THE RIGHT OF SECESSION IN INTERNATIONAL LAW: A NEW THEORY OF LEGITIMACY

By

GERRY J.SIMPSON

LLB, Aberdeen University, Scotland, 1986
Dip.Legal Practice, Aberdeen University.1987

A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF

THE REQUIREMENTS FOR THE DEGREE OF

MASTER OF LAWS

in

THE FACULTY OF GRADUATE STUDIES

(Faculty of Law)

We accept this thesis as conforming
to the required standard

THE UNIVERSITY OF BRITISH COLUMBIA

February 1989

In presenting this thesis in partial fulfilment of the requirements for an advanced degree at the University of British Columbia, I agree that the Library shall make it freely available for reference and study. I further agree that permission for extensive copying of this thesis for scholarly purposes may be granted by the head of my department or by his or her representatives. It is understood that copying or publication of this thesis for financial gain shall not be allowed without my written permission.

Department of Law

The University of British Columbia
Vancouver, Canada

Date 28 Feb, 1989

ABSTRACT

This thesis develops a legal theory of secession based on international law and an original index of validity.

.....

Secession is the process by which a territorially discrete entity within a state achieves independence from that state. In this thesis a code of legality is devised which legitimizes secession in certain cases without advocating the breakdown of world order.

The right of secession envisaged derives its force not from political concepts such as democracy, liberalism or socialism, but from the right in international law to self-determination. To this end, an historical introduction is offered which traces the historical roots of the right to self-determination and its earliest connection with secession. This study illustrates how the transformation of self-determination from political principle to legal right in the era of the United Nations and decolonization led to a restrictive interpretation of the concept. This interpretation, it is argued, has neglected the link between self-determination, human rights and the right to secede.

Self-determination has consequently been drained of significance at the very moment when it should be in the vanguard of the quest for a world order based on respect for human rights.

This study, therefore, has several purposes. First, a basis in international law for a right of secession is sought by analyzing the provisions of several United Nations Declarations on self-determination. Second, the humanitarian potential of the right of secession is realized by renewing the link between human rights and self-determination in a novel theory of legitimacy. Third, an index of validity is outlined by which the legitimacy of a particular secession can be ascertained using criteria which take into account political, economic and moral as well as legal factors. This index is referred to throughout the paper in five case studies which illustrate the varying practical consequences of applying this theory of legitimacy.

.....

In this way, a theory of secession is proposed which subscribes to the rules of international law and the realities of the international political system while providing a conceptual foundation for a humane world order.

.....

TABLE OF CONTENTS

.....

Acknowledgements

This study was completed under the supervision of Professor Maurice Copithorne (UBC) whose comments throughout were greatly appreciated. Professor Douglas Sanders read a final draft and made several helpful comments.

Without the financial aid of the Law Foundation of British Columbia and a bequest from the C.B. Davidson Fund at Aberdeen University, I would have been unable to make this study at UBC, in the beautiful city of Vancouver. I am therefore grateful for their generous support.

Professor John Rankin of the University of Aberdeen was the inspiration behind my Masters Studies.

Jo-Anne Dillabough cast a very critical eye over this study and deserves thanks for the long hours spent deciphering the grammatical vissicitudes of the early drafts.

Structure

This work is divided into eight main parts. Part One is an Introduction in which I sketch the purpose of the study and briefly describe a theoretical basis for the right to secede. In Part Two I provide an Historical Resume of the provenance of the principle of self-determination and the journey it had taken up to 1939. The period from 1945 to the present is looked at in Part Three, Self-Determination in the Age of the United Nations: Decolonization and Secession. This section will delineate the basis for asserting a right to secession in international law. Part Four describes the ongoing attempt to secede by the Eritrean people in northern Ethiopia. This part, Secession and the New Colonialism, furnishes an argument for the renewal of the right to secede in cases of neo-colonialism and alien oppression. The elemental nature of human rights in the struggle for self-determination is addressed in Part Five, A Humanitarian Basis for Secession, which assesses the successful secession of Bangladesh from the rest of Pakistan in 1971. Biafra's failed attempt to secede from Nigeria is the subject of Part Six, Secession and the Autonomy Compromise. This section illustrates how rigid the standards are for a legitimate right of secession under the index of validity. Secession in Western Democracies is the title of Part Seven and its

purpose is to show how the right of secession has only limited meaning within a democratic state. Quebec and Scotland are reviewed in this context. In the final part entitled The Index Of Validity: A Theoretical Conclusion, I posit my theory of legitimacy with the intention of regulating the exercise of the right of secession. A short concluding section completes the study.

.....

CHAPTER I

INTRODUCTION

In recent decades international lawyers and academics have attempted to articulate principles which might provide the foundation for a humane world order. Often these constructs are either overambitious or impenetrably complex. The following study modestly proposes that an imaginative articulation of the, already existing, principle of self-determination will mark the first step towards a reorganization of the state system on the basis of a concern for human dignity and human rights.

The academic and political communities have concentrated their attention on the interdependence of states within the international system. This preoccupation is partly justified by the increasing trend in recent years towards internationalism in the world, as evidenced the creation of many supranational and regional organizations. The economic integration of western Europe (European Economic Community) and the many economic and political alliances being forged world-wide are indicative of this movement towards regionlism.

However, undermining this integrative process is a tendency in the opposite direction exemplified by the proliferation of organizations attempting to shape the world in an entirely different way. Primary among these groups are secessionist movements dedicated to the dismemberment of nation-states. Nationalism, once a potent force for

integration is now just as frequently disintegrative. This urge to fragment threatens a large number of states and is not exclusive to any one geographic area, political system or economic model. Secession, the political manifestation of this urge, is the subject of this study.

To date the phenomenon of secession has not met with an adequate response from the international community nor has its centrality been sufficiently recognized by international lawyers and political theorists.

In the light of this what is required is a legal theory of secession which incorporates an awareness of political realities. The purpose of this study is to develop a limited right of secession, derived from the right in international law to self-determination, that is congruent with a vision for a humane world order.

The act of secession involves the separation of a discrete territorial unit from an established state and the creation of a new state. As such it offends fundamental norms of international law and basic principles of political organization. In this paper it is argued that there is a presumption against secession which can only be rebutted by a series of factors the presence of which stamp the secession as legitimate. This legitimacy will be calculated using, what I have termed, the index of validity. The index will allow international lawyers and politicians to judge the legitimacy of an act of secession by examining the

essential preconditions for validity and weighing a number of critical variables in the analysis of the secession.

In this study a right of secession is inferred from the United Nations law of self-determination[1], particularly from the most recent articulation of that law; The 1970 Declaration on the Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations[2]. In this Declaration the presumption in favour of territorial integrity is defeated by a failure to secure human rights and the right to self-determination of "peoples". Among its other aims, the index of validity is intended to give clarity as to what this failure entails. The index of validity is the flesh on the bones of the principle of self-determination and the 1970 Declaration. The right of secession is conceived as a logical extension of the right to self-determination and as a legal remedy for abuses directed against a territorially-discrete minority within a state.

It is important to recognize that this paper will deal specifically with a particular mode of self-determination,

---

[1] Secession has been described as "maximalist self-determination". See Neuberger,B. National Self-Determination in Post-Colonial Africa, Boulder,Colo: Lynne Reinner Inc., 1986.p70

[2] See G.A. Resolution. 2625, 24 October, 1970.

secession, and that only the issue of potential legitimacy will be examined.

The question of why or when secessions occur is no doubt an interesting one. However attempts to answer this question remain in the province of the political scientist[3]. Answers to these questions are useful because they explain why secession is unlikely to be a receding occurence. Political scientists[4] have shown that some identifiably modern trends have contributed to the number of secessionist movements currently in existence. Most surprisingly they have illustrated how increased interdependence and political development can actually foster separatism. The re-emergence of ethnicity in multi-national states and increased cultural differentiation are a response to the threat of cultural and political homogenization in the modern state. Secessionist groups may either feel threatened by attempts to assimilate it[5] (e.g.Quebec) or take on a sense of deprivation relative to the groups with which they have closer contact (e.g.Bangladesh).

---

[3] See Wood.J. Secession: A Comparative Analytical Framework, Canadian Journal of Political Science XIV:1, March, 1981. See also Connor,W. The Politics of Ethnonationalism, Journal of International Affairs, XXVII (1973),p 1-21

[4] See Wood,J. Secession,supra.

[5] See Suzuki,E. Self-Determination and World Public Order: Community Responses to Territorial Separation, V.A. Journal Int'l Law Vol 16:4, "The process of separation is triggered by a growing discrepancy between value-expectations and value realization" p831

Secession is but one aspect of self-determination and only this particular outcome of self-determination is relevant to this study. Other aspects of these problems not discussed in the following pages are:

(1) The "secession" of states from international treaty organizations. The Hungarian and Czech threats to withdraw from the Warsaw Pact in 1956 and 1968 respectively were not threats to secede as secession is defined in the following paper. What distinguishes these cases is that in these cases the territorial integrity of a state was not at issue.

(2) Self-determination as unification, e.g. the right to self-determination intermittently proclaimed by the Korean and German people.

(3) Self-determination for territorially diffuse minorities within States. e.g. the black Americans in the United States or the Catholic minority in Northern Ireland.

(4) Self-determination through revolution or coup. Attempts to overthrow the government without changing the external boundaries is not secession even though the character of the State might become qualitatively different.

(5) Voluntarily transacted secession. e.g. Singapore. The legitimacy of these is unquestionable since they are uncontested.

(6) Self-determination as political weapon e.g. Vietnam. Self-determination has minimal legal content in these cases. Most often it is used as a slogan to support a military campaign. In the case of Vietnam, American intervention was putatively in support of the South Vietnamese people's right to self-determination. In contrast North Vietnamese action was carried out on behalf of self-determination for the whole of the Vietnamese people.

(7) A claim to the legal identity of the state is not a secession nor is an attempt by central government to cede or abdicate responsibility even if its practical effect might be similar. Beran describes this as an "expulsion[6]".

(8) Apartheid in South Africa is sui generis[7] in the sense that denial of the right to self-determination through political participation is formalized by the law. Similar de facto forms of racial discrimination can be found in Bolivia and Guatemala where the majority Indian populations are

---

[6] See Beran,H. A Liberal Theory of Secession , Political Studies, 1984 XXXII, p21

[7] See White,R. Self-Determination: Time for a Reassessment, Netherlands International Law Review 28, 1987, p156.

unrepresented in government and institutionally oppressed. However, as Emerson states,

> "the demand for self-determination there has no necessary implication of support for self-determination elsewhere and certainly not for what seems likely to be the next major incarnation in the clamor of peoples trapped in pluralistic states in which they have no dominant share to take charge of their own destinies"[8].

These are aspects of internal self-determination rather than claims to secede. The solution to these problems lies in universal political participation not the reorganizing of state boundaries.

.....

Alfred Cobban stated once that,

> "the history of self-determination is a history of the making of nations and the breaking of states"[9].

This study adopts the breaking of states as its focus. It favours attempts to harness the urge to secede, subject it to legal limits and give it the capacity to advance the cause of human rights for oppressed peoples trapped in national territories within states. Finally, this study is an attempt to legitimize the realignment of the international state-system in a manner more congruent with international law and the promotion of human rights.

---

[8] See Emerson,R. Self-Determination, AJIL, 65, 1971, p275.

[9] See A.Cobban, The Nation-State and National Self-Determination,London, 1945, p6.

. . . . . .

CHAPTER TWO

HISTORICAL RESUME:THE PHILOSOPHICAL FOUNDATIONS OF SELF-DETERMINATION.

OUTLINE

A. INTRODUCTION.

Self-determination, in its crudest form, has existed for as long as human beings have possessed consciousness and the instinct to form social compacts and even the earliest communities fought for the right to organize and control their own societies. Even in these early times there was an innate unwillingness in soacial groups to submit to alien domination. Indeed, many of the major wars throughout history have been conflicts over the right to exercise self-determination though it was not until the intellectual enlightenment that these issues were comprehended as such.

Self-determination, as we now understand it, lies in the fusion of external self-determination, "the right of people to choose the sovereignty under which they will live"[1] and internal self-determination, whose more recent philosophical heritage is the subject of the following section.

Self-determination became a fully-fledged principle with the advent of nationalism and democracy in Europe. These two concepts provided the ideological underpinnings. For this reason self-determination is most often traced back to the French Revolution when popular sovereignty usurped the

---

[1] See Woodrow Wilson, Address to the League to Enforce Peace, May 27, 1916 quoted in Wells, B., UN Decisions on Self-Determination, University Microfilms, Inc, Ann Arbor, Michigan: 1963, p22.

divine right of kings as the decisive governing principle in the organization of the nation-state.

The formative steps in the crystallization of the idea of popular sovereignty were taken by the Greeks and Romans. Discoveries made in the scientific field by the Greeks stimulated more sophisticated insights into political organization. The most innovative of these was the invention of the algebraic variable which aroused parallel speculation into the possibility that men could be treated as formal equals. The Romans simply incorporated these ideas into a wider domain, thereby heralding the shift from status to contract in the legal sphere and replacing institutional stratification with formal equality in society at large[2]. The legacy of these two traditions served to undermine the irrational basis for the divine right of kings by positing rationality as the organizing principle in the affairs of men.

The collective amnesia of the Dark Ages interrupted the progress of democracy[3] but as European civilization was reborn so, too, were the ideals of the classical epochs. The developments which led to the establishment of the principle of self-determination occurred at three, mutually-supportive levels - the political, the legal and the philosophical.

---

[2] With the unfortunate exception of slavery.

[3] This was in part due to the influence of Christianity and Islam. The Crusades for example were a negation of self-determination. Irrational myth rather than rational man was the organizing force behind society.

Many of the great names of European thought were involved at this last level. The thinkers of the Enlightenment abjured the religious standards so dominant in the Dark Ages which were dedicated to the suppression of the individual[4]. The re-assertion of the individual's central position in society began with Hobbes and Locke and was placed in a larger political context by Rousseau in his theory of the social contract. Both Hobbes and Locke were concerned either with man's freedom from government in the form of a Lockean sequence of rights[5] or from himself through the protection of the benevolent dictator- the Leviathan[6]. Rousseau took the process a step further in advocating individualization as, first, liberation, then community. Individuals were to reach self-realization by freeing themselves from subjection to the will of another. Having accomplished this, the individual will could contribute to the General Will of society as a whole. Government by social contract could then be ensured. What Rousseau described was the move from individual self-determination to collective self-determination. There is no transfer of sovereignty, as there

---

[4] See Cameron, D, Nationalism, Self-determination and the Quebec Question, Canada: Macmillan, 1974, p36.

[5] See Locke, J, Two Treatises of Civil Government, London: Dent, 1960.,

[6] See Hobbes,T., Leviathan, Baltimore: Penguin, 1968.

is with Hobbes and Locke. Rather there exists an ongoing sovereignty of the people[7].

Though there is a clear, if unspecified, link between the "philosophes" and the people in the germination of the French Revolution, its earlier American counterpart lacked the same philosophical stimulus. The War of Independence was based less on self-determination than it was on a common grievance felt by the thirteen disparate states over British rule[8]. Jefferson drew mostly on Locke and was more interested in individual liberty than community self-determination. The Americans had, as their primary goal, the displacement of the British authorities. Only after this occurred did Jeffersonian ideals of dignity and individuality take root. External self-determination had clear precedence over any thoughts of internal democracy at this early stage.

Neuberger makes the point that if self-determination created the United States then France, in the later revolution, created self-determination[9]. Here, there was a group within an already self-governing[10] country attempting to impose a democratic revolutionary structure where there

---

7 See Rousseau,J.J, The Social Contract, London, Penguin Books p61

8 See Cameron, D, Nationalism, Self-determination and the Quebec Question, supra, p26.

9 See Neuberger, B, National Self-Determination in Post-Colonial Africa, supra,p13

10 See Cobban,A, Historians and the Causes of the French Revolution, London: Routledge and Kegan, 1958, p8

had originally been monarchy. The French were attracted to self-determination, both for themselves, and initially, others. The principles of popular sovereignty, democracy and equality all contributed to the revolution and the principle of self-determination cannot be understood without reference to them. However, it was a fourth element, nationalism, which led to the recantation by the French of their commitment to self-determination for other nations.

As communities coalesced to become nations and these newly-developed nations began to yearn for independence, nationalism became a potent force for change in Europe. Yet 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. This occured in France when the ideals of the French Revolution were quickly corrupted by Napoleonic imperial nationalism whose expansionist tendencies were in no way conducive to independence for other European nations.

Post-revolutionary France remained, for a short time, committed to self-determination which became the governing principle in cases of cession and annexation. The plebiscites in Avignon and Venaisson (1791) and Savoy and Nice (1792), though imperfect in execution, bear witness to

this commitment[11]. However, with the publication of the Cambon Report in 1792[12] it soon became clear that democratic idealism could no longer hold sway in French foreign policy and that same year saw the annexation of Belgium by a plebiscite for which only Belgians in sympathy with the revolution were enfranchised. Self-determination, described by Bos as a "cry of the French Revolution"[13], was reduced to a whimper in the face of Napoleonic hegemony.

Similarly, Prussian and German nationalism from Herder to Hitler was intent on acquiring self-determination for all German peoples but had little respect for those nations whose aspirations ran against the grain of German nationalism. Hitler's aggressive quest for lebensraum represents the ultimate refinement of what Ofuatey-Kodjoe calls "national determinism"[14]. It resulted in the principle's political and theoretical rejection in the latter half of the 20th century.

The progress of other forms of self-determination depended very much on the existing political environment. Self-determination tended to flourish during revolutionary crises and the post-war dismantling of empires but was

---

11 See Wambaugh,S, A Monograph on Plebescites, With a Collection of Official Documents, New York: Oxford University Press, 1920, p33-45.

12 Ibid,p47.

13 See Bos,M, Self-Determination by the Grace of History, Netherlands Law Review, vol 15, (1968), p362.

14 See Ofuatey-Kodjoe,W, The Principle of Self-Determination in International Law, New York: Nellen, 1977, p11,29-33.

neglected while these empires were being formed or whenever Europe entered a rare period of quiescence.

The French experience was mirrored in that of the two other great revolutionary powers of the modern age; the USA and USSR. The US, having achieved independence, found that an inflexible pursuance of Jeffersonian ideals was strategically untenable in its dealings with Western hemisphere neighbours, and with the secession in the South.

The USSR was no different. The consolidation of a Russian revolution, inspired partly by self-determination, could not be successfully completed without a modification of the principle which brought it into existence.

These realities dictated 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.

.....

B. LEGAL SCHOLARS

Legal scholarship confirms the above conclusion with its reluctance to ascribe any jurisprudential significance to the principle until after 1945. Yet the development of international law could not continue oblivious to the political and philosophical changes in the status of self-

determination. Shifts in the political basis for sovereignty were reflected in appropriate legal responses. Even as early as the seventeenth century Grotius registered a cautious revocation of the existing principles of conquest and cession without consent:

> "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"[15].

A century previous to that, Erasamus[16] had first asserted the proposition that authority over men could only be exercised with the consent of the people. These writers were primarily concerned with the influence to be attributed to the residents involved in an international contractual bargain. They did not contemplate the possibility of a principle of self-determination governing international law and relations in general.

Even when self-determination entered the legal lexicon at the turn of the century, lawyers and scholars remained sceptical as to its importance or usefulness. Hall was perhaps the most scathing, warning that,

> "the phrase is one of dangerous vagueness as encouraging inordinate nationalist claims, and its application, in ignoring economic conditions has led to some disastrous results"[17].

---

15 See Grotius,H., De Jure de Belli et Pacis (Trans, W.Whelwell), Cambridge:CUP, 1853, BK I, p342-3.

16 Quoted in Wells,B. UN Decisions on Self-Determination, supra, p8.

17 See Hall, A Treatise on International Law, 8th ed., ed. A. Pearce Higgins, Oxford: Clarendon Press, 1924, p54

Verjizil believes that self-determination had only limited relevance in the "organization of plebiscites in border areas which had a disputed national character"[18] while Stowell was a rarity among his contemporaries in regarding the subject as worthy of any comment at all. His major interest was in the right of intervention in civil wars and in this connection he made the point that sovereignty,

> "belongs...not to the government which has been recognized as acting for the community but to the individuals of which the state is composed"[19].

According to Stowell, the right of self-determination was coterminous with the right of revolution.

Notwithstanding Stowell, it is perhaps the silence of the major writers on international law that speaks most eloquently of the status of the principle of self-determination at this time. It had clearly not found favour in international jurisprudence in the West.

The early-20th century renascence of the principle was due to the support it garnered from two very different ideological sources. These were the liberal internationalism of Woodrow Wilson and the new Marxist-Leninist ideology emanating from the Soviet Union.

---

18 See Verjizil,J. International Law in Historical Perspective, vol 1, Leiden: Sitjhoff,1968, p321

19 See Stowell, International Law: a restatement of Principles in conformity with actual practice, New York: Holt & Son, 1931, p96.

.....

C.WOODROW WILSON AND SELF-DETERMINATION

Woodrow Wilson is often credited as the father of self-determination. However, in his later life he was to rue the haste with which he had sponsored this troublesome creature. From the loam of high principles and good intentions came an unruly weed which spread rapidly through the post-war world. Like so many initially attracted to the positive note sounded by the principle, Wilson was forced to concede that an assortment of practical and conceptual problems denied it universalizability.

Wilson's definitions of self-determination were derived from a peculiarly American perspective. The principle was, for him, the natural successor to a host of other liberal totems in Western democratic thought. He championed self-determination as a democratic principle because of his firm belief that democratic states were less warlike than their authoritarian counterparts. Self-determination was to be the theoretical tool with which he would help construct a lasting post-war peace. Wilson took the US into the war with the intention of making the world safe for democracy, proclaiming in 1918,

> "what we demand in the war...is that the world be made...safe for every peace-loving nation which, like our own, wishes to live its own life, determine its own institutions, be assured of

justice and fair dealings, by other peoples of the world as against force and selfish aggression"[20].

Unfortunately Wilson's self-determination was a worthy, if theoretically flawed, principle which disintegrated when exposed to the Manichean European political environment[21]. Even Robert Lansing, Wilson' Secretary of State, warned that the phrase was, "loaded with dynamite"[22], if taken to its logical conclusions. Wilson never intended such a conclusion. What began as "democratic idealism"[23] or "democratic altruism"[24] eventually became simply conditional self-determination. Wilson's position was at best ambiguous. As a Southern Democrat he, "had the right of secession in his bones"[25] but he was conspicuous in his failure to support secession from existing states. Principle 10 of his famous Fourteen Principles states,

---

20 See The Public Papers of Woodrow Wilson, War and Peace I, 14 Points Speech, Joint Session of Two Houses of Congress, Jan 19th, 1918, p173

21 See Pomerance,M. Self-Determination in Law and Practice, supra, p1-3.

22 See Wells,B. UN Decisions on Self-Determination, supra,p45

23 See Cameron, D. Nationalism, Self-Determination and the Quebec Question, supra, p87.

24 See Cobban,A. The Nation-State and National Self-Determination, supra,p13-22

25 See Notter,H, The Origins of the Foreign Policy of Woodrow Wilson, Baltimore: John Hopkins Press, 1937, p69.

> "the peoples of Austro-Hungary...should be accorded the freest opportunity of autonomous development"[26].

Yet Wilson was at pains to remind his fellow statesmen that he could not contemplate the destruction of the Austro-Hungarian empire. Anomalies like this abound. Indeed it could be argued that Wilson's conception of self-determination was morally flawed, as well as practically fallible. His ideas about colonial peoples were regressive. He quoted Burke's paternalistic and outdated axiom that, "the general character and situation of a people must determine what sort of government is fitted for them"[27] and his own Principle 6 harks back to title by conquest, saying that the adjustment of colonial claims was to be based on,

> "the 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"[28].

Wilson eventually became weary of self-determination when it was apparent that his version was unworkable. Eventually he even condoned the US intervention in Mexico on the specious grounds that the human cost of self-determination was too great. Wilson's various reverses in Europe and the failure of the League of Nations to include

---

[26] See Public Papers of Woodrow Wilson, supra p179.

[27] See Notter, H. The Origins of the Foreign Policy of Woodrow Wilson, supra, p69.

[28] See Public Papers, supra,p178.

the principle in its covenant led him to exclude the right of self-determination from all but, "the territories of the defeated empires". Wilson's lame retreat from self-determination as a universal principle is perhaps a vindication of his contemporary, Woolsey's belief that "the little principle must yield to the big interest"[29].

.....

D.COMMUNISM AND SELF-DETERMINATION

The Bolshevik Revolution provided self-determination with a new and vigorous source of support. Marx initially favoured internationalism. He intended communism to transcend national boundaries and attitudes. Nationalism, and by implication, self-determination, could only retard the spread of communism by hampering the progress of internationalism. Lenin and Stalin developed a more realistic theory of self-determination by which nationalism could be used to make piecemeal attacks on the capitalist system. Both wrote major pieces extolling self-determination[30]. However, while their enthusiasm appeared

---

29 See Woolsey,T.S. Self-Determination, AJIL, vol 13, (1919), p304.

30 See Stalin,J, Marxism and the Colonial Question, New York: International Publishers and Lenin,I.V, The Right of Nations to Self-Determination, New York: International Publishers, 1951.

unconditional, it soon became apparent that the socialist conception of self-determination came with Lenin's caveat that,

> "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"[31].

Stalin confirmed this with his limited definition, promising to,

> "...give full support to the principle of self-determination where it is directed at against feudal, capitalist and imperialist states".

In other cases, self-determination was, according to Stalin, a mere fiction[32]. Self-determination was not an end in itself but a means by which the ultimate triumph of communism could be secured. Closer analysis reveals that communism, like nationalism, cannot accommodate a full-blooded self-determination. The "self" in question can only be that defined by Marxist-Leninist teachings (i.e. a proletariat in a state of full historical consciousness). All other selves are denied the right.

The Communists were responsible for developing a theoretical framework for self-determination and then institutionalizing that framework as a system of autonomy within a multi-national state. The Soviet Union continues to serve as an illustration of the significance of these ideas

---

31 See Lenin,I.V. The Right of Nations to self-Determination, supra.

32 See Cobban,A. The Nation-State and National Self-Determination, supra,p105..

even if, in practice, the autonomy of individual republics is limited.

Ultimately, the Communists, like Wilson, were forced to abandon self-determination, as we understand it, because they realized full self-determination for any of the socialist republics would threaten Central Russian access to raw materials and expose its peripheries to the threat of foreign intervention.

.....

E.THE RIGHT OF SECESSION

Unlike the principle of self-determination, the right of secession never found acceptance either among statesmen or political philosophers. Most often ignored as an inconvenient offspring from its parent principle, it was also derided as dangerous and impractical. Politicians and writers who have supported the principle of self-determination occasionally found it necessary to include a critique of secession. Others assumed that the two were mutually exclusive.

Grotius is the first to speak of a right of secession ("ius resistendi ac sessionis"[33]), though he only recognized

---

[33] See Grotius,H. De Jure de Belli et Pacis, supra, V.1, p139.

the right in extreme circumstances, favouring instead the maintenance of civil society at any cost. He states,

> "if, in fact, the right of resistance should remain without restraint, there will no longer be a state, but only a non-social horde"[34].

