of many other colonised territories, such as Australia, Canada, New Zealand, and the Americas, were never perceived as being entitled to decolonization. Cf. Discussion in 6.5 *"The Right of Indigenous Peoples to Self-Determination"*, below.

<sup>618</sup> Cassese, "Self-Determination", supra, at 75.

<sup>619</sup> Tomuschat claims that this was "the last true case of decolonization": Tomuschat, "Self-Determination", supra, at vii.

Western Sahara.<sup>620</sup> Most of these are small islands in the Caribbean or Pacific regions, administered by France, New Zealand, the United Kingdom, or the United States.<sup>621</sup> However, East Timor and Western Sahara are both special cases, where significant progress has been made towards consulting the peoples concerned, and these territories are currently both under a form of UN administration.<sup>622</sup> Therefore they will also be discussed in a different section.<sup>623</sup>

There is some suggestion that the slow pace of decolonisation for most of the remaining Non-Self-Governing Territories is a serious concern for the international community. In December 1999, the General Assembly adopted 8 resolutions and 2 decisions on decolonisation issues, with most of the resolutions reaffirming the responsibility of the administering powers to promote the "advancement" of their respective territories.<sup>624</sup> The current administering powers either abstained from voting or voted

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<sup>620</sup> United Nations Department of Public Information, "The United Nations and Decolonization", Committee on Decolonization Homepage, online: United Nations, <<http://www.un.org/Depts/dpi/decolonization/main.htm>> (date accessed: 4 August 2000). In 1946, 74 Non-Self-Governing Territories were identified by the respective administering powers, in accordance with article 73e, UN Charter.

<sup>621</sup> Note that the small size of a territory is not supposed to be a barrier to independence. Cf. General Assembly Resolutions 3427 (XXX) and 3433 (XXX), relating to Pacific and West Indian small island territories, and emphasising that questions of territorial size, geographical isolation, and limited resources should not be used to delay implementation of the Colonial Declaration (discussed in Shaw, *supra*, at 135, n. 308). However, in 1976 the population of Pitcairn, for example, was estimated at 92 people (Espie, *supra*, at 59, n. 80), which then dropped to 53 people by 1993 (Minority Rights Group International, *supra*, at 685). Thus, it is highly questionable whether this would be a viable territorial entity. Nevertheless, the peoples living on this collection of islands have the right to choose their sovereign, which is currently the United Kingdom. Also note the argument of Shaw, concerning "colonial enclaves" (*supra*, at 134-140). He suggests that there may be no right to self-determination for "a relatively small area totally surrounded on the landward side by the territory of one other State, thus allowing for a stretch of coast", and "detached by a colonial power from the surrounding territory and placed under the administration of a separate party from that governing the dismembered State. In such cases, the United Nations has adopted the doctrine that the country from which the enclave was originally taken should have the right to reacquire the territory." As examples of this UN practice, he cites: the Spanish enclave of Ifni, which was returned to Morocco in 1969, the Portuguese enclave of St. John the Baptist of Ajoua, which was taken over by Benin in 1961, and various resolutions concerning Gibraltar and Walvis Bay (on the coast of Namibia). He also suggests that this attitude may explain why the international community did nothing to sanction India for its annexation of Goa.

<sup>622</sup> East Timor is currently administered by the United Nations Transitional Administration in East Timor (UNTAET), in preparation for full independence and Statehood at some time during 2001-2002, while the United Nations Mission for the Referendum in Western Sahara (MINURSO) is currently engaged in organising a referendum in Western Sahara. Cf. Discussions below on each of these territories and the issues they raise.

<sup>623</sup> Cf. Discussion in 6.3 "Self-Determination as the Right to Territorial Integrity", below.

<sup>624</sup> United Nations Department of Public Information, Press Release GA/9677, "Assembly Urges Enrichment of United Nations "Internet" Presence, Full Use of Emerging Information Technologies", General Assembly Plenary, 71st Meeting, 6 December 1999, online: <<http://www.un.org/Depts/dpi/decolonization/docs/ga9677doc.htm>> (date accessed: 8 October 2000).

against most of these resolutions, which were adopted by significant majorities.<sup>625</sup> Of particular concern to the majority of other General Assembly members was the “continued alienation of land in colonial and Non-Self-Governing Territories, particularly in the small island Territories of the Pacific and Caribbean regions, for military purposes.”<sup>626</sup>

In addition, in 1999 the United Kingdom “reclassified” its dependent Territories in the Caribbean, as “self-governing”, and has been seeking to have them removed from the list of Non-Self-Governing Territories, so far without success.<sup>627</sup> An expert from the Caribbean region suggested to the Special Committee on Decolonization at the time, that there should be a “set of indicators ... which would amount to a “litmus test” for self-determination and self-governance, ... including: whether or not there was a credible effort to disseminate information to the population on the decolonisation process; whether or not there were adequate educational campaigns on the Territory’s constitutional options; and the degree to which a Territory had a self-sustaining economy, local decision-making on the economy, local control of institutions of cultural power and a constitutionally dominant-subordinate relationship between the Territory and the - possibly former - administering Power.”<sup>628</sup> The United Kingdom has been known to “abandon” its dependent territories in the past, without making adequate arrangements for the governance of the territory by the peoples, prior to its departure (as in the case of the British Palestine Mandate).<sup>629</sup> Clearly, the Special Committee on Decolonization is not yet satisfied

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<sup>625</sup> For example, the first resolution that the General Assembly adopted reaffirming the responsibilities of administering powers and reaffirming the rights of their peoples over their natural resources, was adopted by a vote of 153 to 2 (Israel and the United States), with 5 abstentions (France, Georgia, Federated States of Micronesia, Monaco, and the United Kingdom): UN DPI Press Release GA/9677, *supra*.

<sup>626</sup> This resolution was adopted by a recorded vote of 99 in favour to 53 against (no doubt several administering powers were included in this latter figure), with Federated States of Micronesia being the only State to abstain from voting: UN DPI Press Release GA/9677, *ibid*.

<sup>627</sup> This followed their earlier unsuccessful attempt to claim that these territories were self-governing. in 1967, which led to the withdrawal of the United Kingdom and the United States from the Special Committee on Decolonization in 1971. In 1970, the General Assembly explicitly rejected the United Kingdom’s claim that it no longer needed to transmit information on these territories, in GA Res. 270 (XXV), 14 December 1970: Leibowitz, *supra*, at 210.

<sup>628</sup> United Nations, Press Release GA/COL/3001, “ ‘Litmus Test’ for Self-Determination, Self-Governance Recommended at Decolonization Meeting in Saint Lucia” (26 May 1999), online: <<http://www.un.org/News/Press/docs/1999/19990526.GACO3001.html>> (date accessed: 8 October 2000).

<sup>629</sup> Cf. Discussion in Chapter Four, *supra*.

that the United Kingdom has fulfilled its responsibilities to ensure the “advancement” of the peoples of its Caribbean territories.

There is no question that all 17 remaining Non-Self-Governing Territories have a widely recognised “right to *external* self-determination”, which they may exercise in any one of the three ways that were outlined in the Article 73e Declaration: choosing full independence, full integration into another State, or “free association” with another State.<sup>630</sup> At the same time, during a recent Fourth Committee debate on decolonisation issues, one delegate suggested: “Flexibility must be applied in crafting solutions to the dependency dilemma of those Territories, but only in ways that did not legitimize, for expediency’s sake, the present arrangements.”<sup>631</sup>

The peoples of these Territories also have the right “freely” to “express” their collective “will” as to their preferred international status. However, questions remain as to the exact requirements of such “free expression”, given many inconsistencies in State practice throughout the entire “decolonisation” period. The UN has not often been invited to monitor the relevant plebiscites, to ensure that a particular consultation is “free”, and thus the UN’s standards have not been upheld consistently.<sup>632</sup> Furthermore, sometimes the questions asked of the inhabitants did not allow them the full range of options to which they were entitled. For example, in 1967 the peoples of Gibraltar were asked by British authorities only whether they wished to become part of Spain, or to remain largely the “responsibility” of Britain. Britain had nominated Gibraltar as one of its Non-Self-Governing Territories in 1946, and thus the Gibraltnans should have been asked whether they wanted to form their

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<sup>630</sup> A recent Pacific Regional Seminar organized by the Special Committee on Decolonization “reiterated that a genuine act of self-determination in the small island Non-Self-Governing Territories should be based on the wishes of their peoples and should involve a full range of legitimate political status options based on the principles defined in” the Article 73e Resolution: United Nations, Press Release GA/COL/3029, “Decolonization Committee Concludes Pacific Regional Seminar in Majuro, Marshall Islands” (22 May 2000), online: <<http://www.un.org/News/Press/docs/2000/20000522.gacol3029.doc.html>> (date accessed: 8 October 2000).

<sup>631</sup> United Nations, Press Release GA/SPD/186, “Fourth Committee, Concluding General Debate on Decolonization Issues, Hears Petitioners from Western Sahara and New Caledonia” (29 September 2000). The same delegate also pointed out that “the international community must continue to apply the standard of political equality to the self-determination processes of the small island Non-Self-Governing Territories.”

own independent State. The General Assembly quickly declared that the referendum was invalid, and has continued to urge Britain and Spain to resolve the matter through negotiations, "taking into account the interests of the people of the Territory".<sup>633</sup>

In addition, it appears that such a self-determining entity may not have the right to dictate the terms of its independence, but that it must reach agreement with the relevant authority as to these terms. For example, once a plebiscite or referendum has been held that has resulted in an overwhelming vote for independence, the realisation of that independence may take many years, and its timing has generally been dictated by the administering authority, sometimes in consultation with the UN, but often with scant regard for the wishes of the self-determining peoples.<sup>634</sup>

There are also difficulties in identifying clearly the rights of the peoples in territories that have chosen to "associate freely" with another State. As Leibowitz points out, "the associated territory's power to determine its internal constitution without restriction ... involves subtle questions of the applicability of federal law and questions of the power to amend the constitution. ... [I]n the Puerto Rican case, the general applicability of federal law and the restrictions on the power to amend the constitution - which Congress insisted upon - places Puerto Rico in a dubious free association by UN standards."<sup>635</sup>

Thus, as Cassese points out, the scope of the right to self-determination of Non-Self-Governing Territories can only be described in very general terms:<sup>636</sup>

(i) the peoples of such territories have the right to "freely determine their political status and freely pursue their economic, social and cultural development";<sup>637</sup>

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<sup>632</sup> Cf. Discussion in Chapter Five, *supra*. In fact, the US has made it standard practice *not* to invite the UN to monitor any of the plebiscites it has held in its Non-Self-Governing Territories, although the Charter provides that the UN must have a role in consultations with peoples of Trust Territories: Leibowitz, *supra*, at 205.

<sup>633</sup> Cf. Cassese, "Self-Determination", *supra*, at 206-214.

<sup>634</sup> As the example of Western Sahara shows, even the timing of the particular referendum may be a cause of serious disputes between the administering power and its dependent peoples. Note also the Canadian Federal Government's *Clarity Act*, *supra*, which sets out the terms of secession for the peoples of Quebec, should they reach the required majority of votes in favour of secession at a future referendum.

<sup>635</sup> Leibowitz, *supra*, at 205.

<sup>636</sup> Cf. Cassese, "Self-Determination", *supra*, at 72-74.

<sup>637</sup> Based on article 2, the "Colonial Declaration", and subsequent State practice.

(ii) the right belongs to the peoples as a whole, not to any group within the territory, although the assessment of a vote for independence generally is based on the wishes of a numerical majority of the population, not a consensus decision;<sup>638</sup>

(iii) the scope of the freedom to determine their political status is restricted to the three options listed in the Article 73e Resolution,<sup>639</sup>

(iv) the administering authority may choose the method it prefers for consulting the peoples concerned as to their choice of options, within the guidelines set out in the Article 73e Resolution, plus there is some State practice and *opinio juris* to suggest that the peoples should at least be allowed to vote on a choice between independence and some other option, if not all three options;<sup>640</sup>

(v) it seems that the administering authority may not need to consult the population if it believes that the territory should be independent (the attitude in the future of the international community towards Britain's recent "abandonment" of its Caribbean Non-Self-Governing Territories may clarify this principle further);

(vi) however, the administering power *must* obtain the consent of the population if the territory is to be integrated or "freely associated";

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<sup>638</sup> Note, however, that some administering powers may use "demographic engineering" in order to alter the ethnic makeup of a population, which may then affect the constitution of a "peoples" voting in a plebiscite. For example, disputes over voting rights for "occupiers" are the main cause of the delay in the referendum in Western Sahara. Cf. Discussion in 6.3 "Self-Determination as the Right to Territorial Integrity", below.

<sup>639</sup> Cassese argues that this implies they only have a right to *external* self-determination, not to *internal* self-determination. As he points out, this right in and of itself did not provide the peoples with a right to democratic forms of governance, just a right to "liberation from colonial rule": Cassese, "Self-Determination", *supra*, at 74. In that sense he is correct. But the relevant Resolutions both refer regularly to "democratic processes" and the "complete freedom of the people of the Territory to choose the form of government which they desire". Thus, Cassese appears to be incorrect in asserting that the General Assembly has not supported the right to *internal* self-determination for peoples of Non-Self-Governing Territories.

<sup>640</sup> For example, in the Annex to Resolution 742 (VIII), of November 1953, which lists the "Factors Indicative of the Attainment of Independence or of other Separate Systems of Self-Government", one of the factors "indicative of the attainment of other separate systems of self-government" is: "2. Freedom of choice. Freedom of choosing on the basis of the right of self-determination of peoples between several possibilities, including independence." However, this factor is not mentioned with respect to independence or even free association or integration, in either this resolution or the Article 73e Resolution.

(vii) it seems that the administering authority and/or the UN may also set the terms of any transition to either independence, integration, or association, particularly in terms of timing, and sometimes in terms of certain constitutional freedoms for territories that are “freely associating”, particularly if a federal constitutional system would be affected;<sup>641</sup> and

(viii) Cassese argues that once a people has exercised its right to external self-determination, by any one of the three methods outlined in the Article 73e Resolution, its right to external self-determination expires, although it may still have a right to *internal* self-determination. However, Principle VII, Article 73e Resolution, expressly provides that where a territory has “freely associated” with an independent State, it should be able to modify the status of that territory subsequently.<sup>642</sup>

Therefore, only the following would appear to constitute a clear breach of this type of right to self-determination:

- (i) forcing a Non-Self-Governing Territory to accept integration or “free association” with an independent State without any form of consultation or without the express consent of the peoples of that Territory;
- (ii) completely denying a Non-Self-Governing Territory the opportunity to determine its political future in accordance with one of the three methods outlined in the Article 73e Resolution; or
- (iii) failing to follow a significant number of the general guidelines in the Article 73e Resolution.

In addition, there is some evidence that a referendum or plebiscite that does *not* offer a choice of full independence may breach the right of dependent peoples to “freely determine their political status”.

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<sup>641</sup> Despite the fact that Principle VII, Article 73e Resolution provides that a “freely associating” territory must have “the right to determine its internal constitution without outside interference”, and that it should have the “freedom to modify the status of that territory through the expression of their will by democratic means and through constitutional processes.”

<sup>642</sup> Article 41, *Constitution of the Cook Islands*, is a good example of this. In fact, the existence of this provision was a significant factor in the General Assembly’s acceptance of the voluntariness of the Cook Islands’ decision to “freely associate” with New Zealand, given that there were other concerns about the dominating influence of New Zealand upon those who made this decision: Leibowitz, *supra*, at 138, discussed *supra*, in Chapter Five. In addition, the General Assembly specifically recognised “the responsibility of the United Nations, under General Assembly resolution 1514 (XV), to assist the people of the Cook Islands in the

However, State practice is not consistent enough on that point to draw a definitive conclusion. Even less clear is the extent to which a federation may make demands upon those preparing the constitution for a Territory which is to be in "free association" with that federation. There is also a question mark as to the responsibility of an administering power to ensure that a previously Non-Self-Governing Territory is suitably prepared for independence before it withdraws its administration of that Territory, particularly where the peoples have not expressly chosen independence.

Finally, there is the issue of how long an administering territory can delay the relevant procedures for allowing the peoples of such territories to exercise their right to self-determination. This is one of the main concerns of those agitating for a referendum in Western Sahara,<sup>643</sup> as well as those in the other remaining Non-Self-Governing Territories. A claim of "unreasonable delay" in granting self-determination has yet to be litigated or brought before a body that would actually do something to rectify such a situation. Therefore, there is no obvious standard against which to measure the time it takes a particular administering power to implement the appropriate procedures, to allow the peoples of a Non-Self-Governing Territory to exercise their right to self-determination. Clearly, the demand in the Colonial Declaration for the "immediate" transfer of "all powers" to the peoples of these territories, has not been recognized by many States as binding.<sup>644</sup> Rather, the vague terminology of the Article 73e Resolution has been preferred, including such principles as: "The obligation to transmit information under Article 73e of the Charter constitutes an international obligation and should be carried out *with due regard to the fulfilment of international law.*"<sup>645</sup> [my emphasis]

### 6.3 Self-Determination as the Right to Territorial Integrity

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eventual achievement of full independence, if they so wish, at a future date.": GA Res. 2064 (XX), 16 December 1965, discussed in Leibowitz, *supra*, at 204.

<sup>643</sup> A related issue is the right of the administering authority to transfer large numbers of its own population to the Non-Self-Governing Territory, which then has the effect of altering the ethnic makeup of the peoples of the Territory, and may affect the outcome of any plebiscite on independence (sometimes referred to as "demographic engineering", *supra*). This practice is more widespread in territories that have been annexed prior to full decolonization, or not long after.

<sup>644</sup> Article 5, "Colonial Declaration".

<sup>645</sup> Principle III, "Article 73e Resolution".

Since 1946, very few States have acquired new territory by means of force, and since 1976, there has been no successful territorial aggrandisement by such means.<sup>646</sup> Almost all of the attempts to seize more territory since 1946 have been condemned by the international community, and either the territory was handed back, or the new boundary has not been recognized by the international community.<sup>647</sup> This supports the view that independent States are inviolable territories, with the right to be free from foreign intervention, and thus have the right to “external” self-determination.

However, there are a couple of possible exceptions to this general principle. In the first place, perhaps due to its “political and military importance”,<sup>648</sup> China seems to have been able to argue successfully that the international community should allow it forcefully to “reclaim” territory that it claims originally belonged to it. Thus, in 1950, Chinese forces invaded Tibet, which China claimed was always part of Chinese territory;<sup>649</sup> in 1956, China annexed part of Burma;<sup>650</sup> in 1962 it annexed territory previously belonging to India;<sup>651</sup> and in 1974 it annexed some islands previously belonging to South Vietnam.<sup>652</sup> Most of the international community has recognized the new borders thus created, even though the General Assembly has passed various resolutions condemning such use of force in many instances.<sup>653</sup>

The other exception concerns the invasion and/or re-arrangement of the borders of territories that had only recently been decolonised, or were on the verge of being decolonised. It seems that the international community in general has tolerated such activity, until recently, when attitudes appear to

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<sup>646</sup> Zacher, *supra*, Table 2.

<sup>647</sup> For example, the Turkish claim to the “Turkish Republic of Northern Cyprus” has never been recognized by the international community.

<sup>648</sup> Cassese, “Self-Determination”, *supra*, at 80, n. 36.

<sup>649</sup> Cf. Discussion in Chapter Four, *supra*.

<sup>650</sup> Although the Burmese government subsequently agreed to accept the new border: Zacher, *supra*, Table 2.

<sup>651</sup> There is currently no border agreement between India and China in respect of this disputed territory: Zacher, *ibid*.

<sup>652</sup> Zacher, *ibid*. Note that Iran also seized some islands from the United Arab Emirates in 1971, suggesting that there may also be some tolerance for annexation of relatively small islands.