Much later Rousseau allied himself with the small state, and by implication secession, when states become so large that the General Will is incapable of being created[35]. Most writers at this time favoured the nation-state. Lincoln's assessment that secession was "the essence of anarchy" was accepted by most observers.

Even by the late nineteenth century, when the French were arguing that the doctrine of self-determination had been established as a natural right, German writers continued to oppose it, saying the principle was,

> "wrong in theory and value less in practice, [since] it contradicted the organic nature of the state and would permit secession"[36].

This fear of secession eventually drove French writers such as Despagnet[37], Litz[38] and Bonfils to reject the principle of self-determination in toto.

---

[34] Ibid.

[35] See Rousseau J.J, The Social Contract, supra.

[36] See Wambaugh,S. Plebescites, supra,p22.

[37] See Wells,B. UN Decisions on Self-Determination, supra,p18.

[38] Ibid,p17.

The general feeling was that to recognize a right to secede was to invite international anarchy. Nevertheless secessions did occur and were recognized as validly constituting new states by the international community. If one is to detect a certain pattern it is that the success (Poland in the 1770's, Ireland and Norway[39] in the early 20th century) and the failure (the American civil war and the attempted secession by Hungary in 1848) of secession can be attributed, not to the acceptance or non-acceptance of the right, but rather to a combination of political factors including the political will and military capacity of the parent state to prevent the secession, the sense of identity present in the seceding entity and the international situation.

Woodrow Wilson was conscious of these factors and his advocacy of the right of self-determination did not include approval of the right to secede. His concern was with internal self-determination (the establishment of free, democratic institutions in existing states) rather than the right of nationalities within a state to separate.

Only the Soviets gave the right of secession constitutional meaning. Devised by Stalin and included in the 1936 Constitution, it, in fact, amounted to nothing more than a theoretical right incapable of practical exercise.

.....

---

[39] See Wambaugh,S, Plebescites, supra,p24.

F.CONCLUSION

Self-determination had little practical application in this period despite its ideological significance. It had gained a precarious foothold in international law but had to await another major war to claim a central role in the regulation of state organization. The right of secession remained a political pariah standing in opposition to the legal and political trends of the time which pointed, not to separation and fragmentation, but rather to the strengthening of state sovereignty and the preservation of empire.

.....

CHAPTER II : A NOTE: THE AALAND ISLANDS DISPUTE

Abstract

The Aaland Islands are situated at the Gulf of Bothnia. They lie at a distance of about 50 kilometres form Sweden and 70 kilometers from Finland. Until 1809 the islands were part of Sweden. In that year they were conquered by Russia. The Treaty of Paris in 1856 led to their demilitarization. In 1917. The Aaland islands were incorporated into Finland when that country gained independence in 1917. However the islanders expressed a strong desire in a plebiscite that they be reunited with Sweden. Finland refused to recognize the plebiscite and the matter was brought to the Council of the League of Nations by the islanders and by Sweden.

.....

.....

Much of the legal jousting of the late 20th-century is prefigured in the Aaland Islands case where, for the first time, self-determination was the subject of international inquiry. The somewhat tortuous political history of the islands made this case a difficult one to resolve and inevitably political forces played a larger role in the outcome than the still-nascent principle of self-determination. Despite its recent high-profile, self-determination was to be consumed in the fires of territorial integrity and strategic bargaining. The final decision was paraded as victory for objective international legalism but the accompanying political intrigues[1] documented in the official records of the time revealed this objectivity as a facade.

The case rested on the primacy to be attached to the uncontested desire on the part of the Aaland Islanders to break from Finland and form a union with Sweden. However the matter was complicated by a number of geo-strategic, economic and even moral considerations which combined to marginalize the question of self-determination. Here is not

---

[1] See Barros, J, The Aaland Islands Question: Its Settlement by the League of Nations, New Haven and London: Yale University Press, 1968.

the place for either a summary of the history of the Aaland Islands or a recapitulation of the legal and political machinations of the League of Nations in the case itself.[2] Instead, we can ask, what was the nature of the principle of self-determination or secession invoked by the Commission of Jurists under the auspices of the League of Nations Council ? Commenting on the case afterwards,Charles Noble Gregory summarizes the decision as,

> " the limitation of the right of free self-determination, a toxic principle."[3]

His description is accurate but his acidity is both unwarranted and revealing. By the time of this decision the Wilson-inspired euphoria surrounding self-determination had subsided and even Wilson himself was unwilling to be recruited to the side of the islanders following his apostasy over self-determination in the Southern Tyrol when he was forced to flatly reject an application of the principle. Only the politically naive could fail to see the necessity of limiting the right of self-determination. The International Commission of Jurists' advisory report seriously circumscribed the possible implementation of the right of self-determination but came close to advocating a limited right of secession in its obiter dictum

---

[2] See Barros, J. The Aaland Islands Case, supra. See also, Walters,J. History of the League, p103-105.

[3] See Gregory,C.N. The Neutralization of the Aaland Islands, AMJ Int'l L. vol XVII, 1923, p76.

The Commission concluded that self-determination becomes an issue of international concern only when there is no,

> " definitive established political situation, depending exclusively upon the territorial sovereignty of the state "[4]

The case of the Aaland Islands fell into this category because Finland,

> " had not yet acquired the character of a definitively constituted state "[5]

However even in such a case self-determination, while it was to be regarded as an important principle, could not, according to the Commission, be the sole governing one since there were myriad other considerations to be taken into account, the most important being the interests of peace[6]. The Commission voiced a clear preference for the establishment of limited autonomy[7] for the islands over outright separation from Finland. This was in keeping with the post-war trend towards this form of compensation for minorities whose aspirations could not be fully accommodated by a reconstruction of Europe based on self-determination.

---

[4] See Official Journal, League of Nations, Special Supplement No 3, October, 1920, p14.

[5] Ibid, p14.

[6] See Barros,J. The Aaland Islands Question, supra, p304.

[7] The Aaland Islands were further protected from the threat of assimilation from the mainland by a policy of land ownership which made it difficulty for Finns to buy land on the islands.

The most interesting part of the judgement, for our purposes, concerned the right of secession. The Commission reserved judgement on whether it would recognize such a right in cases where there was,

> " a manifest and continued abuse of sovereign power to the detriment of a section of the population of a state."[8]

For the first time a question of self-determination was linked to human rights. Until then self-determination had been associated with a variety of concepts such as democracy, nationalism and popular sovereignty. This right of secession, tentatively envisaged by the Commission, appears to have no philosophical heritage and is markedly absent from the various Wilsonian derivations of self-determination. Few writers have seen fit to remark on this innovation and it receded from view until it was revived by the pivotal 1970 Declaration on Principles of International Law[9].

Aside from this remarkable, if inchoate, linkage the Aaland Islands Case raises a number of theoretical and practical problems for the principle of self-determination. The question of the character of the self-determining unit is barely raised. Was self-determination for the Aaland Islands a negation of self-determination for Finland as a whole ? Should the whole of the Swedish speaking population

---

[8] See Official Journal, supra,p5.

[9] See General Assembly Resolution 2625, Oct. 24, 1970.supra.

of Finland be included in the process ? Finland further argued that the Aalanders were incapable of self-determination since they had been the object of a Swedish propaganda campaign which had invalidated the consensus behind the secession from Finland. All these curious matters were of little moment next to the part played by the Aaland Islands in the larger political context. Indeed the Commission's stated task was to find,

> " an acceptable compromise based on considerations of commonsense and political expediency"[10].

Political expediency dictated that the status quo be maintained, contrary to the wishes of the Aalanders. Perhaps the decisive factor was the strategic significance of Finland's geographical position. The Western powers were eager to curry favour with the Finns, seeing Finland as a cordon sanitaire or buffer zone between Northern Europe and the Soviet Union.

Nevertheless, it would be wrong to perceive only a sheen of big power cynicism covering the affair. Self-determination was given serious consideration by the Council and the Great Powers. Secession was denied the islanders but an autonomy compromise partially satisfied the demands of both Finnish and Aaland nationalism. The case decision represents a clear theoretical advance on the Wilsonian

---

[10] See Official Journal, No 1, August, 1920, p5.

doctrine if only because both the limits and the possibilities of the right of secession were adumbrated.

.....

CHAPTER III

SELF DETERMINATION IN THE AGE OF THE UNITED NATIONS: DECOLONIZATION AND SECESSION.

OUTLINE

A. INTRODUCTION

B. SELF-DETERMINATION AND DECOLONIZATION

(i) Competing interpretations of self-determination....

(ii) The United Nations Charter.....

(iii) Customary international law.....

(iv) The International Covenants on Human Rights.....

(v) Decolonization and Self-Determination.....

(vi) A new phase: The 1970 Declaration on Principles of International Law.....

(vii) Summary of United nations Practice.....

C. THE UNITED NATIONS AND THE RIGHT OF SECESSION.

(i) The United Nations Charter.....

(ii) The International Covenants.....

(iii) The 1960 Declaration on the Granting of Independence.....

(iv) The 1970 Declaration on Principles of International law.....

(v) Conclusion.....

.....

A. INTRODUCTION.

The post-war years witnessed the elevation of self-determination from an occasionally-adhered to political concept[1] to the crown jewel in the international legal panoply[2]. This was exemplified by its inclusion in the United Nations Charter[3] as one of the organizations major purposes. Despite this, precise definition of the principle continued to escape the grasp of lawyers, politicians and international bureaucrats alike. Attempts to delimit the doctrine were models of obfuscation. Eventually anything beyond its vague restatement as an imperative for action was decried as colonial obstructionism or academic indulgence by those states in the majority, who sought to define it according to how it might best serve their interests.

Paradoxically, as the principle grew in significance, the number of opportunities for application reduced. Its

---

1 The Wilsonian doctrine of self-determination was essentially a political one. It was rejected in the major legal case concerned with the problem at the time (Aaland Islands) and found no place in the Covenant of the League of Nations. Its political application was sometimes haphazard, depending as much on the given exigencies than any devotion to consistency. See Chapter 2.infra.

2 The principle of self-determination was raised in the United nations General Assembly and in committee more often than any other principle. See Ofuatey-Kodjoe.W, The Principle Of Self-Determination in International Law, supra,p2.

3 See United Nations Charter Articles 1(2) and 55.

subsequent transformation from political principle to legal right was accompanied by a restriction in its revolutionary and humanitarian potential. These developments had two principle sources. At one level, there was a self-serving desire on the part of states to exclude the right of secession from the principle of self-determination. Secession was thought to have enormous disruptive potential in the new post-colonial states. This meant the evolution[4] of self-determination was attended by an abhorrence of its natural offspring, secession. The legal and political gymnastics this, position necessitated finally resolved into an espousal of double-standards on the part of statesmen and countless examples of ill-concealed legerdemain in legal and academic circles.

The other source of the development lay in the simultaneous drive to associate self-determination with decolonization. While self-determination was always recognized as a fruitful avenue through which the independence of the colonies might be achieved, it soon came to be identified exclusively with the process of decolonization. Such an identification had several purposes. First it had the merit of being morally laudable. Second, it reflected historical inevitability. Third,it served another useful purpose for the majority of United Nations member states because by making decolonization the only legitimate

---

[4] See Rigo Sureda, A. The Evolution of the Right of Self-determination: A Study of United Nations Practice. Leiden: Sitjhoff, 1973.

goal of self-determination it drew attention away from the principle of secession.

So while self-determination continued to evade definition at a theoretical level it was not, as many commentators have argued[5], incapable of inspiring consistent practical application. The principle of self-determination found a niche in the process of decolonization but this had the double-edged effect[6] of both securing its primacy while decolonization was at its apogee and threatening it with obsolescence as the process reached completion. At present, with only the vestigial peculiarities[7] of colonialism and certain special cases remaining[8], self-determination, as conceived by the UN, has been passively adopted as a principle without a purpose ; a right bereft of any potential recipients. It requires reactivation and reassessment. Only by renewing its umbilical connection with secession can such a renascence be achieved.

This chapter will investigate the UN's role in the developments I have just described and will conclude with an argument for the re-integration of self-determination and

---

5 See Pomerance.M, Self-Determination in Law and Practice, supra, and Neuberger, B, National Self-Determination in Post-colonial Africa, supra.

6 See Emerson, R. Self-Determination, AJIL. vol 65, 1971, p459-75.

7 See e.g. Gibraltar, Hong Kong, St Helena.

8 See e.g. South Africa, Namibia and Palestine.

secession based on a reformist rendering of the present legal position.

.....

B. SELF-DETERMINATION AND DECOLONIZATION

As we have seen, Wilsonian self-determination was a peculiarly European concept not only reflecting the values of the Western democratic tradition but also remaining European in its application. This continental parochialism was to be outmoded in the heady days following the Second World War. The UN was symbolic of, if not a rampant Utopianism, then certainly a sanguine universalism. But if Wilson's self-determination was transformed into a global principle it was also denuded of many of its complexities. The debates that took place over Wilson's theories, most notably during the Aaland Islands dispute[9], and the new insights these afforded were lost in the swirl of internationalism that greeted the end of the war. Toynbee's warning that,

> " self-determination is merely the statement of the problem not the solution of it"[10],

went unheeded. The problem was to be stated with alarming frequency in the future usually in conjunction with a confidence that it was a comprehensive solution.

---

[9] See Aaland Islands Chapter II infra.

[10] See Toynbee,A.J. Self-Determination, The Quarterly Review, 484, 1925, p317-338.

(i) Competing Interpretations of Self-determination.

The advocates of self-determination came from three different traditions, the Afro-Asian, Western and Soviet concepts of international law, and it was in the interplay between these traditions that most of the controversy of the second half of the twentieth century was aroused.

Afro-Asian self-determination was seminal among these traditions and it was this form that distinguished post-war from pre-war self-determination. Manifesting itself at first as an ill-defined yearning for freedom or independence, it eventually prevailed as the inspiration for the " new UN law of self-determination"[11].

World War Two had the effect of revealing as a myth the supposed invulnerability of the Western imperial powers. That this myth had been exposed by the defeated Japanese mattered little. The collective psyche of the colonial peoples had absorbed the message that the empires could be dismantled[12]. This was coupled with an awakening of the Third World from its political lethargy. Having fought with their colonial masters to rid the world of fascism many Third World colonies were ready to demand their reward. As a consequence as more independent states joined the UN so more

---

[11] See generally, Pomerance,M. Self-Determination in Law and Practice, supra.

[12] See Kohn,H. The United Nations and Self-Determination, Review of Politics, 1956.

international pressure was brought to bear on the colonial powers to allow further de-colonization. Anti-colonialism had become a potent force for self-determination. Soon, it was to engulf self-determination entirely.

The Western powers, on the other hand, were chary of self-determination and did not regard it as being of high priority. Only the anti-colonial stance of the USA prevented the Western powers from eschewing it altogether. Certainly the Western imperial powers were extremely antipathetic to the notion that self-determination might be used to facilitate the dismemberment of their empires. US democratic idealism fought a running battle with British colonial entrenchment on the issue. The Americans stressed the need for internal self-determination proclaiming, "...the right of all peoples to choose the form of government under which they will live"[13] but the British, adopting an archaic Wilsonian approach, insisted that such a tenet be applied only to those nation-states which had been submerged under Nazi domination. On the colonial question, Douglas Williams, the British colonial attache to Washington at the time, stated his position succinctly,

> "most of our territories, if the principle of self-determination were applied, would simply disintegrate as administrative units and fall apart on the basis of tribal divisions"[14].

---

[13] See Wells B, UN Decisions On Self-Determination, Michigan: University Microfilms, 1963, p54.

[14] Ibid, p57.

The British view of self-determination was transparently paternalistic and it was the influence of the British and the other major colonial powers that resulted in the adoption of an imprecise principle of self-determination in the Charter[15]. The Americans were at this point reluctant to alienate their allies in the face of a newly-perceived Soviet threat. Though they were eager, too, to curry favour with the new Afro-Asian states, American support for self-determination was regarded by the Afro-Asians as less than whole-hearted. In the absence of a power base for the new Afro-Asian states and American action in the UN it was left to the Soviet Union to promote self-determination at the early discussions over the UN Charter.

The Soviet version of self-determination needs to be seen in the context of Marxist-Leninist dogma. Soviet support for self-determination from Lenin through to the present day has been essentially opportunistic. If self-determination meant de-colonization for the Afro-Asian bloc and representative democracy for the West, then for the Soviet Union it was useful simply as a natural ally to revolutionary communism. Its conceptual framework was subordinated to the demands of the Communist manifesto. In the words of R.B. Levin,

> "...the abolition of colonialism and the rise of the new independent states constitutes the

---

15 See UNCIO, X, p441. See also Wells,B., UN Decisions on Self-Determination, supra, p57-64, Ofuatey-Kodjoe, W., The Principle of Self-Determination in International Law, supra,p104-105.

implementation of the principle of self-determination"[16].

This tells only half the story but it is the half the Soviets chose to amplify in the UN since it most accorded with the aspirations of the Third World states. Full implementation of self-determination for the Soviet Union meant a working-class revolution based on socialist principles. National self-determination was envisaged as a transitional phase between the break-up of empires and the formation of the socialist, multi-national state. National liberation and decolonization were means for the Soviet Union as surely as they were ends for the Afro-Asians.

(ii) The United Nations Charter

The principle of self-determination as contained in the UN Charter is as vague and unrevealing as one would expect given the wholly different traditions from which it was derived. The major powers ensured that the Charter said little that was concrete or illuminating and it was left to the new states of the UN to develop the principle in subsequent years.

The Atlantic Charter of 1941[17] represents an early statement of Allied intentions for the post-war reconstruction. Signed by the President of the United States and the Prime Minister

---

[16] See D.B.Levin, The Principle of Self-Determination in International Law, Soviet Y.B. Int'l L. 1962, p46.

[17] H.Doc. 358/77 CI 1941.

of the UK, it refers to the need to,"...respect the right of all peoples to choose the form of government under which they lives." This is without question a reference to internal self-determination[18] only and for example "all peoples", for the British at least, could only mean non-colonial, independent peoples.

The Dumbarton Oaks Proposals [19], the precursor to the Charter, omitted self-determination entirely from its purview. Article 1(2) of the Proposal simply mentions the need "to develop friendly relations among nations and to take appropriate measures to strengthen universal peace" There are two reasons for this omission. The first was the British aversion to a principle which contemplated the break-up of its empire. The second reason can be found in the general feeling that other principles such as the need to maintain peace and territorial integrity held incomparably greater significance in the stated aim of avoiding a repeat of the recent war.

It was the Soviet Union that sought to have the principle included in the Charter at the San Francisco

---

18 Internal self-determination is distinguished from external self-Determination elsewhere in this study. In this instance it refers to the right of the people in the European and North American democracies to maintain those democratic traditions.

19 United Nations, Documents of the United Nations Conference on International Organization, San Fransisco, 1945 New York: United nations Information Organization,1945. UNCIO III, p2-19.

Conference. It was successful in this only after an amendment discussion in Committee 1/1 in which

> "it was stated that the principle conformed to the Purposes of the UN only in so far as it implied the right of self-government and not the right of secession".[20]

Here we see for the first time an outright condemnation of secession without any clear indication of how it might be distinguished, in certain cases, from the right of self-government of peoples. No further definitions were thought necessary and the principle entered the Charter as Article 1(2) which stated one of the purposes of the UN to be,

> "to develop friendly relations among nations, based on respect for the principle of self-determination of peoples, and to take other appropriate measures to strengthen universal peace"[21].

It was on the basis of this nebulous enunciation that Lachs[22] and others felt able to assert that the UN Charter had confirmed what was already international law. However, existing international law represented most pointedly by the League of Nations Covenant, opinio juris and state

---

[20] See UNCIO VI, p296.

[21] Peace and security were elevated above the principle of self-determination in any reckoning involving the these issues. Self-determination was not at this time an independent value.

[22] See Lachs,M. The Law in and of the United Nations: Some Reflections on the Principle of Self-determination, Indian Journal of International Law, vol 1, 1961, p429-442

practice[23] appeared to deny the existence of a right to self-determination in customary international law. There was no mention of it in the Covenant and until 1945 the legitimacy of colonialism was rarely questioned. The UN Charter at best represented a cautious signal that self-determination was to play an important role in international affairs in the years to come. Article 1(2) was merely the skeleton awaiting the flesh of future UN instruments and changing state practice. Certainly, it was of secondary importance next to the principles of non-intervention (2(7)) and territorial integrity (2(4)) which were regarded as the supernorms of international law in the wake of the Third Reich. There is a strong conservative strain in favour of the status quo in the Charter so it is hardly surprising that a right of secession seemed a distant prospect in 1945 since the Charter is the most conservative of instruments dealing with self-determination the UN has yet produced. It is the only major UN document which denies the existence of a right to immediate independence through the exercise of self-determination. Chapters XI and XII make it clear that self-determination for non-self-governing and trust territories is to proceed at a pace dictated by the colonial administrators e.g. Article 73 (b) enjoins these powers

> "to develop self-government ...according to the particular circumstances of each territory and its peoples and their varying stages of advancement".

---

[23] We can hardly include under the banner self-determination the quest for lebensraum undertaken by Adolf Hitler in the name of Aryan self-determination.

Most writers have discerned here the genesis of a right to self-determination[24]. Lachs reads into article 2(1) a right of political independence and a right of independent peoples to choose their political structures and be free from interference[25]. A reading of article 1(2) and Chapter XI together obliges this writer to come to an entirely different conclusion. One can infer the existence of a goal of self-determination but at this stage there is certainly no right of self-determination. Furthermore the phrase lacks even the barest of definitions which might have given it juridical meaning.

(iii) Customary International Law.

Customary international law, in the form of state practice, supported the contention that self-determination was no more than a vacuous slogan. The colonial powers felt little obligation to precipitate the achievement of independence for their colonies. The British had in mind eventual independence for their colonies but pledged, "...to guide colonial peoples along the road to self-government within the framework of the British Empire"[26] (my emphasis). The French adopted an even more controversial

---

[24] See e.g. Ronen,D. The Quest for Self-Determination, New Haven: Yale University Press, 1979, p5.

[25] See Lachs,M. The Law in and of the United Nations, supra.

[26] See Ofuatey-Kodjoe,W. The Principle of Self-Determination in International Law, supra, p131.

policy that envisaged trusteeship as the first step leading to union with France. Their position was stated clearly at the Brazzaville conference of colonial administrators in 1944, in the following dictate,

> "The aims of the work of civilization accomplished by France in its colonies exclude all idea of autonomy, all possibility of evolution outside of the French bloc of the Empire; the eventual establishment, even in the distant future, of self-government is to be dismissed"[27].

Portugal, The Netherlands, Belgium and Spain pursued variations on one or both of these colonial philosophies and even the Americans, who had long been the sternest critics of Western imperialism, had reservations about self-determination for territories in their sphere of influence[28]. Meanwhile the Afro-Asians had yet to find their collective voice in the UN and many of them, in dialogue with the metropolitan states, were content to accept an incremental move towards independence through negotiation rather than immediate achievement of that goal. The Soviet Union, the original sponsor of self-determination at San Fransisco, continued to formally uphold the idea in its

---

27 See Hatch,J. A History of Post-War Africa, New York: Praeger Publishing, 1965, p37. Quoted in Ofuatey-Kodjoe,W. The Principle of Self-Determination in International Law,supra, p132.

28 See Kohn,H. The United Nations and National Self-determination, supra, p5. And note too, former secretary of state, Cordell Hull who claims the US purpose was, "...to support the attainment of freedom for all peoples who, by their acts, show themselves worthy of it and ready for it."(my emphasis), quoted in Ofuatey-Kodjoe,W. The Principle Of Self-Determination in International Law, supra p101.

constitution[29] while denying it to a succession of nations who became either part of the Soviet Union itself (Lithuania, Latvia and Estonia) or were absorbed into what became known as the Soviet Bloc (e.g. Poland, Czechoslovakia and Hungary). The UN itself in sanctioning the demarcation of Germany, Korea and Vietnam along cold war lines had, in effect, abrogated the principle of national self-determination in favour of the interests of peace and security. Most pertinent, was the absence of any mention of self-determination or minority rights in the Universal Declaration on Human Rights[30] drafted in 1948. Intended as the instrument from which human rights would be developed progressively it is perhaps appropriate that self-determination was not included since the right of self-determination was about to explode on the scene in a most non-evolutionary manner.

(iv) The International Covenants on Human Rights.

The two decades following the Universal Declaration was a period marked by the end of empire. Decolonization and the principles behind it became totems of international law and organization and self-determination was enlisted to the cause with little thought for either its heritage or potential. Self-determination became as synonymous with

---

29 See The Soviet Constitution 1933 and 1970.

30 UN DOC. A. 1811.

independence in the Third world in this period as it had been with nation-state building in post-World War One Europe[31]. From this moment on, "anti-colonial results [were] deemed more important than genuine self-determination methods"[32]. If the UN Charter had been an attempt to give political significance to what had been a moral principle by making self-determination a political aspiration of the UN then the various declarations and resolutions made in the UN during the 1960s strived to give the political winds of change some legal basis. Lachs[33] states, "this is how life implements the principle of self-determination." It could be more accurately described as a hijaking rather than an implementation of the principle for it was transformed from a multifarious democratic ideal into a monotheistic anti-colonial imperative.

A mere two years after the Universal Declaration, the General Assembly recognized the right of self-determination as a fundamental human right[34]. In 1951 the Commission on Human Rights at its 7th session adopted the following proposal,

> "By resolution 545 (VI) the General Assembly decided that the covenant or covenants on human

---

31 See generally, Cobban,A. The Nation State and National Self-Determination, New York: Crowell, 1969.

32 See Pomerance,M. Self-Determination Today: The Metamorphosis of an Ideal, 19 Israel Law Review,p329.

33 See Lachs,M. The Law in and of the United Nations, supra p441

34 See G.A. Resolution 421 V Dec 4th, 1950.

> rights should include an article on the right of all people and nations to self-determination"[35].

By 1955 the Third Committee had decided to include the right in both the draft covenants on human rights being prepared at the time[36]. The Western European states opposed the inclusion of a right of self-determination on a number of grounds. Initially they argued that since self-determination was a principle rather than a right it would be premature to include it as a right in the international covenants[37]. Furthermore, representatives from these states argued that the Charter did not provide immediate self-government for trust territories through exercise of the right to self-determination[38] and that anyway the principle of self-determination was too complex to be translated into legal terms[39]. History, however, was with the new and increasingly vociferous Afro-Asian bloc in the UN. Adopted in 1966, both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights contained at Article One the following provision,

> " all peoples have the right to self-determination. By virtue of that right they freely

---

35 A/2929, Chapter IV, #1.

36 See GAOR 10th Sess. 1955/Annexes, agenda item 28-I (A/3077, para 77).

37 See E/CN.4/SR 253,p7 (GB) and E/CN.4/SR 243,p11 (B).

38 See A/C.3/SR.309, #59 (GB)

39 See A/C.3/SR.311, #21-23 (F) and A/C.3/SR.647, #19 (AUS).

> determine their political status and freely pursue their economic, social and cultural development".

These two covenants were to have legal force only between the signatories but were they also declarative of international law per se? Brownlie argues that they "represent authoritative evidence of the content of the concept of human rights as it appears in the Charter of the United Nations"[40]. Unfortunately self-determination does not appear in the Charter as a human right. Rosalyn Higgins, thus, proposes the following convincing method for ascertaining the status of a legal proposition:

> "What is required is an examination of whether resolutions with similar content, repeated through time, voted for by overwhelming majorities, giving rise to a general opinio juris, have created the norm in question"[41].

Using her formula self-determination could be said to have acquired the status of a principle but not yet that of a fully formed right[42].

(v) De-colonization and Self-determination at the General Assembly.

---

[40] See Brownlie,I. Basic Documents on Human Rights, 2nd ed., Oxford: Clarendon Press, 1981,p150.

[41] See Higgins,R. The UN and Lawmaking: The Political Organs, 64 AJIL 43, (Sept, 1970)

[42] See state practice on this point and in particular the dilatoriness of the Western colonial powers in accepting the legitimacy of self-determination for their colonies. Gross argues that decolonization at this point was a matter of "political expedience" rather than legal approval. See Gross.L. The Right of Self-Determination in International Law, in New States in the Modern World, ed Kilson,M. New York: Harvard University Press.

The General Assembly,in 1960, passed two resolutions within twenty-four hours of one another which further established the principle of self-determination as the conceptual mechanism behind the act of independence. The Declaration on the Granting of Independence to Colonial Countries and Peoples (Resolution 1514)[43] attempted to amend the Charter without going through the appropriate amendment procedures. The Declaration heralded a revolution in international law. As a result, writers such as Pomerance[44] and Ofatuey-Kodjoe[45] have lambasted it as unconstitutional. Its premises, outlined in the Preamble, were contentious (for 1960) and reveal a number of assumptions on the part of the drafters that are only partly realized in fact. It recognizes "the passionate yearning for freedom on the part of all dependent peoples", yet in subsequent years territories such as the Cook Islands and Puerto Rico[46] were to favour integration rather than freedom from their parent states. Similarly Portugal and France might have taken some exception to the notion "that all the peoples of the world

---

[43] G.A. Res. 1514, Dec 14, 1960, 15 UNGAOR Supp. (no.16), 66, UN Doc.A/4684 (1960).

[44] See Pomerance,M. Self-Determination in Law and Practice, supra p11-12

[45] See Ofuatey-Kodjoe,W. The Principle of Self-determination in International Law, supra, p121-122

[46] See G.A. Resolution 748 (VIII), 27 November 1953 which accepted that the Puerto Rican people had "effectively exercised their right to self-determination".

ardently desire the end of colonialism in all its manifestations".

Nevertheless, this "Magna Carta"[47] of decolonization accurately reflected, at least in spirit, the prevailing current in international law. The UN Charter had become something of an anachronism in its references to non self-governing and trust territories and the pattern of meticulous preparation for independence was scrambled in favour of,"a speedy and unconditional end to colonialism." Principle 3, the most radical in its departure from the UN Charter, states, "inadequacy of political, economic,social or educational preparedness should never serve as a pretext for delaying independence". Colonialism was thus identified as the great evil in the modern world and was said "to constitute a threat to the peace" which, under international law, took it outside the proscription against outside interference.

A number of points can be usefully extracted from this declaration. First, there is little contained therein to suggest a move towards recognition of a right to internal self-determination i.e. the right to representative government and freedom from discrimination. Only those territories "which have not yet attained independence" are regarded as relevant subjects for the right of self-determination even if this right must be exercised according

---

[47] See Gros Espiell,H. The Right to Self-determination, New York: United Nations, 1980,p8.

to the "freely expressed will and desire" of the people. Second, preservation of territorial integrity (article 6) remains a supernorm of the UN and the artificial boundaries imposed on the colonies by the Congress of Berlin were thus given tacit approval. This gave legal approval to the quite literal change of subject matter (of self-determination), described by Cameron, from pre-World War Two's "cultural and linguistic communities without political organization" to the present, "...politically defined but culturally diverse colonies and ex-colonies of the developing world..."[48]

Resolution 1541,[49] passed the following day, is a cautious restatement of the UN Charter chapters on dependent and trust territories. In the light of its predecessor (Resolution 1514) it can be viewed as somewhat incongruous given the current trend. It upholds the provisions of the Charter which Resolution 1514 appears to abjure and says nothing of the need for an immediate end to colonialism. Additionally, it provides a number of alternatives[50] to complete independence which are conspicuously absent from the previous day's resolution. The simplistic notion of self-determination then in vogue is embroidered with a

---

48 See Cameron,D. Nationalism, Self-Determination and the Quebec Question, supra,p99.

49 G.A. Res. 1541, Dec 15, 1960, 15 UNGAOR Supp. (No 16), 29, UN Doc. A. / 4684 (1960).

50 See Principle VI. The alternatives offered are (a) emergence as a sovereign independent State, (b) free association with an independent State, (c) integration with an independent State.

number of other ideas so that while it remains fully-identified with decolonization it is no longer thought to be necessarily synonymous with independence. Alternatives to independence are offered but these do not include a right of secession. The colonial political unit remains sacrosanct.

(vi) A New Phase: The 1970 Declaration on Principles of International Law.

The UN Declaration on Principles of International Law [51], adopted in 1970, develops the right of self-determination still further but provides few clues as to how a precise definition of terms might be accomplished[52]. It is content to remain loyal to what Arangoir-Renizz calls "the big print of self-determination"[53] failing to grapple with its hidden agendas. Nevertheless, as the most recent major resolution, concerning self-determination it represents the

---

51 G.A. Res. 2625, Oct 24th, 1970, 25 UNGAOR Supp. (no. 28) 122, UN Doc.A/8028 (1970).

52 See Cassese,A. Political Self-Determination - Old Concepts and New Developments, in UN Law Fundamental Rights, Two Topics In International Law, ed. Cassese, Alphen aan den Rijn: Sitjhoff & Noordhoff, 1979, p143 in which he states, "The Declaration suffers from the same defects of ambiguity and vagueness that marred the Covenants."

53 See Arangior Renizz, The UN Declaration on Friendly Relations and the Systems of International Law, Netherlands: Sitjhoff Noordhoff, 1979, p131.

highest development yet of UN law[54]. At least one writer makes the point that,

> "it is no overstatement to say that the elaboration of the principle of self-determination in the 1970 Declaration provides the cornerstone of the UN approach to the concept"[55].

The Declaration on the Principles of International law is innovative in two distinct and significant ways. First, it proclaims not only a right of self-determination but also "a duty to respect this right in accordance with the provisions of the Charter" and "a duty to promote...realization of the principle of...self-determination of peoples...". So, for the first time there is reference to correlative duties even if the object of these duties is not identified. Secondly, and more importantly, it links self-determination with human rights and reforges the bond between democratic representation and self-determination as part of that linkage.[56] For the purposes of this resume it can be said that the 1970 Declaration reinforces the belief that self-determination has ascended to a prominent, if not predominant, position amongst the principles of international law. It can be

---

[54] It represents seven years work in committee and on the floor of the General Assembly. Brownlie claims that this contributes a normative character to the Declaration. See Brownlie,I. Principles of International Law, 3rd ed., Oxford: Clarendon Press, 1979,p15,595.

[55] See White,R. Self-determination: Time for a Reappraisal, Netherlands International Law Review, 28 1981 p147.

[56] See infra for a detailed analysis of the significance of this development to both international law and the thesis presented in this study, Chapter Eight.

described at this stage as a right but only in certain clearly defined (by state practice) cases.

(vii) Summary of UN Practice.

In the following section certain theoretical conclusions are abstracted from the preceding narrative in reference particularly to the identification of self-determination with decolonization , the distinction between internal and external self-determination and the position of secession in international law.

From at least 1950, national self-determination, the dominant variation of self-determination up to this point, was relegated to the position of an historical obscurity and replaced by colonial self-determination, a theory whose sole concern was with the termination of white colonial domination. Colony replaced nationality as the identifying characteristic of the object peoples of self-determination[57] and with the rise to prominence of the salt-water theory of colonialism it became possible to deny a right of self-determination to a European nation such as Lithuania while asserting it for a piece of African territory arbitrarily arranged by the colonial powers with little thought for

---

57 See Sinha,S.P. Is Self-determination Passe ?, Columbia Journal Of Transnational Law, vol 12, 1973, p260-273.

ethnic contiguity. As Connor[58] reminds us, it is artificial borders and not ethnic distributions which provided the physical springboard for action.

If this reconstruction of the principle had the merit of giving it substance and clarity, it also initiated the beginning of a period in which the democratic dimension of self-determination was reduced to the position of a rhetorical device. External self-determination, meaning the right of peoples to choose the sovereignty under which they wish to live, had become the only meaning subscribed to by the majority of members in the UN. Internal self-determination, a Wilsonian construct stressing the right of peoples to choose the type of government by which they wished to be represented, was regarded as an unnecessary encumbrance to the newly-independent Afro-Asian states. What resulted was what Beloff describes as the replacement of one ruling elite with another[59]. In this way "...government itself, in the modern sense, gave way to direct and corrupt personal rule[60]." The UN never enquired as to what democratic standards were being met in the the newly-independent states. The achievement of self-determination was regarded almost universally as, quite literally, a

---

58 See Connor,W. Self-Determination: The New Phase, World Politics, vol 20, 1967, p31.

59 See Beloff,M. Self-Determination Reconsidered, Confluence: An International Forum, vol5, 1956, p195-203.

60 Ibid, p200.

desirable end. This universal acceptance had sveral consequences.

By the time this end had been achieved in virtually all the ex-colonial territories it was possible to state authoritatively that a right of self-determination in colonial cases had been established[61]. Engers noted that, "ex origine it (self-determination) is not a universal doctrine but rather a specific concept relating to the international law of decolonization"[62]. Behind this statement lies a number of complicating factors which require investigation.

Self-determination had indeed become associated with decolonization but only with a very precisely defined form of decolonization. In fact self-determination had never before been so closely circumscribed by ideological limitations. Conversely, international legal documentation continued to provide only vague signposts on this developmental road and these were open to interpretations not always consistent with a practice that had become pervasive. Finally, the application of self-determination was not completely consistent despite this new specificity. So, to Pomerance's argument that the new UN law of self-

---

[61] See, Higgins,R. The United Nations and Law-making, supra. And note that even sceptics like Emerson are willing to admit this much.

[62] See Engers,J.F. From Sacred Trust to Self-determination, in Essays on International Law and Relations, ed. H. Meijers and E.W. Vierdag, The Hague: Sijthoff-Leyden, 1977, p88.

determination was morally hypocritical[63], one could add the further criticism that even on its own terms it was technically inconsistent.

The source of this confusion lies in the right of secession, a right that in certain cases had great moral weight but remained politically anathema to all sovereign states. Until secession is successfully dealt with this confusion will continue to inhibit the development of the principle of self-determination.

The various attempts to define "peoples" for the purposes of self-determination often seem like exercises in futility dedicated to the circumnavigation of the right of secession.

In the era of self-determination as decolonization, the position held by some writers that "peoples" under the UN Charter and the series of instruments following it had come to mean, "communities that live under (but do not share in) alien sovereignty"[64]. A closer reading of the major resolutions indicates a more precise definition. The Declaration on the Granting of Independence (G.A.Resolution 1514) relates self-determination to "the subjection of peoples to alien subjugation"[65] and specifically mentions colonialism three times. The 1965 Declaration on the

---

[63] See generally Pomerance,M. Self-Determination in Law and Practice, supra.

[64] See Ofuatey-Kodjoe,W. The Principle of Self-Determination in International Law, supra, p111.

[65] See paragraph 3.

Admissibility of Intervention in Domestic Affairs and Protection of Their Independence and Sovereignty requires ,

> "All states [to] respect the right of self-determination and independence of peoples and nations, to be freely exercised without any foreign pressure, and with absolute respect for , human rights and fundamental freedoms. Consequently all states shall contribute to the complete elimination of racial discrimination and colonialism in all its forms and manifestations"[66] (my emphasis).

The Declaration on Principles of International Law (Resolution 2625) makes a similar linkage but it is the resolution outlining the Definition of Aggression[67] that is most illustrative of the prevailing current. It applies the right of self-determination to "peoples under colonial and racist regimes or other forms of alien domination"[68]. The Bandung Conference communique in 1955 affirmed that, "colonialism in all its manifestations...should especially be brought to an end" but noted in addition that, "the exercise of the right of self-determination is the prerequisite of...especially the eradication of racial discrimination"[69] (my emphasis). Clearly, then Umozurike is right to say that, " there is almost complete unanimity that self-determination applies to colonial peoples"[70] but he is

---

66 G.A. Res. 2131 (XX), 12 Dec. 1965.

67 See G.A. Resolution, 3314 XXIX, 14 December 1974: Annex.

68 See Article 7.

69 See Ofuatey-Kodjoe,W. The Principle of Self-Determination in International Law, supra, p141.

70 See Umozurike,U. Self-determination in International Law, Conneticut: Archon Books, 1972, p190.

content to leave it at that. This is a serious error since "colonial self-determination" throughout the fifties and sixties referred to a highly specific mode of self-determination for which the prefix colonial provides an insufficient explanation.

The Afro-Asians, and consequently the UN itself, subscribed to a theory of salt-water colonialism[71]. Self-determination could only apply to territories which were separated from their metropolitan parent by oceans or high seas. In this way, overland acquisitions such as those made by China and the Soviet Union were excluded from consideration. Excluded too were the ethnic groups within a colonial territory who regarded "the majority rule"[72] as alien or oppressive. In the absence of any requirement that there be strict adherence to internal self-determination it was <u>almost</u> enough that the elite no matter how oppressive unrepresentative, was at least not attached with the colonial stigma (in the salt-water sense).

Although self-determination was attaining some measure of conceptual consistency it could not, based as it was at the time on a salt-water definition of colonialism, deal effectively with South African rule in Namibia or Rhodesian

---

71 See e.g. G.A.Res. 1541,supra, describing colonies as "geographically separate and...distinct ethnically and/or culturally from the country administrating it."

72 See Higgins,R. <u>The Development of International Law</u> Through the Political Organs of the UN, London: Oxford University Press, 1963, p105.

U.D.I.[73] since neither white elite was connected to a metropolitan power. Hence, a racial element was introduced. Self-determination was to apply where a racial elite was denying representation to other racial groups. This dealt with the Namibian and Rhodesian questions but raised further ones about tribal rule in the rest of Africa. In order to circumvent this difficulty an additional criterion was incorporated. Mazrui[74],its prime academic exponent, termed the result "pigmentational self-determination" meaning that self-determination could only apply where there was white European or pseudo-European domination. Thus, the ruling religious or racially discriminating elites in the likes of Eritrea, East Pakistan (now Bangladesh) and Biafra were deemed acceptable even though the peoples indigenous to the territory regarded the controlling regime as colonial.

Furthermore, there was approbation in the UN for the Moroccan absorption of Ifni and the Indonesian assimilation of West Irian and a multitude of other situations where the principle of self-determination was ignored because there was no "foreign" domination where, as Neuberger states, "foreign = European"[75]. The Syrians argued that providing the dominant elite was not foreign to the whole continent it

---

[73] Unilateral Declaration of Independence from Britain.

[74] See Neuberger,B. National Self-Determination in Post-Colonial Africa, supra, p83.

[75] Ibid p85.

should be regarded as indigenous, and therefore legitimate. This argument held sway in the UN.

To summarize, self-determination during the period in which the Afro-Asian voice in the UN and world affairs had most resonance, was defined as the right of external independence from white European colonial rule held by the majority within an historically-defined territory. It did not apply to ethnic groups within these territories nor to majorities who were being oppressed by non-white alien elites. Neither secession nor democratic representation were regarded as part of this novel right of self-determination.

Not surprisingly these assumptions are being challenged and a multitude of concepts from secession to African colonialism and embracing human rights are now being employed to unearth the sins of internal oppression.

.....

C. THE UNITED NATIONS AND THE RIGHT OF SECESSION.

International law has yet to admit a right of secession. This proscription was particularly intense during the previously discussed years of decolonization and can be illustrated with reference to state practice, international legislation and the pronouncements of politicians, UN delegates and academics. This is hardly surprising for a

number of reasons. First international law is, after all, the law intended to regulate the behavior of states and is therefore premised on the existence of state sovereignty and territorial integrity. Secession flies in the face of these sacred norms. Second, individual states and, more particularly, the ruling elites in these states have a well-founded fear that a right of secession would bring about the dismemberment and ultimate destruction of the state and with it their power base.

From the conclusion of World War Two, the UN, and the states of which it is composed, have attempted, often unsuccessfully, to maintain a balance between the potentially conflicting principles of self-determination, territorial integrity (including non-interference) and human rights. This precarious balance has been undermined by the requirement that secession be outlawed in all possible cases The result has been that the UN has become bogged down in a miasma of political compromises, legal tautologies[76] and rhetorical contradiction. Ironically, the quest for the full realization of human rights has been sacrificed at the altar of self-determination, putatively the very right from which a great many others must spring. Until self-determination ceases to become a cover for the right to abuse one's nationals without the fear of an internationally sanctioned

---

76 See Pomerance,M. Self-determination in Law and Practice,supra.

right to secessionist agitation, it will continue to impede the cause of human rights throughout the globe

In terms of its legality the right of secession regressed from the position it held just after the First World War. Then, the secessions of Czechoslovakia and Yugoslavia were given the imprimatur of the League of Nations. Contrast this with attempts made by Katanga and Biafra to secede in recent years which were met either with condemnation or complete silence from the UN [77].

(i) The United Nations Charter.

The UN Charter contains nothing directly pertaining to the subject of secession. However, it was made obvious at discussions during the drafting of the Charter that the principle of self-determination could not incorporate a right of secession under any circumstances. At San Fransisco, the Committee debating the Charter provisions stated,

> "Concerning the principle of self-determination...it was stated that the principle conformed to the purposes of the Charter only in so far as it implied the right of self-government of peoples, and not the right of secession..." [78].

---

[77] See O'Brien,C.C. The Right to Secede, New York Times, Dec 30. U. Thant, the Secretary-General of the United Nations at the time of the Biafran secession condemned it in the clearest possible terms as a threat to sovereignty.

[78] See UNCIO, Doc 343, I/1/16.

Most of the state representatives supported this aim but there were exceptions. The Soviet delegate claimed that all nationalities had sovereign equality which in certain cases could become a right of secession[79]. He defined nationality in its broadest possible sense to mean national communities under alien subjugation. The Belgians, too, saw in the draft proposal an unintended approval of secession and in an attempt to clarify the position advanced the following thesis :

> "One speaks generally of the equality of states ; surely one could use the word, "peoples" as an equivalent for the word, "states", but in the expression "the peoples right of self-determination" the word "peoples" means the national groups which do not identify themselves with the population of the state"[80].

Meanwhile, the UN drafters were reluctant to enter into a debate about the nomenclature of self-determination and instead made every effort, no matter how semantically ill-fated, to widen the ambit of self-determination without allowing a right of secession.

(ii) The International Covenants.

Similar concerns to those mentioned above were raised at the committee stage of the International Covenants on Human Rights and the words of Abraham Lincoln warning of the

---

79 See Ofuatey-Kodjoe,W. The Principle of Self-Determination in International Law, supra, p108.

80 See UNCIO, Doc 374, I/1/17.

potential for anarchy inherent in a right of secession[81] were mirrored in the statements of a number of delegates. The Iranian delegate cautioned that, "...if self-determination was misused and considered as an absolute right nothing but anarchy would ensue"[82]. He went on to warn that,

> "...no country would be in existence if every national, religious or linguistic group had an absolute and unrestricted right to self-determination"[83].

The hierarchy of norms recognized by most member states was outlined by the Indian delegate in a later discussion when he said,

> "neither national sovereignty nor territorial integrity must be infringed under the pretext of self-determination"[84].

But attempts at a more complex definition descended into sophistry. The confusion of the Irish delegate was typical,

> "...the only valid standard was the subjective one, in the sense that any group of people living in a determinate territory constituted a nation if it was conscious of itself as a national unity and asserted itself as such. That did not cover the right of strictly local groups to secession, which would in effect, shatter the right to self-determination"[85].

---

81 See Emerson, R. Self-determination Revisited in the Era of Decolonization, Occassional papers in International Affairs, no 9, December, 1964. supra, p30

82 See A/C/3/SR/888

83 Ibid, at para. 25.

84 Ibid at 891.

85 Ibid at 887.

What are "strictly local groups"? What is a "determinate territory"? The questions raised by such "definitions" multiplied as surely as the solutions remained unattainable. Futhermore, if one school of thought at these discussions was represented by the confident assertion that self-determination was, "a matter which was solely of interest to colonial territories"[86] then another was equally attracted to the somewhat naive Soviet proposition that,

> "the General Assembly should not undertake theoretical studies of such simple ideas as "self-determination", "peoples" and "nation"..."[87]!

The covenants themselves with their bare assertion that "all peoples shall have the right to self-determination"[88] indicate that this reductive view had prevailed.

(iii) The 1960 Declaration on the Granting of Independence.

The 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples[89] recognizes the right of self-determination of peoples and by "peoples" it clearly has in mind dependent peoples in single territorial units. By highlighting the principle of territorial integrity it has the obvious intention of excluding the right of

---

86 Ibid at 894.

87 Ibid at 890.

88 Article 1 of both covenants.

89 G.A. Res. 1514, December 14, 1960.

secession from these units. It is unsuccessful because of a failure to define its terminology precisely enough. In the preamble it notes that,

> "all peoples have an inalienable right to...the integrity of their national territory"(my emphasis)

and Principle 6 states,

> "any attempt at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations"(my emphasis).

The interchangeable nature of these concepts obscures the meaning of the Declaration. Based on a traditional derivation of the word, "nation" it sees plausible to make a textual claim that the clause dealing with territorial integrity does not, in all cases, prohibit secession since it is not the territorial integrity of an arbitrary political unit that is being asserted but rather that of a national unit. One can argue for example that the Nigerian state is made up of several national groups[90] and that, therefore, the revolutionary creation of a new territorial unit contiguous with a nationalistic impulse does not offend the proscription against the disruption of territorial integrity and would simply represent the exercise of a "peoples'" right to self-determination[91].

---

[90] But note that the United Nations did not characterize Biafra as a "national unit".

[91] See Pomerance,M. Self-determination in Law and Practice, supra, p318, where he states, "there is no Charter-derived necessity to preserve the territorial integrity of a colonial unit".

(iv) The Declaration on Principles of International Law.

The possibility that a right to secession might exist finds its most forcible legal expression in the 1970 Declaration on the Principles of International Law[92]. Having re-affirmed the existence of a right of self-determination, and three modes of implementing that right, a clear advance on the "self-determination=independence" equation, the Declaration includes the usual admonition against breaching the territorial integrity of a state. Typically used as a protective device against the possibility of secession, such clauses appear at the conclusion of most UN instruments dealing with self-determination. However the 1970 Declaration adds an important rider to the prohibition which seems to have the effect of allowing secessionist activity under certain circumstances. The passage reads:

> "Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent 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"(my emphasis).

This is important because it fulfills a promise, often alluded to in previous resolutions, namely the promise that self-determination could be fully integrated with human

---

92 G.A Res.2625, October 24th, 1970, supra.

rights This declaration takes the first step in readmitting elements of the Western democratic tradition into the principle of self-determination. Interestingly, it appears to sanction "action" (secession ?) dedicated to the dismemberment of the territorial integrity of states with governments which are unrepresentative. There are two crucial caveats to be noted. First, there must be some racial or religious discrimination accompanying this lack of representation in order that the territorial integrity prohibition cease to apply. Second, such an interpretation is not reflected in state practice[93].

(v) Conclusion.

Nevertheless such conditions of government have existed in a number of states from Bangladesh[94] to Guatemala (where the indigenous Indian population are excluded from government) and in more progressive states such as the Soviet Union and Turkey[95].

If the United Nations is to play a role in alleviating the suffering caused by governments and experienced by

---

[93] See infra, Chapter Eight.

[94] See infra, Chapter Five.

[95] In the Soviet Union there is a strong Russian bias in Government and there is no representation of religious groups. In Turkey the Kurds and Armenians have been persecuted for centuries and appear to be excluded from representation in the government.

minorities throughout the world it must redefine the responsibility of the nation-state. Self-determination can be saved from the desuetude threatened by the end of colonialism only by a theoretical reattachment to human rights and a flexible approach to the principle of territorial integrity. The Declaration on the Principles of International Law[96] can provide a declarative basis for such a realignment. In order for this to occur the limits of a right to secede must be given legislative effect at the United Nations.

.....

The remaining chapters of this study will investigate methods of determining the criteria relevant in the formulation of these limits beginning with a detailed survey of five cases where a right to secede was or is asserted.

.....

---

[96] G.A. Res. 2625, October 24th, 1970,supra.

CHAPTER IV

ERITREA : THE NEW COLONIALISM AND SECESSION.

OUTLINE

Abstract

Ethiopia is an independent country in North-Eastern Africa bordered by Sudan (to the North and West), Somalia (to the East), and Kenya (to the South). It has a coastline of 628 miles on the Red Sea. The capital is Addis Ababa. A 1974 census put the population at 28 million. Eritrea lies in the Noth-West on the Red Sea coast. Its capital is Asmara. As in the rest of Ethiopia, there is a division between those following Christian doctrine and those who are Moslems. A similar division can be made between Caucoscoid and Negroid peoples. There are no tribal divisions as such, only linguistic groupings. In 1974 a Marxist regime replaced the monarchy and this regime continues to pursue the civil war with the Eritrean secessionists (EPLF) that began in 1952. That civil war is the subject of the following discussion.

.....

A. Secession and Neo-Colonialism.

It is one of the many ironies of the Eritrean situation that while it may seem in the context of this paper to represent the epitome of an attempted secession, the whole premise of the Eritrean rebels' philosophy is in fact that their cause has nothing to do with secession or separatism but is a movement dedicated to the the throwing off of the yoke of a new colonialism[1]. In other words this is a war of national liberation more closely paralleling the post-World War Two struggles for independence made by former colonies in black Africa than the more recent separatist agitations and uprisings in places such as Katanga and Biafra.

These accusations of neo-colonialism directed against the Ethiopians are more than a matter of mere revolutionary semantics. But in describing the Eritrean conflict as secessionist there need not be inferred a disavowal of the legitimacy of the Eritrean quest for self determination. For if the typology developed later is to include the notion of legitimate secession then it must accept too that those

---

[1] See, e.g. Andemarian Gebremichael's complaint that," many in the media continue mistakenly to describe Eritrea as an "Ethiopian province" and its freedom fighters as "secessionists". Such characterizations have greatly damaged the cause of the Eritreans and their efforts to survive war and famine. Eritreans are not fighting a war of "secession" ; they never have been a part of Ethiopia. They are fighting a war of occupation of their homeland by a neighbour'. See Christian Science Monitor, July 4-10, 1988.

seeking continued domination over the secessionists are oppressive in some way. The term colonialism has been extended by most revolutionary movements to include any domination they perceive to be illegitimate and in some cases evidence of neo-colonialism is undeniable[2]. Therefore, this newly-defined colonialism and secession can no longer be regarded as mutually exclusive phenomena.