<sup>653</sup> For example, cf. GA Res. 1353 (XIV), 21 October 1959, GA Res. 1723(XVI), 20 December 1961, and GA Res. 2079 (XX), 3 November 1965, all condemning China’s denial of the “autonomy” which the Tibetan people “have traditionally enjoyed”, and the deprivation of their “fundamental human rights and freedom, including the right to self-determination” (but note that the recognition of a “right to self-determination” only appears in the latter two resolutions).

be changing, with the recent referendum in East Timor after 25 years of occupation by Indonesia,<sup>654</sup> and a 1993 *Agreement on Principles* for the settlement of the Israel-Palestine conflict, after almost 30 years of occupation.<sup>655</sup>

The Organization for African Unity mostly has prevented any deviations from the *uti possidetis* principle within the African continent.<sup>656</sup> The most notable "failures" of the OAU were the situations of Eritrea and Western Sahara.<sup>657</sup> In the former case, the colonial territory of Eritrea was incorporated into the "Empire of Ethiopia" before Britain had completely terminated its authority over it in 1952, and without full consultation. However, the territory finally managed to achieve full independence in 1993, after a long struggle with Ethiopia, and finally a referendum supporting independence.<sup>658</sup>

In the second case, Western Sahara had been claimed by Spain, then by Morocco and Mauritania, since 1884, and in 1975 the latter three all agreed to an interim tripartite administration, followed by some form of independence for the peoples of Western Sahara. However, in December 1975, before the Spanish had relinquished their control of the territory, Mauritania and Morocco invaded it, and their control of the territory was subsequently recognized by one of the bodies said to be representing all of the Western Saharan peoples, but not by the main liberation movement, Polisario, which has agitated for the right to self-determination of Western Sahara ever since. In 1979, Mauritania gave up its claim to Western Sahara, and a majority of the OAU members recognised the Polisario-created "Saharan Arab Democratic Republic" as the legitimate authority. In 1991, after prolonged conflict and various diplomatic efforts, the United Nations Mission for the Referendum in Western Sahara

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<sup>654</sup> Discussed below, this Chapter. Zacher argues that the 1999 referendum on independence in East Timor "was a very important development in the strengthening of the territorial integrity norm - especially since Indonesia relented after it had controlled East Timor for 24 years." [footnote omitted] (supra, at 24).

<sup>655</sup> 1993 *Declaration of Principles on Interim Self-Government Arrangements*.

<sup>656</sup> The OAU has enforced this principle in relation to territorial disputes between: Egypt and Sudan (1958), Algeria and Morocco (1963), Ghana and Upper Volta (1963-1965), Somalia Ethiopia, and Kenya (1964), Libya and Chad (1973-1987), Mali and Burkina Faso (1975 & 1985), Somalia and Ethiopia (1976-1980), and Uganda and Tanzania (1978).<sup>656</sup>

<sup>657</sup> Conflicts are also continuing in Sudan and in the Congo. It remains to be seen whether they will result in boundary changes or not.

[hereinafter: "MINURSO"] was established, in accordance with Security Council Resolution 690<sup>659</sup> and a ceasefire came into effect. The referendum has not taken place as yet, mainly due to disputes over the criteria for voter eligibility.<sup>660</sup>

However, the most substantial border changes of this type have occurred mostly in Asia. In 1950, Tibet was annexed by China, after having declared its independence and ousted Chinese forces in 1912.<sup>661</sup> Pakistan and India have had several border disputes since they each achieved independence in 1947,<sup>662</sup> which have resulted in various changes to their original borders, the most dramatic being the creation of Bangladesh in East Bengal/Pakistan in 1971.<sup>663</sup> In addition, India successfully seized the Portuguese territory of Goa in 1961.<sup>664</sup> Also in 1961, Indonesia annexed West Irian/Papua, which was still under Dutch control at the time. In 1962 the Vietcong began their 13 year campaign to unify North and South Vietnam, after separation on independence in 1954. When North Vietnam finally defeated the South Vietnamese in 1975, the international community recognised the Hanoi regime's authority over both North and South Vietnam.<sup>665</sup> In 1975, both East Timor and Western Sahara were invaded by military forces from neighbouring countries, the former having only just achieved independence from Portugal, and the latter yet to achieve independence. The Security Council failed to interfere in either of these cases.

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<sup>658</sup> Cf. Cassese, "Self-Determination", supra, at 218-222; and E. Gayim, *The Eritrean Question: The conflict between the right to self-determination and the interests of States*, (Uppsala: Iustus Förlag, Juridiska Föreningen, 1993). However, at the time of writing, Eritrea and Ethiopia were still having border disputes.

<sup>659</sup> Adopted 29 April 1991.

<sup>660</sup> Polisario wants to limit voting rights to those who were residing in Western Sahara in 1974, in order to exclude a large number of Moroccans who moved to the territory after the occupation. But Morocco will not agree, and the UN is continuing to try and bring the two sides closer together. However, the last direct meeting between representatives of Polisario and the Moroccan government, on 28 September 2000, "was again inconclusive": United Nations, Press Release SG/SM/7567, "Talks on Western Sahara held in Berlin 28 September" (29 September 2000). Cf. Cassese, "Self-Determination", supra, at 214-218; and United Nations, *Western Sahara - MINURSO, News and Developments*, online: <<http://www.un.org/Depts/DPKO/Missions/minurso/minursoN.htm>>.

<sup>661</sup> Cf. Discussions supra, in Chapters Two and Three.

<sup>662</sup> They have had wars over territory in 1947-48, 1965, and 1971: Zacher, supra, Table 2. They are also involved in a dispute at present over the rest of Kashmir.

<sup>663</sup> Cf. S.R. Chowdhury, *The Genesis of Bangladesh: A Study in International Legal Norms and Permissive Conscience*, (London: Asia Publishing House, 1972). The creation of Bangladesh will also be discussed in the section on "Minority Rights to Self-Determination", below.

<sup>664</sup> Zacher, supra, Table 2.

The other suitable case study for this analysis is Palestine, which was to become an Arab State within Israel when the latter seized most of the territory under negotiation in a succession of wars between 1948 and 1973. Again, the Security Council failed to intervene at the time.<sup>666</sup>

The common thread running through all of these situations is the "newness", or "still-evolving" status, of each of the territories prior to occupation/conflict (some of them had not even achieved independence from the colonial power before they were taken over by another foreign power), and the apparently corresponding "latitude" allowed to occupying forces to maintain their claim to the territory until recently. Also notable is that strong resistance groups in many of the territories have kept up pressure over many years on the occupying forces to abandon their claim, and on the international community to recognise the rights of the peoples of these "occupied territories".<sup>667</sup>

For example, support grew amongst many members of the international community for the Palestinian cause, after Israel's successive occupation in 1967 and 1973 of *all* the territory that was supposed to be divided between Jews and Arabs under the Partition Plan.<sup>668</sup> Subsequently, the issue of the rights of the Palestinian people to self-determination became the concern of the "Committee on the Exercise of the Inalienable Rights of the Palestinian People" [hereinafter: "CEIRPP"], established in 1975.<sup>669</sup> In its first report, submitted to the Security Council in June 1976, the Committee urged the Security Council "to promote action for a just solution", including "a two-phase plan for the return of

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<sup>665</sup> Although of course they had tried to support the South Vietnamese during the Vietnam war, and had been defeated themselves.

<sup>666</sup> Cf. Discussion in Chapter Five, *supra*.

<sup>667</sup> In recent times, the people of West Irian/Papua have become noticeably more vocal, in the wake of the referendum on independence held in East Timor, perhaps inspired by the results achieved through constant pressure from the East Timorese Fretilin movement on Indonesia, and from outside supporters - such as the Catholic Church - on the broader international community. Cf. G. Dyer, "West Papua shaping up to be next East Timor", *supra*, Chapter Five.

<sup>668</sup> Cf. Discussion in Chapter Five, *supra*.

<sup>669</sup> GA Res 3376 (XXX), 10 November 1975. It is significant that this Committee does not have *any* Permanent Five Security Council members on it but, rather, an odd assortment of representatives largely from the Third World, plus some outspoken opponents of the United States: Afghanistan, Belarus, Cuba, Cyprus, Guinea, Guyana, Hungary, India, Indonesia, Lao People's Democratic Republic, Madagascar, Malaysia, Mali, Malta, Namibia, Nigeria, Pakistan, Romania, Senegal, Sierra Leone, South Africa, Tunisia, Turkey, Ukraine and Yugoslavia (Guyana, Mali, and Nigeria were added in December 1976). However, note that 21 other countries are "observers" on the Committee, along with the PLO, the League of Arab States, and the Organization of the Islamic Conference: Espiell, *supra*, at 50.

Palestinians to their homes and property; a timetable for the withdrawal of Israel forces from the occupied territories ...; [and] endorsement of the inherent right of Palestinians to self-determination, national independence and sovereignty in Palestine.’<sup>670</sup>

There seems to have been a marked shift over the last decade in the attitudes of the international community towards any territory forcefully acquired since around 1966,<sup>671</sup> with the exception of the following, seemingly isolated, events: (i) Vietnam’s involuntary unification, which the international community tried unsuccessfully to oppose; (ii) the creation of Bangladesh, which was not a case of a “foreign” power acquiring more territory, but a minority group forming its own State; and (iii) China’s seizure of certain Vietnamese islands in 1974. Thus, State practice in the form of substantial moves towards referenda in East Timor and Western Sahara, support for the independence of Eritrea in 1993, and recent pressure on Israel to grant Statehood to Palestine, all seem to indicate that these territories may have “done their time”, so to speak. It is as if they are now “ready” to join the international community, having managed to maintain their distinct identities and political momentum throughout a lengthy and trying period of foreign domination.<sup>672</sup>

It is not entirely clear why the same principles are not being applied to Tibet, Goa, and West Irian, which were all annexed prior to 1962 yet have retained distinct cultural attributes. The current conflict between India and Pakistan over Kashmir would also seem to be a continuation of the same kind of struggles as those continuing today between Israel and Palestine, and thus should be of “international” concern. Perhaps the lengthy passage of time since the original forced change of sovereignty appears to favour maintenance of the current status quo. However, Tibetans in particular have managed to

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<sup>670</sup> CEIRPP - “Information Note”, online: <[http://www.un.org/Depts/dpa/qpal/CPR\\_note.htm](http://www.un.org/Depts/dpa/qpal/CPR_note.htm)>.

<sup>671</sup> That is, prior to the Israeli-Arab war of 1967, in relation to which the international community has consistently refused to recognise Israel’s sovereign authority over the “occupied territories”. Even though the peace process in the Middle East is currently on hold again, there is no question that the Palestinian peoples will eventually have some form of sovereignty over certain of these territories.

<sup>672</sup> Of course, the end of the Cold War and other political factors have influenced the change in attitude of the international community. For example, one of the reasons given by Western States for allowing East Timor to be annexed by Indonesia, was the “conspicuous existence of a Marxist government in East Timor” immediately after independence: Moreira, *supra*, at 294. Now that the “spread” of Communism across the

“beat the odds” and sustain their cultural identity in the face of horrendous repression and atrocities.<sup>673</sup> Perhaps they have not kept up an active enough armed resistance, unlike the East Timorese Fretilin, the Western Sahara Polisario, the Eritrean Liberation Movement (ELM) then Front (ELF),<sup>674</sup> and the Palestine Liberation Organization, as well as numerous other Arab groups supporting Palestinian statehood - including religious groups such as Ha’amas - who have all fought long, unrelenting civil wars. Or perhaps these peoples do not have strong enough support from their former colonial authorities, unlike some of the other occupied territories.<sup>675</sup>

In summary, it seems that there is a general shift in State practice, towards recognising the territorial inviolability and right to “external” self-determination of *all* territories occupied since around 1966-67, even those that had not achieved full Statehood when they were invaded.<sup>676</sup> Thus, it would seem that the peoples of all these territories are entitled to all of the same rights as those of recognized Non-Self-Governing Territories, as set out in the Article 73e Resolution, with the addition, possibly, of a “norm” of obtaining independence without the governing authority having to consult the peoples of the territory.<sup>677</sup> In addition, if any of the present Non-Self-Governing Territories are annexed prior to, or immediately after, decolonisation, it seems likely that the international community would now not recognise such forceful acquisition of territory, and would insist that the peoples be granted the full right to external self-determination.

Therefore, in accordance with the practice concerning Non-Self-Governing Territories, only the following would appear to constitute a clear breach of this type of right to self-determination:

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globe is no longer such a threat to Western democracies, they seem more prepared to tolerate the possibility of East Timor forming its own “left-wing” government: Zacher, *supra*, at 24.

<sup>673</sup> See generally “ICJ Inquiry on Tibet”, *supra*.

<sup>674</sup> Gayim, *supra*, at 470-471.

<sup>675</sup> For example, Tibet’s “former colonial power” is also its current governing authority (China).

<sup>676</sup> This list includes: East Timor, Eritrea, Palestine, and Western Sahara, two of which are actually on the official list of Non-Self-Governing Territories (East Timor and Western Sahara), and one of which has now achieved independence after being consulted via a referendum (Eritrea). It may be that the adoption of the two Human Rights Covenants in 1966 helped to crystallise an emerging norm in this regard.

<sup>677</sup> Cf. Discussion, *supra*, of the rights of the peoples of recognized Non-Self-Governing Territories.

- (i) forcing the "occupied" territory to accept integration or "free association" with an independent State without any form of consultation or without the express consent of the peoples of that Territory;
- (ii) completely denying an "occupied" territory the opportunity to determine its political future in accordance with one of the three methods outlined in the Article 73e Resolution; or
- (iii) failing to follow a significant number of the general guidelines in the Article 73e Resolution.

#### 6.4 National Constitutional Rights to Self-Determination

In recent years, most of the former "Communist bloc" countries have witnessed a fragmentation of their component parts into new nation States, thus dissolving the federations that had dominated the eastern parts of Europe since the 1940's. Some of these "fragmentations" have occurred peacefully, such as the break-up of the former Soviet Union,<sup>678</sup> and the partition of Czechoslovakia into two Republics, Czech and Slovak, on 1 January 1993.<sup>679</sup> However, other devolutions of power have revived historical grievances, and caused hostilities to break out in parts of Yugoslavia in 1991, with devastating consequences for the region.<sup>680</sup>

Certain of these federations actually had constitutional provisions allowing the constituent republics the right to secede.<sup>681</sup> But these had not previously been explored. China's 1931 Constitution had also

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<sup>678</sup> This process is believed to have begun in 1989, with the presentation to the First Congress of Peoples' Deputies of the USSR, of a plan for Nagorno-Karabakh to secede from Azerbaijan. Rising nationalism in other Soviet Republics subsequently coincided with Boris Yeltsin's ambition to "vacuum" the "political center" [*sic*] of the Soviet Union, "in the person of Gorbachev", which led to the Belovezhsk Accords and the subsequent disintegration of the entire Union: F. Burlatsky, "Who or What Broke Up the Soviet Union?", in M. Spencer, *Separatism: Democracy and Disintegration*, (Lanham, Maryland: Rowman & Littlefield Publishers, 1998) 139 at 140-148. Of course, the secessionist struggle in Chechnya has been far from peaceful, as is the case with many battles fought by "national liberation movements" against the entity denying them their liberation: cf. discussion in 6.9 *National Liberation Movements*, below.

<sup>679</sup> Cf. P. Pithart & M. Spencer, "The Partition of Czechoslovakia", in M. Spencer, *supra*, at 185.

<sup>680</sup> *Report on the situation of human rights in the territory of the former Yugoslavia submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, pursuant to paragraph 14 of Commission Resolution 1992/S-1/1 of 14 August 1992, E/CN.4/1992/S-1/9, 28 August 1992, in Sunga, supra, at 117.*

<sup>681</sup> For example, article 2, 1974 *Constitution of the Socialist Federative Republic of Yugoslavia* allowed its Socialist Republics of Bosnia and Herzegovina, Croatia, Macedonia, Slovenia, and Serbia to choose complete independence. However, there was no such constitutional recognition for the right of the two Socialist Autonomous Provinces to secede (Vojvodina and Kosovo were considered as "within" Serbia, Croatia, and Montenegro): O. Antic, "Kosovar Independence", *supra*, at para. 8.

granted certain of its "national minorities" the right to secede, but the Communist government of Mao Zedong replaced this Constitution in 1949 with one that did not allow for any secessions.<sup>682</sup> It merely provided for "autonomous regions", which were not defined.

At the time when republic after republic was declaring its independence from its respective federation during the early 1990's, there were great uncertainties as to whether international law would allow this, notwithstanding the domestic constitutional provisions being relied upon. It was also unclear whether the principle of self-determination was involved at all, or whether unprincipled anarchy was the only factor guiding the process.<sup>683</sup> However, in retrospect, several clear principles have emerged from State practice and *opinio juris*, which do suggest that the principle of self-determination, and indeed the right to self-determination, were integral to the process. These principles can be discerned from the following sources: (i) the actions and reactions of States at the time; (ii) contemporaneous declarations made by the European Community; (iii) the various stances taken by the Committee on Security and Co-operation in Europe [hereinafter: "CSCE"]; (iv) relevant United Nations resolutions and actions; and, finally, (v) the opinions of the Arbitration Committee of the International Conference on Yugoslavia ("Badinter Committee"),<sup>684</sup> which was established by the European Community in 1991 to consider requests by the various Yugoslav republics to be considered as independent States.<sup>685</sup>

The European Community basically agreed to recognise all the new Yugoslav republics that wished to be recognized as independent States, along with the new States that had emerged from the dissolution of Eastern Europe and the Soviet Union, *provided* that they all satisfied certain criteria:

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<sup>682</sup> Cf. Discussion in Chapter Four, *supra*.

<sup>683</sup> Cf. H. Hannum, "Rethinking Self-Determination", (1993) 34 Va. J. Int'l L. 1.

<sup>684</sup> So named after its Chair, Mr. Robert Badinter, also President of the French Constitutional Council.

<sup>685</sup> Extraordinary Meeting of the Foreign Ministers (Brussels, 27 August 1991), *Declaration on Yugoslavia*, reprinted in (1993) Eur. J. Int'l L. 73. On the same day, the Foreign Ministers also adopted the *Declaration on the 'Guidelines on the Recognition of New States in Eastern Europe and the Soviet Union (16 December 1991)*, reprinted in (1993) Eur. J. Int'l L. 72. The latter Declaration confirmed the "attachment" of the European Community to "the principle of self-determination", and affirmed "their readiness to recognize, subject to the normal standards of international practice and the political realities in each case, those new States which, following the historic changes in the region, have constituted themselves on a democratic basis, have accepted the appropriate international obligations and have committed themselves in good faith to a peaceful process and to negotiations."

“- respect for the provisions of the Charter of the United Nations and the commitments subscribed to in the Final Act of Helsinki and in the Charter of Paris, especially with regard to the rule of law, democracy and human rights<sup>686</sup>

- guarantees for the rights of ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the CSCE

- respect for the inviolability of all frontiers which can only be changed by peaceful means and by common agreement ...<sup>687</sup>

The Badinter Committee was to determine whether these criteria had been met or not. In 1992, the Committee recognized the right to recognition of the Socialist Republic of Macedonia<sup>688</sup>, and the Republic of Slovenia.<sup>689</sup> It is interesting to note that the Committee considered “that, for the purpose of applying these criteria, the form of internal political Organization and the constitutional provisions are mere facts, although it is necessary to take them into consideration in order to determine the Government’s way over the population and the territory.”<sup>690</sup> Instead, the Committee looked first to “the principles of public international law which serve to define the conditions on which an entity constitutes a state”.<sup>691</sup>

In Opinion 4 of the same date, the Commission found that the Socialist Republic of Bosnia-Herzegovina had *not* respected the right to self-determination of *all* the peoples of its territory, when it based its decision to secede upon the results of a plebiscite that only involved the “Serbian people of Bosnia-Herzegovina”, not “all the citizens of the SRBH without distinction”.<sup>692</sup> Thus, the Committee

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<sup>686</sup> These documents are discussed in-depth in Cassese, “Self-Determination”, *supra*, at 277-292. The most significant principle in the *Final Act of Helsinki*, in terms of expanding the extent of the right to self-determination, is Principle VIII: “... By virtue of the principle of equal rights and self-determination of peoples, all peoples *always* have the right, in full freedom, to determine, when and as they wish, their *internal and external* political status, without external interference, and to pursue as they wish their political, economic, social and cultural development. The participating States ... also recall the importance of the elimination of any form of violation of this principle.” [*my emphasis*]

<sup>687</sup> Extraordinary Meeting of the Foreign Ministers (Brussels, 27 August 1991), *Declaration on the Guidelines on the Recognition of New States in Eastern Europe and the Soviet Union (16 December 1991)*, *supra*. The rest of the international community adopted similar policies to recognize these new States.

<sup>688</sup> *Opinion No.6 on International Recognition of the Socialist Republic of Macedonia by the European Community and its Member States*, Paris, 11 January 1992, para.5, reprinted in (1993) 3 Eur. J. Int’l L. 77-80.

<sup>689</sup> *Opinion No. 7 on International Recognition of the Republic of Slovenia by the European Community and its Member States*, Paris, 11 January 1992, para. 4, reprinted in (1993) 3 Eur. J. Int’l L. 80-84.

<sup>690</sup> *Opinion No. 1*, 11 January 1992, para. 1(c), reprinted in (1992) 3 Eur. J. Int’l L. 182-183.

<sup>691</sup> Para. 1(a), *ibid*.