Indeed the question of colonialism, and the dispute over its correct characterization and relationship to secession, lies at the heart of this (Eritrean) matter and many others involving non-metropolitan or indigenous colonialism. At the crux of the Eritrean position is the contention that continuing Ethiopian rule over their land constitutes the replacement of white (Italian and latterly British) imperialism with black colonialism. This argument is not peculiar to the Eritreans and has been employed by a number of similar groups (e.g.like the Polisaro guerrillas of the Western Sahara who have no difficulty in equating their new Moroccan masters with the departed Spanish).

This central issue is further complicated by a number of factors such as ethnic composition, geostrategic location, historical anomaly and geographic significance. It is these that highlight Eritrea as an ideal case study. Eritrea represents a theoretical and practical test case for

---

[2] See infra, Chapter V.

the future development of the stagnant[3] principle of self-determination. What is drawn from the investigations here can be extrapolated successfully to cover other situations and, more importantly, provide further insights towards a unifying theory of secession.

Neither of the two most immediate parties to the conflict, the Ethiopians and Eritreans, deny the existence of the right to self-determination and both accept its application to the issue. The real essence of the dispute lies with the form self-determination for the Eritreans should take. The Ethiopians favour a limited form of self-determination based on a purely formal grant of provincial autonomy for Eritrea, similar to that acquired by the Soviet socialist republics, with the real power residing in Addis Ababa. They are unwilling to negotiate away any part of Ethiopia's ultimate sovereignty over Eritrea. Ethiopian intransigence has led to the seemingly never-ending civil war. However, it is matched by an equally stubborn insistence by the Eritrean People's Liberation Front (EPLF) that nothing short of complete independence for Eritrea will be sufficient to put an end to hostilities on their part. Both sides have advanced a number of arguments to support their respective cases and if it is on the battlefields of southern Eritrea that this matter is currently being

---

[3] The principle of self-determination is at risk because of its recent confinement to colonialism. With the end of colonialism it has been reduced to the level of political slogan.

contested, it is nevertheless the less lethal theoretical positions with which this chapter will be primarily concerned.

.....

B. Eritrean History and Its Significance for Self-Determination.

The task of validating the historical claims of the two parties is one that has occupied the minds of all scholars wishing to make a serious study of the political situation in modern Eritrea. The debate centres round the question of whether Eritrea has "always" been part of Ethiopia or whether its assimilation was a recent turning point in the history of a previously discrete entity. Most commentators approaching this matter hold the view that a decisive resolution of this debate would lay to rest the whole question of self-determination. It is perhaps more fruitful to see this issue as only one of many which must be resolved in order to ascertain the legitimacy of the two claims. No doubt it is banal to remind ourselves that justice in the present and future is unlikely to be grounded in an unquestioning acceptance of the injustices of the past. This is particularly true when that past provides us with no definitive version of its character. Such is the case with Eritrea. The following narrative is drawn from a number of contradictory academic sources. Reference will also be made

to the two conflicting "histories" provided by the Ethiopian government and the political wing of the Eritrean rebel movement.

These histories lead their two proponents to predictably opposite conclusions. The Ethiopian government position is summed up in the following extract from a 1977 policy declaration:

> "It is an indelible historical fact that the northern region of Ethiopia, called Eritrea for the last 87 years, has been the seat of the history, culture and administration of ancient Ethiopia."[4]

This version is reconfirmed by the statement of the Ethiopian Minister for Foreign Affairs to the UN Commission 27 years previously which ran :

> "In the course of your travels in Eritrea and Ethiopia you have been able to note for yourselves the complete identity of territories and peoples which have been identified under the name of Ethiopia...for 4000 years Eritrea and Ethiopia have been, identical in their origins, identical in their historical development, identical in their defence of the Ethiopian and Eritrean region"[5].

---

[4] See Basic Documents of the Ethiopian Revolution, Published by The Provisional Office for Mass Organizational Affairs ; Agitation, Propaganda and Educational Committee, Addis Ababa, May 1977, Policy Declaration of the Provisional Military Government to solve the problem in the administrative region of Eritrea in a peaceful way".

[5] Consultations with the Government of Ethiopia, Annex 6, Report of the United Nations Commission. Quoted in Firebrace and Holland, Never Kneel Down - drought,

Eritrean statements, on the other hand, stress the lack of historical continuity in the region and the distinct territory Eritrea occupied. Discussing the connection between the two empires on which the Ethiopians rest many of their arguments, the Eritreans state:

> "All available documentary evidence about the Axumite Kingdom shows that Axum did not comprise all of present day Eritrea. Nor is it true that the Abyssinian kingdom is an "expansion", "extension", "growth" or "evolution" of the Axumite kingdom. The two kingdoms occupied different territories at different periods of time"[6].

Objective history, if such a thing can be said to exist, points to a conclusion closer to the Eritrean version. Eritrea has never been an "independent" country in the same way as the great European nations were. Equally, however, Eritrea has never consistently formed a part of a larger entity such that it could be said to have been fully absorbed into that country's territory and cultural history. The Ethiopian version of history depends on acceptance of the notion that the various ruling elites in the region were mostly representative of Ethiopian cultural supremacy. Haggai Erlich supports this, historically dubious, assertion in stating:

---

development and liberation in Eritrea, Nottingham: Spokesman, p13

[6] See In Defence of the Eritrean Revolution, New York, 1978, p32.

> "...the core regions of today's Eritrea were undoubtedly an integral part - indeed the cradle - of Ethiopian civilization, statehood and history"[7].

Other historians and political analysts tell a different and, given our knowledge of the haphazard route of historical development in other parts of the world, more credible story.

The earliest records we have of Eritrea come from Egyptian hieroglyphs which tell of the trade carried on between the pharoahs and inhabitants of the Red Sea coast around 3000 B.C. This combined with the Hellenistic conquest of Egypt points to very early cosmopolitan influences on these coastal people which helped set them apart from their neighbours in the interior[8].

Ethiopian empire building began with the Axumite empire which controlled much of the region from at least the 4th to the 10th century A.D.. Axum depended on the Red Sea coast for trading and had a major port in what is now the Eritrean city of Massawa. The rest of Eritrea was of little interest to the Axumites whose centre of power moved south to Tigre during the remaining period of their dominance. Ethiopian history stresses the connection between the Axumite dominion and Melenik's 19th century empire. However

---

[7] See Erlich,H. The Struggle Over Eritrea, 1962-78, War and Revolution in the Horn of Africa, Stanford, Calif.: Hoover Institution Press, 1983.

[8] See Kaplan,R. The Loneliest War, Atlantic Monthly, July 1988, p60.

Selassie[9] disputes the nature of this connection arguing that Melenik's empire, while it covered substantially the same land mass that now constitutes Ethiopia, in no way corresponds to Ancient Axum. Given the tributary nature of Axumite control and the fact that it was not particularly secure in the coastal regions not required for trade, it is unlikely that it ever acquired the degree of centralized authority attributed to Melenik.

The fall of Axum heralded the rise of Islam and a period in Eritrean history equivalent to the European Dark Ages. During this period the Bejas invaded Eritrea and maintained control for four centuries. The Bejas were replaced by a series of Abyssinian kings beginning with the Amhara people who were ascendents of the pre-1977 Ethiopian ruling elites. The significance of the Beja interlude is that it represents an interruption of four centuries in which the Eritrean region was subject to the rule of a group with no Ethiopian heritage whatsoever.

Even the Amhara rule beginning in the 14th century was an ephemeral one marked by an unwillingness on the part of the inhabitants of the region to accept what they perceived as alien rule. The various Abyssinian kingdoms established over Eritrea became subject to additional pressures from foreign powers. With the increasing sophistication of the communications networks they were eager to gain some measure

---

9 See Selassie,B. From British Rule to Federation and Annexation in Behind The War in Eritrea, eds. Davidson, Cliffe and Selassie, Nottingham: Spokesman, 1980.

of influence over the crucial Red Sea coast. This meant that Eritrea became prey to a number of diverse incursions which the central Ethiopian land mass escaped.

Egyptians, Greeks, Persians and Arabs were among those who sought a foothold on this precious Red Sea coastal land but the most dominant rulers for three centuries from the 16th to late 19th century were the Ottoman Turks whose occupation of Eritrea virtually cut Ethiopia off from the outside world. These developments unquestionably had a profound effect on the attitudes of the inhabitants of these two areas. The result was that, as Kaplan says,

> "the Eritreans came to be more sophisticated and less xenophobic than the Amharas of the interior"[10].

The Amharas continued to covet the Eritrean coast but never achieved much success in this venture. By contrast, more powerful foreign imperial powers seemed to invade with impunity. European adventurers,too, began to arrive in the area. The Portugese landed in 1520 and there are records of them becoming aware of a coastal region distinct from the interior which they identified as Medi Bahr. They were followed by a Scottish explorer named James Bruce of Kinnaird who made a similar discovery in 1770.

.....

---

[10] See Kaplan, The Loneliest War, supra, p60.

C. COLONIZATION.

European interest in the region began in the latter half of the 19th century. First the Egyptians, with British support, displaced the Turks. Foolowing this, the Italians began their penetration of Abyssinia in 1885. Though this marked a new era in Eritrean history many of the themes were the same. More powerful states were still engaging in cynical aggrandizement and the tribes indigenous to Eritrea continued to be dedicated to evicting the invaders.

The Italian occupation of Eritrea was, however, a turning point and one from which the modern-day quest for self-determination by the Eritreans can be traced. It was critical for two distinct reasons. First, it was the Italians who initiated the formation of an Eritrean entity territorially distinct from Ethiopia. This occurred not because of any express desire on the part of the Italians but because their military thrusts into Ethiopia itself had met with disaster and they had been forced to sue for peace with Melenik, the Amhara Emperor, who, in signing The Treaty of Ucciali, recognized the existence of an Eritrean land distinct from the Ethiopia over which he held control[11].

But Italian colonialism had a second major effect. For, having established the parameters of an Eritrean nation, they then set about creating an infrastructure suited to

---

[11] On the 1st January, 1880, the King of Italy proclaimed the creation of the colony of Eritrea.

colonial exploitation. This, in turn, created an effect which is central to our whole discussion. Eritrea underwent something of a socio-economic revolution during which the seeds of a national consciousness were sown. In UN terms, Eritreans were about to become a "people". It is true that the Italian occupation made little difference to the level of internal diversity among Eritrea's various ethnic and religious groupings but it is surely an absurdity to state, as Erlich does, that,

> "Italy's impact on Eritrean society was minimal"[12].

Certainly the Italians did little to forge a sense of national identity in the Eritreans. It would have been contrary to their interests to do so. They did however lay the foundations for such a process to take place. They industrialized parts of Eritrea and brought aspects of the European social and political culture to the people there. Whole new classes were formed during this colonially-imposed social revolution and Leonard[13] makes the additional point that these classes were interdependent in a way the old tribal units had never been. Statistically, the most telling

---

[12] See Erlich, The Struggle Over Eritrea, supra, p3.

[13] See Leonard,R. European Colonization and the Socio-Economic Integration of Eritrea, in The Eritrean Case: Proceedings of the Permanent Peoples' Tribunal of the International League for the Rights and Liberation of Peoples, Session on Eritrea, Rome: Research and Information Centre on Eritrea, 1982.

figure is the 18% reduction in the numbers of peasantry from 98% to 80% during the colonial rule of the Italians and British. Even the modernized communications network set up by the Italians was instrumental in forming Eritrea into a more recognizable socio-economic unit. If the Eritreans were not yet ready to fully digest all these changes the political legacy left by the Italians is an indisputable one. A political structure had been created which was to form the basis of the Eritrean argument for formal self-determination and make that self-determination a realistic possibility in an area which had previously known no real social cohesion.

The British period of rule from 1941, when the Italians were defeated at Keren, to 1952 resulted in only a modification of the displaced colonial administration. It did however serve to further fan the flames of nationalist aspirations by at first actively encouraging Eritreans to win self-determination and later, when British policy changed, by allowing a measure of free speech which facilitated a greater degree of political agitation against Allied plans to dispose of Eritrea in a manner contrary to the wishes of the population. But the establishment of political parties wrought by the increasing literacy of the Eritreans and a greater general awareness of Eritrean nationhood were to play a minor role in decisions concerning Eritrea's future.

The question concerning the historical validity of competing claims[14] can be addressed with this in mind.

In a nebulous sense Eritrea could be described as having been part of "Greater Ethiopia"[15]. Writing in 1945, Stephen Lonrigg suggests that, had there been no Italian occupation, Eritrea "would be partly, as always before, the ill-governed or non-governed northernmost province of Ethiopia"[16].

Even if historically accurate, such hypotheses have become largely irrelevant, Eritrea was colonized and this fact alone renders much of the historical dialectic superfluous.

Eritrea may well be, "an artificial creation of European imperialism"[17] but it is far from alone among modern African states in this respect. Clearly, this fact is immeasurably more critical to the question of sovereignty than the collection of tribute on an intermittent basis and over an area much smaller than present-day Eritrea over 100 years ago[18]. If any party should understand this it is the marxist Ethiopians whose own ideology makes the creation of the nation-states dependent on the advent of capitalism. Thus Ethiopia and Eritrea could only be nation-states after

---

[15] See Levine,D. Greater Ethiopia, Chicago: 1974.

[16] See Lonrigg,S. A Short History of Eritrea, Oxford: Clarendon Press, 1945, p3.

[17] See Erlich, The Struggle over Eritrea, supra,p1.

[18] See Pool,D. in The Eritrean Case.supra.

the Italian colonization. Their claims to self-determination should be based on this period's legacies.[19] By the time the Italians left Eritrea a colonial unit had, without question, already been carved out of the "Greater Ethiopian Empire".

.....

D. THE UNITED NATIONS AND THE AUTONOMY COMPROMISE.

At the Paris Peace Conference in 1946 following the end of the war Italy gave up her rights to Eritrea and it was decided that the ultimate disposal of the ex-colony should lie in the hands of the Big Powers (the USA, USSR, France and Great Britain) or, failing agreement between them, the UN.

In an effort to find some common ground between the Big Powers a commission of inquiry was sent to Eritrea. Its report, submitted in May,1948, contained nothing that might have formed the basis of an agreement between the four powers and the question was submitted to the UN under the terms of the Treaty of Paris (article 23). The UN had similar difficulty finding a satisfactory solution and resorted to sending a second commission of inquiry with

---

[19] Confirmation of this view can be found in Salmon J., "Droits des peuples et droits des Etats, in Realites du droit international contemporain faculte du droit de Reims, 1976, p221, where he makes the point that the Western Sahahra Case had been decided "in a line with the traditional view according to which only a state established in a European style can hold title to sovereignty". Clearly, this could be applied equally to the Eritrean situation.

members from Burma, Guatemala, Norway, Pakistan and South Africa. This commission was charged with ascertaining,

> "the wishes of the Eritrean people and the means of promoting their future welfare"[20].

It could agree only on opposition to partition, originally mooted in the Bevin-Sforza plan and strongly opposed by the Eritreans themselves.

In the end the wishes of the Eritrean people played a relatively minor role in the final report. The commission was more concerned with the other elements of its brief, notably the need to be cognizant of "the interests of peace and security in East Africa"[21] and the requirement that it take into account the "legitimate" needs of Ethiopia. Security was defined in terms of the geostrategic interests of the Western powers articulated for the Americans most unambiguously by Secretary of State John Foster Dulles when he stated,

> "From the point of view of justice, the opinions of the Eritrean people must receive consideration. Nevertheless the strategic interest of the United States in the Red Sea basin...make it necessary that our country has to be linked with our ally, Ethiopia"[22].

---

20 UN Resolution 289 A (iv)

21 Ibid.

22 Quoted in Selassie, B.H. Eritrea and the United Nations in The Eritrean Case, supra, p132.

The French and British were equally prejudiced against Eritrean independence ; the French because they regarded independence anywhere in Africa as a danger to their control over colonies such as Algeria and neighbouring French Somalia, and the British because of an obsession with access to the Red Sea and Suez canal which was to result in a disastrous expedition against Nassar only four years later.

These powerful states undoubtedly had an influence on the commission's findings. The opinion that Eritrea was incapable of supporting a self-sufficient national economy or effective self-government came about because of an over-reliance on the skewed judgments of the British administering authorities. These judgements formed the basis for the final decision to federate Eritrea with Ethiopia despite the reservations of the representatives from Guatemala and Pakistan who favoured full and immediate independence.

The resolution itself was really the child of ill-disguised strategic bargaining on one hand and general apathy as to the inevitable outcome on the other. The US made a tacit agreement with Ethiopia's Emperor Hailie Selassie not to support the Eritrean claim for self-determination in exchange for the use of the militarily important Kagnew communications base. None of the other major powers (apart from the USSR who had little influence in the region) had much to gain from Eritrean independence and as a consequence were either unable or, more likely, unwilling to perceive

the obvious flaws in the final resolution on Eritrea's future.

The drafters of the resolution paid lip-service to the principle of self-determination without ever mentioning it by name but this was the period, before the last vestiges of colonialism had disappeared, when it was still acceptable to make the exercise of self-determination conditional on such factors as the preparedness of the self-determining unit and the interests of other states. Had the resolution been prepared ten years later its tenor would have been much different. As it stands, it fails to conform to the new standards set out in later declarations on self-determination such as The Declaration on Principles of International Law (Res 2625) and The Declaration on the Granting of Independence to Colonial Peoples (Res. 1514).

Even if the resolution, and the new constitution springing from it, had been adhered to by the parties to them (and it will be illustrated conclusively that this was not the case[23]) it is still doubtful whether it was consistent with the exercise of self-determination as it has come to be defined.

In its preamble the resolution makes it clear that the disposal of the territory is to take place only, "in the light of the wishes and welfare of the inhabitants" and that such disposal should take,"into consideration the views of interested governments"(my emphasis). These "interested"

---

[23] See below p96-98.

governments include the major Western powers and the USSR. Thus, not only is this preamble a negation of the full right to self-determination, it actually appears to approve the continuation of what came to be known as neo-colonialism (i.e. the notion that colonialism was capable of existing in less overt forms than had previously been extant). Later instruments on self-determination were dedicated to extinguishing this phenomenon.

The most decisive voice among these interested governments, and one that eventually prevailed over the Eritrean right to self-determination, was that of the Ethiopians. Paragraph (c) enshrines this "interest" stating that the final recommendation should take into consideration,

> "The rights and claims of Ethiopia based on geographical, historical, ethnic or economic reasons, including in particular Ethiopia's legitimate need for adequate access to the sea."

The resolution also recognizes,

> "that the disposal of Eritrea should be based on its close political and economic association with Ethiopia".

The spirit of compromise that inform this document and the need to satisfy Ethiopia's imperial claims, are perhaps best illustrated in the following paragraph whose ostensible purpose was to safeguard Eritrean culture,

> "Desiring that this association assure the inhabitants of Eritrea the fullest respect and safeguards for their institutions, traditions, religions and languages, as well as the widest

> possible measure of self-government, while at the same time respecting the Constitution, institutions, traditions and the international status and identity of the Empire of Ethiopia."

The actual recommendations themselves, not surprisingly, favoured an Eritrea that was to,

> "constitute an autonomous unit federated with Ethiopia under the sovereignty of the Ethiopian Crown"(Clause 1).

The remainder of the resolution assigned jurisdiction in various matters to either a proposed Eritrean Government (domestic affairs) or the Federal Government (defence, foreign affairs and finance) and enumerated a series of rights which were to accrue to the residents of Eritrea.

Did the creation of such a unit constitute an act of self-determination on the part of the Eritreans ?

One of the principal arguments employed by the Ethiopian regime and those who favour its claims over Eritrea is that by accepting the resolution the Eritreans engaged in a definitive act of self-determination[24] which they cannot now rescind.

This argument is easily refuted on two major grounds. The first ground lies in the flawed nature of the resolution itself, the other in the behaviour of the Ethiopians in the

---

[24] A once-only self-determination. See Index of Validity, Chapter VIII.

years immediately following the federation of Eritrea with Ethiopia.

It is never made clear in the resolution why Ethiopia should acquire de facto control over a territory and people who had, in the preceding seventy years, severed most of its (tenuous) historical links with that state. Nor is it obvious why "interested" governments should play such a prominent role in the process of self-determination. There are several, more technical, reasons why resolution 390 must be disqualified from consideration as a valid act of self-determination:

(1) The "capacity of the people for self-government" (paragraph(a)) was deemed a relevant factor in the final decision. Resolution 1514 makes it clear that this can no longer attenuate the right to self-determination stating,

> "Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence"[25].

Two other points should be noted in connection with this matter. First, there is the question as to whether this "capacity" or economic viability was ever fully investigated. There are indications that the commission may have simply depended on the extremely prejudiced views of the British administering authorities when it came to determine this. Second, there is the issue of consistency and motive. Equivalent disposals of colonial units around

---

[25] See G.A. Res. 1514, Dec. 14th, 1960 supra, Principle 3.

this time paid no heed to the capacity of the people to govern themselves effectively (e.g. Libya) raising the suspicion that this may have simply been another ploy to subvert the Eritrean right to self-determination.

(2) If we assume that Eritrea existed as a "colonial unit" (something I will elaborate on later) and ally this to the apparent recognition in the resolution that the Eritreans do exist as a people26 we have to ask why it was in this particular case that a powerful neighbour (Ethiopia) was thought to have such extensive claims to the Eritrean unit when similar African colonies were either granted outright independence or were at least put under the temporary authority of an administering power as a transitional step to independence.

The only reasonable conclusion one can come to is that the interests of governments with no claim on Eritrean sovereignty were allowed to play a decisive and unwarranted role in the ultimate disposal of Eritrea.

E. Human Rights and the Eritrean Right to Secede

If the Eritreans were dissatisfied with the outcome of the UN involvement in the issue, the Ethiopian government, despite its conciliatory tone, was equally unhappy and

---

26 See references to the capacity of the "people" at paragraph (a) and the distinctive "institutions, traditions, religions and languages" in the final clause of the preamble.

hinted on several occasions that Eritrean autonomy was to become severely limited. A number of objections were made by Ethiopian representatives to the Commission including complaints about the existence of an Eritrean national flag and the decision to make Tigrinya and Arabic the official languages of Eritrea. By the time the constitution was passed (on July 10th, 1952) these objections had been set aside and it appeared that Eritreans had secured some measure of administrative independence for themselves. Unfortunately, the decade following the passing of the constitution was marked by a series of Ethiopian assaults on its provisions each with the apparent intention of undermining Eritrean autonomy.

Between 1952 and the outright annexation of Eritrea on November the 14th, 1962, the Ethiopian federal government systematically subverted the constitution and, by implication the UN Resolution that initiated it. In 1956 Tigrinya was replaced by Amharic (the official Ethiopian language) as Eritrea's official language and was followed by a familiar sequence of human rights deprivations. Ethiopian courts tried Eritrean citizens (impermissible under the constitution), newspapers were closed down, trade unions abolished and dissent was treated harshly, culminating in several massacres during demonstrations against Ethiopian oppression[27]. The Ethiopian intimidation campaign resulted

---

[27] See Selassie,B.H. Eritrea and the United Nations, supra, p141-152.

in the absorption of Eritrea into the modern Ethiopian empire. However it had the paradoxical effect of further molding an Eritrean national consciousness which was to prove fatal to the ultimate ambition of the Ethiopian government to completely eliminate Eritrean resistance to its regional hegemony. The decision by the Eritrean Assembly (made under duress) to accept the annexation initiated a period in which armed resistance became the only effective method of reclaiming an Eritrean national identity. Furthermore the Ethiopian action frustrated the whole arrangement. It has been argued that Eritrea became part of Ethiopia only after the federation Therefore, if we accept that the federation was illegally implemented then under international law Eritrea has never been part of Ethiopia. The Eritreans were never given the opportunity to exercise even the diminished right of self-determination awarded them by the UN. The UN, therefore, has a continuing duty to ensure that this right is resurrected[28]. The proposition that Eritrea exercised its once-only right to self-determination is a preposterous one in these circumstances.

The Eritrean Liberation Force (ELF) was formed in 1962 in response to the political failure of the UN and the autonomy

---

[28] See UN Commissioner for Eritrea, Matienzo, Final Report, Chapter 11, p201,"...it does not follow that the UN would no longer have any right to deal with the question. The UN Resolution on Eritrea would remain an international instrument and, if violated, the General Assembly could be seized of the matter."

compromise described above. The violent intransigence of the Ethiopians on the question of even a measure of Ethiopian independence. Support for the ELF in the early years of this struggle was tempered because of its association with the more powerful elites in Eritrean society and the fact that it was an Islamic fundamentalist group with little attachment to the Christian majority among the Eritrean people. This lack of unconditional public support meant that the role of the ELF was marginal during this period. The ELF fought a classic low-level guerrilla war punctuated by the occasional publicity-seeking terrorist attack including several PLO-style hijackings which did little to improve their standing abroad. Eventually they were superseded by an off-shoot group, the Eritrean People's Liberation Front (EPLF), who after a decade of military in-fighting gained dominance over their parent organization and by 1981 could be described as the only significant opposition to Ethiopia in Eritrea.

This change was mirrored in Ethiopia by the 1974 coup in which a military committee made up, primarily, of middle ranking officers and NCOs in the Ethiopian armed forces overthrew Emperor Haile Selassie and began the transformation of Ethiopia from feudal monarchy to modern marxist state.

The Dergue, as it was known, flirted briefly with the notion of negotiating with the Eritrean rebels. However, after a series of unsuccessful discussions, following which leading

Dergue officials were usually liquidated for their "failure", it began to zealously pursue the military solution to which it remains committed.

The infamous switching of sides undertaken by the superpowers during the Ogaden war between the Somalis and Ethiopians had major implications for the future of Eritrea. No longer could the Eritreans depend on the support of friendly marxist governments abroad since the Soviets were now allies of the Ethiopian government. Ironically it was the Soviets, erstwhile suppliers to the Eritreans, who encouraged the Dergue to seek military ascendence over the EPLF. Major offensives in pursuit of this objective have resulted only in a military and political stalemate with the EPLF controlling approximately 85% of Eritrea and the Ethiopian army presence restricted to a handful of towns[29]. It is questionable whether this military stalemate will lead to a desire to seek political solutions as has happened in Afghanistan, the Persian Gulf and Angola. There appears to be little common ground between the two sides save their shared marxist dogma which in this case serves merely to convince them both that theirs is the historically correct position.

The questions we must ask are, what outcome would best secure self-determination for Eritrea and Ethiopia ? Does Eritrea have a right to self-determination under

---

29 See Gebremichael,A. "Famine makes it crucial to understand Eritrean struggle", Christian Science Monitor, supra.

international law as formulated in the UN ? And finally what are the implications of our final assessment for a theory of secession ?

.....