<sup>692</sup> *Opinion No. 4 on International Recognition of the Socialist Republic of Bosnia-Herzegovina by the European Community and its Member States*, Paris, 11 January 1992, paras. 3-4, reprinted in (1993) 3 Eur. J.

upheld the need for the “freely expressed will of *all* the peoples”, in the context of self-determination, as a “principle of public international law”. The Commission also found that Croatia had failed to make adequate provision for the protection of its minorities, by failing to grant them “special status”.<sup>693</sup> Thus, the obligation to protect minorities also was elevated to the status of a “principle of public international law”, relevant to the exercise of the right to self-determination, although it actually placed the obligation upon the entity seeking independence.

Professor Thomas Franck provides a perceptive summary of some of the other relevant principles to emerge from the resolution of the Yugoslavian crisis:

(i) the “international system” does not recognise a general right of secession, but nor does it prohibit secession as such;

(ii) the international system “will extend recognition to a secessionist territory and government if

(a) that government has demonstrated effective continuous control over its territory,

(b) the government has made provision for accepting relevant international obligations by, *inter alia*, making provision in its constitution and by ratification of relevant international legal instruments for the protection of the nationality, cultural, linguistic and religious rights of its minorities, and

(c) where it has taken constitutional steps to ensure political autonomy for its postmodern tribal minorities if they desire it”;

(iii) “egregious and protracted violence” by any of the parties involved in a secessionist struggle, will “transform” the dispute into an international conflict, whereby the international community has the right to intervene and seek a peaceful resolution of the conflict, in the interests of maintaining international peace and security;

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Int'l L. 74. As the Commission notes in para. 1, Bosnia-Herzegovina's population included “Muslims, Serbs and Croats ... [as well as] members of the other nations and ethnic groups living on its territory.”

(iv) in such a situation, the international system “will no longer presumptively side with governments against secessionists except, perhaps, where the secession is being fomented or supported by an external intervening party”; and

(v) the principle of *uti possidetis* will apply to any new territories formed under such circumstances, in other words the new State is only “entitled to those boundaries and territories that were administratively applicable to it prior to independence, when it was a unit of a parent-state.”<sup>694</sup>

In summary, Republics within a federation or other multifaceted political arrangement:

(i) do not have an absolute right to secede, even if their constitution allows it, unless the secession is achieved by consensus, in which case they have a right to be recognized as a sovereign State;<sup>695</sup>

(ii) have a right to external self-determination, that is, to choose their international status, if they

(a) have a constitutional right to secede, and

(b) manage to free themselves from the central authority; and

(c) meet the criteria outlined in (iii), below;

(iii) must satisfy all of the following criteria in order to have a right to external self-determination, whether or not they have a constitutional right to secede (but not if the secession is achieved by consensus) -

(a) demonstrated respect for “the rule of law, democracy and human rights”,

(b) guaranteed rights for “ethnic and national” minorities (and possibly other minority groups within the territory), including autonomy, if this is desired by the minority group in question,

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<sup>693</sup> *Opinion No. 5 on the Recognition of the Republic of Croatia by the European Community and its Member States*, Paris, 11 January 1992, paras. 1-3, reprinted in (1993) 3 *Eur. J. Int'l L.* 76-77.

<sup>694</sup> Franck, “Postmodern Tribalism”, *supra*, at 19-20. [footnotes omitted] Franck supports all of these conclusions by referring to his separate analysis of the Yugoslavian Crisis, in the Annex to this article, which was added after the original article was written, to take into account the growing crisis at the time.

<sup>695</sup> As in the case of the former Czechoslovakia.

(c) they must seek secession by peaceful means, although they may be allowed to defend themselves and to seek assistance from the international community against "egregious and protracted violence" perpetrated against them by the body denying them the right to secede,<sup>696</sup>

(d) however, they do not have a right as such to seek support nor to receive it,

(e) they cannot seek to acquire more territory than they were entitled to as a sub-State actor prior to independence, in accordance with the principle of *uti possidetis*,

(f) the decision to secede must be based upon the freely expressed will of *all* the peoples of the territory, and

(g) they must have had effective continuous control over the territory they are seeking to delineate, in accordance with general principles of State recognition.

If a seceding entity meets all of these criteria, then it has a right to act and to be treated as a sovereign State, if that is what it wishes. Thus, a seceding entity that has satisfied all of these criteria has a right to external and internal self-determination, which would be breached if it were not then recognized as a sovereign State by other members of the international community.

The practice of China in relation to Outer Mongolia suggests that China also recognises the right of a sub-State actor to secede by agreement with the central authority.<sup>697</sup> This suggests that if Tibet or any of the other "autonomous regions" of China could ever secure the co-operation of the Chinese government to allow them independence, and they met all the other criteria outlined above, then the international community would be required to recognise the Statehood of such independent nations. Clearly this manifestation of the right to external self-determination is far more limited than that accorded to Non-Self-Governing Territories but, nevertheless, it creates certain obligations upon members of the international community that must be fulfilled.

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<sup>696</sup> The armed conflicts in Yugoslavia were generally initiated by another member of the federation who was trying to prevent a Republic from leaving the federation. Cf. Discussion below, on the rights of national liberation movements to use force.

<sup>697</sup> Cf. Discussion in Chapter Four, *supra*.

### 6.5 *The Right of Indigenous People to Self-Determination*

As many authors have noted, the “rights of indigenous peoples” have only come to the fore in the last thirty years or so.<sup>698</sup> This is despite the fact that “indigenous peoples” are really just a variant on the “peoples” of territories under colonial occupation, in historical terms.<sup>699</sup> They were in possession of their lands when the same colonial powers came and forced them to share these lands, either by using force or through dubious treaties ceding that land, just as happened in Africa.<sup>700</sup> Many African tribes have the same kind of relationship with land that characterises most recognized “indigenous groups”.<sup>701</sup> However, the other distinguishing feature of “indigenous peoples” as a category in international law is that historical circumstances have left them as a minority within their own territory, unlike the majority of African peoples.<sup>702</sup> Thus, they have not been recognised as a “peoples”, with a right to external self-determination, in the same way that African peoples were able to claim independence during the twentieth century, despite several hundred years of the same kind of “alien domination”.<sup>703</sup>

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<sup>698</sup> Cf. Sanders, “Indigenous Questions”, *supra*, at 3.

<sup>699</sup> For example, US President Nixon wrote in 1970: “The first Americans - the Indians - are the most deprived and most isolated minority group in our nation. On virtually every scale of measurement - employment, income, education, health - the conditions of the Indian people rank at the bottom. This condition is the heritage of centuries of injustice. From the time of their first contact with European settlers, the American Indians have been oppressed and brutalized, deprived of their ancestral lands and denied the opportunity to control their own destiny.”: President R. Nixon, *Special Message on Indian Affairs*, in Wilmer, *supra*, at 89-90.

<sup>700</sup> Cf. Discussion on the colonization of Africa in Chapters One and Five, *supra*. Note that some groups in Africa identify themselves as “indigenous”, and have attended in increasing numbers the work of the UN Sub-Commission Working Group on indigenous populations, including Ken Saro Wiwa of the Ogoni people of Nigeria: B. Kingsbury, “‘Indigenous Peoples’ in International Law: A Constructivist Approach to the Asian Controversy”, (1998) 92 *Am. J. Int’l L.* 414 at 416, n. 12.

<sup>701</sup> Shaw, *supra*, at 28.

<sup>702</sup> Although there are ethnic minorities within African States, the majority of the population of all African States is “African” in ancestry.

<sup>703</sup> H. Hannum, *Autonomy, Sovereignty, and Self-Determination*, (Philadelphia: University of Pennsylvania Press, 1990) at 73-76 [hereinafter Hannum, “Autonomy”]. For example, the Nisga’a people of British Columbia, Canada, recently were trying to negotiate a treaty with the Federal Government of Canada, rather than the Provincial Government. But the Federal Government did not consider that the Nisga’a people had the right to negotiate a treaty with the sovereign authority, implying that the Nisga’a were not sovereign in their territory, even in historical times. As one Heiltsuk writer from British Columbia, Canada, suggested recently: “From the outset, it was my understanding that through this [treatymaking] process we would be looking for ways in which we could have equal participation and a fair, equitable share in the wealth of this country, so that we could no longer rely on handouts. ... The governments have hijacked a process where they lend money to First Nations to negotiate away 90 to 95 per cent of their traditional lands and resources. ... If you ask other First Nations groups currently participating in this process if their nation has a mandate to

The most widely accepted groups falling within the category of “indigenous peoples” in international law are the original inhabitants of territories subsequently colonised by Britain, Spain, and Portugal, in the Americas and Oceania. This categorisation is at least partly due to the fact that the initial move towards building “a vibrant international indigenous peoples’ movement in the 1970’s was driven primarily by groups from areas of European invasion and settlement.”<sup>704</sup> However, the definition of “indigenous peoples” is still in flux, and may also include many peoples within Asia, although most Asian governments do not wish to recognise any of their minority groups as “indigenous”, because this places different obligations upon them.<sup>705</sup>

Indigenous peoples, because of their unique and vital link to territory, are often recognized as having more rights than other minority groups without the same connection to land, as the Human Rights Committee has suggested.<sup>706</sup> Thus, they have a different right to self-determination from many minority groups. Neither group has an absolute right to secede and form its own State. However, the international community has recognized that indigenous groups must have a certain measure of control over their lands, if they are to exercise even internal self-determination. This is because their relationship to land is central to their cultural identity, and thus the exigencies must be provided for them to exercise their right to maintain this cultural identity. Thus, in Australia’s Northern Territory, the *Aboriginal Land Rights Act (1976)* granted freehold title to Aboriginal groups who could establish that they had maintained a “traditional” connection with their land, in order to help them maintain this connection.

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negotiate away 90 to 95 per cent of their lands and resources, the answer would be a resounding no!”: R. C. Moody, “After we are gone”, (2000) 4 *Raven’s Eye* 4.

<sup>704</sup> Kingsbury, *supra*, at 421.

<sup>705</sup> *Ibid*, at 416-419.

<sup>706</sup> This close association with territory is largely what distinguishes “indigenous peoples” from other “minorities”. For example, the Human Rights Committee in its *General Comment No. 23 on Article 27 of the Covenant* (*supra*), stated, “aspects of rights of individuals protected under that article, such as enjoyment of a particular culture, ‘may consist of a way of life which is closely associated with territory,’ particularly for members of indigenous communities” and [c]ultural rights under Article 27 extend to ways of life ‘associated with the use of land resources, especially in the case of indigenous peoples.’ [my emphasis]

However, there still remains considerable controversy over the legitimacy of present forms of self-governance and self-determination under such "autonomy regimes". For example, in relation to Indian reserves in the United States, Frank Wilmer writes:

"There are conflicts today on many reservations, including the Akwesasne, Mohawk, the Hopi, and Navajo, reflecting the questionable legitimacy of tribal governments approved by the U.S. government but not necessarily by the tribal people. Many abstain from tribal elections on this basis."<sup>707</sup>

Taiaiake Alfred, a Mohawk, explains further:

"In this supposedly post-colonial world, what does it matter if the reserve is run by Indians, so long as they behave like bureaucrats and carry out the same old policies? Redefined and reworded, the 'new' relationship still abuses indigenous people, albeit more subtly. In this 'new' relationship, indigenous people are still bound to another power's order. The rusty cage may be broken, but a new chain has been strung around the indigenous neck; it offers more room to move, but it still ties our people to white men pulling on the strong end."<sup>708</sup>

In terms of a "right" to self-determination under international law, this is still unclear. Many States recognise that the "CERD" applies to their indigenous populations.<sup>709</sup> Article 1 of the Convention defines "racial discrimination" as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin". However, despite that fact that this Convention makes explicit reference to "colonialism and all practices of segregation and discrimination associated therewith", the CERD does not provide any *positive* rights to racial groups, and does not even mention self-determination.

A Working Group has been preparing a *Draft Declaration on the Rights of Indigenous Peoples*, which has proven highly controversial, and is making slow progress through the various UN organs.<sup>710</sup> Article 3 of that Declaration provides: "Indigenous peoples have the right to self-determination. By

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<sup>707</sup> F. Wilmer, *supra*, at 94, n. 15.

<sup>708</sup> Alfred, *supra*, at xiii.

<sup>709</sup> H. Hannum, "Autonomy", *supra*, at 78.

<sup>710</sup> General Assembly Resolution 32 (1995) established this working group, "in accordance with operative paragraph 5 of General Assembly Resolution 49/214 of 23 December 1994."

virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”<sup>711</sup>

However, many States are reluctant to recognise that indigenous peoples have such a right. Many are concerned that this would lead to separatist struggles, or to an increase in the current range of disputes as to the limits of indigenous rights in modern democracies.<sup>712</sup> For example, in Australia recently, the Prime Minister, John Howard, wrote his own version of a *Declaration Towards Reconciliation*, and refused even to use the term “self-determination”, even though the Council for Aboriginal Reconciliation had been negotiating for years over the appropriate terminology to be included in the document. The relevant phrase, as drafted by the Council for Aboriginal Reconciliation, states: “... and respect that Aboriginal and Torres Strait Islander peoples have the right to self-determination within the life of the nation”, whereas Howard’s version states: “... and respect the right of Aboriginal and Torres Strait Islander peoples, along with all Australians to determine their own destiny.”<sup>713</sup>

Rosalyn Higgins noted in 1994 that “the concept of autonomy for this special group appears to be gaining ground.”<sup>714</sup> However, in summary, it would seem that the “right” to autonomy has not yet crystallised. Many issues remain to be worked out, and in the meantime “indigenous peoples” will continue to enjoy very much the same rights as other minority groups, in the current political climate.

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<sup>711</sup> UN Doc. E/CN.4/Sub.2/1994/2/Add.1, 20 April 1994.

<sup>712</sup> For example, in Burnt Church in eastern Canada, recently there has been an ongoing struggle, which has involved violence between native fishermen, non-native fishermen, and the Federal Government, concerning native treaty rights to fish for lobster and Federal Government rights to regulate them: M.C. Come, “Call off your troops”, *The Globe and Mail* (18 August 2000) A13.

<sup>713</sup> Reprinted and discussed in M. Grattan & D. Jopson, “PM’s spin on black accord”, *The Sydney Morning Herald* (3 April 2000) 6. The National Aboriginal Community Controlled Health Organisation, representing 100 indigenous health-related services across Australia, complained to the Committee for the ICESCR (ECOSOC) a week later that Howard’s version “would ... appear to be a repudiation of Australia’s obligations under this particular covenant”, as part of a “scathing report” on the Howard Government’s dismal record on Aboriginal health issues: R. McQuirk, “Aborigines blame PM in report to the UN”, *The Canberra Times* (10 April 2000) 2.

<sup>714</sup> R. Higgins, “Minority Rights: Discrepancies and Divergencies between the International Covenant and the Council of Europe System”, in Steiner & Alston, *supra*, at 1011.

However, indigenous peoples are making many legal advances in several countries, that may necessitate a change of policies towards indigenous self-determination.<sup>715</sup>

#### 6.6 *Minority Rights to Self-Determination*

There are numerous minority groups across the globe engaged in various types of separatist struggles.<sup>716</sup> However, “minorities *as such* do not have a right of [external] self-determination. That means, in effect, that they have no right to secession, to independence, or to join with comparable groups in other states.”<sup>717</sup>

On the other hand, the right to self-determination has taken another expansive step forward in more recent years, with the development of the concept of “internal” self-determination. This concept was first stated expressly in the *Final Act of the Helsinki Conference on Security and Co-Operation in Europe* in 1975, but not widely accepted until it was adopted by 171 states in the form of the *Vienna Declaration and Programme of Action* in 1993. The traditional formulation of the right of all peoples to self-determination was expanded to: “all peoples always have the right, in full freedom, to determine, when and as they wish, their *internal and external* political status, without external interference ...” [my emphasis] This provision has been taken as intending to imply that minority groups may have the right to a certain measure of political autonomy in their own region. But there is still no “right” for a minority group to secede as an exercise of self-determination in international law.<sup>718</sup>

At the same time, many commentators have pointed out that the “Friendly Relations Declaration”, supra, arguably only prohibits secession by a minority group from: “States conducting themselves in compliance with the principle of equal rights and self-determination of peoples ... and thus possessed of a government representing the whole people belonging to the territory without distinction as to race,

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<sup>715</sup> For example, the highest courts in Australia, Canada, and New Zealand, have successively expanded some of the land rights of indigenous peoples in those countries, particularly in the last 10 years: Tremblay & Forest, supra.

<sup>716</sup> For example, in Bougainville, Canada, Chechnya, Kashmir, the Philippines, the Solomon Islands, Spain, and Sri Lanka, as well as the Kurdish people who are spread across several different States.

<sup>717</sup> Higgins, “Problems and Process”, supra, at 124.

creed or colour.” Clearly, States practising genocide or carrying out similarly grave human rights violations against a sector of the population could not be said to be “conducting themselves in compliance with the principles of equal rights and self-determination of peoples.”<sup>719</sup> This argument has been used to explain the anomaly of the creation of the sovereign State of Bangladesh in 1971, out of the territory of Pakistan.<sup>720</sup>

There is some suggestion that Kosovo, a province within the Former Yugoslavia, may be granted complete independence, in order to protect the Kosovo Albanians from further persecution by the national authorities.<sup>721</sup> In June 1999 the Security Council adopted a Resolution on Kosovo, creating a UN civil administration to develop “provisional institutions for democratic and *autonomous* self-government pending a political settlement, including the holding of elections.”<sup>722</sup> [*my emphasis*] Previously, US President Clinton had suggested: “The prospect of international support for Serbia’s claim to Kosovo [is] increasingly jeopardized.”<sup>723</sup>

The Security Council Resolution on Kosovo broke new ground in many ways. As Franck points out:

“Resolution 1244 ... endorses the deployment of collective (regional) armed force to counteract not aggression, but gross violations of humanitarian law and human rights. In that sense, ... the resolution marks a significant progression in international jurisprudence. Never again will it be possible to argue that serious mistreatment of minorities is privileged by the oft-cited (and much misquoted) reservation of Charter Article 2(7) regarding “matters which are essentially within the domestic jurisdiction of any state.”<sup>724</sup>

There was some precedent for this approach, since the break-up of the Former Yugoslavia was treated as a “minorities” issue in the early stages, before it was clear that the majority of members of the

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<sup>718</sup> Spiliopoulou Åkermark, *supra*, at 28.

<sup>719</sup> For example, cf. S.K.N. Blay, “Self-Determination versus Territorial Integrity in Decolonisation”, (1988) 18 N.Y.U.J. Int’l L. & Pol. 441.

<sup>720</sup> Note that Saxena points out there were many similarities between the situation in Pakistan and the situation in Nigeria with respect to Biafra: Saxena, *supra*, at 88-109.

<sup>721</sup> Although, with the recent change in government, this may no longer be necessary.

<sup>722</sup> SC Res. 1244 (1999), 10 June 1999, para. 11(c).

<sup>723</sup> Quoted in J. Cienski, “Clinton hints at independence for Kosovo”, *National Post* (31 March, 1999) at 1.

<sup>724</sup> T. Franck, “Lessons of Kosovo”, (1999) 93 Am. J. Int’l L. 857 at 858. In a footnote to this statement, Franck explains: “The misquotations often result from overlooking the exception to this exception: “but this principle shall not prejudice the application of enforcement measures under Chapter VII.” (ibid, n. 19)

international community would recognise the Statehood of the seceding Republics. Thus, UN intervention in that conflict was sometimes characterised as “humanitarian intervention”, rather than “peacekeeping”. In fact, in a preliminary hearing for an early case in front of the International Criminal Tribunal for the Former Yugoslavia [hereinafter: “ICTY”], the defence argued that the Tribunal did not have jurisdiction to prosecute the defendant for crimes that had occurred in that “internal” armed conflict, as opposed to an “international” armed conflict.<sup>725</sup>

The Badinter Committee had also broadened the potential scope for minorities within a territory to determine their external status, in Opinion No. 2.<sup>726</sup> In that Opinion, the Committee held: “Where there are one or more groups within a state constituting one or more ethnic, religious or language communities, they have the right to recognition of their identity under international law.” The Committee went on to suggest:

“Article 1 of the two 1986 [*sic*] International Covenants on human rights establishes that the principle of the right to self-determination serves to safeguard human rights. By virtue of that right every individual may choose to belong to whatever ethnic, religious or language community he or she wishes. In the Committee’s view one possible consequence of this principle might be for the members of the Serbian population in Bosnia-Herzegovina and Croatia to be recognized under agreements between the Republics as having the nationality of their choice, with all the rights and obligations which that entails with respect to the state concerned.”<sup>727</sup>

Clearly this extreme suggestion was intended only for the equally extreme situation that the Committee was trying to address, whereby ethnic conflicts seemed intractable. It would be completely unworkable if it was applied to almost any other territory.

#### 6.6.1 “Internal” self-determination in operation in Palestine

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<sup>725</sup> The Court, however, did not accept that argument: *Prosecutor v. Tadic, Appeal on Jurisdiction*, International Criminal Tribunal for Yugoslavia (1995) 35 I.L.M. 32, discussed in B. Simma & A. L. Paulus, “The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts - A View from Positivism”, (1999) 93 Am. J. Int. L. 678.

<sup>726</sup> Reprinted in (1992) 3 Eur. J. Int’l L. 183-184.

<sup>727</sup> *Supra*, paras. 2 & 3.

Although not strictly a “minorities” issue, it is worth reviewing here some of the more recent developments in the peace process in Israel, in terms of providing an example of a practical application of some of the principles of “internal” self-determination, while the details of the “external” part of the right to self-determination are still being negotiated between peoples of two different races sharing the same territory and both with strong historical ties to that territory.<sup>728</sup>

In 1977, Israel began negotiations with Egypt to try and bring peace to the region,<sup>729</sup> which resulted in the “Camp David Accords”.<sup>730</sup> Israel agreed to hand the Sinai back to Egypt, and to establish a “framework” for future Palestinian “autonomy” in the West Bank and Gaza Strip. This was the first “land for peace” agreement. At the same time, the leaders of both the negotiating nations appended separate letters to the agreement, outlining their governments’ irreconcilable positions on the future of the city of Jerusalem. The President of Egypt, Mohammad Anwar al-Sadat, asserted that East Jerusalem should be under Arab sovereignty, because it was integral to the West Bank. The Prime Minister of Israel, Menachem Begin, declared that “Jerusalem is one city indivisible, the capital of the State of Israel”.<sup>731</sup> This became the official policy of the Israeli government, in the form of the *Israeli Law on Jerusalem*, in July 1980. The Security Council immediately passed another resolution condemning any measures taken to change the status of the city.<sup>732</sup> Notably, the United States abstained from voting on this resolution, apparently in order to avoid harming its relationship with Israel.

Eisner suggests that Israel entered the 1977 agreement because it “no longer felt invulnerable” after the 1973 war, and that “Egypt was moved by four costly wars with Israel to adopt a more realistic

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<sup>728</sup> For a variety of contemporary articles on the negotiations, cf. *Sydney Morning Herald*, online: <<http://smh.com.au/news/specials/intl/mideast/index.html>>.

<sup>729</sup> Since the 1949 Armistice Agreements did not provide a permanent peace settlement, Israel technically has still been at war with Egypt, Syria, Iraq, Jordan and probably Lebanon ever since: Eisner, *supra*, at 264.

<sup>730</sup> *A Framework for Peace in the Middle East Agreed at Camp David*, 17 September 1978, reprinted in 17 ILM 1466 (1978).

<sup>731</sup> Eisner, *supra*, at 236.

<sup>732</sup> SC Res 478, SCOR, 35th Sess., 2245th mtg at 14 UN Doc. S/RES/478 (1980).

approach toward the existence of Israel and to accept the idea of co-existence.”<sup>733</sup> In other words, the constant fear of reprisals and retaliations appears to have led to an “endgame” situation, where neither side could see a way of winning decisively, and the only way to survive was through compromise.

However, Palestinian “autonomy” did not materialise in any form within the time frame that had been set in 1977. The next successful round of negotiations was not until 1993, when Israeli Prime Minister Yitzhak Rabin and PLO Chairman Yassir Arafat signed the *Declaration of Principles on Interim Self-Government Arrangements* [hereinafter: “Declaration of Principles”].<sup>734</sup> This historic Declaration was a major breakthrough, in that it was the first time that an Israeli Prime Minister had negotiated directly with the PLO on such a fundamental issue.

The “Declaration of Principles” was negotiated in the context of the following key developments:

- (i) the growing number of Israeli settlements in the West Bank and Gaza Strip, in violation of the Camp David Accords, which led to the Palestinian “intifada” of 1986, and drained precious resources and caused great insecurity on both sides;
- (ii) Jordanian King Hussein’s agreement to relinquish any Jordanian claims to the West Bank, if Israel withdrew from there, giving the Israelis no choice but to deal directly with the Palestinians on that issue;
- (iii) the PLO losing the financial support of many of the Gulf States, because it supported Iraq after it invaded Kuwait;
- (iv) an exodus of PLO supporters to the militant, fundamentalist Organization Ha’amas, further weakening the PLO; and
- (v) Iraqi scud missiles landing in Israel during the Gulf War, demonstrating how ineffectual the West Bank was as a buffer zone against the Arab countries.<sup>735</sup>

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<sup>733</sup> Eisner, *supra*, at 235-236.

<sup>734</sup> Signed 13 September 1993, Israel - PLO, (1993) 32 ILM 1525.

<sup>735</sup> Eisner, *supra*, at 237.

Clearly the Rabin government also had a more conciliatory approach than previous Israeli governments.

The 1993 "Declaration of Principles" was followed by the *Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip*, signed on 28 September 1995 [hereinafter: "Interim Agreement"].

This Agreement led to elections for a Palestinian Council in January 1996<sup>736</sup>, which would provide a measure of "internal self-determination" for Palestinians living in the West Bank and Gaza Strip.<sup>737</sup>

The city of Jerusalem was mentioned this time, albeit indirectly: Palestinians living in Jerusalem were allowed to vote in these elections.<sup>738</sup> The "Interim Agreement" also proposed that negotiations on the permanent status of all "occupied territories" would commence no later than 4 May 1996 (Article V).

Both the "Declaration of Principles" and the "Interim Agreement" specified that such negotiations would be "based on Security Council Resolutions 242 and 338."<sup>739</sup> In other words, both parties agreed that full Palestinian self-determination could only ever be exercised over territory occupied by Israel in 1967, not any other territory previously allotted to the Palestinians under the Partition Plan.<sup>740</sup> This again left the future status of Jerusalem unclear, because the agreements made no reference to all the Security Council resolutions demanding that no changes be made to the "status of the City" from that of a *corpus separatum*, as discussed previously.<sup>741</sup>

After a change in government in Israel, following Rabin's assassination, and a period of stalemate, the *Wye River Memorandum* between Israel, the Palestinian Council, and the US, finally was signed on 23 October 1998.<sup>742</sup> This Memorandum essentially extended the time-frames for implementation of the

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<sup>736</sup> See Common Article 1, "Declaration of Principles" and "Interim Agreement".

<sup>737</sup> Becker, *supra*, at 351.

<sup>738</sup> Article 1, Annex 1 to the "Declaration of Principles", *supra*, *Protocol on the Mode and Conditions of Elections*.

<sup>739</sup> Common Article 1, "Declaration of Principles" and "Interim Agreement". Security Council Resolution 338 of 22 October 1973, passed in the middle of the 1973 war, calls for a ceasefire and for implementation of Resolution 242 as soon as a ceasefire commences.

<sup>740</sup> But note that these Security Council resolutions do not provide expressly for an independent Palestinian state.

<sup>741</sup> For example, SC Res 252 of 1968, 267 of 1969, and 298 of 1971.

<sup>742</sup> Available via: Website of the Government of Israel, online: <<http://www.israel.org/>>. Note that the US' role is mainly to provide technical assistance and to oversee the whole process.

previous interim agreements, in terms of exchanging "land for peace". It also provided: "The two sides will immediately resume permanent status negotiations on an accelerated basis and will make a determined effort to achieve the mutual goal of reaching an agreement by May 4, 1999."<sup>743</sup> The city of Jerusalem was not mentioned specifically, once again, but presumably it has to form part of any agreement on the "permanent status" of all territory in the region.<sup>744</sup>

Since the US has been involved actively in this process, as a party to the Wye River agreement, it seems likely that "internationalisation" of at least the Walled City of Jerusalem will be encouraged, so that all faiths may have access to their Holy Sites. However, given the fact that the US has maintained such strong support for Israel over so many years,<sup>745</sup> and the fact that the US currently dominates the international arena in so many ways, it seems likely that the Palestinians will continue to resist any attempts by the US and Israel to place parts of Jerusalem under a so-called "international" trusteeship, which would most likely be dominated by US policy.<sup>746</sup>

Only time will tell if the *Wye River Memorandum* becomes yet another "fantastic" collection of words that fails to resolve the conflict, or whether it will prove to be a decisive influence on peace and security in the region. Unfortunately, only two months after the agreement was signed, a report issued by Egyptian observers was already condemning Israel for violating the agreement by creating more Jewish settlements in territory that Palestine was to inherit: "[T]he volume of Palestinian land confiscated by Israel in the Gaza Strip and West Bank since signing the accord is greater than the amount of land delivered to the Palestinian government in the first stage of Israeli redeployment."<sup>747</sup>

Hopefully, this action by Israel was intended only to remind the Palestinians of what they stand to lose if they do not keep up with their side of the agreement, rather than an indication of Israeli contempt for

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<sup>743</sup> Article IV.

<sup>744</sup> Jerusalem is not mentioned either in an Israeli Foreign Ministry publication, "May 4 1999 - Some Frequently Asked Questions", available via Website of the Government of Israel, *supra*.

<sup>745</sup> Including the recent decision by President Clinton not to block a law allowing the US to move its embassy from Tel Aviv to West Jerusalem.

<sup>746</sup> The Israelis have never supported the "internationalization" of Jerusalem, either.

<sup>747</sup> Arabicnews.com, "Egyptian report tells of Israeli violations of Wye River accord", 12/12/98, online: <<http://www.arabicnews.com/>>.

the promises they made. Israel, for its part, claims that its “obligations, which appear at the end of each stage [of the agreement], are dependent on the fulfillment of the prior Palestinian commitments within that stage” and that the Palestinians have been lagging behind in implementing such obligations as taking all necessary measures to “outlaw all organisations ... of a military, terrorist or violent character and their support structure”.<sup>748</sup> The Israeli government has stated regularly that it will only “implement its obligations on the basis of reciprocity”.<sup>749</sup>

At the time of writing, violence has broken out once again in Israel, and the peace process is again in jeopardy. Thus, Palestinian “dreams” of sovereignty are again on hold, particularly sovereignty over some of Jerusalem, which is at the heart of the present conflicts. However, the Palestinians are one step closer to “external self-determination”, having managed successfully their own “internal” self-determination thus far, which has enabled them to participate in the negotiations on their future international status, unlike most other “minority” secessionist groups.

#### *6.6.2 Conclusions as to the rights of minorities to self-determination*

It appears that minority groups are entitled to some form of political autonomy, if their rights are not being protected adequately. In other words, they have a right to *internal* self-determination. Kirgis suggests that there are “degrees” of self-determination, whereby “a claim of right to secede from a representative democracy is not likely to be considered a legitimate exercise of the right of self-determination, but a claim of right by indigenous groups within the democracy to use their own languages and engage in their own noncoercive cultural practices is likely to be recognized - not always under the rubric of self-determination, but recognized nevertheless. Conversely, a claim of right to secede from a repressive dictatorship *may* be regarded as legitimate. Not all secessionist claims are equally destabilizing. The degree to which a claimed right to secede will be destabilizing may depend

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<sup>748</sup> Israel Ministry of Foreign Affairs, *Wye River Memorandum: Status of Implementation as at March 1, 1999*, available via Website of the Government of Israel, *supra*.

<sup>749</sup> For example, cf. UN Press Release GA/9541 of 24 September 1998, *supra*.

on such things as the plausibility of the historical claim of the secessionist group to the territory it seeks to slice off.”<sup>750</sup>

Thus, in certain very limited circumstances, a minority group may be able to argue that it has a right to secede, if the governing authority is grossly non-representative and persistently mistreats members of the minority group, or where two different groups with substantive historical ties to the same territory cannot realistically co-exist and function peacefully within the same sovereign entity. Apart from that, minorities as such do not have a right to *external* self-determination.

#### *6.7 The right of all peoples to internal self-determination*

During negotiations on the two Human Rights Covenants, several delegations suggested that the right to self-determination should apply to “peoples oppressed by despotic governments.”<sup>751</sup> Higgins also suggests that “the right of self-determination continues beyond the moment of decolonization, and allows choices as to political and economic systems within the existing boundaries of the state.”<sup>752</sup> We have seen already how weak the guarantees of representative government are in the ICCPR, suggesting only weak State support for a “right” to democracy in its fullest sense. However, at the same time, military and other coups are routinely condemned by the international community, and most Communist and totalitarian regimes have collapsed.

Thus, it seems that a limited right of *internal* self-determination is available to *all* peoples, to have a reasonably representative government and some say in the make-up of that government.

#### *6.8 Enforcement of the right to self-determination*

One of the main problems with the right to self-determination generally is that there is no effective way of enforcing this right, without the co-operation of either the governing power, a more powerful State

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<sup>750</sup> Kirgis, *supra*, at 308 [footnote omitted].

<sup>751</sup> Cassese, “Self-Determination”, *supra*, at 48-49. These States included Afghanistan, and several Asian, African and Latin American countries, as well as a few Western countries.

<sup>752</sup> Higgins, “Problems and Process”, *supra*, at 123.

ally, and/or the UN, unless one resorts to violence and manages to overthrow the regime that is oppressing one. Even then, one needs the recognition of the international community if one is to maintain the status one attains through such means.<sup>753</sup>

As political bodies, neither the Special Committee on Decolonization nor the General Assembly has any power to enforce its decisions or resolutions condemning the slow pace of decolonisation.<sup>754</sup> Nor do any of the various Sub-Commissions and Special Rapporteurs have the power to do more than just make recommendations. The Security Council has the power to enforce certain of its resolutions under Chapter VII, UN Charter. But 3 of the 4 remaining powers still administering Non-Self-Governing Territories are permanent members of the Security Council, with the right to veto any action by that body.<sup>755</sup> Thus, it is extremely unlikely that any one of them would try and force New Zealand, for example, to speed up the process of decolonisation in Tokelau, when they are responsible for so many more Non-Self-Governing Territories themselves.<sup>756</sup>

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<sup>753</sup> On the factors relevant to recognition of Statehood and the significance of the doctrine of recognition for groups who manage to overthrow the governing authority within a State, in the context of Tibet's 1912 declaration of independence, cf. van Walt van Praag, *supra*, at 78-80, 93-110.

<sup>754</sup> Articles 10-14, UN Charter, merely empower the General Assembly to "make recommendations", or to "call the attention of the Security Council to situations which are likely to endanger international peace and security" (article 11(3)), although the General Assembly has certain powers under Chapters XII and XIII, "including the approval of the trusteeship agreements for areas not designated as strategic." (Article 16) [*my emphasis*] Note also the language of the General Assembly's "Programme of action for the full implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples", in GA Res. 2621 (XXV), 12 October 1970. Preambular paragraph 3 provides that this programme was intended to "assist in the full implementation" of the Colonial Declaration, not to "ensure" or "enforce" the "full implementation" of that Declaration. [*my emphasis*].

<sup>755</sup> Note that China was able to argue successfully in 1972 that Hong Kong and Macau should be taken off the list of Non-Self-Governing Territories, because they were "part of Chinese territory occupied ... [respectively] by the British and Portuguese authorities": United Nations, *Yearbook - 1972*, at 543, in Cassese, "Self-Determination", *supra*, at 80, n. 36. The General Assembly endorsed this request in Resolution 2908 (XXVII): Cassese, *ibid*. Thus the populations of these territories were not consulted at all before being "returned" to China in 1997 and 1999, respectively. Cf. W. Goodhart et al, *Countdown to 1997: Report of a Mission to Hong Kong*, (Geneva: International Commission of Jurists, 1992).

<sup>756</sup> The Territories that are still considered to be "Non-Self-Governing" are discussed in 6.2 *Self-Determination as the Right to Decolonisation*. The United Kingdom is considered the administering power of most of the 8 Caribbean Non-Self-Governing Territories (with the exception of United States Virgin Islands), while it and the United States continue to administer most of the Pacific Territories as well (with the exception of New Caledonia and Tokelau). Numerous authors have discussed the problems with the "veto" power of the Permanent Members of the Security Council, and the resultant "paralysis of the international community in settling international disputes", including disputes concerning self-determination. For example, cf. I. Bibó, *The Paralysis of International Institutions and the Remedies: A Study of Self-Determination, Concord among*

At the institutional level, the UN Human Rights Committee has denied all "groups" the right to use the "individual communication" method under the ICCPR, for bringing matters concerning the right to self-determination to the attention of that Committee.<sup>757</sup> In a Canadian case alleging breaches of the rights of the Mikmaq peoples to self-determination, the Committee held that the rights under article 1 are group rights, not individual rights. Therefore, it said, only groups could allege that such rights had been breached. However, the Committee pointed out that it could only receive communications from "individuals", therefore it found the communication inadmissible.<sup>758</sup> Thus, neither groups nor individuals can bring an alleged breach of their right to self-determination to the Committee.

The ICJ has also used its jurisdictional provisions and created procedural hurdles, which ensure that it rarely adjudicates issues concerning self-determination. In the first place, the ICJ does not have the jurisdiction to consider claims by non-State actors, such as a "peoples" alleging that their right to self-determination has been breached.<sup>759</sup> In addition, States may decide whether or not to accept the jurisdiction of the Court in any particular matter, and cannot be forced to recognise the Court's jurisdiction.<sup>760</sup> Thus, any State accused of breaching a peoples' right to self-determination can simply refuse to accept the jurisdiction of the ICJ to adjudicate the matter, and the Court cannot assume jurisdiction in such circumstances.

The Court has also made it virtually impossible for a State to bring a claim alleging that another State is breaching the right to self-determination of a Non-Self-Governing Territory, or any other entity with a right to self-determination. In the 1995 "East Timor Case", supra, Australia successfully invoked the Court's doctrine of "indispensable third parties", otherwise known as the "Monetary Gold"

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*the Major Powers, and Political Arbitration*, (New York: The Halsted Press, 1976), who suggests that there should be a binding system of political arbitration, in order to overcome the deficiencies of the present system.

<sup>757</sup> Article 1 of the *First Optional Protocol to the ICCPR* requires States Parties to recognise "the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant."

<sup>758</sup> Communication No.78/80 concerning the Mikmaq tribal society: *A.D. v. Canada*, Views in UN Doc. A/39/40 (1984). See also Communication No. 413/90 concerning a claim in respect of the right to self-determination of the peoples of the autonomous province of Bozen-South-Tirol (Bolzano, Alto Adige) in Italy: *A.B. v. Italy*, Views in UN Doc. A/46/40 (1991), which was also found inadmissible.

<sup>759</sup> Article 34 (1), *Statute of the International Court of Justice*.

doctrine. This doctrine evolved from the *Case Concerning Monetary Gold Removed from Rome in 1943*,<sup>761</sup> where the ICJ held that it could not exercise its jurisdiction to adjudicate a dispute when a third State, whose legal rights or obligations would be determined by the adjudication, was not a party to the proceedings. The Court further held that, in order to find such a case inadmissible, the rights or obligations of the third party had to form “the very subject matter of the decision”, not just “be affected by the decision”.<sup>762</sup> Since deciding the Monetary Gold case, the Court had further elaborated on the doctrine in subsequent cases, but it had never allowed the doctrine to interfere with its exercise of jurisdiction until the East Timor case was presented. The particular facts of the Monetary Gold case were usually readily distinguished wherever the principle was invoked.<sup>763</sup>

However, in the East Timor case, the Court used the Monetary Gold Doctrine to refuse to exercise its jurisdiction, declaring that Indonesia was an “indispensable third party” to the dispute. Portugal was unsuccessful in arguing that the Court should declare that Australia had infringed the rights of both East Timor and Portugal - allegedly still its administering power - by entering into the Timor Gap Treaty with Indonesia in 1991.<sup>764</sup> Instead, the majority of the Court found that “in order to decide the claims of Portugal, it would have to rule, as a prerequisite, on the lawfulness of Indonesia’s conduct in the absence of that State’s consent. [All] the claims of Portugal ... raise a common question: whether the power to make treaties concerning the continental shelf resources of East Timor belongs to Portugal

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<sup>760</sup> Article 36, *ibid.*

<sup>761</sup> (*Italy v. United Kingdom*) [1954] ICJ Rep. 19 [hereinafter “the Monetary Gold case”].

<sup>762</sup> *Ibid.*, at 32.

<sup>763</sup> Cf. The “Nicaragua Case”, Jurisdiction and Admissibility, *supra*; *Case concerning the Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, Application for Permission to Intervene, [1984] ICJ Rep. 25; *Case concerning the Frontier Dispute (Burkina Faso v. Mali)*, [1986] ICJ Rep. 554; *Case concerning the Land, Island and Maritime Frontier Dispute, (El Salvador v. Honduras)*, Application to Intervene, [1990] ICJ Rep. 116; and *Case concerning Certain Phosphate Lands in Nauru (Nauru v. Australia)*, [1992] ICJ Rep. 260.