F. ERITREA'S RIGHT TO SELF-DETERMINATION UNDER UN LAW.

In addressing this issue two aspects of the question should be distinguished. To begin with, Eritrea's claim to be a "people" with a right to self-determination must be assessed according to how the UN has chosen to define the term over the last three decades. Associated with that is the second question: do the conditions exist by which this right comes into effect over the norm of territorial integrity ?

The rapid development of the right to self-determination in various UN instruments simply serves to make the Eritrean claim increasingly irrefutable. There is hardly a criterion in the new UN law of self-determination that Eritrea fails to fulfill. Support for the establishment of a new state of Eritrea does not offend the principles of territorial integrity or political sovereignty since Eritrea's incorporation into Ethiopia was a recent and an unconstitutional act[30]. Nor can it be said that Eritrea

---

[30] In other words Eritrea does not constitute part of Ethiopia's territorial integrity.

achieved self-government, "by association with another state...freely and on the basis of absolute equality"[31].

The EPLF describes the Ethiopian claim to its territory as "colonial" and the recent history of cultural imperialism (e.g. the banning of languages) and economic exploitation gives credence to that description and would indicate that the Eritreans are under the "alien subjugation, domination and exploitation" disapproved of in Resolution 1514. Certainly their so-called exercise of self-determination does not come close to satisfying the guarantees laid out in Principles VII to IX of Resolution 1541.

Perhaps it is the Declaration on Principles of International Law[32] that provides the best argument for a renewed right of Eritrean self-determination. As a people they,

> "have the right to freely determine without external interference, their political status and to pursue their economic, social and cultural development...".

This much is clear. However, even if we accept the possibility that Eritrea has become part of the sovereign state of Ethiopia it is difficult to envision how the Ethiopians can avail themselves of the territorial integrity provision since any state not,

---

[31] See General Assembly Resolution 742 (VIII), 27th November 1953.

[32] See G.A.Resolution. 2625, Oct. 24th, 1970.supra, Chapter 2.

> "conducting itself 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",

foregoes the right to an inalienable sovereignty.

So, under the formal rules of the UN law of self-determination the Eritreans have a strong case to secede.

The index of validity, outlined later in this paper, imposes a substantive body of rules on the UN law of self-determination. This index is the construct central to the proposed theory of legitimacy. In the index a set of essential conditions are allied to a number of critical variables with a view to empirically assessing the legal and political validity of a claim to secede. How does the Eritrean situation respond to the indices of validity? Is there also a substantive right of secession conforming to our vision for the new world order lurking below all the revolutionary verbiage and formalistic rule-making?

In order to qualify for the right of secession the Eritreans must satisfy a number of basic criteria and if Eritrea is legally disbarred from exercising the right to secession it must be assumed that other supernorms such as territorial integrity and political sovereignty have worked in Ethiopia's favour.

.....

G. ERITREA AND THE INDEX OF VALIDITY.

In order to assess the legitimacy of the Eritrean claim we should reflect on the indices of validity developed as part of this theory of secession and apply them to the Eritrean situation.

(i) Eritrea's existence as a people.

An Eritrean national consciousness can be traced back at least to the time of Italian colonization. Prior to this, historical evidence would indicate that the people of this region were never integrated into Ethiopia. It is unnecessary then to preempt any concluding discussions on the theoretical definitions of "people" in order to conclude that Eritreans do indeed constitute a people. The original UN Resolution (390) makes it clear that the Eritreans are to be regarded as such and the ill-fated proposed federation with Ethiopia carried with it a constitutional caveat that the Eritrean state would be protected. Even at this early post-colonial stage Eritrea was being treated as a distinct entity. The failure of the UN to intervene when the Ethiopians abrogated the agreement in no way detracts from its initial decision. So, based on arguments previously made, the existence of an Eritrean people is uncontestable.

(ii) Human Rights.

Severe deprivation of human rights on a widespread scale by the state from which secession is sought can, if other factors are present, set up a valid claim to self-determination. This is particularly true if such deprivation is aimed at the minority group within the seceding entity. Ethiopia's human rights record is said to be the worst in the world.[33] The Government's list of transgressions of international human rights law is a familiar and depressing one and needs no enumeration here. Typically the worst abuses have occurred in areas of conflict including the Tigre and Eritrea. In Eritrea, the Ethiopians have been waging a campaign of terror since World War Two. The bribery and intimidation which marked the early period of Eritrean autonomy have been replaced by military tactics whose natural consequence is indiscriminate violence contrary to the humanitarian law of armed conflict.[34] In fact it is thought to be deliberate policy on the part of the Ethiopians to create an optimal environment for starvation in the region.[35]

---

[33] See Amnesty International Report 1978. Little would appear to have changed in the intervening decade.

[34] See e.g. the Ethiopians are reported to be using napalm and chemical weapons on Eritrean civilians. Reports of massacres are too numerous to be doubted see e.g. N.Y. Times, Aug 23, 1988, p6 and ICJ Review 40, June 1988, p2.

[35] See Gebremichael,A. Christian Science Monitor, supra. See also the frequent complaints by relief organizations concerning the obstructive behaviour of Ethiopian officialdom during the famines of the last decade.

Conversely the Eritreans have shown that human rights are unlikely to be compromised in an Eritrean state to the point where claims to internal self-determination will be activated. The recent attack by the EPLF on a relief convoy is at worst an aberration, at best a natural response to Ethiopian deceit in this arena. The Eritreans have a very positive human rights record. Well-documented in various writing[36] on the subject, it includes a thriving health service, women's rights, relatively benevolent treatment of prisoners of war and a commitment to a socialist democracy that seems less spurious than most. While the longevity of a guerrilla cause can never be a measure of its legitimacy the Eritreans have survived as a nation because of the proven humanitarian concerns of its political and military representatives, the EPLF.

(iii) Political Stability and Legitimacy.

The situation in Eritrea has been met with the greatest apathy around the world.[37] Of the major power blocs, only the EEC has indicated support for the Eritreans.

---

[36] See Kaplan,R., The Longest War, supra. See also Firebrace and Holland, Never Kneel Down, supra.

[37] See e.g. C.B.C., The Fifth Estate, on the war in Eritrea Sunday 11th October. 9p.m. where it was said by a commentator that "the Canadian government has no idea what's going on in Eritrea" Globe And Mail Tuesday, October 11th 1988 p16. Also in Kaplan, "The Longest War", where a guerrilla finds comfort in the presence of satellites in the sky because it "meant that at least somebody somewhere was paying attention to the war",p65

Ironically this has strengthened their claim to self-determination. Lelio Basso tells only half the story when he says :

> "...the Eritrean people have, for 17 years now been fighting a war of liberation, and have thereby furnished the best possible proof of their existence as a people, and as a consequence, of their right to self-determination."[38]

What he omits to mention is that this war of liberation has been fought without the patronage of any major powers. The EPLF is one of the few guerrilla movements that can claim almost complete self-sufficiency. This is a powerful argument against the idea that granting independence to a small nation is simply to grant it the right to dependence as the client of a major sponsoring power. The EPLF also has the support of the local populace[39] and is said to have "reversed the classical guerrilla warfare pattern" by feeding the peasants rather than living, parasitically, off them.[40]

There was some doubt as to whether Eritrean nationalism was powerful enough to cohere the various religious and ethnic groups in Eritrean society. Erlich argues that the First Assembly (between 1952 and 1956) failed because,

---

[38] See Lelio Basso, The Eritrean Case, supra, p10

[39] See Firebrace and Holland, Never Kneel Down, supra, p43

[40] See Shepherd,J. Issue, quoted at R.Kaplan, The Loneliest War,supra, p63

"Eritrea's fragmented society had no majority"[41]. He concludes that by 1978,

> "the reality of ethnic, religious, regional, social and personal rivalries...legitimizing disunity proved stronger than the relatively young sentiment of Eritrean nationalism"[42]

According to Erlich, while Ethiopian nationalism survived the revolution in 1977, Eritrean nationalism was too fragmented to survive a similar trial. This argument is highly disingenuous. What Erlich fails to mention is that Ethiopian "nationalism", in the dubious shape of a military committee, survived only because its leader, Mengistu, eliminated all possible fragments in several bloody liquidations of high level opponents. Further, Eritrean nationalism "failed" precisely because there was no similar ruthlessness manifested on the Eritrean side. He might have made reference too, to the scorched earth policy of an Ethiopian Army apparently dedicated to making Eritrea almost entirely uninhabitable.

This "fragmentation" is essentially a multi-ethnicity which cannot possibly preclude the exercise of self-determination unless we are to return to a neo-Nazi

---

41 See Erlich,H. The Struggle over Eritrea, supra, p8.

42 Ibid, p96.

definition of national self-determination[43]. As Leonard says,

> "Under Italian colonialism, Eritrea was not formed as a nation-state but as a multi-national state"[44]

Eritreanism may well be the negation of Ethiopianization but it has served to coalesce the diverse forces within the country under the EPLF. Internal disunity is no longer a problem and the ability of the liberation movement to unite Eritreans augurs well for the political stability of an Eritrean state.

(iv) Economic Potential 45

One of the principal reasons given by the UN Commission (sent to investigate Eritrea in 1950) for its reluctance to recommend an independent Eritrea was a British report which stated that Eritrea was incapable of supporting a national economy. However if Eritrea is to be judged according to a continental standard it is discovered that when that decision was made it had an economic infrastructure,

---

43 See Cobban,A. The Nation-State and Self-determination, supra, p53

44 See Leonard, The Eritrean Case, supra ,p58

45 Note Resolution 1514, Paragraph 3 states "Inadequacy of ...economic...preparedness should never serve as a pretext for delaying independence." In terms of formal legal rules the following discussion is not relevant. If we are to take this process a step beyond these rules the issue becomes central.

inherited from the Italians, which gave it a distinct advantage over its African neighbours.

Its current economic capacity is a more controversial subject. There is no doubt that Eritrea is at present in dire economic circumstances, unable to feed its people far less support a healthy economy. Nevertheless any criteria developed must take into account particular circumstances. Eritrea is at present a war-zone with one of the combatants fighting a war intended to destroy the Eritrean social and economic infrastructure. The Ethiopians have for years been in the process of dismantling Eritrean industries left by the Italians and British. It is unjust to depend on these present circumstances in any judgment since they have little bearing on the possibilities implicit in an independent Eritrea. Instead, it is more instructive to view the progress made by the EPLF within their extremely limited means. Though information about the EPLF is not readily available there is enough evidence to suggest that they operate an equitable and efficient distributive economy, albeit on a minimal scale[46] and that their,

---

[46] See Kaplan,R. The Loneliest War, supra, p58,60 and 64 on the ERA (Eritrean Relief Association) health-care service and Orotta, "one of the few black African "capitals" that actually works" (58), Richard Sherman on the semi-dormant state of the Eritrean economy, Chapter 5, The Unfinished Revolution and Firebrace and Holland, Never Kneel Down, supra, on self-reliance, "In an economically backward Third World country like Eritrea, given the domination of the world markets by the imperialist power, this policy of self-reliance is a necessary precondition for the establishment of an independent and viable economy" (72)

"...achievements to date provide a strong argument within the overall case for the economic viability of a future self-governing Eritrea."[47]

H. CONCLUSION.

Eritrea satisfies not only the standards for legitimacy set out in the index of validity but has an equally strong claim to self-determination by secession under the UN law of self-determination mapped out in the 1970 Declaration on principles of International Law[48] and by self-determination as decolonization.

Eritrea's political and economic viability, geographic position and high bona fides combined with the abysmal and highly discriminatory human rights record of the Ethiopian state, confirm it as an ideal candidate for a legitimate exercise of the right to secession.

.....

---

[47] See Firebrace and Holland, Never Kneel Down, supra, p83

[48] See Resolution. 2625,October 24th, 1970. October 24th, 1970, supra.

CHAPTER V.

BANGLADESH: HUMANITARIAN BASIS FOR SECESSION.

OUTLINE

.....

Abstract

Bangladesh is an independent state in South Asia lying at the Ganges delta. It is bordered by the Indian states of West Bengal (to the west and north), Assam (to the north), Meghalaya (to the north and north-east) and Tripara (to the East). It also has a border with Burma to the south-east and a southern coast along the Bay of Bengal. Its population of 105 million consists of 86 % Moslems and 12 % Hindus. In ethnic terms 98% of the inhabitants of Bangladesh are Bengalis with a small number of Biharis. Bengali is the official language. Known as East Bengal during the British colonial rule of India, it became part of the independent state of Pakistan in 1947. The other provinces of Pakistan and the central government were all to be found in West Pakistan from which East Pakistan (now Bangladesh) was separated by 6000 miles. A civil war broke out between East and West in 1971 after constitutional attempts by East Pakistan's major political party, The Awami League, to secure a greater measure of autonomy for the region. This civil war ended with the Indian intervention and Bangladesh became an independent state in 1972.

.....

A. INTRODUCTION

Bangladesh's secession from Pakistan in 1971 and its subsequent recognition by the world community is often used as a basis for asserting the legitimacy of secessionist struggles. It is invoked as the prime example of separatist success and is summoned whenever there is a similar movement for independence elsewhere in the world. It is examined here because it serves as a model for a politically desirable and legally acceptable secession. Yet the circumstances surrounding its achievement were atypical, making its utility as a paradigm doubtful. In the absence of these peculiar circumstances, Bangladesh would likely have been consigned to the same fate as Biafra. The questions to be answered, then, are the following : why was this the only successful[1] secession since World War Two ? Is success the only standard by which we can measure legitimacy ? What was the reaction of the world community before and after the conclusion of the armed insurgency ? How does the Bangladesh situation respond to (1) the principle of self-determination in international law as it has been developed in the United Nations and (2) the index of validity formulated in this paper?

---

[1] I include only secessions that were contested by the parent state in this category.

.....

B. THE SOURCES OF BANGLADESH'S QUEST FOR SECESSION.

The human tragedy which marked the point of no return for Bangladeshi independence began on March the 25th, 1971 when the Pakistani armed forces began a period of military rule in Dacca and initiated a six month campaign of terror against the civilian population of what was then East Pakistan. These events and the establishment of Bangladesh as a nation-state in its own right find their source in a political-historical context which must be traced back at least to the British colonial rule of the Indian peninsula.

(i) The Formation of Pakistan.

India, having played such a prominent role in the defeat of the Axis forces during the Second World War, naturally felt independence should be its reward. The emergence of Gandhi made British capitulation inevitable but even he was incapable of welding the potent religious forces of Hinduism and Islam into one political unit and the preferred solution of the Muslim elite was the creation of a Muslim state independent of India. The powerful Muslim League ensured that the Indian Independence Act of 1947 recognized their wish for a single Islamic state[2] and

---

[2] See generally, Saxena J.N., Self-Determination, Delhi: University of Delhi,1978, p49-51.

Pakistan came into being as a state encompassing two culturally disparate and, more significantly, geographically distinct territorial units known as West and East Pakistan separated by 1200 miles of Indian territory.[3] Islam was the unifying principle, thought capable of overriding the concepts of nationhood and culture which might otherwise have favoured the two-nation solution for Pakistan.[4] So Pakistan came into existence with its component units "sharing only Islam, fear of India and a common poverty..."[5] and political differences were not long in manifesting themselves.

---

[3] One prescient observer was moved to note that this could only lead to further fragmentation in the Indian sub-continent at a later date. See Hans J. Morgentau, Military Illusions, The New Republic, 19 March, 1956, p14-16

[4] Clearly this was something that was seriously contemplated as can be seen from the following quote, "That geographically contiguous units be demarcated into regions which should be constituted with such territorial adjustments as may be necessary, that the areas in which Muslims are numerically in a majority as in the North-Western and Eastern zones of India should be grouped to constitute independent states in which the constituent units shall be autonomous and sovereign" Muslim League Conference,1940 at Lahore quoted in The Events In Pakistan, A Legal Study By The Secretariat Of The International Commission Of Jurists Geneva, 1972,p7. Hereinafter "ICJ, A Legal Study".

[5] See Barnds, Pakistan's Disintegration, World Today 27 1971.

(ii) Developments in East Pakistan from Independence to Secession.

A spiral, typical of these cases, began to precipitate events. As the unit seeking secession (or, as was the case in East Pakistan at least until 1970, autonomy) agitated for greater independence so the central government eager to preserve the territorial integrity of the state adopted increasingly repressive measures to secure this end. This in turn has the inevitable consequence of inviting further rebellion by transforming a political action into a national and human imperative. Thus, a constitutionally permissible political campaign, denied a voice, becomes a bitter armed insurgency. On the other hand, as the tragedy of 1971 amply illustrates, governmental disquiet readily metamorphosizes into military frenzy.

This sequence of events, seen to a lesser extent in Eritrea and Biafra, is epitomized by what occurred in Pakistan between 1950 and 1971. As early as that first date legislators began demanding greater autonomy for East Pakistan and in 1954 the Muslim League (which had come to symbolize continued allegiance to the one-nation ideal) was routed in an election. From that point on East Pakistan was in effect governed by a West Pakistani government in Islamabad. By 1958 the two men most capable of leading Pakistan from the abyss, Liaquat Ali Khan and Jinnah, had died (the former was assasinated) and the country was in a state of chaos. The resulting army coup placed General Ayub

Khan at the head of government and his government exacerbated the grievances of the East Pakistanis with a series of measures guaranteed to preserve the dominance of the western part of the country. By the time Khan came to power the Urdu language spoken by those in the west had already been declared Pakistan's official language despite the fact that it was not widely spoken by East Pakistanis[6]. He was particularly zealous in pursuing mono-linguilism in Pakistan in the process perhaps tacitly admitting that religion was no longer a sufficient binding force for his country. Throughout the sixties the army retained a tenuous control, implementing a number of programmes designed to alleviate the pressure from its numerous political opponents. These included a new constitution in 1962 which proclaimed a "basic democracy" revealed soon afterwards as a sham, the release of opposition leaders such as Bhutto, from the West and Sheikh Mujibur Rahman, from the East, and finally, the imposition of martial law in 1969 under a new president, General Yahya Khan. Yahya Khan commited himself to the re-introduction of democracy and an election was held in the December of 1971.

(iii) The Election of 1971.

The 1971 election was a turning point in the nation's history. It marked the emergence of a fully-formed Bengali

---

[6] Note the similarities here with Ethiopian attempts to impose Amhara on the Eritreans.

national consciousness in the East which translated itself at the polls into an overwhelming victory for Sheikh Mujibur's Awami League and its Six Points for East Pakistani autonomy.[7] In the months following the election intense negotiations took place between General Khan, Mr Bhutto (who had a majority of the seats in the West) and Sheikh Mujibur in order to find a way out of the political impasse resulting from Khan's reluctance to see central control diminished by an elected assembly led by a party committed to autonomy, Bhutto's unwillingness to see local power shift eastwards and Sheikh Mujibir's refusal to compromise the strident tone of the Six Points which he now declared were "public property"[8] and, therefore, not open to negotiation.

Under pressure from Bhutto, who threatened a general strike in the West, Khan postponed the Assembly indefinitely on March the 1st. From then on the situation in East Pakistan steadily aggravated . The Awami League and the majority of people in East Pakistan, feeling that their democratic rights had been subverted, participated in a five-day general strike during which there were several violent clashes.9 Meanwhile both the army and Sheikh Mujibur

---

7 The election was carried out on a one-man,one-vote principle thus giving the Eastern province 169 seats to the West's 144. When the Awami League won 167 of the East's available seats it found itself with a clear majority in the country overall and a powerful mandate from all inhabitants of East Pakistan.

8 See A Legal Study, ICJ, p13

9 Ibid, p15-16

were becoming more obdurate in their demands. Khan warned that the armed forces would move to ensure that Pakistan's integrity was not threatened while Sheikh Mujibur declared that he was about to "outline a programme for achieving the right of self-determination for the people of Bengal"10.

(iv) The Military Solution.

On March the 25th the army broke out of its barracks in Dacca and began an operation designed to end any hopes of Bengali independence or autonomy. What happened between that date and the surrender of the Pakistani armed forces in the newly-constituted Bangladesh on December the 16th, has been forcefully described elsewhere and can best be described as something akin to an Asian holocaust.[11] In the early days of the crackdown the army eliminated all known supporters of independence and carried out a massacre of the intelligentsia at Dacca University. This was followed by even more indiscriminate abuses amounting to a campaign of terror. Later the army concentrated on persecution of the Hindu minority in East Pakistan and finally on the rural population, amongst whom the Mukti Bahani (i.e. the Bengali guerrilla army) operated. While the army dealt with the guerrilla forces the task of maintaining order among the civilian population was handed over to the West Pakistan

---

10 Ibid, p16

11 See, e.g. ibid, p24-45 and Saxena, Self-determination, supra, p56-59

police and a paramilitary force known as the Razakars whose record of brutality in some cases outstripped that of the Pakistani Army. The violence spread to other sections of the populace ; religious antipathies surfaced and various groups within the country turned on each other with venom.[12]

The intervention of the Indian Army after a series of border clashes throughout November (1971) was the decisive act of the war. Prompted partly by concern for what was happening inside East Pakistan and partly by the refugee problem which had sent millions into India, it became inevitable when Pakistan launched a series of air-strikes on Indian airfields on December the 3rd. The war lasted only 12 days and on December the 14th Indian troops entered Dacca. Two days later the war was over with the surrender of the Pakistan Army at Dacca. On January the 20th the independent state of Bangladesh was established and immediately recognized by seven states including India.

.....

C.SUCCESS , SELF-DETERMINATION AND SECESSION.

(i)Success and Legitmacy.

Bangladesh has since been universally recognized, leading one commentator to conjecture that "success is still

---

[12] The "war" within a war between the Bihari minority and the Bengals in East Pakistan is the most prominent example of such tendencies.

relevant...to the question of who or who may not exercise the "right" of self-determination."[13]

Even if that opinion carries an element of plausibility it is important to note that recognition is perforce a political act and need not imply approval of the methods used to secure the emergence of a nation-state. Acceptance into the world community does not necessarily invest a particular act of self-determination with legitimacy. It would be impractical to expect states to withhold recognition from new entities on the grounds that they did not come into being in a legally acceptable manner. Equally it would be perverse for states to continue to recognize entities that no longer exist as independent states, such as Biafra.

Yet surely we cannot equate the right of self-determination with success. To do so would be to diminish the principle of self-determination to the status of a jural veneer for the ex post facto justification of successfully accomplished acts of secession. The right of self-determination must mean more than the might of self-determination, it must integrate political realism with legal certainty[14] and be fired by a vision for the future structure of the world community.

---

[13] See Pomerance,M. Self-determination in Law and Practice, supra, p20

[14] See Chapter Eight, infra.

While an investigation into the question of whether Bangladesh had the right to secede from the rest of Pakistan may be accused of lacking political relevance it retains its legal significance by virtue of the fact that the success of a military or political campaign can never establish legitimacy. The principle of self-determination should illuminate the various scenarios it encounters not shape itself in their political light.

That is not to say that success has no relevance when assessing a claim to secede. If that success results in the permanent establishment of a nation-state there is a presumption created that some of the factors necessary for the presence of a right to secede have been fulfilled (e.g. economic viability and political allegiance). Furthermore if that success was aided by the support of a large section of the world community arguments for the legitimacy of the act are enhanced.

The Bangladesh case is interesting because it indicates the sort of conditions that might have to be present for a successful act of secession. If success was derived from legitimacy and not the other way round, as some writers have argued,[15] then Bangladesh can be used as a marker for past acts of self-determination and a precursor for future ones.

---

[15] See Neuberger,B. National Self-determination in Post-Colonial Africa, supra, p80

(ii) Unique Features of the Bangladesh Secession.

The three facts that distinguish the Bangladesh case from others examined in this essay, notably Biafra and Eritrea are, not coincidentally, the very aspects which contributed most directly to the successful resolution of the Bengali claim. These are the geographic bifurcation of East and West Pakistan, the human rights holocaust that occurred as a direct result of action taken by the Pakistan army and the intervention of the Indian Army in Bangladesh[16]. At least two of these factors have a direct bearing on the question of legitimacy (under international law and the index of validity). The third (the Indian intervention) had perhaps the greatest effect on success but its relationship to legitimacy is more ambiguous[17].

---

[16] These factors are interrelated. It was Bangaldesh's geographic distinctiveness that allowed the Pakistan Army to act with such ferocity. The members of the armed forces were drawn predominantly from the West and therefore because of the distance between the two regions would have been unlikely to have had any contact with the Bengalis. This must have allowed them to form the impression that they were dealing with an alien population. Similarly Indian intervention was made less onerous by the fact that the territorial integrity of the central government's unit was unimpaired during the Indian foray into East Pakistan. Finally, the human rights abuses carried out by the Pakistanis formed a climate of opinion in India which was to favour intervention. See also the refugee problem caused by these activities.

[17] I will discuss this ambiguity in greater detail later in this chapter.

Bangladesh's geographic separateness[18] from the rest of Pakistan gives this case its unusual character. Pakistan in 1947 was another artificial creation of the post-colonial period and like the many states enclosed by colonially-imposed boundaries, it was a creature of expediency as much as commonsense. Unlike these new African states Pakistan could not even claim to exist over a single-territorial unit capable of engendering a national sentiment based solely on a feeling of territorial unity. Ironically, Pakistan is a rarity among such creations in that it was permitted to determine its own area. The accepted colonial territorial unit was an India that at the time included the two regions of Pakistan. The UN's accepted practice of offering self-determination only to colonial territorial units was, in this case, not followed. Instead the relevant "people" of the area were allowed to choose their territorial destiny based on something other than the administrative unit inherited from the colonial power. Religion was, thus, reckoned to be a glue more powerful than geographical contiguity. In effect, Pakistan seceded from the Indian colonial unit but it was an imperfect secession which paid little heed to ethnic and political realities. Pakistan died from the same sword of which it was born but the geographic peculiarity outlined makes it a poor contender for the domino theory of secession which it might be thought to

---

[18] The trip from one wing to the other had to be undertaken by air. The alternative was an arduous 7-day journey by sea.

illustrate[19]. Rather, the 1200 miles separating East from West were mirrored by a gulf in attitudes that could not be bridged by either common religion or a shared mistrust of India. Pakistan prior to 1971 was a political artifice undermined by a geographic and cultural gulf.

(iii) Discrimination against Bangladesh.

There is no shortage of documentation demonstrating how the policy of Pakistan's central government in Islamabad served to further cleave the two regions to the point where an engagement of overt discrimination was discerned[20].

The Army was an almost exclusively West Pakistani one. Only 10% of the officer corps were from the East and out of a total number of fifty appointments to the post of general since independence only one had been an Easterner.[21] At a government level all but one of the ministerial appointees since that time had been from the West. The official language of Pakistan became Urdu despite the fact that the majority (55%) in the East spoke variations of Sanskrit and

---

[19] See later for more detailed study of the implications of this domino theory for secession.

[20] See Khan, The Disintegration of Pakistan, Meerut: Meenakshi Prakashan, 1985, p10. where it is described as "...a central policy of invidious economic discrimination...".

[21] These figures come from Nanda,V.P. Self-determination in International Law : The Tragic Tale of Two Cities : Dacca and Islamabad, 66 A.J.I.L. p321.

were deeply opposed to the imposition of the etymologically, Persian-derived Urdu.

But it was in the economic sphere that the inequitable distribution of power was most keenly felt. Nanda goes as far as to describe the relationship as belonging to a "neo-colonial status of economic relations"[22] and some of the economic figures[23] from this time certainly bear out that description. Estimates for the period from 1958 to 1968 speak of an annual budget in which civil expenditure for the respective regions amounted to 62% for the West and 38% for the East. Nearly all major industrial programs were allocated to the West, foreign aid was assigned for projects in the West while exports of jute and jute products from the East were often used to pay for the aid. Unfortunately, while East Pakistani exports amounted to 59% of total exports it received only 30% of the imports[24]. In 1954, The Economist concluded that,

> "...Pakistan is economically viable largely because of the eastern wing's export and exchange earnings."[25]

There is little doubt that the government's aim was to improve the economic position of the western wing and thus

---

[22] See ibid, p330. See also, A Legal Study, ICJ, supra,p10 for a similar point.

[23] Economic figures come from Bangladesh Documents, External Affairs Ministry, Government of India, New Dehli, 1971 quoted in New York Journal of International Law and Politics 4 1971 p524.

[24] See Saxena,J.N. Self-determination, supra, p63,64.

[25] See The Economist, Vol 170, 27th March 1954, p958.

consolidate its political primacy. This inevitably led to neglect in the East and even as droughts were being tackled vigorously in the West using modern immigration techniques virtually nothing was done about the long-standing flooding problems in the more fertile East. The 1965 Indo-Pakistan War added to the problems after the government ordered a trade embargo against India. This effectively sealed the East off from its major trading partner and caused further economic hardship. The effect of these measures and policies was to create a feeling of resentment towards the central government which was further aggravated by the apparent indifference of that body to the suffering endured by East Pakistan during the cyclone of November, 13th 1970.

It is suggested by the International Commission of Jurists that "callous indifference"[26] contributed directly to the overwhelming mandate given to the autonomy-seeking Awami League a month later in the general election.

(iv) Economic Discrimination and the Right to Self-determination.

Can it be said that this economic discrimination itself activated a right to self-determination for the Bengalis ? Certainly the unfairness of the economic system employed by the Government of Pakistan can be established beyond doubt. However, does it amount to the sort of discrimination required to provoke a justifiable surge for independence ?

---

[26] See A Legal Study, ICJ, supra, p12.

Under international law the right of secession is ruled out in all but the most extreme cases. Economic discrimination is absent from a list of the sort of practices which might give rise to a right of self-determination. Only a very wide definitional standard would include it among "colonialism...and discrimination associated therewith"[27] or "alien...exploitation"[28] and even the most liberal reading of The UN Declaration on Friendly Relations[29] finds little to support such a claim for self-determination. Given the very restrictive interpretations of these clauses made thusfar and state practice on this matter it would be imprudent to assert that Bangladesh had a right to self-determination as early as 1970 based on perceived economic discrimination. Perhaps a stronger case could be made on the basis of under-representation of Bengalis in senior government and the army but the same objections would arise. The Government of Pakistan could argue that the country was,

> "possessed of a government representing the whole people belonging to the territory without distinction as to race,creed or colour"[30].

It has a plausible case for arguing that under-representation was due to a lack of competence and that the central government did represent the whole people regardless

---

27 G.A. Res. 1514, Dec 14, 1960, Preamble, Paragraph 10, supra..

28 Ibid, Principle 2.

29 G.A. Res. 2625, Oct 24, 1970,supra.

30 Ibid, Paragraph 8,beginning, "Nothing in the foregoing...."

of its ethnic make-up[31]. This argument does have force in that it has never been a requirement of UN resolutions on the subject that a perfect democracy be extant[32]. Few states would be able to depend on the paragraph quoted if such an interpretation was adopted. The inherently conservative, statist ideals of the UN make the preservation of territorial integrity the fulcrum of any definitive rendering. The presumption in favour of territorial integrity is very high and could be rebutted only in very exceptional circumstances. I will enumerate these in the index of valididty but they would incorporate a large human rights dimension.

(v) The Bona Fides of Bangladesh's Claim to Secede and the Pakistan government.

Did the massacre carried out by the army in 1971 provide grounds for such a rebuttal ?

---

31 It has been suggested that the reason for the imbalance in the armed forces was due to the inherently war-like qualities in the people of the western wing and the more pacific tendencies of the Bengalis. It is difficult to see how this argument could be extended to the respective propensity to acquire positions in central government.

32 Resolution 1514, supra, states, "Inadequacy of political, economic,social or educational preparedness should never serve as a pretext for delaying independence" (Principle 3). The obvious conclusion to draw from this long accepted rule is that here is no requirement that the act of self-determination and the subsequent implementation of government and national economy should be of a particularly sophisticated nature. Lack of preparedness is likely to lead to administrative unfairness and the absence of a just distributive system for the economy.

The events leading up to the armed intervention are important in this regard because they may be used to establish what the grounds for the government action were. If the grounds for intervention are shown to be justified it will be harder to show that the methods used, no matter how reprehensible, give rise, in themselves, to a right of secession.

The people of East Bengal felt an understandable grievance when the Awami League, whom they voted for by a vast majority in the elections of 1970, was denied its place as the majority party in the National Assembly. The Awami League's position on the status of East Bengal was vague. Did it support autonomy (as it claimed) or was its manifesto a veiled attempt to secede ? The distinction is crucial. If the former is true then the Government acted rashly and illegally in sending in the army. If, on the contrary, the Awami League was dedicated to the independence of East Pakistan then, under international law, the Government had a prima facie right to do everything in its power to preserve the territorial integrity of its nation.

The Six Points under which the League fought the election were ostensibly a programme for regional autonomy. Its provisions included a demand for,

> "...full regional autonomy, including the powers of management of the economy (in order to) save the regional economy from ruination"[33].

---

[33] Awami League Manifesto, Ministry of External Affairs, Republic of India, Bangladesh Documents, 66 1971. See note 21, supra.

There was a further call to "break loose from the institutional framework which is a legacy from colonial times"[34]. Whether the electoral mandate given this plan meant only "a vote for provincial autonomy and not for the disintegration of the country"[35] or was, as Bhutto believed, an attempt to strike at Pakistan's unity. There is little doubt that its full implementation would have led to a severe emasculation of federal power ultimately facilitating any outright act of secession[36].

This hypothesis was never tested because the central government refused to let the democratic process continue to the point where the Awami League could enact the Six Points constitutionally. Did this denial of democratic rights strengthen the Bengali claim to self-determination ?

Some extremely complex issues are raised by this question. Though most writers seem to accept that East Pakistan did have a right to self-determination[37] at this point the International Commssion of Jurists Secretariat concludes in its report that:

> "It is difficult to see how it can be contended that in March 1971 the people of East Pakistan or

---

[34] Ibid, p525.

[35] Address by Mohammd Yahya Khan, President of Pakistan, June 28 1971. See ibid, p559.

[36] The Six Points called for federation but central control was to be precariously established e.g. the "autonomous" East was to have jurisdiction over taxes and be permitted to create its own militia.

[37] See especially, Saxena, Self-determination, supra, p82-84.

> the leaders of the Awami League on their behalf, were entitled in international law to proclaim the independence of Bangladesh under the principle of self-determination of people"[38]

The date of course is critical because it was at the end of March when the army began its campaign of terror, a campaign that changed many of the premises on which the above question is based[39].

The ICJ contends that the 1970 election extinguished many of the legitimate grievances on which the East Pakistanis demanded a right of self-determination. Prior to that the denial of "equal rights" for the East may have been sufficient grounds for an assertion of the right[40] based on the 1970 Declaration on Principles of International Law[41] but the election, according to the ICJ, ended the discrimination against East Pakistan even though the Awami League was denied its place in the National Assembly following the election. The ICJ reasoning supporting this anomalous position is fairly confused beginning with the statement,

> "As we have seen, the Declaration of Principles of International Law seems to imply that a separate

---

[38] See A Legal Study, ICJ, supra, p75.

[39] I will discuss the impact of the army's action later in this essay but for now it is important to discover whether a right of self-determination existed before their assault.

[40] See A Legal Study, ICJ, supra, p73 and some of the figures showing economic discrimination and under-representation in government that I have already quoted and upon which the ICJ base their tentative decision.

[41] See G.A. Res. 2625, October 24, 1970, supra.

> people within a nation state are entitled to a high level of self-government in order to develop their own cultural, social and economic institutions. But how is it to be determined what that level should be? On what criteria can it be said that the Six Points complied with the principle, whereas a federal constitution within the Legal Framework Order would not have done ?"[42]

This is, ex facie, a reasonable argument but the Legal Framework Order was an executive enactment with no democratic mandate whereas the Six Points were overwhelmingly endorsed in an election which the ICJ insists re-introduced equal rights for the Eastern province. If the election is the basis on which the East forfeits its right to self-determination then surely that election must be given some meaning outside the polling booths ?

The ICJ goes on to say that President Yahya Khan did nothing to undermine the right of self-determination because,

> "He considered that in any constitution (drawn up in accordance with the Six Points) which would have resulted, the powers of the central government of Pakistan would have been weakened to the point where the future territorial integrity and political unity of Pakistan was threatened"[43]

And yet if one considers the ICJ's later point that,

> "The Awami League had no mandate for independence, nor did they claim to have one. They had fought the election on the Six Points programme of autonomy within a federal constitution"[44],

---

[42] Ibid, p73-74.

[43] Ibid, p74.

[44] Ibid.

then clearly Khan subverted the democratic process on the capricious grounds that he disapproved of the outcome. This subversion makes it impossible to argue that his decision to allow an election in the first place was enough to re-establish equal rights for the people of the eastern province. Alternatively if these "equal rights" were re-acquired by involvement in the electoral process then the failure to accord that involvement (in the shape of a majority vote for the Six Points) any political relevance reverts the people of East Pakistan to their pre-election position vis a vis self-determination.

The ICJ position is further confused by their assumption that armed resistance on the part of East Pakistan was justified because,

> "Provided the majority were ready...to grant an equal degree of autonomy to the people of West Pakistan, it is difficult to see why on democratic principles their will was not entitled to prevail. If the people of West Pakistan were not prepared to accept a constitution on this basis, the only remedy would have been partition of the state. The minority were not entitled to force their preferred constitution upon the majority.....As the army had resorted to force to impose their will, the leaders of the majority party were entitled to call for armed resistance to defeat this action by an illegal regime"[45]

This statement is at odds with the previous thesis and cannot be squared with the belief that the people of East Pakistan were not entitled to exercise the right of self-determination in March 1971. If the "only remedy" prior to the army response was partition how could it possibly be the

---

[45] Ibid, p75

case that Bangladesh was not entitled to the right of self-determination? Did the armed attack by the minority not simply confirm the existence of this right?

What the ICJ has attempted to do is support a right of resistance (which appears morally incontestable) while at the same time denying a right of secession. It has merely ended up defying logic.

If the Awami League had been permitted to form a constitution and had implemented their Six Point plan then the right of secession would have been extinguished. Had the League subsequently attempted to secede the army's intervention would not have been illegal since the electorate had endorsed autonomy and not secession. Had there been no election and no change in the conditions of the Eastern Province a right of self-determination would continue to be present.

The complication arises when one considers the Six Point plan itself. If the plan really was a "veiled scheme for secession" designed to mislead the electorate and deceive the central government then that government is placed in a difficult situation. If it allows democracy to take its course the government may find itself acquiescing to a de facto declaration of secession something a government need not do to ensure the equal rights of all the electorate are met. If it takes the opposite course it may be accused of refusing a legitimate demand for greater autonomy thereby activating a right of secession.

International law suggests that the right to autonomy or minority rights is a much more readily invoked right than the right to secede. Following the election of 1970 the Eastern province established the right to autonomy within a federal structure based on both the election result and the previous two decades of discrimination. It did not have a right to secede since the human rights element required was not present. If the government had granted autonomy based on a reading of the Six Points corresponding to it, and not outright secession, then it might have avoided both the conflict and the establishment of a separate state. If it could be established that the Awami League rejected autonomy during the negotiations then the government response was a legal one.

(vi) Human Rights and the Right to Secede.

The motives of neither party are clear but the argument is resolved by the large-scale human rights violations which took place following the army intervention. These brought into place the factors required to give East Pakistan a right to self-determination under international law. It could no longer be argued that Pakistan was a state conducting itself,

> "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"[46]

All evidence indicates that there was no compliance with these principles. A.S. Choudhury, the Pakistani member of the UN Human Rights Commission, described what he saw as,"atrocities unparalleled in history"[47]. Further, there is little doubt that these atrocities were conducted by an army composed almost entirely of soldiers from West Pakistan against the Bengali majority in East Pakistan[48]. There are records indicating that a policy which counselled genocide[49] was directing army action. The officer who stated,

> "We are determined to cleanse East Pakistan once and for all of the threat of secession, even if it means killing off two million people and ruling the province as a colony for 30 years"[50]

was not alone in this determination and his statement confirms the neo-colonial designs the West had on the East at this time. The military strategy of the army was inherently discriminatory. It encompassed racial discrimination and religious persecution and thus qualified

---

46 See G.A. Resolution. 2625, Oct 24, 1970, supra.

47 New York Times, May 30th 1971 p5 c.1 quoted in Nanda,V.P. Self-determination in International Law, supra, p332.

48 See A Legal Study, ICJ Study, p24, "The military reign of terror in East Pakistan was directed almost exclusively against the unarmed civilian population"

49 See Indira Gandhi, who claimed that Pakistan's intention was the "annihilation of an entire people whose only crime was to vote democratically". New York Times, December 4th,1971, p10.

50 See ICJ Press Release, Aug 16, 1971, p,3-4

as "alien subjugation"[51]. First there was the elimination of the intelligentsia at Dacca University. This was followed by massacres directed exclusively at Hindus, ex-members and associates of the Awami League and finally a large proportion of the Bengali peasantry (who were accused of providing support for the Mukti Bahni resistance forces). Even West Pakistan estimates of those killed amount to no less than a quarter of a million - a remarkable figure considering that they were engaged in a clean-up operation.[52] These statistics seem to confirm Anthony Mascarenhas' opinion that,

> "This was organized killing, this is what was terrifying about it. It was not being done by mobs. It was a systematic organized thing"[53]

Nanda suggests,correctly in my opinion, that,

> "...where violence is perpetrated by a minority to deprive a majority of political,economic,social and cultural rights, the principles of "territorial integrity" and "non-intervention" should not be permitted as a ploy to perpetuate the political subjugation of the majority"[54].

The Government of Pakistan had in effect foregone the right to legally govern the region of East Bengal. Self-determination could no longer be realized while that government had jurisdiction over Bangladesh.

---

51 See Res.2625, Declaration on the Principles of International Law supra.

52 See A Legal Study, ICJ , p33 and 36.

53 Sunday Times, London, June 13,1971 quoted at ibid, p33.

54 See Nanda,V.P. Self-determination in International Law, supra,p336.

.....

D. THE INDEX OF VALIDITY.

It was, unquestionably, India's intervention that led to the successful separation of Bangladesh from Pakistan. Nevertheless, it is unlikely that Pakistan would have survived as a single unit for much longer after the civil war in 1971 such was the resentment harbored by the people of Bangladesh towards the Pakistan Government. The right of self-determination came into effect when it became legally, morally and practically impossible to refute it. And yet state practice hardly confirms this view. Certainly the UN chose not to interpret events as giving rise to a definitive right to secede. The UN Secretary-General expressed concern at what had evolved in Bangladesh prior to independence but never came out in support of this irrefutable claim. During the Biafran crisis in 1968 he had said that the UN could never support the act of secession against a member state but his position on this occasion was modified and he delivered the UN's most ambivalent message yet regarding the right of secession, declaring,

> "A related problem which often confronts us and to which as yet no acceptable answer has been found in the provisions of the Charter, is the conflict between the principles of integrity of sovereign states and the assertion of the right to self-determination, and even secession, by a large group within a sovereign state. Here again, as in

> the case of human rights, a dangerous deadlock can paralyze the ability of the U.N. to help those involved"[55]

This paralysis arises as a result of the perceived ambiguity in the relationship between self-determination and territorial integrity in UN instruments on self-determination and through a reluctance to read some of these declarations and resolutions in a way that might threaten the statist framework. The UN, and the states of which it is composed, are most concerned to maintain peace and security and to avoid sanctioning a process which might threaten their existence. These phenomena have been variously described as the "disruption factor"[56] and the "domino effect".

What is needed then is a new formulation of self-determination which allays these fears by incorporating criteria which recognize these factors. In this way certainty would be established within the parameters of political reality. States would feel more secure in supporting a legitimate case for secession such as in the example cited without worrying that by doing so they were sanctioning the activities of every organization intending the destruction of a state's territorial integrity.

---

[55] See Thant,U."Introduction to the Report of the Secretary-General", 1971, A Legal Study, ICJ, p65.

[56] See Bucheit,.L.C. Secession. The Legitimacy of Self-determination, New Haven and London: Yale U. Press, 1978,Chapter 4.

If the indices of validity are applied, Bangladesh is found to possess a right to secession which was morally irrefutable (from a human rights point of view), legally grounded (the 1970 Declaration and a more complex hypothetical instrument based on our index), practically attainable (taking into account some of the factors stated above) and politically realizable.

The human rights violations committed by the Pakistan army provide ample support for the first point and a reasonable reading of the UN instruments concerning self-determination establishes formal legality. What of the substantial realities contemplated by our third and fourth contentions i.e. the criteria established in the index of validity.

(i) Some General Remarks.

All four of the essential conditions necessary for a legitimate exercise of the right of secession under the index of validity are present in the Bangladesh case. That the people of Bangladesh possessed a sense of self-identification and the political will to take action in the interests of that self is obvious from the preceding narrative. So, too is the existence of a separable territorial unit. Ample evidence also exists for the proposition that the human rights deprivations inflicted on the people of Bangladesh were of such a magnitude that the criteria requiring substantial human rights abuse was easily

satisfied. Finally, the Awami League's apparent willingness to pursue greater autonomy through the state's constitutional framework and the Pakistan government's inflexible response would seem to point to the conclusion that this was indeed a remedy of the last resort and that the people of Bangladesh were denied the option of appraising realistic alternatives[57].

In addition to thse essential conditions it is necessary to assess a number of critical variables before judging the legitimacy of Bangladesh's right of secession.

(ii) Economic Viability.

Bangladesh's ability to survive as a state has been proven over the last two decades. However, even in 1971 it was predictable that Bangladesh had an economic potential capable of supporting an independent nation-state. Previously mentioned figures suggest that the Eastern province was already carrying the burden of aiding development in the West and was receiving little in return. Industrially, the area was backward only because of a lack of investment in it by the central government and in agricultural terms Bangladesh has been described as the most fertile land in the world. Renewed links with India following independence were also expected to boost the economy. In other words, Bangladesh could not be worse off

---

[57] These conclusions are supported in the preceding text.

after secession since prior to independence it was economically exploited by the West to its obvious detriment.

Another concern linked with economic potential is that the parent state will be left an economic invalid by the secession. This was the case with Biafra and is of particular importance when the seceding entity has exclusive access to sources of raw materials or controls all outlets to the sea (Eritrea). None of these factors were an issue in Pakistan's case. Nanda makes this distinction clear in stating,

> "...its (Bangladesh's) independence would not undermine that of West Pakistan, for the latter does not depend upon the former either for its political stability or for its economic viability. Therein lies the major distinguishing feature between the East-West Pakistan relationship as contrasted with the Katanga-Congo and Biafra-Nigeria relationships"[58].

(iii) Geo-strategic Destabilization.

The fear both of the domino effect and of geo-strategic destabilization led most states to hesitate in recognizing Bangladesh's right to secede. How realistic were these fears ?

The two states most likely to suffer from the domino effect were India and Pakistan. India was concerned because of the possibility of an independent Bangladesh (East Bengal) causing unrest in West Bengal, a province of India.

---

58 See Nanda,V.P. Self-determination in International Law, supra, p334.

This never became a problem for India in the ensuing years and their support for Bangladesh indicates that these fears were not justified. The claim that Pakistan's concern that independence for Bangladesh would lead to the disintegration of the country into several smaller units has proved unfounded. Certainly the Pathans in West Pakistan were more active in their desire for greater autonomy for Pakhtoonistan during the crisis in the east and Bhutto had threatened that Pakistan would become five separate provinces if martial law was lifted in Bangaldesh. Notwithstanding, Pakistan remained territorially intact because the situation in the western provinces was not comparable to that of Bangladesh. The contagion of secession spreads only where the state-body is weak or abused.[59] It is a highly selective "disease" and, to continue the metaphor, requires amputation only in the most serious of cases.

Instability in the, strategically important, Indian sub-continent was not a prospect many viewed with equanimity. Support for Pakistan's territorial integrity even in the face of the human rights disaster in Bangladesh was based on this fear of instability. United States Secretary of State, Rogers said at the time,

> "We favour unity as a principle and we do not favour secession as a principle, because once you

---

[59] Contra Neuberger,B. National Self-determination in Post-Colonial Africa, supra, "...there will not be a Bangladesh only in Pakistan, there will be a Bangladesh everywhere." p94

> start down that road it could be very destabilizing"[60].

But as Bucheit points out,

> "the US's much-criticized role in the Bangladesh affair was dictated less by its theoretical approval of secession than by its perception of Soviet and Chinese alignments"[61].

International politics dictated how the superpowers would reveal their hands. The Americans, preferring the status quo, demonstrated little inclination to come to the aid of the people of Bangladesh. Only Congress, displaying a typically greater humanitarian concern than the executive, indicated disapproval of Pakistan's action by suspending military aid. The Soviet Union expressed its desire to see a peaceful resolution to the conflict as did a number of other states.[62] In various sessions of the UN delegates spoke of their sympathy for the people of East Pakistan but all steered clear of advocating a right of self-determination. ECOSOC condemned Pakistan's action but the remedy was to be "compromise". The Sinhalese Ambassador to the UN, H.S. Amersinge, articulated the ambiguity felt by nearly all member states when he requested that,

> "immediate recognition (be given) to the will of the East Pakistan population as expressed in the elections of December 1970...(but)...the East Pakistan leaders must renounce all secessionist demands. We do not, however question their right to negotiate secession with the Government of Pakistan, but we cannot condone or encourage the

---

60 Quoted in Bucheit, Secession, supra, p209.

61 Ibid, p208.

62 See Saxena, Self-determination, supra, p71-73.

use of force in the pursuit of these objectives"[63].

All state observers wished to give the appearance of supporting a solution in line with democracy and the preservation of human rights. Unfortunately, they could not bring themselves to condone the exercise of secession. The reasons, as stated, lie in the absence of consensual agreement about the substance of the right.

It, therefore, behooves those anxious about the strategic effects of an unfettered right of secession to engineer a process by which the right can be effectively delimited. Predictions of legitimacy would do much to remove the uncertainty which creates a climate of instability.

(iv) Popular Allegiance and Political Legitimacy.

These are what Buccheit describes as the "internal merits"[64] of the claim. They exist independently of the activities of other states and are a measure of the ingredients which are said to constitute nationhood leading to statehood.

In general terms they answer the question: Is there a people with a sufficient sense of self-identification and collective political allegiance to support a state-structure?

---

[63] A/PV 2003, Dec 7th, 1971, p11-17. Quoted above, p79.

[64] See Buccheit,L, Secession, supra, p228-231

In the case of Eritrea a national consciousness was created by the colonial powers (Italy and Great Britain) and reached a high point of organized national solidarity because of the repressive activities of the Ethiopian Government. The opposite process occurred in Bangladesh which began as a separate unit and was later absorbed into an artificial state entity. The Pakistan Government was left with the massive problem of "...making one nation out of what are essentially two"[65]. Its failure to do so comes as no surprise given the ethnic, cultural and, most of all, geographical cleavages that distinguished East from West. It is this last factor that proved most telling. It had the effect of encouraging an allegiance to national in the East and it made differentiation from those in the West even more pronounced than ethnic and cultural differences alone might have produced. Pakistani national integration proved impossible and the policies of the central government seem designed to accomplish the opposite effect.

The electoral mandate given to the Awami League was the best evidence of a universal sense of belonging which characterized East Pakistan in 1970. The unanimous support for a dominant party representing one set of political ideals was a democratic statement of intent that creates a strong presumption both of the existence of a people and of the right of that people to self-determination. This,

---

65 See Loshak,D. Pakistan Crisis, London: Heinemann,1971, p18

combined with the Government refusal to grant any alternative forms of self-determination originally sought, and a policy of racial discrimination and neo-colonial exploitation culminating in almost unequaled human rights deprivations gave rise to an irresistible right of secession[66].

.....

[66] See C.C. O'Brien, C.C. who decribes Bangladesh's right of secession as "the most solidly founded right to secede which has emerged since WW II". See New York Times, Dec 30, 1971.

CHAPTER VI

CASE STUDY: BIAFRA

SECESSION AND THE AUTONOMY COMPROMISE .

OUTLINE

.....

Abstract

Nigeria is the largest state in West Africa and the most populous in Africa (1986 est.106 million). It is bordered by Niger to the North, Chad and the Cameroons to the East, Benin to the West and has a coast on the Gulf of Guinea to the South. The capital, Lagos lies on this coast. The North is predominantly Moslem while the South is mainly Christian. Its major ethnic groups are the Hausa and the Fulani (in the North), the Yoruba (in the West) and the Ibos in the Eastern Province (Biafra). The languages spoken tend to correspond to the ethnic divisions though English is the official language. Nigeria was a British colony until 1960 when it gained its independence. Intra-ethnic disputes have been a feature of Nigerian political life since then. The worst cases of ethnic conflict precipitated the secession of Biafra (the Eastern Province) in 1967. In 1970 the Biafrans capitulated after a civil war that left a million dead. The legitimacy of this secession will be discussed in the following study.

.....

A. INTRODUCTION.

If Bangladesh is famous for its success in seceding from Pakistan then equally Biafra has gained notoriety as a representative of failed secession. Yet the pattern of alienation, mobilization and suppression is similar in these two cases. The difference in outcome can be attributed to a number of factors but the key to distinguishing the relative legitimacy of the two demands for self-determination will be found in the substantial nature of each of the elements in the pattern. In Bangladesh these elements were present in their most extreme manifestations making the secession more likely to find success and be accorded legitimacy. This was not true of Biafra where any dispassionate investigation would discover a number of moral, legal and political ambiguities.

The Eastern Region of Nigeria seceded from the federal state of Nigeria on the 30th of May, 1967 declaring its independence as the Republic of Biafra. On July the 6th of that same year the armed forces of Nigeria attacked Biafra (in what was described as a police action) with the stated aim of reintegrating the area within a new Nigerian federal structure. The civil war ended on the 12th of January, 1970 when the leaders of the Biafran secession surrendered

unconditionally and the Eastern Region was reabsorbed into Nigeria.

The antecedents for the initial declaration are complex and in bear remarkably few similarities to the Bangladeshi situation. As with Eritrea and Bangladesh however, the colonial legacy was a decisive factor in creating the conditions which led to the secessionist struggle.

.....

B. COLONIALISM TO SECESSION

(i) The Colonial Legacy.