<sup>764</sup> Australia had been negotiating with Indonesia since 1971 to establish a delimitation of the continental shelf between their respective coasts, in order to allow Australia to explore the continental shelf off East Timor, which was believed to have very rich oil and natural gas deposits. After Indonesia invaded East Timor in 1975, Australia initially did not recognise the right of Indonesia to negotiate on behalf of the East Timorese people, but subsequently it extended *de facto* and then *de jure* recognition of Indonesian incorporation of East Timor (on 20 January 1978, and 15 December 1978, respectively). A unique joint venture agreement was finally entered into between the two States on 11 December 1989, which came into force in 1991, called the “Timor Gap Treaty”. It created a “Zone of Co-Operation” between Indonesian and Australian maritime

or Indonesia, and, therefore, whether Indonesia's entry into and continued presence in the Territory are lawful."<sup>765</sup> Therefore, the Court held by 14 votes to 2 that it was unable to rule on the merits of Portugal's claims, "whatever the importance of the questions raised by those claims and of the rules of international law which they bring into play."<sup>766</sup>

By way of *obiter dicta*, the majority of the Court nevertheless upheld the right of the peoples of East Timor to self-determination, due to the continuing status of East Timor as a Non-Self-Governing Territory.<sup>767</sup> It also stated: "Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable."<sup>768</sup> Judge Vereschetin was the only judge to take issue with the fact that the wishes of the people of East Timor should "at least be ascertained and taken into account by the Court."<sup>769</sup> He held that this was another reason for the Court to decline to exercise its jurisdiction, of equal importance with the application of the Monetary Gold doctrine, with which he concurred.<sup>770</sup> The minority Judges - Weeramantry and Skubiewski - held that the Monetary Gold doctrine did not apply. They both felt that Australia's obligations under international law were "distinct and separable from the conduct of Indonesia", and thus they formed the subject matter of the dispute.<sup>771</sup>

Another means of utilising the ICJ has proven only marginally successful in clarifying some aspects of certain claims for self-determination, namely, the Court's "advisory opinion" jurisdiction.<sup>772</sup> Some

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territory, which allowed them both to explore and exploit the resources of the maritime areas off the coast of East Timor.

<sup>765</sup> "East Timor case", *supra*, at para. 35, majority decision.

<sup>766</sup> *Ibid*, at para. 36. Note that Judge Oda thought the Court did not have jurisdiction for other reasons than the Monetary Gold doctrine: concurring opinion, *supra*.

<sup>767</sup> East Timor case, *ibid*, at para. 37.

<sup>768</sup> *Ibid*, at para. 29. Without any more elaboration than this, the exact content of such an *erga omnes* right remains uncertain. However, cf. dissenting opinion of Judge Weeramantry, who explores the issues of *erga omnes* rights in considerable depth.

<sup>769</sup> East Timor case, *ibid*, separate opinion of Judge Vereschetin, at 1.

<sup>770</sup> *Ibid*, separate opinion of Judge Vereschetin, at 4.

<sup>771</sup> B. Fitzgerald, "Portugal v. Australia: Deploying the Missiles of Sovereign Autonomy and Sovereign Community", (1996) 37 *Harv. Int'l L. J.* 260 at 267.

<sup>772</sup> Article 65, *Statute of the International Court of Justice*, allows the General Assembly to seek advisory opinions from the ICJ. But these opinions are not binding, since "the decision of the Court has no binding force except between the parties and in respect of that particular case (article 59, *supra*), and there are no "parties" where the Court is asked to provide an advisory opinion.

Non-Self-Governing Territories were fortunate to have independent States on their side (or opposing them in some cases), and the support of the General Assembly, to seek advisory opinions on their behalf from the ICJ as to their status in international law. For example, the ICJ provided several opinions on the status of "South West Africa"/Namibia, between 1950 and 1971, including two advisory opinions.<sup>773</sup> In 1975, the ICJ delivered its influential decision on the status of Western Sahara in international law, which elaborated upon the doctrine of *terra nullius* in relation to acquisition of territory of nomadic peoples, and "placed an interpretation on the existing standards that broadened the purport and impact of self-determination" in relation to the "free expression" of a peoples' will.<sup>774</sup> Nonetheless, the peoples of Western Sahara are still waiting to attain their self-determination, and cannot seek the assistance of the ICJ in enforcing their right.

#### 6.9 National liberation movements

Thus, it seems that the last remaining avenue currently in existence for enforcing a right to self-determination, is violence.<sup>775</sup> Many Non-Self-Governing Territories had previously recognized this, as they struggled with their colonial administrators to achieve the promise of freedom. For example, Portugal's oppression of its dependent peoples was singled out for particular mention in a 1970 General Assembly Resolution, which expressed "concern at the fact that some countries, notably Portugal, with the support of its North Atlantic Treaty Organization allies, are waging war against the national liberation movement of the colonies and against certain independent States of Africa and Asia and the developing countries".<sup>776</sup>

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<sup>773</sup> Cf. Dugard, *supra*, at 128-216 & 447-543.

<sup>774</sup> *Advisory Opinion on Western Sahara*, [1975] ICJ Rep. 32, para. 55, discussed in Cassese, *supra*, at 88.

<sup>775</sup> Until international criminal law begins to address this area of human rights violations. Cf. Discussion in Chapter Seven, below.

<sup>776</sup> GA Res. 2787 (XXVI), 6 December 1971. The territories specifically mentioned also included others not being administered by Portugal: "Reaffirming the inalienable rights of all peoples, and in particular those of Zimbabwe, Namibia, Angola, Mozambique and Guinea (Bissau) and the Palestinian people, to freedom, equality and self-determination, and the legitimacy of their struggles to restore those rights": preambular paragraph 8. Note that Portugal had never voluntarily advised the UN that it was administering any "Non-Self-Governing Territories". In 1960, the UN had declared on its own initiative that all of Portugal's overseas

Even more significant was the General Assembly's unanimous adoption of Resolution 2625 (XV) in 1970, which included the "Declaration on Friendly Relations", supra. This Declaration had been drafted meticulously over a considerable number of years, in order to take into account the many ideological and political stances of UN members. As Professor Georges Abi-Saab states :

"... for the first time the Western Powers as a whole recognized self-determination as a legal right and its denial as a violation of the Charter. This consensus was reached not on a vague general formula, but on a detailed interpretation, making explicit the different legal implications of the principle. It can thus be said that even if self-determination was not universally accepted as a legal principle in 1945, or even in 1960, the practice which has taken place in interstate relations since the adoption of the Charter, leading to the emergence of almost a hundred new States, as well as the consistent and cumulative practice of the organs of the United Nations, have led in 1970 to the universal recognition of the legally binding nature of the principle of self-determination."<sup>777</sup>

For the first time, the "Declaration on Friendly Relations" expanded on the Charter's "principle of equal rights and self-determination of peoples", in considerable detail. It introduced the notion of "alien domination", rather than referring just to colonial situations.<sup>778</sup> In this regard, it has been suggested that the "Declaration on Friendly Relations" was targeted specifically at the intractable situations of Israel and South Africa, where racist policies were being inflicted on the majority of the population by a more powerful minority in both cases. And in fact two months later, the right of the people of Palestine to self-determination was finally proclaimed by the General Assembly, in Resolution 2672/C (XXV) of 8 December 1970. This was a clear indication that *any* kind of "alien domination", not just colonial oppression, was now considered unacceptable by a significant proportion of UN members. The ICJ confirmed this view in its 1970 Advisory Opinion on Namibia, where the majority stated that "the subsequent development of International Law in regard to non-self-governing

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possessions were such Territories within the meaning of article 73e, in GA Res. 1542 (XV), 15 December 1960: Ofuately-Kodjoe, supra, at 114.

<sup>777</sup> G.M. Abi-Saab, "Wars of National Liberation", (1979) 165 Hague Recueil at 370.

<sup>778</sup> This distinction has never been defined, but presumably refers to the domination by any "foreign" power of a territory.

territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them".<sup>779</sup>

The "Declaration on Friendly Relations" also impliedly granted to peoples trying to exercise their right to self-determination the right to forceful self-defence, if they were being "forcibly" deprived of their right to self-determination:

"Every State has the duty to refrain from any forcible action which deprives peoples ... of their right to self-determination and freedom and independence. *In their actions against and resistance to such forcible action* in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter of the United Nations."<sup>780</sup>  
[my emphasis]

This provision was not without controversy.<sup>781</sup> The UN Charter expressly prohibits the use of force, unless in "self-defence", and only "until the Security Council has taken measures necessary to maintain international peace and security."<sup>782</sup> Thus, the peoples seeking self-determination argued that they were merely "defending" themselves in accordance with the Charter, even though the Charter is only supposed to apply to States.<sup>783</sup> The threat of Security Council action was never a reality at this time, and thus could not be relied upon by those defending themselves, because of the influence of the Cold War on the Permanent Five members' unwillingness to characterise *any* use of force as "aggression", in case it then reflected back on their own antagonistic activities in various regions of the world.<sup>784</sup>

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<sup>779</sup> *Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* [1971] ICJ Reports 31.

<sup>780</sup> Paragraph 5, "The principle of equal rights and self-determination of peoples". Note, however, Cassese's argument that this "makes explicit provision for resort to force by liberation movements": Cassese, "Self-Determination", *supra*, at 154, n. 17.

<sup>781</sup> Cf. Cassese, "Self-Determination", *supra*, at 150-155; and see generally, eg. C.O. Quaye, *Liberation Struggles in International Law*, (Philadelphia: Temple University Press, 1991); and H.A. Wilson, *International Law and the Use of Force by National Liberation Movements*, (New York: Oxford University Press, 1988).

<sup>782</sup> Article 51, UN Charter.

<sup>783</sup> Cassese, *supra*, at 151. He suggests that the Third World and socialist countries were particularly in favour of such an interpretation. This position was clarified when General Resolution 3070 was adopted in 1973, in the same year that war erupted in Israel again. This resolution expressly affirmed "the legitimacy of ... peoples' struggle for liberation from ... alien subjugation by all means including armed struggle."

<sup>784</sup> As Cassese suggests, "It is common knowledge that the enforcement mechanism set up by the Charter immediately jammed as a result of the rift between East and West. Consequently collective security had to

The right to use force to defend one's exercise of a right to self-determination was also included in the General Assembly's 1974 "Definition of Aggression".<sup>785</sup> Article 7 of that Definition provides:

"Nothing in this Definition, and in particular article 3,<sup>786</sup> could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the ["Declaration on Friendly Relations"] ..., particularly peoples under colonial and racist regimes or other forms of alien domination; *nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.*"<sup>787</sup> [my emphasis]

Preambular paragraph 6 of the Definition also reaffirms "the duty of States not to use armed force to deprive peoples of their right to self-determination, freedom and independence ..." Yet, in general terms, under traditional international law, governments are entitled to put down "insurgencies" and "rebellions", and to defend themselves against "belligerencies". However, these terms are not definitive legal terms, and there is considerable confusion and debate as to their exact meaning.<sup>788</sup> One of the main problems causing controversies in the area of national liberation movements, is the inadequacy of these traditional laws of war to address the situation where a "group" challenging a government may have a *sui generis* status in international law in the form of a distinct characteristic,

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rely increasingly on (i) two conflicting systems of alliance (NATO and the Warsaw Pact), both established on the strength of the 'collective self-defence' concept laid down in Art. 51, and (ii) the 'Ersatz' of collective security consisting of the 'peace-keeping' operations mounted since 1956 by the General Assembly and (or) the Security Council": A. Cassese, "Return to Westphalia? Considerations on the Gradual Erosion of the Charter System", in A. Cassese, ed., *The Current Legal Regulation of the Use of Force*, supra, 505 at 508 [hereinafter: "Cassese, 'Return to Westphalia'"].

<sup>785</sup> Annexed to GA Res. 3314 (XXIX) of 14 December 1974.

<sup>786</sup> Article 3 enunciates the list of acts that could qualify as "acts of aggression".

<sup>787</sup> Note that similar language is included in Option 1, Variation 1, of the "Consolidated text of proposals on the crime of aggression", prepared in December 1999 by the Co-Ordinator of the Working Group on the Crime of Aggression, Preparatory Commission for the International Criminal Court, now Annex IV to "Proceedings of the Preparatory Commission at its fourth session (13-31 March 2000)", UN Doc. PCNICC/2000/L.1/Rev.1, 3 April 2000. Cf. Discussion in Chapter Six on the relationship between the right to self-determination and international criminal law.

<sup>788</sup> Wilson describes "rebellion" as "a sporadic challenge to the legitimate government" whereby during "internal disturbances such as riots, or isolated and sporadic acts of violence, the rebels have no rights or duties in international law": supra, at 23. Protocol II additional to the Geneva Conventions provides that such "internal disturbances" are not "armed conflicts", for the purposes of determining the application of the Geneva Conventions to non-international armed conflicts: article 1(2). By contrast, "insurgents" are recognised as " 'contestants-at-law' and no longer merely law-breakers": Wilson, supra, at 25. However, there is no clear definition of an "insurgency". The definition of a "belligerency" is clearer, Wilson maintains, but "there is still substantial room for interpretation": supra, at 26.

with a recognised “legal personality”, and with a recognised right to challenge that government, such as a recognised right to external self-determination, unlike most other “rebellious” groups.<sup>789</sup>

Thus, the main issues of contention in relation to the aforementioned provisions in the “Declaration on Friendly Relations” and the Definition of Aggression are:

(i) who exactly is entitled to resist such “forcible measures”?

(ii) how much force can they legitimately use?

(iii) how much assistance, and of what kind exactly, are independence groups entitled to receive from third States?

(iv) to what extent are States entitled to use force to *defend themselves* against unwarranted attacks by independence groups? and

(v) to what extent can States use *indirect* means, such as hiring mercenaries, to defend their interests in colonial territories?

In relation to issue (i), concerning the general rights of national liberation movements, Cassese argues that they do not have a *right* to use force, but they do have a *licence*.<sup>790</sup> He explains this “middle-of-the-road legal position ... as follows: ... liberation movements do not breach international law if they engage in armed action against a State that forcibly denies their right to self-determination, and cannot therefore be held responsible for an international wrongdoing”. Dr. Heather Wilson concurs with Cassese’s view that national liberation movements do not have a widely recognized *right* to use force, but she argues that “the trend over the last four decades and since 1960 in particular has been toward the extension of the *authority* to use force to national liberation movements.”<sup>791</sup> [*my emphasis*]

A few powerful States have resisted such an interpretation, particularly throughout the negotiations on the drafting of the 1977 Protocols additional to the Geneva Conventions of 12 August 1949 on

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<sup>789</sup> Wilson, *supra*, at 135.

<sup>790</sup> Cassese, “Self-Determination”, *supra*, at 153.

<sup>791</sup> Wilson, *supra*, at 136.

international humanitarian law.<sup>792</sup> Article 1(4) of Protocol I expressly provides that international armed conflicts “include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination”.<sup>793</sup>

However, genuine “wars of national liberation” in pursuit of a right to self-determination have now been given greater legitimacy by their inclusion as matters subject to international humanitarian law.

In addition, Protocol II extends the provisions of the four Geneva Conventions to include “non-international armed conflicts” between State forces and “dissident armed forces or other organised armed groups”.<sup>794</sup> In other words, international humanitarian law should also apply (to both parties to the conflict) where it may not be clear initially that an armed group is pursuing a legitimate right of self-determination.<sup>795</sup> These Protocols are now considered as part of customary international law,<sup>796</sup> and have been held to apply to hostilities between Israel and Palestine, which is clearly not a “colonial” situation, as Britain withdrew its Mandate from Palestine before the State of Israel was created.<sup>797</sup>

Thus, all “occupied territories” are now widely recognized as having rights to self-determination and a corresponding right to defend themselves, to some extent.

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<sup>792</sup> Belgium, Ireland, and the United Kingdom initially opposed the extension of international humanitarian law to wars of liberation, but they have subsequently supported these two Protocols. More than 100 States signed the *Final Act of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, with Protocol I, Protocol II and Resolutions adopted at the Fourth Session*, 10 June 1977.

<sup>793</sup> Note, however, that the “grave breaches” provisions of the Geneva Conventions expressly do not apply to such situations (common article 2, Geneva Conventions; article 1(3) & (4), Protocol I; and article 1, Protocol II). In other words, breaches of the laws of war during *internal* conflicts are not characterised as “crimes” under this regime, even though “grave breaches” during international conflicts are to “be regarded as war crimes”: Y. Sandoz, C. Swinarski, & B. Zimmermann, eds., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, (Dordrecht: Martinus Nijhoff Publishers, 1987) at paras. 3411-22, 3521-23, in Simma & Paulus, *supra*, at 319.

<sup>794</sup> Article 1(1).

<sup>795</sup> However, Article 1(2), Protocol II, expressly provides that: “This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.” In other words, “rebellions” are not considered “armed conflicts” for these purposes.

<sup>796</sup> *Prosecutor v. Tadic, Appeal on Jurisdiction*, *supra*, at paras. 128-34; also T. Meron, “International Criminalization of Internal Atrocities”, (1995) 89 Am. J. Int’l L. 554 at 558-565; and Simma & Paulus, *supra*.

<sup>797</sup> For example, cf. UN Sub-Commission on Prevention and Discrimination and Protection of Minorities, Resolution No. 1992/28, 27 August 1992, discussed in A. de Zayas, “The Illegality of Population Transfers and the Application of Emerging International Norms in the Palestinian Context”, (1990/91) 6 Palestine Y.B. Int’l L. 17 at 37-39. Also cf. discussion in Chapter Four, *supra*.

With respect to the legitimacy of the actual “national liberation movements”, there is significant disagreement as to any criteria that may apply. The Fourth Committee of the General Assembly made its first move towards formalising a definition of “legitimate” independence groups in 1972, when it adopted a proposal granting certain such groups the right to observer status in its deliberations concerning Trust and Non-Self-Governing Territories.<sup>798</sup> Only those groups recognized by the OAU were granted such status, upon the recommendation of the OAU. In 1974, the General Assembly went further and granted observer status to liberation movements recognized by the OAU or the Arab League.<sup>799</sup>

Subsequently, and more controversially, the General Assembly granted the PLO observer status “on an equal footing with other participants” in November 1975, and the PLO was invited to participate in a Security Council debate that same month “on the Middle East problem including the Palestinian question.”<sup>800</sup> The PLO had been designated “the sole legitimate representative of the Palestinian people” at an Arab summit meeting in October 1974, and had since distanced itself from its previous terrorist activities.<sup>801</sup> But Israel refused to recognise the new status of the PLO, decrying it as a “terrorist Organization”.<sup>802</sup> This tendency to characterise independence movements as “terrorists” in order to undermine their legitimacy, is widespread. There is a well-known saying that “one man’s terrorist is another man’s freedom fighter.”<sup>803</sup> At the same time, many groups claiming to represent the legitimate interests of an oppressed population are actually just “terrorists”.<sup>804</sup>

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<sup>798</sup> The proposal was accepted by a vote of 79 to 13, with 16 abstentions: UN Docs. A/C.4/744 and A/C.4.SR.1975, 27 September 1972, at 20. An Irish proposal to seek the opinion of UN Legal Counsel was rejected: Shaw, *supra*, at 174, n. 182.

<sup>799</sup> GA Res. 3247 (XXIX), 1974, discussed in Shaw, *supra*, at 175.

<sup>800</sup> GA Res 3375 (XXX) of 10 November 1975; SC Res 381 and decision, 30 November 1975.

<sup>801</sup> Cassese, “Self-Determination”, *supra*, at 239.

<sup>802</sup> There had been a substantial increase in Palestinian terrorist activities since the 1973 war, including hijackings of western passenger aircraft by members of the Popular Front for the Liberation of Palestine, which were all condemned by the international community as “terrorism”. Note that the international community has never agreed upon a single definition of “terrorism”.

<sup>803</sup> A.R. Norton, “Drawing the Line on Opprobrious Violence”, in J.H. Rosenthal, ed., *Ethics and International Affairs: A Reader*, *supra*, 186 at 187.