The British interest in Nigeria began in the mid-nineteenth century with the occupation of Lagos (a port on the South-West coast on the Bay of Guinea) in the 1860s and the appointment of a British consul in 1849.[1] This was followed by the proclamation of a Niger Coast protectorate in 1900 and the establishment of the United Protectorate of Nigeria in 1914. This colonial unit was set up principally for reasons of administrative convenience and marked the first attempt to merge the Moslem North and the, predominantly, Christian South. Significantly, there are records of the resentment felt by the North towards the

---

1 See Umozurike, U. Self-determination in International Law, supra, p261.

merger [2] and there are indications that Northern separatism might have become a potent force had it not been for its desire to retain access to the sea through the ports in the South.[3] The British policy from this point on was essentially one of "divide and rule" beginning with indirect rule after the First World War which enabled the Eastern Nigerians to advance at a more rapid pace than their northern counterparts and consolidated by the Richards Constitution of 1946 which enacted a very weak federalism. Throughout this period regional differences remained entrenched and there was little attempt on the part of either the British or Nigerians to facilitate a national identity. In fact the division of the country in 1946 into three units, North, East and West[4], encouraged these regional tendencies and in the following decade inter-regional rivalry resulted in several outbreaks of xenophobic violence. Between 1957 and 1959 all three regions made demands under the constitution for self-government, ominously prefiguring post-independence turmoil.[5]

---

[2] Ibid,p261.

[3] see Tamuno, Separatist Agitations in Nigeria since 1914, 8 Journal of Modern African Studies 1970, p566

[4] These changes were made partly to perpetuate rthnic divisions and partly to facilitate British administration.

[5] These were made at the Constitutional Conferences in 1957 and 1959. Amber,P. Modernization and Political Disintegration: Nigeria and the Ibos, 2 Journal of Modern African Studies (1967),p163.

At this time the country was composed of three major tribal peoples and several smaller ethnic groups. The more populous North was the territory of the Hausa-Fulani who were overwhelmingly Moslem and of a more traditional orientation than the other groups. Their relative lack of development was partly a consequence of cultural differences and partly because of deliberate British policy. In the West were the Yorubas who were a mix of Moslems and Christians and the Christian Ibos dominated the Eastern region. The Ibos were the most Westernized and entrepreneurial of the three groups and thus had a tendency to fan out over Nigeria in search of opportunity. This however had little effect on the solidity of tribal ties and all three areas continued to display more regional loyalty than national unity. Conflict, at first sporadic and non-violent, was the inevitable consequence of the attempt to make three nations into one state.[6]

(ii) Independence

Independence in 1960 brought little respite from this strife. Central government was incapable of imposing any semblance of unity on the country. Census figures were disputed, tribalism flared and the federal election in 1964 was marked (especially in the Western region) by,

---

[6] Many writers make the point that the Yorubas,Ibos and Hausa-Fulani constitute nations in much the same way as the English,Welsh or Irish. See K.W.J. Post, Is There A Case For Biafra ? International Affairs 44, 1968, p28.

> " the most glaring abuses that could be witnessed anywhere in parliamentary elections"[7].

With the whole country engulfed in ethnic hostility and government corruption, the stage was set for a series of coups that were to lead directly to the Biafran secession.

The first coup began on January the 15th, 1966 and was led by disaffected junior officers in the army. Predominantly Ibo-inspired, its victims were nearly all Northern politicians and senior army commanders. On May 24th a counter-coup was launched by Major General Aguiyi Ironsi (an Ibo senior officer who had survived the first coup) who began a personal war on regionalism which he clearly regarded as the scourge of Nigerian unity. He succeeded only in estranging both North and South with his Unification Decree and he was killed in the year's third coup of July the 29th 1966. This coup was prompted by the North's fear of Southern domination and was headed by a Northerner, Lieutenant-Colonel Yakubu Gowon. Gowon saw little to encourage him that national unification was possible and he contemplated withdrawing the North from the rest of Nigeria. Meanwhile during the period September-October 1966 a number of riots took place in the North accompanied by massacres which took the lives of between 10,000 and 40,000 Ibos living in the region. One million Ibos were expelled from the North and resettled in the Eastern region. By this time

---

[7] See Umozurike, Self-determination , supra, p263.

two opposing forces were gathering momentum. Gowon had implemented a 12-state federal compromise which gave the central government added strength while dividing the country provincially according to ethnic characteristics. His government became committed to this solution and made it clear that any attempt to reject it would be met with force.

(iii) Secession

The Eastern Ibos and their leader, Lieutenant-Colonel Odumegwu Ojukwu, resentful of the North's treatment of their people were intent on achieving independence from Nigeria. The Republic of Biafra was declared in May, 1967 and was supported by both the Ibos and, to lesser extent, the other ethnic groups which inhabited the Eastern Region. The inevitable collision occurred and a civil war in which millions were killed or wounded ended only with the defeat of the Biafrans in 1970.

.....

C. THE RIGHT TO SECEDE

In Bangladesh victory went to the secessionists and the resultant state has long been accepted into the international community. The situation in Eritrea remains unresolved but probably marginally favours the creation of a new sovereign state. Biafra, in contrast, has become a

purely historical term; the region it occupied is simply another province of Nigeria. As Umozurike states, "the law takes note of a fait accompli"[8]. The Biafran claim is no longer an issue in international relations but like Bangladesh's its theoretical and practical implications remain alive. Unlike Bangladesh it closely resembles the self-determination archetype of the federated province which occupies a land mass within the state's larger geographical area. Biafra also wishes to gain its own independence from colonially-imposed national boundaries but as with all cases of secession and attempted secessions the pertinent factors are frequently those peculiar to itself.

Biafra was a test case not only for self-determination but also for the precarious notion of African territorial integrity and the wider ideal of pan-Africanism. Its legitimacy was thus perceived in different terms from that of Bangladesh. The future of the black African state was said to be at stake. It became a matter of African "public policy" that Biafra, regardless of the internal merits of its claim, should fail to attain independence. The sovereign rights of the new African states were regarded as being under threat from the Biafran secession so that even if the Biafrans were thought to possess a good case in vacuo the greater good of African unity would have to prevail.

This is a consideration of some weight but to ignore the substantive case brought by the Biafrans would be to

---

[8] Ibid p267

deny the applicability of legal principle and justice to the resolution of African problems. Biafra was no more a wholly African concern than it was a matter of internal Nigerian politics. Secession is an international problem, self-determination decidedly a matter of international concern. The claims to exclusive jurisdiction are anachronistic and reactionary.

On turning to the substantive issue one is immediately confronted by the complex nature of this particular claim. The Biafran case is undermined by a number of crucial factors while the central Nigerian authorities acted with a degree of political and human concern not present in Bangladesh[9] or Eritrea. Biafra's claim to self-determination is not wholly without merit but unlike the claim held eventually by East Pakistan it never takes the appearance of an irrefutable or undeniable one.

This is because, as stated earlier, neither the alienation of the Ibos nor their suppression was as severe as that of either the East Pakistanis or the Eritreans. Furthermore, the position of the rest of Nigeria was much different from that of West Pakistan in 1971. The fear of disintegration and economic catastrophe was reasonable in the case of Nigeria and the central government's attempts to hold the body politic together appear to have been made in a

---

[9] See Chowdhury,S.R. The Genesis of Bangladesh, London:APH, p104 in which it is stated, "evidence shows Army action [in East Pakistan] far more brutal than anything seen in the Nigerian civil war".

spirit of compromise not present in Pakistan. Finally, unlike the Awami League, the Ibos could not guarantee the support of the other tribal groups in their area whose own territorial ambitions did not necessarily coincide with that of the Ibos.

That said, Biafra was born out of some genuine grievances that should not be overlooked. This was not a case comparable to that of the Katangan secession in the Congo between 1960 and 1963. In that case the secessionists were inspired by mercenary motives and supported in the venture by the colonial Belgians who saw opportunities for further economic exploitation of the mineral rich area without which the rest of the Congo would have lost its viability. Biafra's mineral wealth was substantial but the economic possibilities of the area were not what caused Biafran secessionism nor was its cause aided by an ex-colonial power eager to exploit its economic potential.

Biafra lies somewhere on the spectrum between Katanga and Eritrea in terms of the legitimacy of its claim to secede. I want to now look in more detail at the relevant circumstances in order to discover whether Biafra had a right to self-determination by secession under (1) the United Nations law of self-determination and (2) the index of validity outlined later[10].

.....

---

[10] See Chapter Eight.infra.

D. UN LAW AND THE BIAFRAN CLAIM.

The Biafran claim was looked on with some disdain by the large majority of the states that made up the UN and this may account for the organization's passive response to the crisis. There was little attempt to address the legal and political dilemmas presented by the case and the UN seemed content to allow the OAU exclusive supranational jurisdiction.

The timing of the secession is of some importance in this regard. Biafra's struggle for independence predated by three years the Declaration on Principles of International Law[11]. The UN position on self-determination underwent something of a transformation in that declaration. The Biafran secession came at a time when the concept of colonial self-determination was predominant and the post-colonial unit's right to territorial integrity was free of the caveats subsequently attached by the 1970 Declaration. U.Thant, the secretary-general of the UN in 1967, made clear the organization's official position when he stated,

> "As far as the question of secession of a particular section of the State is concerned, the United nations' attitude is unequivocable. As an international organization, the United Nations has never accepted and does not accept and I do not believe it will ever accept the principle of secession of a part of its member state"[12].

---

[11] See G.A. Resolution. 2625, 24 October, 1970,supra.

[12] UN Monthly Chronicle, Vol 7, Feb 1970, p36.

United Nations law in 1967 was most concerned with eradicating colonialism and preserving post-colonial boundaries. It was ill-equipped to deal with the coming era of self-determination in situations which did not conform to the colonial model. The principles incarnated in the 1960 Declaration on the Granting of Independence to Colonial Countries and People[13] applied only to these cases where there was, "alien subjugation, domination and exploitation"[14]. None of these factors was present to a significant degree in the Nigeria of 1967. There was little of the neo-colonialism[15] which marked the relationship between East and West Pakistan. The Eastern Province (Biafra) had contributed its fair share of Nigerian leaders and its influence in the army was at least as great as that of any of the other provinces. Economically the Eastern Province was probably the strongest of the provinces and it enjoyed symbiotic economic relations with the rest of the country.

---

13 See UN General Assembly Resolution 1514, 14 December,1960, supra.

14 Ibid ,Principle 1

15 See the definition of colonialism quoted in Saxena, Self-Determination, supra, p101, "colonialism is the establishment and maintenance for an extended time of rule over an alien people that is separate from and subordinate to, the ruling power ...[where there is] a manifestation of the everpresent truth that the strong dominate the weak and a part of that country does or ought to exist for the benefit of the other part." from Emerson, R. & Fieldhouse,D.K., Colonialism, International Encyclopedia of the Social Sciences, Vol 3, p1.

Under present UN law, as embodied in the 1970 Declaration on the Principles of International Law, it is doubtful whether the Biafran claim has legal force. The central question here must be : Was Nigeria a state conducting itself,

> "in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour"[16] ?

This issue has both a temporal and a factual dimension. There has to be not only an evaluation of the above phenomena but also a recognition that the expression "Nigerian state" meant different things at different times.

The Biafran secession was prompted by a perception on the part of the Ibos that their physical security could no longer be guaranteed in the Nigerian state. This is in part borne out by the evidence of widespread massacres of Ibos in the North prior to the declaration of independence.[17] However, human rights abuses alone do not give rise to an irresistible right to secede under international law. They

---

[16] See General Assembly Resolution 2625, 24th October,1970, supra.

[17] see Legum,Colin. Observer, 16th October, 1966, who is quoted as saying, "after a fortnight, the scene in the Eastern Region continues to be reminiscent of the in-gathering of the exiles into Israel after the end of the last war. Men, women and children arrived with arms and legs broken, hands hacked off, mouths split open. Pregnant women were cut open and the unborn children killed"

have to be accompanied by a central policy of discrimination and repression. There is no suggestion that the massacres were authorized in this instance as they were in Bangladesh and continue to be in Eritrea. The Nigerian government was unquestionably guilty of negligence but the Gowon government had just acquired power and had little control over the simmering ethnic hostilities. Furthermore, the government's bona fides are well established by its willingness to negotiate on the question of real autonomy for the provinces. Gowon's 12-state solution was an advanced scheme for ameliorating regional jealousies and antipathies. The 12-State decree of May the 27th, 1967 outlined a new federal system which was to replace the four large semi-autonomous, mutually-suspicious regions with twelve smaller, more interdependent and provincially sensitive states. This arrangement found favour among three of Nigeria's four provinces (the fourth being Biafra). The North feared a southern coalition and saw the 12-State solution as a means to prevent united opposition to its perceived superiority. The Mid-West was concerned about an independent Biafra and wished to forge new constitutional ties with the North while the West, though initially in favour of secession for itself, saw distinct possibilities for greater Northern domination should Biafra be allowed to withdraw from the federation. As Nixon points out, $Nigeria_3$ (as he describes the 12-State Nigeria), posited a new, more legitimate "self"

as a counterweight to the Biafran "self"[18]. Gowon's 12-State solution permits Nigeria to claim both a right to its self-determination and territorial integrity based on a reading of the Declaration on Principles of International Law.

.....

E.BIAFRA AND THE INDEX OF VALIDITY.

How would Biafra's claim be approached under the more sophisticated legal framework for secession proposed in this study? Clearly some of the factors relevant under present international law would remain so under any new proposal. The merit of searching for a more complex test would lie in its more comprehensive nature. A number of socio-economic and political factors not considered in any formulation of the UN law on self-determination would enter the legal equation. This would have the effect of reducing the formalistic elements to a minimum and give any legal decision political meaning. Therefore, what is proposed is is a combination of procedural consistency, legal certainty and political relevance in defining the right to secede and its limits.

---

[18] See Nixon, Self-determination : The Nigeria/Biafra Case, World Politics 24 1972, p492.

The case involving Biafra is not one that lends itself easily to any decisive conclusion. This is because its claim to secede from Nigeria, while having great moral and political weight, is flawed in some important respects. Equally the Nigerian claim to maintain its territorial integrity has some foundation but cannot be admitted without certain reservations.

(a) Essential Conditions:

(i) Biafra as a "People".

No question of secession can arise without a preliminary designation of the group seeking it as a people. It is the Biafran claim to be regarded as such that must now be considered.

Do the Biafrans possess the objective criteria (ethnicity, culture, territory) and, more importantly, what Nayar describes as the determining factor (i.e. "the subjective sense of its (the people's) own identity and common destiny"[19]) ?

The Ibos can be regarded as a nation in the same way as the Welsh or English. They have common tribal and racial characteristics which distinguish them from other Nigerians. Furthermore they were undoubtedly an oppressed people at the

---

19 See Kaladharan Nayar,M.G. Self-determination Beyond The Colonial Context : Biafra In Retrospect, Texas International Law Journal, Vol 10, 1975,p334.

time of the events in question. The major difficulty, though, lies with the fact that the Ibos and the Biafrans were not synonymous groups. Ojukwa, the Biafran leader, hinted at this when he said, "Biafra is a people not a tribe"[20]. The concept of the Biafran nation embraced not only the Ibos but also the other tribal groups in the Eastern Region. Of course it has never been a prerequisite for self-determination that the "people" in question be ethnically homogeneous and the Biafran Consultative Assembly which sanctioned the pursuit of secession contained a very substantial non-Ibo minority[21]. Nevertheless the Biafran claim was partly based on the right to physical security - a right which had been withdrawn from the Ibos in the rest of Nigeria. But if this was an Ibo claim why then was the whole of the Eastern Region forced to secede ? If on the other hand it was a Biafran claim how could the massacres of the Ibos be used as a justification for secession ? [22] Had these issues been resolved they might have lent more weight to the Biafran cause.

---

20 See Ojukwa,G Biafra : Selected speeches and random thoughts, p133-134, (1969).

21 The non-Ibo minority made up 165 of the 335 members of the Assembly.

22 See Panter-Brick,S.K. The Right to Self-determination: Its Application to Nigeria, International Affairs 44, 1968, p254-66, for an elaboration of these questions.

(ii) Biafra as a territory capable of supporting a claim to self-determination.

The Eastern Province of Nigeria (Biafra) was recognisably a territorial unit almost from the moment Nigeria itself was created. It has always been a distinct component of that state and in 1957 it gained its internal autonomy, even sending its own representatives to London.[23] By the late sixties provincial loyalties enhanced by tribal cohesion meant each region was most concerned with securing its own interests in the constitution ahead of any perceived Nigerian national interest. Secessionist tendencies continued to dominate the political scene as they had done throughout the history of modern Nigeria.[24]

These tendencies are unsuprising considering the assessment, made by a former administrator that Nigeria was,

> "...perhaps the most artificial of the many administrative units created in the course of the European occupation of Africa."[25]

The Biafran claim can find little solace in such an appraisal since the Eastern Province itself was an administrative unit and, given the tribal differences, was probably as artificial as the Nigerian unit. It was not a

---

23 See Nixon, Self-determination : The Nigeria/Biafra Case, supra, p481.

24 see for further examples, Tamuno, Separatist Agitations, supra.

25 See Lord Hailey, An African Survey Revised, London : Oxford University Press, 1957, p307

"natural internal demarcation"[26] but rather a colonial division. This is not to discount Biafra as a territory with the potential for self-determination but rather to post a reminder that its claim on this ground is no better than Nigeria's.

(iii) Human Rights and Biafra

The question of human rights has already been dealt with at some length in the discussion of the UN law of self-determination[27]. The condition of aggravated human rights abuse is not sufficiently present here to activate a right to secession. No doubt there was a temporary suspension of equal rights for the Ibos but it took the form of inter-ethnic conflict rather than direct government oppression (e.g. Eritrea and Bangladesh). The degree of central direction present in the latter two cases was not apparent here. Even during the civil war itself the Nigerian Army appears to have operated within a certain code. An international group of observers found no evidence of genocide and concluded that federal troops had behaved with restraint[28]. This is not to deny that human rights abuses

---

26 See Tamuno, Separatist Agitations, supra, p565.

27 Ibid.

28 see Woronoff, J., Organizing African Unity, p424, quoted in Saxena, Self-determination, supra p47. The representatives came from Canada, Poland, Sweden, United Kingdom, United Nations and the OAU. All these organizations and states however favoured Nigerian unity which may colour their collective assessment.

did take place on a large scale, but the remedy [29] in this case could not be one of a last resort since (1) this was not the most extreme denial of rights possible and (2) a number of alternative remedies had been by-passed.

It is to these alternatives and the relative legitimacy of the Nigerian and Biafran claims this analysis turns.

.....

(b) Critical Variables:

(i) Economic viability of Biafra and Nigeria

The Katangan secession failed to meet the criteria of the index of validity on a number of grounds but the most important of these was the devastating economic impact such a move would have had on the rest of Zaire at that time. In Biafra the situation was less clear. Biafra (or the Eastern Region) was certainly the location of a large number of oil deposits[30] without which Nigeria would have been much poorer. However, there is little doubt that Nigeria, as the most populous state on the African continent, could have survived the secession and remained economically viable[31].

---

29 See generally White, Self-Determination: Time For A Reappraisal, Netherlands Law Review, supra.

30 See Saxena, Self-determination, supra, p37. He puts the figure at between 600-1200 million tons of oil.

31 pace Post,K.J. Is there a case for Biafra, supra, p38 in which he argues that Nigeria would not have been viable

Equally these same oil reserves and the entrepreneurial disposition of the Ibo people would have ensured a relatively bright economic future for an independent Biafra.

The one question that remains then is that of motive. One would clearly prefer to exclude from the category of legitimate secessions those that are undertaken for purely selfish economic reasons. This does not appear to have been the case with Biafra where the secession was prompted by humanitarian and political concerns[32]. Nor do the pronouncements of the central Nigerian authorities reveal any suspicions on their part that this might have been the motive of the Biafrans. Instead they stress the need for political unity rather than economic integration.

(ii) Geo-strategic implications and domino effect.

A successful Biafran secession would undoubtedly have had major strategic consequences. Nigeria would have lacked access to the sea and there was the possibility of continuing conflict between it and a newly-independent Biafra. Biafra's choice of international allegiance would

---

with the amputation of the Biafran territory. One can only assume that his standards for viability are much too high.

[32] Note too that unlike the Katangan secession where the secession was supported by the Belgian mining company, Union Miniere, the Biafran secession was looked on with distaste by the large multi-national oil companies who did not view the possibility of having to renegotiate petroleum contracts with any enthusiasm. As a consequence their support was for the Nigerian government.

have been a controversial issue but there is little doubt that it was capable of maintaining its political independence free of overt, big power influence. External disruption would probably have been minimal since Nigeria was not regarded as an area where superpower conflict, either direct or by proxy, was likely.

Far from minimal was the potential for internal disruption. Talk of secession among the various regions was common currency and the translation of talk into action in one of these regions might have had a disturbing knock-on effect in the others.[33] Even Biafra may have been met with a swift claim to secession on the part of the Ijawes. There was the further question of resentment amongst disaffected Ibos left behind in the Mid-West province. These considerations, though not decisive, weigh against the legitimacy of the Biafran secession. They suggest that the trauma caused by a Biafran secession would have had a profoundly negative impact hardly alleviated by the increased sense of security felt by the Biafrans themselves.

---

[33] Secession has been envisaged by each of the regions at some point. At the Constitutional Conference of September the 12th, 1966 the North originally wished to include the following clause in any constitutional amendment, " [the] right of self-determination of all people in this country must be accepted ...[including]...the right of any state within the country to secede." The Western Region too proposed that, "each state should have the right unilaterally to secede from the Commonwealth at any time of its own choice." See Umozurike, supra p478.

(iii) Alternatives to secession and Nigeria's right to its political unity.

Gowon's 12-State federal proposal is the key to this whole discussion. His proposal transformed a bald declaration of political sovereignty into a sophisticated assertion of Nigeria's right to self-determination. Biafra's claim to secede would have acquired greater legitimacy in the face of government intransigence. Instead it was met by a competing claim based on a restructuring of the constitutional arrangements intended to eradicate the very problems the secession itself was dedicated to abolishing. The Nigerian government chose an integrative solution rather than an inherently conflictual one.[34] The new Nigeria envisaged by the government became a more legitimate counterweight to the Biafran quest for self-determination which began to look like a solution designed to add to the political alienation of the many minorities left in Nigeria.[35]

(iv) Bona Fides and the Autonomy Compromise.

This poses a major question pertaining to our study (i.e. is the promise of a constitutional arrangement that the state will "represent the whole people" sufficient to

---

[34] see Saxena, Self-determination, supra p93

[35] see Nixon, Self-determination: The Nigeria/Biafra Case, supra p492

allow a government to claim a right to its territorial integrity over a competing claim to secede?) Or should the secession be judged against previous constitutional efforts to maintain unity? If the latter is the case then Nigeria's claim is harder to support given the fact that imperfections in the system caused such resentment that a million Ibos were forced to evacuate parts of their own country. However, if we look at the promise contained in the 12-State compromise then the Biafran claim seems less secure. Biafran secession is made to look like the selfish act of a mineral rich unit within a federal state likely to have consequences detrimental to the other minorities in Nigeria. Furthermore it has not been conclusively established that the Ibos had the full support of the other tribal groups within the Eastern Region of which there were approximately 40%. There is some indication that the Ijawes would have wished some measure of autonomy over Port Harcourt - something they would be unlikely to achieve under Biafran sovereignty. The 12-State proposal would have greatly weakened Biafra and this may have been Gowon's intention. However, his power base in the North was also to be compromised by the new arrangement which would have divided the Northern region. The 12-state proposal catered more to the needs of minorities within Nigeria. The Ijawes position under this arrangenment may have looked more attractive than Biafran independence. This inevitably gives rise to the further question : Would the Biafran state have been any more

capable of representing the whole people than the Nigerian state ? There is no conclusive answer to that question, a fact that itself argues in favour of the status quo.

.....

From the study made above it can be argued that, the Ibos and Biafra did have a right to self-determination but not a right to outright secession. The Eastern Province had a right to self-determination within a newly constituted Nigerian federal structure. In order to satisfy the demands of the principle of self-determination this should have taken the form of greater regional autonomy and an end to the discriminatory practices that had afflicted Nigerian political life up to that point. Had these requirements not been met then secession might, under under the index of validity proposed, become a legitimate means to achieve self-determination for the Biafran people.

.....

CHAPTER VIII

CASE STUDY: SCOTLAND AND QUEBEC.

SECESSION IN A REPRESENTATIVE DEMOCRACY: PROVINCIALISM AND REGIONALISM.

OUTLINE.

.....

Abstract

Scotland

Scotland covers the northern part of the United Kingdom occupying 37% of the total British land mass. It has a border with England to the South but is otherwise surrounded by water (the Atlantic Ocean and Irish Sea to the West and the North Sea to the East). Originally inhabited by a distinct celtic people, it can now be said that the Scots are of the same ethnic background as the majority of the British people. The Kingdom of Scotland entered into a union with England and Wales in 1707 and has remained part of the United Kingdom ever since. The Scots are possessed of a strong sense of national identity though they do constitute a state in themselves. This latent nationalism has had only the limited political effect described in the following pages.

Quebec

Quebec is a province of Canada with a population of 6,658 000 (Jan,1987). It is bordered by the fellow Canadian provinces of Ontario to the west and Newfoundland and New Brunswick to the east. To the south it is bordered by the US states of Vermont, Maine, New York and New Hampshire. It has a 1000km. coastline on the Hudson Bay (west) and Atlantic Ocean (east).

Quebec is the French-speaking province of Canada with eighty-one per cent naming French as the mother toungue. Eighty-eight per cent are Catholics and this gives Quebec its distinctive quality within the Canadian state as seen in the recent Meech Lake Accord which recognizes Quebec as "a distinct society". Quebec's claim on the right of secession, intermittently agitated for, is the subject of the following case study.

.....

A. INTRODUCTION.

The problem of secession is not confined to states in the developing world even if most of its violent manifestations are found there. In North America and Europe there are discrete, territorially-separate minorities within states who have at one time or another sought independence from those states. North America's most voluble separatist movement is found in the French-speaking, Canadian province of Quebec which witnessed rare outbreaks of violence during the crisis of 1970 when it seemed possible that secession might occur. Though the situation is calmer now, the Quebec issue remains a constitutional thorn in Canada's side and the Canadian Government in Ottawa has expended a great deal of energy in the last two decades in ensuring that secession is never again contemplated by the French Canadians in Quebec.

Likewise few European countries are free of separatist concerns despite the high level of economic advancement and central control found on that continent. The Basque separatists in northern Spain and their terrorist arm ETA have the highest profile among western European groups while in Eastern Europe such tendencies threaten the dismemberment of the multi-national Yugoslav state. In the Soviet Union,

the Baltic nations, Lithuania, Estonia and Latvia, are beginning to perceive Gorbachev's perestoika as an opportunity to agitate for increased autonomy if not outright independence. These and other movements in Europe have met only limited success since the Second World War. However, it is important to recognize that precedents for a successful secession do exist there. In 1905 Norway seceded from Sweden in a peaceful if not wholly- uncontested manner and low-intensity armed struggle in Ireland during and following the First World War resulted in the creation of a new Irish state[1], the Republic of Ireland, in the southern part of an Ireland which had once formed a part of the British state. Indeed the UK is perhaps the most fertile ground for separatist movements in Europe since it continues to bind four very distinct national groups, the English, Irish, Welsh and Scots, all of whom maintain a strong national identity.