<sup>804</sup> Cf. E. Chadwick, *Self-Determination, Terrorism and the International Humanitarian Law of Armed Conflict*, (The Hague: Martinus Nijhoff Publishers, 1996), who argues (at 127) that international humanitarian law (IHL) should be used as a guide to defining “terrorism”: “The value of using IHL to guide a

Wilson has suggested that the following conclusions can be drawn from UN and OAU practice, "concerning the authority of a particular movement to use force on behalf of a people":

1. In general, the United Nations has deferred judgment on the representative character of particular liberation movements and has relied upon recognition by the regional intergovernmental Organization concerned. In practice, this has meant the League of Arab States for Palestine and the OAU.
2. The criteria for recognition used by the OAU have a certain judicial formalism, but are open to wide interpretation. The two major requirements are that the movement be representative of the people of a territory and that it be engaged in an armed struggle of unspecified intensity. The movement need not control territory.
3. To be recognized, a national liberation movement must claim to represent the whole of a people identified as having a right to self-determination.
4. The OAU has been very reluctant to recognise a movement as the legitimate representative of a people when this claim conflicts with the territorial integrity of a member State.
5. Although attempts are usually made to reconcile disparate liberation movements fighting in the same territory, recognition of more than one liberation movement as representatives of the same people has occurred.
6. In practice, the recognition of particular liberation movements as representatives of their people is a highly subjective procedure affected by the perception of popular support, ideological affinity with neighbouring States, and the territorial integrity of self-governing States.<sup>805</sup>

The issue, (ii), of how much force such a group may legally use, is similarly unclear. As suggested previously, the provisions of the Geneva Conventions now apply, *mutatis mutandis*, to armed conflicts concerning claims to self-determination. Otherwise, the only other restrictions on national liberation armies appear to be the general principles of international law on the use of force as self-defence, namely, the "conditions precedent of necessity and proportionality - generally accompanied by a third condition of immediacy"<sup>806</sup>.

Issue (iii) is also rather vague, as to how much assistance and "support" independence groups are "entitled" to receive from third States. Cassese argues that State practice seems to suggest that third

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legal approach to terrorism is thus that the use of means and methods of warfare which are intended solely to spread terror or fear is prohibited. While terror is a weapon, common methods of which involve psychological means, IHL prohibits the infliction of superfluous injury or unnecessary suffering." [footnote omitted].

<sup>805</sup> Wilson, *supra*, at 145-146. Cf. Her analysis which led her to arrive at these conclusions, *supra*, at 138-145.

<sup>806</sup> Y. Dinstein, *War, Aggression and Self-Defence*, (Cambridge, Great Britain: Cambridge University Press, 1994) at 202.

States are allowed to "give military equipment and financial or technical assistance to a liberation movement, [but] they are prohibited from sending armed troops."<sup>807</sup> In other words, States are prohibited from using force against other States, even where the latter may be denying a legitimate claim to self-determination. Instead, State practice seems to support the use of countermeasures such as the refusal to give legal recognition to a situation that breaches the right of self-determination, or introducing economic sanctions, in addition to providing military equipment and so forth to the independence group.<sup>808</sup>

At the same time, the "entitlement" to receive such support from a third State is not at all clear. Most liberation movements quickly find political allies who are eager to assist them and thereby to affect the stability and governance of another State. As Wilson points out: "Intervention by a third State on one side or the other in a civil conflict has become so common and has been justified by so many exceptions to the general rule [of non-intervention] that the exceptions seem to have become the rule."<sup>809</sup> However, State practice and *opinio juris* supporting a "positive legal obligation" to assist liberation movements is limited, apart from general exhortations "to contribute through joint and independent action to the implementation of the principle of self-determination".<sup>810</sup> For example, despite widespread international condemnation of the apartheid regime in South Africa, including sanctions, the international community did not provide much additional "moral and material

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<sup>807</sup> Cassese, "Self-Determination", *supra*, at 152.

<sup>808</sup> *Ibid.*, at 158.

<sup>809</sup> Wilson, *supra*, at 33.

<sup>810</sup> For example, cf. GA Res. 2787 (XXVI), 6 December 1971, at para. 7. Espiell argues: "Since the warlike conflicts resulting from the struggle of peoples against colonial and alien domination are not civil wars but international armed conflicts, third States are not bound by the duty of non-intervention in the conflict, since on the contrary there is a positive legal obligation to assist a people struggling against colonial domination.": Espiell, *supra*, at 14-15, para. 97.

assistance” to those suffering under the regime.<sup>811</sup> Therefore, it seems unlikely that any such positive obligation exists in international law.<sup>812</sup>

Issues (iv) and (v) are much clearer, in terms of *opinio juris*, even if the accompanying State practice is not always completely consistent: States appear to have a positive duty *not* to use forcible means to repress a legitimate claim for self-determination. This includes third States as well as the State denying the right.<sup>813</sup> In addition, the use of mercenaries to fight independence movements, instead of using regular State forces, has been described by the General Assembly as “a criminal act”, calling for “the Governments of all countries to enact legislation declaring the recruitment, financing and training of mercenaries in their territory and the transit of mercenaries through their territory to be punishable offences and prohibiting their nationals from serving as mercenaries.”<sup>814</sup> State practice also seems to support a prohibition against using mercenaries.<sup>815</sup>

In summary:

(i) the legitimate representatives of peoples living under colonial or “alien” domination are entitled to “resist” forcible measures to deprive them of their right to self-determination;

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<sup>811</sup> cf. GA Res. 2621 (XXV), paras. 3(1), (2), (3)(b), (c); also UN Secretary-General, *Annual Report - 1976*, Official Records of the General Assembly, Thirty-first Session, Supplement No. 1A UN Doc. A/31/1/Add.1, in Espiell, *supra*, at 67, n. 2.

<sup>812</sup> The intervention of the North Atlantic Treaty Organization (“NATO”) in Kosovo suggests that this area of the law may be changing, in terms of the legitimacy of forceful “humanitarian intervention” by third States, but not necessarily in terms of creating positive obligations on States to intervene where there are gross violations of humanitarian laws. Cf. L. Henkin, “Kosovo and the Law of “Humanitarian Intervention””, (1999) 93 Am. J. Int’l L. 824.

<sup>813</sup> Cassese, “Self-Determination”, *supra*, at 154. However, Wilson suggests that a government is entitled use force against “insurgencies” and a third State may assist a government fighting an “insurgency [which] is fomented by yet another State.”: Wilson, *supra*, at 32.

<sup>814</sup> GA Res. 31/34 (XXXI), 30 November 1976, para. 6. Unfortunately, this absolutist attitude towards the illegitimacy of mercenaries has sometimes prevented a weak government from effectively defending itself against “illegitimate” rebel groups, such as when the South African security firm “Executive Outcomes” was forced to abandon Sierra Leone in 1996, despite the fact that they had only taken “a matter of weeks to drive the rebels out of Freetown and then out of Kono”, something the government had not been able to achieve in years, and which took UN Peacekeeping Forces several more years to accomplish successfully: S. Junger, “The Terror of Sierra Leone”, *Vanity Fair*, No. 480, (August 2000) 110 at 116.

<sup>815</sup> For example, the South African “security firm” called “Executive Outcomes” has been expelled from both Sierra Leone and Papua New Guinea, after pressure from the international community upon the two governments who invited “Executive Outcomes” to assist them in dealing with their respective rebel “problems”.

(ii) their legitimacy as a liberation movement is determined by a wide range of subjective factors, but the most influential appear to be:

(a) their recognition by a regional intergovernmental Organization as a legitimate representative of a "peoples";

(b) their representativeness of *all* the peoples of *all* the territory;

(c) not being a minority group agitating for secession from a sovereign State; and

(d) involved in more than "internal disturbances and tensions, such as riots, isolated and sporadic acts of violence";<sup>816</sup>

(iii) no State or governing authority is allowed to use either direct or indirect "forcible action" to deprive such peoples of their right to self-determination;<sup>817</sup>

(iv) if such force is being used against the peoples, they may use a certain, unspecified amount of force to defend themselves;

(v) any forceful actions taken by national liberation movements must comply with the provisions of the Geneva Conventions and Protocols on international humanitarian law, as well as the laws of war concerning self-defence (proportionality, necessity, and immediacy);

(vi) third States may generally *not* assist a legitimate national liberation movement to use *force* against a governing or administering authority, in accordance with the principle of non-intervention;

(vii) third States may, however, provide other types of assistance to national liberation movements, if they wish (possibly including "forcible means").

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<sup>816</sup> This last factor is highly problematic, in that it often encourages secessionist movements to increase the amount of violence they use, in order to elevate the nature of their dispute with the governing authority to an "armed conflict", in order to try and invoke more support from outside the State.

<sup>817</sup> The use of the term "forcible action" instead of "force" suggests that even a lower threshold of "forcefulness" than that normally used during most armed conflicts will not be tolerated. In other words, a full-scale "aggressive war" is not the standard being used here to determine what kind of behaviour is prohibited. It is something much lower. Even if a State manages to argue successfully that it is entitled to defend itself against a "forceful" separatist movement, the State is bound to observe most of the provisions of the Geneva Conventions and Protocols.

Thus, in very general terms, a breach of a right to self-determination in this context would arise where a State or other governing authority uses “forcible means” to deny a “peoples” subject to colonial or “alien” domination their right to self-determination.

#### *6.10 Summary of current status*

As we have seen, the right to self-determination has manifested itself in a wide variety of contexts throughout the twentieth century, and into the twenty first. Everyone has this right, but in varying “degrees”.

So, who holds this right? According to the previous analysis, the holders of a right to *external* self-determination are:

- (i) all the peoples of Non-Self-Governing Territories, as provided for and in accordance with the UN Charter (particularly article 73e);
- (ii) any sovereign State that is invaded by a foreign power;
- (iii) all the peoples of territories that have been occupied since 1966, even those that had not achieved full Statehood at the time they were occupied;
- (iv) republics within a federation or other multifaceted political arrangement who achieve secession through peaceful negotiations, and fulfil the following criteria, whether or not they have a constitutional right to secede:
  - (a) demonstrated respect for “the rule of law, democracy and human rights”;
  - (b) guaranteed rights for “ethnic and national” minorities (and possibly other minority groups within the territory), including autonomy, if this is desired by the minority group in question;
  - (c) they must seek secession by peaceful means, although they may be allowed to defend themselves and to seek assistance from the international community against “egregious and protracted violence” perpetrated against them by the body denying them the right to secede;

(d) however, they do not have a right as such to seek support nor to receive it;

(e) they cannot seek to acquire more territory than they were entitled to as a sub-State actor prior to independence, in accordance with the principle of *uti possidetis*;

(f) the decision to secede must be based upon the freely expressed will of *all* the peoples of the territory; and

(g) they must have had effective continuous control over the territory they are seeking to control, in accordance with general principles of State recognition.

(v) republics within a federation or other multifaceted political arrangement who -

(a) have a constitutional right to secede; and

(b) manage to free themselves from the central authority; and

(c) meet the criteria outlined above;

(vi) in some very extreme cases of egregious and protracted human rights violations, or in light of other practical considerations, minority groups.

In addition, each and every person and group has a right to *internal* self-determination, in the sense of having rights to a representative governing authority and other basic constitutional guarantees. Indigenous groups and minority groups may also be able to claim some form of additional autonomy, in order to preserve their cultures and way of life, if the government is not representative and their rights are not adequately protected under a country's constitution.

What is the extent of that right in each instance? In summary, those with the right to *external* self-determination have the broadest range of options. They are able "freely" to determine both their international *and* their internal status, in accordance with the Article 73e Resolution, while peoples with a right to *internal* self-determination are only able to determine their internal status, and often this is subject to further limitations. For example, an acceptably "representative government" may include a single party system, under present international law. However, if the governing authority is

sufficiently unrepresentative, and mounts a sufficiently serious campaign of discrimination or violence against a group within the territory, that territory may have the right to external self-determination. In all cases, peoples must be allowed to express their will “freely”.

The legitimate representatives of peoples living under colonial or “alien” domination are also entitled to “resist” forcible measures to deprive them of their right to self-determination. No State or governing authority is allowed to use either direct or indirect “forcible action” to deprive such peoples of their right to self-determination. If such force is being used against the peoples, they may use a certain (unspecified) amount of force to defend themselves. Any forceful actions taken by national liberation movements must comply with the provisions of the Geneva Conventions and Protocols on international humanitarian law, as well as the laws of war concerning self-defence (proportionality, necessity, and immediacy). Third States may generally *not* assist a legitimate national liberation movement to use *force* against a governing or administering authority, in accordance with the principle of non-intervention. However, third States may provide other types of assistance to national liberation movements, if they wish (possibly including “forcible means”).

What could constitute serious breaches of these various rights? The following would appear to constitute a clear breach of the rights of Non-Self-Governing territories and “occupied territories” to self-determination:

- (i) forcing such a territory to accept integration or “free association” with an independent State without any form of consultation or without the express consent of the peoples of that Territory;
- (ii) completely denying such a Territory the opportunity to determine its political future in accordance with one of the three methods outlined in the Article 73e Resolution; or
- (iii) failing to follow a significant number of the general guidelines in the Article 73e Resolution (however, there is little guidance as to what weight should be given to any particular guideline).

In addition, there is some evidence that a referendum or plebiscite that does *not* offer a choice of full independence may breach the right of dependent peoples to “freely determine their political status”. However, State practice is not consistent enough on that point to draw a definitive conclusion. There is also a question mark as to the responsibility of an administering power to ensure that a previously Non-Self-Governing Territory is suitably prepared for independence before it withdraws its administration of that Territory, particularly where the peoples have not expressly chosen independence.

In the case of a seceding entity that has satisfied all of the relevant criteria, its right to self-determination would be seriously breached if it were not then recognized by other members of the international community as a sovereign State.

Indigenous groups and minority groups must look to the rights that are protected in the two Human Rights Covenants, and determine whether the appropriate circumstances are being provided in order to allow them to exercise those rights adequately. However, a relatively minor breach of a small number of these rights may not amount to a serious breach of the right to self-determination, which is more concerned with overall “freedom”. Similarly, a serious breach of any peoples’ right to *internal* self-determination would have to be constituted by a fairly substantial denial of fundamental guarantees, as provided for in the two Covenants, or a combination of repressive actions that has serious consequences for the person or group being denied the rights.

What can be done to enforce one’s right to self-determination? If one is fortunate enough to have the support of a powerful State or the majority of members of the UN or the Security Council, then there are a significant number of avenues to explore. However, if the most influential members of the international community do not consider it expedient to come to your aid when you are in need, there is very little that you can do on your own.<sup>818</sup> Anyone contemplating a campaign of violence must be

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<sup>818</sup> For example, it now seems that much of the bloodshed in the Rwandan genocide could have been avoided if key members of powerful governments had heeded the warning signs.

prepared for a long, sustained program of resistance, with no guarantee whatsoever that it will achieve anything.

### *6.11 Conclusion*

Throughout the course of history, as outlined in this thesis to this point, we have seen how a “crisis of enforcement” has gradually emerged, in relation to the right to self-determination. In the early part of the twentieth century and previously, the colonial powers assumed that they knew what was best for the colonised peoples of the world. Therefore, they did not set up effective enforcement mechanisms to protect the rights of those peoples. With the growth and triumph of democracy, also in the early part of the twentieth century, there was a shift from relying on the “empire” to look after one, to relying on the State apparatus to provide all the circumstances required for the exercise of one’s free will.

However, even in democracies, granting some measure of autonomy may be necessary to ensure that certain groups can exercise all the freedoms to which they are entitled. And even in democracies, there may not be sufficiently effective enforcement mechanisms to recognise the “special” needs of certain vulnerable groups within the community.

Thus, it is time to turn our mind to the possibility of calling upon international criminal law to address this volatile situation.

**Chapter Seven:  
Conclusion - Potential Criminal Proscriptions for Severe Breaches of the Right to Self-Determination**

As we have seen, the right to self-determination has a long and problematic history. Even today, more than 50 years after the adoption of the UN Charter, it is not entirely clear who holds the right, nor what that right entails, nor what kind of obligations it imposes upon States. The issue of how to enforce one's right to self-determination is even more vexed.

As Bassiouni points out:

“Throughout the evolutionary process, the enactment of international criminal proscriptions invariably has followed an implementation crisis. Nevertheless, the adoption of criminal proscriptions has not derived from an appraisal of the significance of the right sought to be preserved and protected, rather, it has been caused by the inadequacy of modalities of protection in the first four stages. Thus, the inadequacy of these modalities has compelled the transformation of the protected right into a prohibited crime. Therefore, international criminal proscriptions are the *ultima ratio* modality of enforcing internationally protected human rights.”<sup>819</sup>

It seems that the right to self-determination has reached the stage of “implementation crisis”, with 17 Non-Self-Governing Territories still being supervised by administering powers, despite the best efforts of the UN. Serious conflicts over territory are also still raging all over the globe, particularly those involving secessionist movements. It would be a significant contribution to international peace and stability if international penal proscriptions were developed to address serious violations of the right to self-determination, just as there have been recent moves to strengthen the enforcement mechanisms for serious breaches of international humanitarian law, genocide, and other international crimes.<sup>820</sup>

In fact, various members of the international community have been engaged since 1950 in determining whether international criminal law is a suitable avenue for trying to enforce, *inter alia*, self-determination rights. The International Law Commission has taken up the responsibility for drafting

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<sup>819</sup> Bassiouni, “Proscribing Function”, *supra*, at 182.

<sup>820</sup> For example, the creation of the two International Criminal Tribunals in Yugoslavia and Rwanda, and the recent adoption of the Rome Statute, *supra*.

both a *Code of Crimes for the Peace and Security of Mankind*,<sup>821</sup> and *Articles on State Responsibility*,<sup>822</sup> including responsibility of States for international crimes. The right to self-determination has been included for consideration at various stages of the process of drafting both of these documents, in the context of the crime of aggression, and “serious breaches of international obligations”, respectively.

With the international community’s growing concern over igniting or inflaming ethnic tensions around the world, the right to self-determination has not been associated with penal provisions in more recent documents. However, in this Chapter I will conclude my thesis by analysing how the “implementation crisis” pertaining to the right to self-determination could be addressed by current developments in international criminal law, such as the *Rome Statute of the International Criminal Court*, supra, and how a strict interpretation of such law could help to avoid exacerbating such critical situations.

### *7.1 Early steps in the “criminalization stage” of human rights*

In order to place in perspective current work on codification of international crimes and international criminal responsibility, it is necessary first to examine the origin of such concepts in international law.

Some attempts were made to codify international crimes and draft a statute for an international criminal court by various groupings of scholars and statesmen from the US and its European allies, in the years between the signing of the *Second Hague Convention* (1907) and the creation of the *Nuremberg Tribunal* (1945).<sup>823</sup> But none of those nations’ leaders was willing to give such an institution their full support. There were also several Commissions of Inquiry into Breaches of the *Laws of War* after both World Wars, that first had to agree upon the “laws of war” they would investigate. The earliest of these bodies, the *Commission on the Responsibility of the Authors of the*

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<sup>821</sup> A draft version of this Code was adopted in 1996, but it is still being finalised by the International Law Commission.

<sup>822</sup> These Articles have been completed in Draft form only, and are currently being discussed by the International Law Commission as well.

<sup>823</sup> Cf. Discussion in Chapter Four, supra.

War and on Enforcement of Penalties, established in 1919<sup>824</sup>, recommended that a tribunal be set up<sup>825</sup> to try offenders and that the "law to be applied by the tribunal shall be 'the principles of the law of nations as they result from the usages established among civilised peoples, from the laws of humanity and from the dictates of public conscience'."<sup>826</sup> Clearly such vague, subjective sources of law would undermine the legitimacy of such an institution, and the Americans opposed the inclusion of such terminology in the statute for the Court.<sup>827</sup>

In 1920, the Legal Committee of the League of Nations, after considering the Recommendations of an Advisory Committee of Jurists appointed to prepare a statute for a permanent international criminal court, considered that there was "not yet any international penal law recognized by all nations".<sup>828</sup> The Assembly of the League of Nations thus decided not even to attempt to codify international penal law at that stage.

Subsequently, a number of international conventions were created that outlawed some of the more serious excesses of the First World War.<sup>829</sup> Proscriptions against "aggressive wars" had been set out in the 1899 and 1907 *Hague Conventions for the Pacific Settlement of International Disputes*, and the 1928 *Pact of Paris (Kellog-Briand Pact)*. But none of these actually declared aggression an international "crime". Needless to say, most of these agreements were made amongst the so-called "civilised" nations only, and did not even attempt to encompass the views of the rest of the world.

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<sup>824</sup> By the US, Britain, France, Italy, and Japan, the latter two of whom at that time were accorded the status of "Great Powers", and were presumably considered sufficiently "civilized" at that point to be involved in such a Commission, in contrast to the charges of "barbarity" subsequently levelled against them after their actions in World War II.

<sup>825</sup> With three judges each from the US, the British Empire, France, Italy and Japan; one each from Belgium, Greece, Poland, Portugal, Romania, Serbia and Czechoslovakia; and none from non-European or non-Japanese territories and colonies that had been equally mistreated during the war but had not yet attained the status of "nations" in the eyes of the "Great Powers".

<sup>826</sup> Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties, *Report Presented to the Preliminary Peace Conference*, 29 March, 1919, reprinted in: Ferencz, *supra*, at 490.

<sup>827</sup> The Treaty of Versailles, which was completed after the Report by the aforesaid Commission, represented a compromise, providing that the Kaiser should be tried "for a supreme offense against international morality and the sanctity of treaties" [*my emphasis*]. Cf. Article 227, Treaty of Versailles, 1919.

<sup>828</sup> Ferencz, *supra*, at 38.

<sup>829</sup> 1925 *Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous Gases and Bacteriological Methods of Warfare*; 1929 *Geneva Convention on the Treatment of Prisoners of War*; and

Another Commission for the Investigation of War Crimes was created by the US and the United Kingdom in 1942.<sup>830</sup> Initially a fact-finding Commission, its members also continued the work that many of them had performed at the London International Assembly in preparing a convention for an international criminal court to prosecute war crimes. One of the major points of disagreement amongst Commission representatives was whether initiating aggressive war was a crime. The representatives of Australia, China, New Zealand, Poland, and Yugoslavia, all agreed with a minority report prepared by a Czechoslovakian delegate, Dr. B. Ecer, that "preparation and launching of the war was a crime not merely morally but also in accordance with criminal laws of the invaded countries and the general principles of international law".<sup>831</sup> However, with the exception of Dr. Ecer, the aforementioned representatives were not on the special subcommittee that had been created to deal with the issue of the criminality or otherwise of launching an aggressive war. Thus, the issue was decided largely by a British representative, Sir Arnold McNair, and two Americans, Lt. Col. Hodgson and Dr. J.M. De Moor, with Dr. Ecer dissenting. The majority report of these three individuals stated:

"(I) Acts committed by individuals merely for the purpose of preparing for and launching aggressive war and not falling within the next paragraph are, *lege lata*, not "war crimes".

(II) Acts committed before the outbreak of war which command or procure the commission of "war crimes" after the outbreak of war, such as pre-war instruction that no prisoners should be taken, which was followed and resulted in a refusal to take prisoners after the outbreak of war, are war crimes.

(III) However, such acts as mentioned sub.(I) and especially the acts and outrages against the principles of the laws of nations and against international good faith perpetrated by the responsible leaders of the axis powers and their satellites in preparing and launching this war are of such gravity that they should be made the subject of a formal condemnation in the peace-treaties.

(IV) It is desirable that for the future penal sanctions should be provided for such grave outrages against the elementary principles of international law."<sup>832</sup>

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1936 *London Procés-Verbal Relating to the Rules of Submarine Warfare*, set forth in Part IV of the Treaty of London of 22 April, 1930.

<sup>830</sup> Later the UN War Crimes Commission.

<sup>831</sup> Ferencz, *supra*, at 63.

<sup>832</sup> United Nations War Crimes Commission, *Report of the Sub-Committee Appointed to Consider Whether the Preparation and Launching of the Present War Should Be Considered 'War Crimes'*, 27 September 1944, reprinted in Ferencz, *ibid*.

This one-sided view of responsibility for wartime atrocities was perpetuated in the UN War Crimes Commission's *Draft Convention for the Establishment of a United Nations War Crimes Court*, which provided that the Court would only prosecute persons "acting under the authority of, or claim or colour of authority of, or in concert with a State or political entity engaged in war or armed hostilities with any of the High Contracting Parties, or in hostile occupation of territory of any of the High Contracting Parties."<sup>833</sup> In other words, Allied personnel could not be prosecuted by such a court, no matter how atrociously they behaved themselves.<sup>834</sup>

Against the background of all this treaty-making on specific issues, moral condemnation, uncertainty over the state of the law generally, and self-serving restrictions on the ambit of any international criminal court, representatives of 4 countries<sup>835</sup> took 6 weeks to draft the *London Agreement* containing the Nuremberg Charter, supra. Nineteen nations then expressed their adherence to the Agreement after it was completed.<sup>836</sup> Given this sequence of events, it is not surprising that the US is concerned about its lack of influence over the recent drafting of the Rome Statute, supra, when compared with the absolute control that the Allied Powers had over the Nuremberg Charter to ensure that none of their own activities would ever be scrutinised by the international community, such as the saturation fire-bombing of Dresden.<sup>837</sup>

During their deliberations on whether "crimes against peace" and "war crimes" had been committed, the judges of the Nuremberg Tribunal relied mostly on peace and war crimes treaties to which Germany was a party, such as the two *Hague Conventions* and the 1928 *Pact of Paris*, supra. However, there were no such tangible sources of law for the concept of "crimes against humanity" at that time. Professor Bassiouni claims that "There was indeed nothing under existing international law

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<sup>833</sup> Article 1.3, United Nations War Crimes Commission, *Draft Convention for the Establishment of a United Nations War Crimes Court*, reprinted in Ferencz, *ibid*, at 428.

<sup>834</sup> Debates over the definition of the crime of aggression have continued along these lines ever since, even during the Rome Conference, which failed to find an "acceptable" definition of aggression to satisfy the interests of all States.

<sup>835</sup> The Provisional Government of France, the United Kingdom, the US, and the U.S.S.R.

<sup>836</sup> Australia, Belgium, Czechoslovakia, Denmark, Ethiopia, Greece, Haiti, Honduras, India, Luxembourg, the Netherlands, New Zealand, Norway, Panama, Paraguay, Poland, Uruguay, Venezuela, and Yugoslavia.

that would have justified these charges.<sup>838</sup> Thus, the Nuremberg Charter took the cautious approach of linking “crimes against humanity” to the two other crimes, effectively creating a specialised category of “war crimes”.

In contrast to Nuremberg, the Tokyo Tribunal, *supra*, has been criticised widely as being “shamefully unfair and riddled procedurally with every type of error, bias, prejudice and unfairness that one can imagine.”<sup>839</sup> For example, one piece of evidence relied upon to prove the complicity of the defendants in ordering a particular invasion, was “a photostat of a newspaper report of an alleged official communiqué”.<sup>840</sup>

One of the most striking dissimilarities between Nuremberg and Tokyo is the origin of those who sat in judgment. For the Tokyo Tribunal, 11 different countries from a range of juridical and cultural backgrounds each provided a judge: Australia, Canada, China, France, India, the Netherlands, New Zealand, the Philippines, the United Kingdom, the US, and the U.S.S.R.<sup>841</sup> Only US and European judges presided at Nuremberg. It seems that the Tokyo Tribunal was considered less significant,<sup>842</sup> and thus due process was given a lower priority than at Nuremberg.

The Indian Justice, Dr. Rahadbinod Pal, who caused considerable controversy by producing a lengthy dissenting opinion acquitting the accused on all counts, was described by one of the American defence attorneys as “the only deep student of international law on the bench”.<sup>843</sup> Justice Pal felt it his duty to point out that the trial was solely a political exercise, that it did not have a sound legal basis, and that

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<sup>837</sup> Which, being a widespread attack on civilians, could be viewed as a war crime.

<sup>838</sup> M.C. Bassiouni, “American Society Proceedings”, *supra*, at 62.

<sup>839</sup> *Ibid.*

<sup>840</sup> R.J. Pritchard, *An Overview of the Historical Importance of the Tokyo War Trial*, Nissan Occasional Paper Series No.5, 1987 at 32.

<sup>841</sup> However, two of these countries - India and the Philippines - were not actually self-governing “sovereign states” when the trial began.

<sup>842</sup> For example, the Australian President of the Tribunal, Sir William Webb, departed for several weeks in the middle of the hearing to attend the Sessions Court in Australia, which indicates what a low priority he gave the Tokyo Tribunal in the scheme of his career: Pritchard, *supra*, at 16.

<sup>843</sup> E.S. Kopelman, “Ideology and International Law: The Dissent of the Indian Justice at the Tokyo War Crimes Trial”, (1991) 23:2 N.Y.U. J. Int. L. and Politics, 373 at 378. It seems ironic now that he has been so heavily criticized for wanting to acquit the Japanese, when the lack of procedural fairness throughout the trial suggests that they probably should have been acquitted on that basis alone.

the characterisation of the alleged activities as crimes could not be supported by an accurate interpretation of international law as it stood at the time.<sup>844</sup> He stated: "A victor nation is, under the international law, competent to set up a Tribunal for the trial of war criminals, but such a conqueror is not competent to legislate on international law."<sup>845</sup>

Justice Pal was particularly critical of the Charter of the Tokyo Tribunal's reliance on the *Pact of Paris* as a source of "law", when so many of its signatories had chosen not to honour the obligations it allegedly placed on all of its parties.<sup>846</sup> It has been suggested that, since India was not directly involved in hostilities with either Japan or Germany, Justice Pal was too far removed from the "wartime fray"<sup>847</sup> to appreciate how important it was for him in the eyes of his superiors, to eliminate "for all time the authority and influence of those who have deceived and misled the people of Japan into embarking on world conquest".<sup>848</sup>

Aside from Justice Pal, the only judges who dissented from the majority decision to convict all of the accused, were Justice Bernard of France and Justice Röling of the Netherlands, both of whom were concerned about some aspects of the validity of the Tokyo Charter and the characterisation of a "failure to act" as an international crime.

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<sup>844</sup> In this respect he will probably be joined soon in the annals of history by the lone dissenting judge in the "Pinochet decision", Lord Goff of Chieveley. He applied a strict, positivist interpretation of international law in his decision, rather than exercising the moral outrage that was expected of him at Pinochet's activities, and despite having once said that the Law Lords had freedom to "mould and remould the authorities to ensure the practical justice is done within the framework of principle": "Profiles: The seven 'Pinochet judges' ", 24 March 1999, BBC News, Online version; and *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet ; Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* (On Appeal from a Divisional Court of the Queen's Bench Division), House of Lords, Lord Browne-Wilkinson, Lord Goff of Chieveley, Lord Hope of Craighead, Lord Hutton, Lord Saville of Newdigate, Lord Millett, and Lord Phillips of Worth Matravers, Opinions of the Lords of Appeal for Judgment in the Cause on 24 March 1999, all of which is available online: via <<http://news.bbc.co.uk/>>.

<sup>845</sup> Ferencz, *supra*, at 81.

<sup>846</sup> Kopelman, *supra*, at 423.

<sup>847</sup> *Ibid.*

<sup>848</sup> Article 6, *Potsdam Declaration*.

Arguably, the US had more “dirty laundry” to hide in the Japanese context than in the European.<sup>849</sup> Thus, it is not surprising that it asserted even more control over the creation of the Tokyo Tribunal, and were so affronted that judges from “minor powers” would challenge the exercise. For example, the *Initial Post-Surrender Policy for Japan* of 25 August 1945, created to implement the Potsdam Declaration, was initiated unilaterally by the US Government. It declared that, should there be “differences of opinion” between the Allies as to interpretation of this policy, American policy would govern.<sup>850</sup> As well, the Charter of the Tokyo Tribunal was issued as an order by US General Douglas MacArthur, the Supreme Commander for the Allied Powers in Japan. General MacArthur also controlled the International Prosecution Section, and was empowered to act as the Tribunal’s Reviewing and Confirming Authority.<sup>851</sup> The defendants were chosen by a majority vote of an executive committee of Allied prosecutors, chaired by the British associate prosecutor, Comyns Carr. It seems highly probable that the relatively large US prosecution team otherwise dominated this executive committee.<sup>852</sup> In addition, the Tokyo judges followed the example of their Nuremberg brethren in not admitting any evidence favourable to the defence that may appear to bring the wartime conduct of the Allies into disrepute.<sup>853</sup>

## 7.2 *The Legacy of Nuremberg and Tokyo*

In 1991, M. Cherif Bassiouni identified the following as essential elements in considering whether or not something has the character of an international crime, “as evidenced by conventional and customary international law ... :

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<sup>849</sup> Not only did they drop the atom bomb on Nagasaki on the very day that they were signing the *London Charter*, but it has since been revealed that they concealed from the Tokyo Tribunal judges any evidence that some of the accused had been involved in the production of biological weapons and then tested them on prisoners of war; in return, the US was able to obtain that technology exclusively for itself. Section on International Law and Practice, American Bar Association, *Report on the International Tribunal to Adjudicate War Crimes Committed in the Former Yugoslavia, Submitted by a Special Task Force of the ABA Section of International Law and Practice*, (American Bar Association, 1993) at 8.

<sup>850</sup> Kopelman, *supra*, at 383.

<sup>851</sup> Pritchard, *supra*, at 27-28, n.66.

<sup>852</sup> But note that both China and the U.S.S.R. later insisted on adding several more names to the list: Pritchard, *ibid*, at 30.

- (i) An international element which evidences that the violative conduct affects world peace and security or significantly offends the basic values of humanity; and
- (ii) A transnational element whereby the offence affects more than one state, or the citizens of more than one state, or is committed by means involving more than one state.<sup>854</sup>

However, even in the short span of time since then, his second element is no longer essential to all international crimes. The Rome Statute of the proposed new International Criminal Court, *supra*, adopted by 120 States in July 1998, provides that crimes against humanity and genocide committed by governments against their own people require no transnational element in order to be considered international crimes.<sup>855</sup>

Thus, the focus of modern international criminal law is predominantly on acts that "harm fundamental interests of the whole international community".<sup>856</sup> This idea is similar to the concept of *erga omnes* obligations. These were first referred to in the Barcelona Traction case of 1970, in an oft-quoted section of the ICJ's judgment:

"In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection ; they are obligations *erga omnes*.

Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion*, ICJ Rep. 1951, p.23); others are conferred by international instruments of a universal or quasi-universal character."<sup>857</sup>

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<sup>853</sup> R.J. Pritchard, "The International Military Tribunal for the Far East and its Contemporary Resonances", (1995) 149 Military L. Rev. 25 at 31.

<sup>854</sup> M.C. Bassiouni, "A Comprehensive Strategic Approach on International Cooperation for the Prevention, Control and Suppression of International and Transnational Criminality", (1991) 15 Nova L. Rev. 356 at 358.

<sup>855</sup> Articles 6 & 7, Rome Statute, *supra*.

<sup>856</sup> Y. Dinstein, "International Criminal Law", (1985) 20 Israel L. Rev. 206 at 221, referring to *Eichmann v Attorney General* (1962) 16 (iii) P.D. 2033 at 2052.

<sup>857</sup> *Case concerning the Barcelona Traction, Light and Power Company, Ltd., Second Phase*, *supra* at 3. Cf. Discussion in Chapter One (Introduction) on the concept of "erga omnes" obligations, particularly as they were described and discussed in the East Timor case, *supra*.

The International Law Commission, in its *Draft Articles on State Responsibility*, incorporated the idea of obligations *erga omnes* into Draft Article 19, which is concerned with "International Crimes and International Delicts":

"An internationally wrongful act which results from the breach by a State of an international obligation *so essential for the protection of fundamental interests of the international community* that its breach is recognized as a crime by that community as a whole, constitutes an international crime."<sup>858</sup> [*my emphasis*]

Examples of such crimes are listed under Article 19(3) and, most notably, they include "a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination."

Referring to the Barcelona Traction case, the ILC's Commentary to Article 19 states:

"In the Court's opinion, there are in fact a number, albeit a small one, of international obligations which, by reason of the importance of their subject-matter for the international community as a whole, are - unlike the others - obligations in whose fulfilment all States have a legal interest. It follows, according to the Court, that the responsibility engaged by the breach of these obligations is engaged not only in regard to the State which was the direct victim of the breach; it is also engaged in regard to all the other members of the international community, so that, in the event of a breach of these obligations, every State must be considered justified in invoking - probably through judicial channels - the responsibility of the State committing the internationally wrongful act."<sup>859</sup>

These *Draft Articles on State Responsibility* are by no means a reflection of the law as it really is, however. They remain draft articles only. In addition, Yoram Dinstein points out, "the presence of these general traits by itself does not denote that a specific act ... is an international offence *de lege lata*. The practice of States is the conclusive determinant in the creation of international law (including

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<sup>858</sup> Reprinted in Rosenne, *supra*.

<sup>859</sup> *Report of the International Law Commission on its twenty-eighth session*, Yearbook of the International Law Commission, 1976, vol. II, Part Two, at 99, reprinted in Rosenne, *supra*, at 183.

international criminal law), and not the desirability of stamping out obnoxious patterns of human behaviour.”<sup>860</sup>

From the conclusion of the Nuremberg trials in October 1946<sup>861</sup> to the first meeting of the *Ad Hoc* Committee on the Establishment of an International Criminal Court in April 1995, we can now safely say that the international community was moving slowly but inexorably towards the creation of a permanent international criminal court. For many, many years, it did not seem as if any such progress was being made. But when one examines the small steps that were taken over the last half century, and put them together, it becomes clear in retrospect that there was a general, if painstakingly slow, movement in this direction. Unfortunately, within the confines of this paper it is only possible to highlight briefly the significant developments in codification of international crimes during this period.

In the first instance, as Lord Browne-Wilkinson stated in the most recent ruling concerning Chilean General Pinochet:

“Although there may be legitimate doubts as to the legality of the Charter of the Nuremberg Tribunal, in my judgment those doubts were stilled by the Affirmation of the Principles of International Law recognized by the Charter of Nuremberg Tribunal adopted by the United Nations General Assembly on 11 December 1946. That Affirmation affirmed the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal and directed the Committee on the codification of international law to treat as a matter of primary importance plans for the formulation of the principles recognized in the Charter of the Nuremberg Tribunal. At least from that date onwards the concept of personal liability for a crime in international law must have been part of international law.”<sup>862</sup>

In 1947 the United Nations established the ILC and requested it to formulate the principles of law recognized by the Nuremberg Charter<sup>863</sup>. These Principles were finalised in 1950. In 1948, the

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<sup>860</sup> Dinstein, *supra*, at 221.

<sup>861</sup> The Tokyo trials did not finish until November 1948.

<sup>862</sup> *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet ; Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet*, *supra*.

<sup>863</sup> GA Res 177(II) of 21 November 1947.

*Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention)* was adopted.<sup>864</sup>

Also in 1948, the United Nations General Assembly [hereinafter: "UNGA"] requested the ILC to study the question of international criminal jurisdiction and "to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions."<sup>865</sup> The ILC reported subsequently that it considered the establishment of an international judicial organ for the trial of persons charged with genocide was both desirable and possible. It recommended against the tribunal being set up as a chamber of the ICJ, which would require an amendment of that Court's Statute to allow individuals to be parties before that Court.<sup>866</sup> A committee composed of the representatives of 17 Member States of the UN was created to prepare "concrete proposals relating to the creation and the statute of an international criminal court."<sup>867</sup> However, the UNGA was splintered into polarised factions by the Cold War at this time and no agreement could be reached on what crimes should be within such a court's jurisdiction.

The only other significant development around this time was the acceptance of the two *Geneva Conventions on the Laws of War* in 1949, which codified much of the law that the Nuremberg Tribunal had relied on. Note that only "grave breaches" of the laws of war are considered international crimes under these conventions<sup>868</sup> and even such breaches were not recognized as crimes in "internal conflicts" until the adoption of the two Protocols to these conventions in 1977.<sup>869</sup>

The ILC was also requested in 1947 to prepare a draft code of crimes against the peace and security of mankind, which it has worked on ever since. Unfortunately, all of the various drafts proposed by the

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<sup>864</sup> Cf. Discussion in Chapter Four, *supra*.

<sup>865</sup> GA Res 260 B (II) of 9 December 1948.

<sup>866</sup> As the Statute of the International Court of Justice is part of the UN Charter, any amendment to the Statute would require that the same onerous procedure be followed as for any other amendment to the Charter.

<sup>867</sup> GA Res 489 (V) of 12 December 1950.

<sup>868</sup> Common Articles 49/50/129/141.

<sup>869</sup> Cf. Discussion in Chapter Six on national liberation movements, *supra*.

ILC have been soundly criticised for lacking any kind of “systematic approach to existing International Criminal Law”<sup>870</sup> or for ignoring the requirements of legal drafting altogether. Professor Bassiouni has pointed out that the project was doomed to failure from the start, with three different bodies taking responsibility for drafting different aspects of the same issues:

“The consequences of proceeding along three parallel tracks are self-evident. The “Special Committee” charged with drafting a statute for the court completed its work in 1953 but the project was tabled because there could be no court without first having a code. Then the code project was tabled in 1954 because it could not be approved until aggression was defined.”<sup>871</sup>

A Definition of Aggression was finally adopted by the UNGA in 1974, but it did not have the support of the major powers.<sup>872</sup> In addition, the *Draft Articles on State Responsibility* contain a provision that criminalizes certain Acts of State, without positing that there should be any individual responsibility for such acts<sup>873</sup>. This provision states that “an international crime may result, *inter alia*, from: ... (b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination”.<sup>874</sup>

Israeli judges in the *Eichmann* case in 1962 asserted unilaterally that there was universal jurisdiction for genocide as a “crime against humanity”.<sup>875</sup> Subsequently, in 1968, the UNGA was split along Cold War alliance lines when Poland proposed the *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, which purported to define both of those crimes in an expanded form, adding such crimes as a “policy of *apartheid*”, and providing that crimes against humanity could be committed in either time of war or time of peace. But this convention was

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<sup>870</sup> McCormack & Simpson, *supra*, at 251.

<sup>871</sup> M. C. Bassiouni, “Remarks on the Draft Code of Offenses Against the Peace and Security of Mankind”, American Society of International Law, Proceedings of the 80th Annual Meeting, at 120.

<sup>872</sup> GA Res 29/3314 of 14 December 1974. Cf. Discussion in Chapter Six, *supra*.

<sup>873</sup> Article 19, *Draft Articles on State Responsibility*.

<sup>874</sup> Article 19(3), *ibid*.

<sup>875</sup> *Attorney-General of Israel v. Eichmann* (1962) 36 I.L.R. 5

not supported by "the West".<sup>876</sup> Clearly the time was not yet ripe for the international community to be able to reach agreement on these kinds of issues.

There followed a tragic sequence of horrors across the globe, in many cases of the same magnitude as the Jewish Holocaust during World War II. With the growing availability of televisions and other media, people all over the world could see for themselves the devastation of such events as the "killing fields" in Cambodia, the policy of *apartheid* in South Africa, the "ethnic cleansing" in Bosnia, and the genocide in Rwanda. The end of the Cold War also saw the Security Council take on a much more active role in humanitarian intervention. Once again the topic of an effective international deterrent mechanism was placed on the agenda.

In 1979 the Commission on Human Rights requested Professor Bassiouni to prepare a draft statute for an international tribunal to prosecute persons accused of *apartheid*, but this was never followed up<sup>877</sup>. Ten years later, Trinidad & Tobago proposed the creation of an international criminal court to the UNGA, but only to prosecute international drug trafficking offences. In 1992 the UNGA requested the ILC to re-commence work on a draft statute for an international criminal court<sup>878</sup>. In the same year, the ILC presented a complete *Draft Code of Crimes Against the Peace and Security of Mankind* to the UNGA for comment, and Bassiouni produced his own *Draft Statute for an International Criminal Tribunal*, which covers a broad range of crimes including drug trafficking and war crimes.<sup>879</sup> Bassiouni's Draft Statute did not include any mention of self-determination, but article 18, Draft Code of Crimes (1992), provided:

"An individual who as leader or organizer establishes or maintains by force or orders the establishment or form of maintenance by force of colonial domination or any other

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<sup>876</sup> The Convention was adopted on 26 November 1968, by a vote of only 58 in favour (including the U.S.S.R. and many Third World countries), 7 against (including the U.S., the U.K. and Australia) and 36 abstentions (including Canada and many European states).

<sup>877</sup> M.C. Bassiouni, "Observations Concerning the 1997-98 Preparatory Committee's Work", in Association Internationale de Droit Pénal, *The International Criminal Court: Observations and Issues Before the 1997-98 Preparatory Committee; and Administrative and Financial Implications*, v.13, Nouvelles Études Pénales, (Pau Cedex, France: éditions érès, 1997) at 5-6.

<sup>878</sup> GA Res. 47/33 of 25 November 1992.

<sup>879</sup> Published with commentary by Association Internationale de Droit Pénal, v.9, Nouvelles Études Pénales, (Pau Cedex, France: éditions érès, 1997).

alien domination contrary to the right of peoples to self-determination as enshrined in the Charter of the United Nations shall, on conviction thereof, be sentenced ...”

This provision caused intense controversy.<sup>880</sup> Some States could not see the need for retaining “colonial domination”, as so few colonies remain today. But many former colonies wanted that reference retained, to deter any future would-be colonisers. In addition, as Lyal Sunga points out, the word “force” needed to be defined or at least clarified, to state whether or not “economic, political or other coercive methods would qualify as ‘force’.”<sup>881</sup> Ten states, including the US, Australia, and several European nations, called for the provision to be deleted entirely. Their main objection was the “overly broad and vague character of Article 18”<sup>882</sup>, particularly the reference to “alien domination” without further explanation. They wished to know whether this applies to oppression of minority groups, for example. The provision was deleted in the next draft of the Code, presented by the ILC in 1996, rather than attempting to address any of these concerns.

It seems likely that the international political situation between 1992-1996 also had an impact on this decision. The breakup of the Former Yugoslavia was taking place during this period, causing severe consternation for all States with ethnically divided populations, fearing that a certain momentum had begun, towards breaking down entirely the system of sovereign States.<sup>883</sup> Thus, it would have appeared to be against the interests of the international community at this time, to provide vague criminal proscriptions against those State authorities attempting to stave off claims for self-determination by every minority group.

The ILC presented its *Draft Statute for an International Criminal Court* to the 49th. session of the UNGA for comment in 1994. Not surprisingly, the Statute did not contain any reference to self-determination. The ILC recommended that a diplomatic conference be called to finalise the Statute as

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<sup>880</sup> Cf. Discussion in Chapter One (Introduction) on the reaction of States to this provision.

<sup>881</sup> Sunga, *supra*, at 103.

<sup>882</sup> *Ibid*, at 104.

<sup>883</sup> For example, cf. quote by then UN Secretary-General Boutros-Boutros Ghali in 1992, in Chapter Six, *supra*. And note the comments of Halperin et al, concerning the “alarmist view” often taken by governments of claims for self-determination, in Chapter One (Introduction), *supra*.

soon as possible.<sup>884</sup> But many States were reluctant to see the Court come into being so rapidly, so the UNGA established an *Ad Hoc* Committee to look into the matter.<sup>885</sup>

In the meantime, the Security Council set up the Yugoslavian and the Rwandan *Ad Hoc* International War Crimes Tribunals, *supra*, in 1993 and 1994, respectively [hereinafter: "ICTY/R"]. The jurisdiction of these tribunals was determined in a manner reminiscent of the Nuremberg and Tokyo experiences. Initially, Special Rapporteurs for the Commission on Human Rights collected evidence of "mass and flagrant human rights violations and ... breaches of humanitarian law"<sup>886</sup> while the conflict was continuing. Then the Security Council, taking the same approach as many of the same countries had taken to reports they received of atrocities that were being committed during the Second World War, adopted a resolution declaring their intention to create tribunals to prosecute all those responsible for "serious violations of international humanitarian law" in both territories<sup>887</sup>. The Statutes of both Tribunals were prepared by a "Committee of Experts to the Secretary-General", in haste and with limited consultation. The definitions of the crimes within the Tribunals' respective jurisdictions were largely based on the Nuremberg precedent and on the reports they had received of the types of atrocities that were being committed<sup>888</sup>. This is not to say that the Statutes are defective. The speed with which they were prepared in order to deal with such crises was no doubt a direct result of a lack of time spent in widespread consultations, and probably led to a more coherent end-product if anything. But, despite both Tribunals' assertions that their jurisdiction is soundly based on customary

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<sup>884</sup> Report of the International Law Commission on the work of its 46th. session, Official Records of the General Assembly, 49th Session, Supp. 10, A/49/10, 1 September 1994.

<sup>885</sup> GA Res. 49/53 of 9 December 1994.

<sup>886</sup> *Report on the situation of human rights in the territory of the former Yugoslavia submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, pursuant to paragraph 14 of Commission Resolution 1992/S-1/1 of 14 August 1992, E/CN.4/1992/S-1/9, 28 August 1992, para.69, in Sunga, supra. See also Report of Mr. Bacre Waly Ndiaye on his mission to Rwanda from 8-17 April 1993, E/CN.4/1994/7/add.1 of 11 August 1993, ibid.*

<sup>887</sup> S/Res/808 of 22 February 1993 (in relation to crimes committed in Yugoslavia) and S/Res/935 of 1 July 1994 (in relation to crimes committed in Rwanda).

<sup>888</sup> In particular, the Statutes had to make it clear that they applied to *internal* armed conflicts, and thus developed customary international law to some extent.

international law,<sup>889</sup> their Statutes do not reflect anywhere near the same widespread *opinio juris* element as the Rome Statute does, simply because of the small number of States involved in drafting them.<sup>890</sup>

### 7.3 *The lead-up to the Rome Conference and Statute*

Unfortunately I will only be able to deal in a cursory manner with the enormous volume of materials that has been promulgated by the *Ad Hoc* Committee for an International Criminal Court, the Preparatory Committee for an International Criminal Court, and numerous NGO organisations over the last 4 years, not to mention the work that is still continuing at meetings of the Preparatory Commission, which commenced in February 1999.<sup>891</sup> I will simply outline the points in the process that I thought were significant in determining over which crimes the ICC should have jurisdiction.

In the first place, the second *Ad Hoc* Committee session, held in August 1995, began with rumblings that the ICC should have inherent jurisdiction over at least a "hard core" of crimes,<sup>892</sup> such that States could not "reserve" their way out of any meaningful obligations, as would have been possible under the ILC's *Draft Statute*. This "hard core" of crimes would be genocide, crimes against humanity, and war crimes. Aggression still proved to be a contentious area, as were the numerous treaty-based crimes that the ILC proposed to bring within the jurisdiction of the ICC. Many representatives were concerned that "the inclusion of terrorism, drug trafficking, torture, apartheid or other crimes

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<sup>889</sup> See especially: *Prosecutor v. Tadic, Appeal on Jurisdiction*, supra. Some commentators would disagree, particularly with the contention that international humanitarian law applies to internal armed conflicts under customary international law: for example, cf. Simma & Paulus, supra.

<sup>890</sup> The Rome Conference of Plenipotentiaries that drafted the Rome Statute was attended by approximately 160 countries, including non-UN members, such as Switzerland: UN Press Release L/ROM/22, supra.

<sup>891</sup> For a full documentary history of the work of the two Committees, cf. Bassiouni, "Documentary History", supra. Many other relevant documents are also available via the homepage of the NGO Coalition for an International Criminal Court, online: <<http://www.igc.org/icc/>>.

<sup>892</sup> Report of *Ad Hoc* Committee for an International Criminal Court, 28 August 1995, Press Release GA/8912.

prohibited by international treaties in the statute of the court would overburden it ... [and] should be dealt with by national courts".<sup>893</sup>

In complete contrast to the Nuremberg and subsequent processes, the Preparatory Committee and Rome Conference were deliberately programmed in such a way that small delegations would not be disadvantaged in being able to express their views on the vast array of matters. Due to the broad scope of the Committees' work, they regularly divided into Working Groups to discuss particular issues. The timetable for these Working Groups was arranged so as not to exclude participation by smaller delegations trying to cover all areas. Thus, the larger delegations did not have the opportunity to dominate discussion of several crucial issues, by scheduling them at the same time. So every delegation had a fair chance of influencing the final form of the Statute, not just the Permanent Five members of the Security Council.

At the Rome Conference, the crimes under consideration for inclusion were still the three "hard core" crimes, plus aggression and the "treaty crimes". However the latter were "seen more or less from the beginning as bargaining chips since it was clear that consensus on these individual crimes would be extremely difficult to obtain."<sup>894</sup> And in fact all of these treaty crimes were bargained away, as time needed to be spent on more important matters, such as defining "crimes against humanity" to everyone's satisfaction. These crimes became the locus of the greatest expansion of customary international law concepts, doing away entirely with the nexus requirement with armed conflict, and introducing crimes of "sexual violence" for the first time in such a treaty.<sup>895</sup> In addition, the chapeau of the section was finally drafted as: "widespread *or* systematic" attacks, a major victory for those trying to avoid creating loopholes for future perpetrators. However, the threshold was raised to some

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<sup>893</sup> Ibid.

<sup>894</sup> Fariello, *supra*, at 3.

<sup>895</sup> Which was a particularly remarkable achievement given the Arab and Catholic difficulties with the concept of "enforced pregnancy" as a crime, and even a satisfactory definition of gender. See generally the various discussions in *The International Criminal Court Monitor*, August 1998, online: <<http://www.igc.org/icc/>>.

extent by the addition in the definitions of a requirement of an attack in “furtherance of a state or organizational policy”.<sup>896</sup>

#### 7.4 Conclusion: Self-Determination and the Rome Statute

Given the length of time it has taken for the international community to arrive at an agreed set of “international crimes”,<sup>897</sup> and the wide consensus given to the Rome Statute,<sup>898</sup> it seems unlikely that there will be another attempt to codify international crimes to such an extent in the near future.<sup>899</sup> The Rome Statute may be amended in the future to include more crimes, but at the earliest this will not occur until a Review Conference is held at least 7 years after entry into force of the Statute.<sup>900</sup>

Thus, it seems appropriate to focus on the Rome Statute as the most realistic source of potential penal proscription for those who commit severe breaches of recognised rights to self-determination. In this regard, 2 provisions suggest themselves as being open to an interpretation that may include a severe breach of a right to self-determination as one of “the most serious crimes of concern to the international community as a whole”:

- (i) article 5(1)(d) - the crime of aggression; and
- (ii) article 7(1)(h), & (2)(g) - the crime against humanity of persecution.

With regard to (i) the crime of aggression, the ICC will only have jurisdiction over such a crime “once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime [and] [s]uch a

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<sup>896</sup> Article 7(2)(a), Rome Statute, supra.

<sup>897</sup> Article 5, Rome Statute, supra, stipulates that these are “the most serious crimes of concern for the international community as a whole.”

<sup>898</sup> As at 12 December, 2000, 120 States had signed the Rome Statute, signalling their support for the Court. These States come from a diverse range of regions and legal traditions, and they include Bangladesh, Guinea (Bissau), Korea, Kyrgystan, Nauru, Russia, Syria, Thailand, Uganda, and the United Kingdom. For full details on the list of signatories and ratifiers, cf. ICC website of the UN, online: <<http://un.org/icc/>>.

<sup>899</sup> Even if the ILC adds a provision pertaining to self-determination back into its *Code of Crimes Against the Peace and Security of Mankind* in the near future (which is highly unlikely), it is questionable whether that Code will have any force of law, and thus whether it could serve as an effective enforcement mechanism in prosecuting such crimes.

<sup>900</sup> Articles 121 & 123, Rome Statute, supra.

provision shall be consistent with the relevant provisions of the Charter of the United Nations.”<sup>901</sup> In other words, the crime of aggression will only fall within the ICC’s jurisdiction not less than 7 years after entry into force of the Rome Statute, once an agreed definition is adopted.

The ICC Preparatory Commission Working Group on the Crime of Aggression [hereinafter: “WGCA”] has been discussing the definition of aggression and the “conditions under which the Court shall exercise jurisdiction”, since November 1999. It is beyond the scope of the present inquiry to discuss the latter issue, which concerns the relationship between the ICC and the Security Council, the latter of which has always assumed responsibility for determining when “aggression” has occurred.<sup>902</sup> However, the definition of aggression is relevant to this discussion. As noted previously, the 1974 General Assembly Definition of Aggression contains explicit references to the right to self-determination, and the right of “peoples under colonial and racist regimes or other forms of alien domination ... to struggle ... and to seek and receive support”.<sup>903</sup>

In the consolidated text of proposals currently under consideration in the WGCA, which is still heavily bracketed and thus still subject to intense debate, Option 1 (Variation 1), on the definition of aggression includes a similar reference to self-determination:

“For the purposes of the present Statute, ... the crime of aggression means ... [an armed attack] [the use of armed force] [a war of aggression] ... [against another State, or depriving other peoples of their rights to self-determination], in [manifest] contravention of the Charter of the United Nations, to violate ... the [sovereignty,] territorial integrity or political independence of that State [or the inalienable rights of those people] [except when this is required by the principle of equal rights and self-determination of peoples and the rights of individual or collective self-defence].”

As with the Draft Code of Crimes, the States that were once colonised are arguing that these references to self-determination be kept, while the administering powers are reluctant to include such

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<sup>901</sup> Article 5(2), Rome Statute, *supra*.

<sup>902</sup> Several suggestions have been put forward as to how this relationship should be established in relation to the crime of aggression, and these are contained in the WGCA “Consolidated text of proposals on the crime of aggression”, *supra*.

<sup>903</sup> Article 7, Definition of Aggression, discussed *supra*, this Chapter.

references.<sup>904</sup> At this stage, it seems more likely that a very general definition is likely to be adopted, which does not include an explicit reference to the right to self-determination. However, that will not necessarily preclude claims that a “crime of aggression” is being committed where peoples are forcefully being denied their legitimate rights to self-determination, as long as such acts fall within the definition that is finally agreed upon, and also accord with the previous analysis of the content of a “right to self-determination” in international law currently. Additionally, international law may develop further in this area, allowing for a different interpretation of the content and scope of the right to self-determination in future.

In the short term, it is also worth analysing (ii) the crime against humanity of persecution which, in this author’s opinion, provides ample scope for severely aggrieved holders of rights to self-determination to bring to justice those denying them their rights.

Article 7(2)(h), Rome Statute, provides that the crime against humanity of “persecution” is the “intentional and severe deprivation of fundamental rights contrary to international law”, against any “identifiable group or collectivity” on prohibited discriminatory grounds. The right to self-determination has not been mentioned specifically, but nor have any other rights. Given the discussion throughout this thesis of the “fundamental” nature of the right to self-determination in international law, it seems that this provision could provide a suitable basis for prosecuting an “intentional and severe deprivation” of the right to self-determination.

Article 7 has been drafted to ensure that only the “most serious crimes of concern to the international community as a whole” will be prosecuted by the Court.<sup>905</sup> For example, the chapeau provides that “crimes against humanity” must be “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.” Article 2(a) defines “attack directed against a civilian population” as “a course of conduct involving the multiple commission of acts

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<sup>904</sup> Author’s notes taken during Meetings of the WGCA, United Nations, New York, between November 1999 and December 2000.

referred to in paragraph 1 against a civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack”.

In addition, article 7(1)(h) stipulates that persecution is only a crime under the Statute when it is committed “in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.” In other words, it must be established that other crimes against humanity are also being committed against the group, before the crime of persecution can be established. This is intended to prevent the Court from becoming merely a “human rights court”, which only prosecutes less serious violations of human rights. In addition to persecution, at least one of the following crimes against humanity must be established (and only those “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”): murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity, enforced disappearance of persons, apartheid, or “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or mental or physical health.”<sup>906</sup>

Thus, the Court will be protected from spurious claims by illegitimate groups that they have been “severely deprived” of their right to self-determination, while allowing genuine victims the opportunity finally to have a means to enforce their right to self-determination. The Court will need to establish the legitimacy of the claim to a right to self-determination, and then ascertain whether this right is being “intentionally and severely deprived”. This will largely be a question of fact, and may involve investigating such issues as the extent of the group’s freedom to use their language (if they have one of their own), access to employment opportunities, freedom of religion, freedom of association, freedom of expression, the right to participate in relevant political institutions, the right to a means of

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<sup>905</sup> Article 5, Rome Statute, *supra*. Cf. D. Robinson, “Defining “Crimes Against Humanity” at the Rome Conference”, (1999) 93 Am. J. Int’l L. 43.

<sup>906</sup> Article 7(1), Rome Statute, *supra*.

subsistence, and any other rights that allow a peoples to "freely determine their political status and freely pursue their economic, social and cultural development."<sup>907</sup>

In conclusion, I would like to return to a little-known work by Professor Bibó, who feels that a satisfactory resolution of the many problems surrounding enforcement of the right to self-determination, would lead to increased international peace and security, which I hope I have also demonstrated through this thesis.

"Again and again we meet the pull of sovereignty of the people and self-determination, the twin principles of a social organisation based on freedom and equal human dignity, and this no matter how much other important considerations try to draw us away. It appears that there is no other principle that is rooted in common conviction and that could ensure the social and psychological conditions of legitimacy, and the necessary inner and outer organisation. And there appears to be nothing that could or should replace these in the foreseeable future.

... All criticisms marshalled against self-determination are reminiscent of the recurring theories and moods of disillusion of the past 300 years that have frequently declared the twilight of self-determination as the basic principle of the inner organisations of the state. But always it was found that these critics intended to replace the sovereignty of the people with something inferior; and sovereignty of the people would arise with renewed strength, and similarly with the counterpart of sovereignty of the people - self-determination.

The undistorted application of the principles derived from the concept of democratic freedom may well lessen the threat of war, even amongst a multitude of states, and even more than the application of the greatest power."<sup>908</sup>

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<sup>907</sup> Common article 1, ICCPR and ICESCR.

<sup>908</sup> Bibó, *supra*, at 63.

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