The following study, then, will examine the separatist movements in Scotland, a distinct country covering the north of Great Britain[2], and the province of Quebec in Canada.

---

[1] This state was known first as the Irish Free State but later became the Republic of Ireland (or Eire as it is commonly referred to in the UK).

[2] A distinction can and should be drawn between Great Britain and the United Kingdom (UK). Great Britain includes only Scotland, England and Wales. The UK adds Northern Ireland to these three. The term "Britain" is used synonymously with the UK and the British are regarded as the nationality of those who live in the UK.

The purpose is to analyze secession in the context of modern industrial states (Canada and the UK) and in particular to examine whether secession could ever possess legitimacy while a sophisticated democracy functions effectively.

B.SCOTLAND

Scotland's position in the British unitary state is a strangely anomalous one. It has no status under international law and has few of the powers of a state or province within a federal arrangement e.g. it has no legislative capacity such as that found in Texas or Ontario. It is however a nation with a more pronounced sense of history and identity than many of the nation-states currently in existence and represents a curiously well-defined sub-system within the UK. Scotland is readily identifiable as a country and the Scots as a people yet its absorption into the larger British social, political and economic unit has been both harmonious and relatively comprehensive.

This absorption began in 1707 with the Treaty of Union between England and Scotland which forged a single state out of two nations. Previous to this, Scotland had existed as an independent state[3] with its own crown and nobility. The distinctiveness of Scotland within the British land mass began with the Roman invasion of Britain in AD 43. By AD 77 the south of Britain had been conquered but the Roman army

---

[3] I use this term loosely to describe an independent actor on the international scene. States as we now conceive of them did not exist at the time referred to in the paper.

was repelled by the Picts in the region of Caledonia[4]. The Romans built two walls to separate England from Scotland and after their departure the division was perpetuated by this physical demarcation and consolidated by the differing degree of social development in the two parts of Britain. With the union between the Picts and the Scots (from Ireland confusingly) in the Middle Ages a Scottish nation emerged whose independence in the centuries prior to 1707 was asserted in various wars with the English and alliances with the French. It was in this period, too, that Scotland's distinct educational, legal and ecclesiastical systems took shape.

The Union of 1707 has been the subject of much dispute over the centuries. However, there is little doubt that it was a voluntary act on the part of two sovereign powers that was mutually-beneficial. It undoubtedly constituted an act of self-determination by Scotland which remains in constitutional force today. Though this may not have been a decisive act of self-determination (i.e. a once-only decision), it is one whose consequences are now so thoroughly entrenched as to be almost irrevocable. Furthermore this constitutional formula has never been subject to the subversion which marked the Ethiopia-Eritrea constitution three and a half centuries later. The vastly more powerful English nation, while imposing its dominant

---

[4] Caledonia encompassed most of what we now know as Scotland.

stamp on the British state, has done little to weaken the Scottish institutions of church, law and education protected by the treaty. Scotland has thus remained culturally and politically differentiated. This is evident by the uniqueness of its national institutions.

In the following section it will be shown that Scotland, despite constituting a well-defined "people", more socially and ethnically homogeneous than that of the Eritreans or Biafrans, does not possess a right of secession (under either UN law or my suggested index of validity) because of the absence of certain necessary conditions.

(i) The Scots as a "people".

Scotland's claim to nationhood is a particularly emphatic one. In fact, only the absence of legislative capacity prevents us from designating Scotland a sub-state.

In other matters Scotland is already relatively autonomous. Its education system is very different from that in England and Wales with a unique examination process and an entirely separate administrative structure. The Scottish universities offer degree programs with a radically different orientation from that found in England. The Scottish police force operates under police legislation which applies only in Scotland and many of its procedures are different from that of its English counterparts.

Edinburgh is the seat of Scotland's executive branch where a mini-government led by the secretary of state for Scotland implements important policies formulated by the Scottish bureaucracy. Major policies are initiated in London by central government. However, the method of their application in Scotland is often left to Scottish administrative bureaux. As Kellas reminds us,

> "Scottish government should serve two purposes : to run the things which must be done differently in Scotland (e.g. law, education, housing and industrial development) and to coordinate government activity on all fronts to take account of Scottish needs (e.g. economic planning)."[5]

Apart from defence and foreign policy, then, there is little with which the central Scottish "government" is not directly involved.

It is the legal system, however, which argues most persuasively for the notion of a Scottish "nation sub-state" and, by implication, "people". Scotland's independent legal system is enshrined in the Treaty of Union and has been guarded carefully by Scots lawyers and politicians alike. Scots law, unlike its English equivalent, is derived from Roman Law and is more "principle" than "precedent" based. Its practitioners nearly all come from the Scottish university law faculties which teach only Scots law and those aspects of UK law which have applicability in

---

5 See Kellas,J.G, .The Scottish Political System ,3rd,ed.,Cambridge:Cambridge University Press,1984,p61.

Scotland[6]. Even at Westminster, home of the UK parliament, separate laws must be passed for Scotland[7]. Kellas, again, states that this separate legislation "is important in strengthening the autonomy of Scottish politics."[8]

These institutional factors are reinforced by the consciousness of the Scots that they do constitute a people. The Scottish national identity is a powerful one and recent polls show that Scots overwhelmingly perceive of themselves as Scots first and British second[9]. This subjective self-identification is an indicator of the existence of a people. Culturally, this self-identity is encouraged by the existence of a distinct Scottish press and news media. In the sporting world, Scotland often competes as a separate entity. This is particularly true of football where Scotland fields a national team in World Cup tournaments competed for almost exclusively by teams representing states[10]. All this has helped foster a continuing sense of national identity in the absence of statehood.

---

6 e.g. Revenue or tax law.

7 Private law is exclusively Scottish with minor exceptions. The public law areas which are most often legislated for Scotland specifically are in the areas of law reform, local government,education and agriculture.

8 See Kellas J.G. The Scottish Political System, supra, p25.

9 Ibid.

10 Only the other "home" countries are permitted to compete on this basis. It is inconceivable that any other ethnic or national minority be admitted to international sport at this level.

(ii) Scotland's right to self-determination under UN law

By almost any definition the Scottish nation can be described as a "people". It satisfies the criteria, both subjective and objective, by which most models determine the existence of a people. However its right to self-determination can only be asserted rather ambiguously. UN law until 1970 applied the right only to sovereign states and territories still under (racial) colonial rule. The Declaration on the Principle of International Law[11], of that year, gave the right meaning for "peoples" within a state which failed to meet certain democratic and humanitarian standards[12].

The UK meets those standards easily and Scotland can hardly therefore claim the right to secede as a last resort[13] under that declaration. Additionally it is difficult to discern a colonial patina in the relationship between England (or the UK in general) and Scotland.[14]

---

11 General Assembly Resolution 2625 , 24th October 1970, supra.

12 See Chapter III, infra.

13 See White,R. Self-determination: Time for a Re-assessment ,Netherlands Law Review.

14 But see "Getting Away Scot-free, Fed by economic stagnation and political neglect, Scottish separatism is regaining its head of steam." Michael Keating, The Globe and Mail, Monday, January 16th, A7. But there is little evidence in the article that this economic stagnation is peculiar to Scotland. "Parts of southern England have been booming" but Scotland is suffering no more badly than the North of England and in some areas is doing much better.

Scotland has benefited from the Union and there is evidence that Scotland receives a proportionally greater share of the social services and industrial development budget of the UK.[15] Scotland's right to self-determination is a different issue. As a distinct national group Scotland qualifies for certain minority rights and a right to some degree of autonomy.

These rights have already been acquired. Scotland possesses and exercises the right to self-determination by maintaining a separate socio-political existence short of outright secession. Certainly Scotland has been allowed to exercise its democratic right to determine it own future. In the referendum on devolution in 1975, during which Scots were given the opportunity to vote for greater legislative autonomy , only 32.8% of the electorate confirmed their support for this constitutional change.

(iii) Scotland and the right to secede.

This absence of popular approval for even a limited measure of autonomy has important consequences for the right of secession. One of the central determinants of the existence of the right lies in the degree to which the people in question have a desire to secede. This is itself determined by the amount of grievance felt by the people and the level of solidarity arising from this sense of

---

15 See Mackintosh, Scottish Nationalism , 38 Political Quarterly,1967, p345.

resentment. The Scottish people experience only a comparatively "low-level grievance"[16] next to the Eritreans or Tamils which is indicative of the absence of discrimination and/or human rights abuse.

(iii) Human Rights in Scotland

Human rights contributes the most critical indicae to the index of validity for secession. Secession is posited under this scheme as a possible antidote to human rights abuse. This is in keeping with the UN law set out in the Declaration on the Principles of International Law. Certainly, the severity of the abuse will determine (all things being equal) whether a right to secede arises. Clearly genocide, regardless of other factors, must give rise to an immediate right of secession. This occurred in Bangladesh and the near-genocidal policy of the Ethiopian Government has strengthened Eritrea's claim to become an independent state.

Lower levels of abuse may, in combination with a series of other factors, contribute to the establishment of a right to secede. Even these abuses must be associated with the right to physical security. Rights such as the right to work or the right to suitable housing are not relevant to our study unless deprivation of these rights is accompanied by

---

16 See Schwarz , The SNP, Nonviolent Separatism and Theories of Violence , 22 World Politics, 1970.

massive discrimination. According to these criteria human rights are not a relevant indicae in the case of Scotland which suffers from, at worst, mild deprivation. This deprivation is a result of an economic recession which bit deeper into Scotland's more traditional industries than their more adaptable English equivalents[17]. Unlike East Pakistan, Scotland does not suffer form extreme economic discrimination. Any such inequalities have a natural provenance and are not a result of central government policy.

There is no institutionalized violence against Scots as there was against the Hindus in Bangladesh and the Eritreans. It is doubtful whether there is even minimal discrimination against the Scots in the UK[18]. In fact, the Scottish people may well be as successfully assimilated into British political and cultural life as it is possible for any national minority to be.

To talk of secession under these circumstances is, arguably, an absurdity.

(iv) Constitutional Law, International Law and Secession

---

17 pace Tom Nairn, a Marxist, who believes Scotland will secede because of uneven capitalist development and exploitation. see Nairn,T. The Break-up of Britain,London:Verso,2nd ed,1981.

18 e.g. the National Society for the Vindication of Scottish Rights published a comprehensive programme for change. Hanham estimates that every part of the programme has been adhered to by central government. See Hanham,H.J. The Scottish Nation Faces the Post-Imperialist World, 23 International Journal 1967/68.

The Scottish National Party, the major political voice for independence in Scotland, remains a minority party. Its anticipated success has been much-heralded but it has never broken the hold of Labour over Scotland. It is best seen as a party of protest whose demand for independence does not attract the majority of the Scottish people[19]. Nevertheless, it has long claimed a right of secession for Scotland and this view has, intermittently, been shared by all the major parties in the UK[20].

It is important then to distinguish the constitutional right to secede from the international law right to secede. Under UK constitutional law Scotland's right to secede is not clearly recognized. It has, however, become a matter of convention that a democratically held referendum in which

---

19 These sudden spurts of electorally-significant nationalism are, according to Berger, a product of the cyclical nature of self-determination among the European nationalities. Major breakthroughs at the polls such as the recent victory in the Govan by-election for the SNP are part of this cycle in which protest inevitably follows apathy and disaffection. see Berger,S. Bretons, Basques, Scots and Other Nations, Journal of International History 3 1972 p167

20 The Labour Party has promised some degree of independence should they attain power at Westminster and Leon Brittan, the former Home-Secretary in Mrs Thatcher's cabinet, has publically stated following the SNP victory at the Govan by-election that, self-determination being a fundamental right, "if it really could be proved that a majority of Scots seriously and on a sustained basis want Scotland to go its own way within the European community, then Britain's duty would be clear...self-determination is a fundamental right that could not be denied by those unequivocally claiming it", see The Times, November the 17th, 1988 p1.

the Scots voted overwhelmingly for independence would be given effect under constitutional law. This does not mean that Scotland has a right to secede under international law. Its internal position in the UK is not reflected by its external status in international law. Any referendum would be held and given effect as a matter of internal state-government discretion i.e. Scotland has no right under international law, whose democratic standards are rather less stringent than that of UK constitutional law, to demand that a referendum be held. Rather the UK has an absolute right to maintain its territorial integrity providing it continues to possess a government representing the British people as a whole.

.....

Scotland's qualifications under the index of validity are virtually negligible. It possesses the sine qua non for secession i.e. a national identity, but in terms of mobilization, alienation and suppression it could not claim the right under present circumstances. As Kellas says "Scottish interests can be preserved without national self-determination.[21]" What Scotland has a right to is not secession but cultural and low-level political self-determination. Gros-Espiell, in a study conducted under the auspices of the UN, states clearly that,

---

[21] See Kellas, The Scottish Political System , supra p161.

> "where the people [Scotland], through the exercise of the right to self-determination [Treaty of Union 1707] has formed a political entity [U.K.] ... the cultural content of its right to self-determination remains in effect..."[22]

Scotland's quest for self-determination exists more in the cultural domain than the political-economic domain. It is more a product of regionalism than nationalism[23] and this regionalism seeks only "to provide [Scotland] with additional powers to secure self-determination in broad cultural matters[24]." This is certainly feasible under existing constitutional arrangements without recourse to secession.

.....

---

[22] See Hector Gros Espiell, The Right To Self-determination, Implementation of UNResolutions, E/CN.4/Sub,2/405/Rev.1, p28

[23] See Mercer,J. Scotland : The Devolution of Power, London:J.Calder,1978 p3.

[24] See Eadie, Alex & Sillars, Jim, "Don't Butcher Scotland's Future : The case for reform at all levels of government" in Drucker,H. Breakaway, The Scottish Labour Party, Edinburgh: EUSB,1978,p14

C.QUEBEC

Quebec is Canada's largest province and its predominantly francophone community[25] is the biggest outside France. It possesses its own Quebecois institutions and French traditions and culture which make it Canada's most distinctive community. Unlike Scotland Quebec has its own provincial government with a legislative capacity separate from that of the central government in Ottowa. Howevever, like Scotland its historical claim to self-determination is a well-established one.

The French first settled in Quebec in 1627 and the next century saw a further influx of settlers, bringing the number up to around 20,000. Following this, there was little immigration from France. However, by 1987 that original 20,000 has become six and a half million. The French of "New France" have engaged in struggles with their more numerous English countrymen throughout history. British domination was secured in 1759 after a short war but the new British government allowed the residents of Quebec to keep their language and religion. Quebec's identity was severely threatened throughout the 19th century until Confederation

---

[25] It is estimated that 82.5% of Quebec's inhabitants speak French as a first language.

in 1867[26] when Quebec became a province of Canada with control over its civil laws, education, religion and language. Quebec's development in the latter half of the 19th century was retarded by a weak provincial government and the inability of its institutions, notably the church, to adapt to modern industrial life[27]. By the 20th century, Quebec had gone some way to re-assert itself economically but the great depression of 1930 saw the rise of Quebec nationalism. This was born out of a feeling that French Canadians had been discriminated against by the rest of Canada. The Union Nationale Parti controlled Quebec for the next three decades and strengthened its cultural autonomy. However, it failed to arrest a further economic decline, partly because of the refusal on the part of the dominant Duplessis regime to accept federal subsidies. A Liberal victory in 1960 heralded a new awakening of Quebecois nationalism. The economy expanded rapidly and a modern administration was developed to meet the needs of the late-20th century. In this period, too, the provincial government began to flex its international muscles, especially vis a vis France, sometimes to the chagrin of the federal government. More recently, in 1980, French-Canadian

---

[26] See The British North American Act, 1867, 30 Vic, c.3. but note that the Quebec Act of 1774 had entrenched these rights for Quebec.

[27] The resurgence of the American economy in 1896 also had an adverse effect on Quebec's economy. The church continued to stress the value of simple rural life during this period.

nationalism received a set-back when separatism was defeated in the referedum of that year. Provincial-federal relations have improved from that point and disputes now tend to be resolved by a constitutional compromise, the latest of which is the Meech Lake Accord. Quebec nationalism has been accompanied by sporadic violence since the formation of Front de Liberation de Quebec in 1963. In 1970 FLQ kidnappings sparked a constitutional crisis in Canada and led to the imposition of the War Measures Act by the Trudeau Government. However, it has never been established that the FLQ had more than minimal support from the Quebec people.

(i) Quebec as a "people".

As we have seen "peoples" have a right to self-determination under international law although defining these peoples and delimiting the scope of their right has proved extremely problematic. The genus of peoples legally capable of gaining independence from a larger political administration has been restricted thusfar to colonial peoples. Secession is impermissible under international law except in certain cases where an ethnic group within a state and occupying a distinct area of that state lacks representation at a governmental level. This possibility arises from a reading of the 1970 Declaration on the

Principles of International Law[28]. It is the purpose of this paper to both limit and elaborate on this possibility.

Self-determination is more inclusive a concept than secession and its exercise need not lead to either independence or secession. The nationalist-provincial-federal matrix that exists in Quebec allows us to delineate more clearly these distinctions and show how the right to self-determination can be exercised and asserted without detriment to the body politic (in this case Canada) and without recourse to secession.

Quebec's right to self-determination is premised on its existence as a people in the vaguest, sociological sense (as opposed to the conditional United Nations definitions). Here, there is virtually no argument[29]. The French Canadians in Quebec are a people by virtue of their unique history, ethnicity, culture, language and religion. A glance at Quebec's culture-defining institutions is sufficient to establish the existence of a separate, self-identifying, people. Quebec's own provincial government is responsible for education and the allocation of health and the social service resources. As with Scotland, the law is distinct in terms of its jurisdiction and content. While criminal law is

---

[28] See supra for fuller analysis of its provisions.

[29] See Carey,C.Self-determination in the Post-Colonial Era : The Case Of Quebec, ASILS International Law Journal,Vol 1,1977,47. But for an opposing view see Pierre Trudeau,Federalism and the French Canadians, Toronto:MacMillan, 1968, where he state "...(a people) is no more and no less than the entire population of a state." p153

legislated for federally, each province has jurisdiction over its civil laws. Quebec's civil law is based on the Roman law-derived Civil Law. The other provinces all operate codes based on the Anglo-American common law system. The most significant cultural differences are language based. The predominance of the French language is the clearest physical signal that Quebec is different from the rest of Canada - this predominance affects all areas of Quebec life and is the source of both pride and concern for the French Canadians[30].

This language difference gives them an even stronger sense of self-identity than the Scots and this perception of themselves as a people with cultural uniqueness encourages the adoption of shared political interests and as Johnson states,

> "The ultimate characteristic of nationhood is the development of national identity among a people."[31]

So, the French Canadians satisfy both the objective and subjective standards used to assess the presence of "national" identity.

---

[30] See Robert Bourassa's decision to use the "notwithstanding" clause in the Charter to circumvent "freedom of expression" in the Charter of Rights and Freedoms.

[31] See Johnson,H. Self-determination Within the Community of Nations. Leyden,1967, p50.

(ii) Quebec and the Right to Secede.

These factors are not in themselves sufficient to assert a right of secession. Other factors must be present if the French Canadians are to avow a right to separate under international law.

The first question to be answered is : Is the presumption in favour of Canada's territorial integrity rebutted by evidence of discrimination or human rights violations against the people of Quebec? In order to make that claim the French Canadians must show either that the Quebec-Canada relationship has been a colonial one or that Canada does not have "a government representing the whole people belonging to the territory"[32]. The burden in the latter case is on the entity seeking secession and it is a heavy one. The criteria presented in this thesis for determining legitimacy centre round this aspect of "representation". Given the fact that secession is anathema to nearly all states in the UN and that customary international law favours the rejection of the right altogether, it is important that the conditions for secession be stringent if our theory of legitimacy is to be practicable. This is why human rights must play such a a large role in the final reckoning. Canada's record on human rights in Quebec has been attacked on two major fronts.

---

[32] See G.A. Resolution 2625, Oct. 24th 1970. supra.

Many writers have discussed human rights deprivation in Quebec, stressing particularly economic deprivation or relative deprivation. Certainly Quebec has suffered in the past from economic inequities but its present economic vibrancy argues against institutional discrimination. True, Quebec contains 30% of the Canadian population and yet a much smaller proportion of its skilled and managerial class. However, these figures belie the advances made by the French Canadians in recent decades and the discrepancies that remain have more to do with historical factors than present discrimination.

Others have pointed to a dilution of political rights for the French Canadians in Quebec. However, Quebec, like Scotland, has been, at worst, the victim of a malfunctioning democracy and cannot be said to lack representation in the Canadian government. Politically, the French Canadians are indeed a minority but recently they have wielded a disproportionate amount of power in the Canadian political system[33]. There can be no sense in which they are deprived democratic rights. Federally Quebec is marginally over-represented in parliament and provincially it exercises a good deal of independence already. Even if the majority of Quebecois desired independence and saw it as the best means

---

[33] Robert Bourassa, the Quebec premier, was instrumental in Brian Mulroney's victory in 1988's federal election which was won by the conservatives in Quebec. Furthermore this electoral success was partly due to Mulroney's willingness to accommodate Quebec's desire for special treatment in the constitution at Meech Lake.

to achieve a high level of democratic representation the federal province of Quebec would have no standing in international law to pursue the claim[34]. This could only occur if the situation in Quebec deteriorated to the point where the treatment of the French Canadians became a matter causing international disquiet. As Umozurike states,

> "Inasmuch as the political machinery of Canada has adopted a flexible approach to the problem of French Canadians, it is maintained that it remains an internal affair and not one of international concern."[35]

Quebec's right to self-determination exists in the cultural sphere[36]. Denial of this right combined with human

---

34 "...the component states of a federal state normally (my italics) are not subjects of international law. Only the federal state has international rights and duties.", Klsen,H. General Theory of Law and the State, Russel & Russel:1961 p316. See also, Is There A Right to Secede ?, Murphy K.in The Referendum and Separation Elsewhere : Implications for Quebec, Rowat,D.C. ed.,Dept of Political Science: Carleton University. And, Can Quebec Separate ?, Matas,D. Mcgill Law Journal, Vol 21, 1975, p399-401, in which he states "Quebec has no legal right to assert that claim against Ottowa."(p401) Constitutionally, Canada is under no obligation to implement a programme supported by a majority of the Quebec people. A full analysis of the constitutional minutiae involved is outwith the purview of this paper. For a fuller treatment see The Legal Secession of Quebec, A Review Note, Greenwood,F.M. UBC Law Review, Vol 12, p71.

35 See Umozurike,U.Self-determination in International Law, Conneticut:Archon,1972, p259.

36 see Gros Espiell,H.The Right to Self-determination,supra ,p28. See also Declaration of Principles adopted by Habitat: UN Conference on Human Settlements,para 9 section II, which states, "Every country should have the right to be a sovereign inheritor of its own cultural values created throughout its history and has a duty to preserve them as an integral part of the cultural heritage of mankind".

rights abuses and a number of associated factors might lead to a right of secession as a remedy of the last resort. However, these conditions do not obtain in Quebec where Quebec's culture has been preserved successfully without undue interference from the federal authorities[37].

Politically and economically Quebec has suffered from inconsistencies in government policies and some residual discrimination. However many of these discriminations have been rectified and Quebeckers can hardly claim the gross maltreatment that has given rise to secessionist movements in Asia and Africa.

A Quebecois secession would pose difficulties too numerous to mention for Canada, Quebec and the world community. Among them would be reallocation of national debt, redistribution of defence responsibilities, economic restructuring and trade complications. Furthermore there would be the problem of irredenta both inside (English-speaking Canadians) and outside (French-speaking Canadians) Quebec. As Cameron notes there is only a "fictional coincidence between the province of Quebec and the French-Canadian nation"[38]. The benefits are harder to gauge though

---

[37] And note, too, that, as Claydon and Whyte say, "... the cultural affiliation of an individual may not always be coterminous with his other allegiances." Legal Aspects of Quebec's Claim for Independence in Must Canada Fail ? ed. Simeon,R. Montreal:Queens University Press,1977,p269.

[38] See Cameron,D. Quebec and the Right to National Self-determination, supra,p152.

the preservation of Quebec' French-Canadian culture would be ensured if a secession took place.

.....

Quebec's right to self-determination is not disputed in this case study. Clearly, Quebec constitutes a "distinct society" and the French Canadians in Quebec are a predominant group who deserve the status of a people by virtue of their distinctive culture and history. However, it is argued that Quebec, as part of the Canadian federation, possesses a degree of political autonomy which, allied to the protection of its culture, results in the exercise of self-determination already.

The index of validity used in this paper envisages a right of secession as a remedy of the last resort when the right of self-determination is denied a people and their human rights are grossly violated. The situation in Quebec fails to meet these qualifications for a right to secede.

.....

CHAPTER EIGHT

A NEW STANDARD OF LEGITIMACY: THE INDEX OF VALIDITY

OUTLINE

.....

A. A NEW STANDARD OF LEGITIMACY.

It is this author's contention that the right to external[1] self-determination no longer has sufficient legal substance or jurisprudential coherence to serve as the right in international law from which most human rights must flow[2].

The principle of self-determination having been enlisted in the cause of de-colonization has been discarded by statesmen now that this process is near completion[3]. Its association with anti-colonialism brought it to a political zenith but a failure to grasp its humanitarian potential in other aspects of political organization threatens it with petrification[4]. Reduced to a rhetorical device[5], it has

---

[1] The concept of internal self-determination continues to have relevance in terms of political participation, democracy,limited autonomy and the rights of indigenous peoples.

[2] See The International Covenants on Human Rights and numerous writers on this point.

[3] See chapter III, infra.

[4] See D.W. Bowett, Self-determination and Political Rights in Developing Countries, Proceedings of the American Society of International Law, 129, where he states that self-determination may have, "exhausted its mandate" since the end of colonialism.

remained in the past two decades in a theoretical wilderness inhabited by confusion,hypocrisy and even, on occasion, contempt.[6] If the principle is to be salvaged from "its descent into incoherence"[7] it must first be injected with clear and definitive meaning.

This can be accomplished only by recognizing a right of secession in international law and thus renewing the link between human rights and self-determination. Only by adopting a rationally formulated, limited, right of secession can the principle of self-determination be galvanized and retrieved from practical and theoretical disuse. It is to this end I propose an index of validity outlined in detail in this chapter and applied throughout this study.

The utility of self-determination has been undermined by an unsubstantiated and logically-inconsistent fear of

---

[5] The most recent example of this being the US State Department's insistence that Afghanistan be accorded the right to self-determination even though the retreating Soviet Army will leave a political vacuum in which self-determination may have only limited meaning. See New York Times, Thursday, Feb 9th. p6, c.6.

[6] Witness the unsavoury regimes and organizations who have nailed their colours to the mast of self-determination. Among them are the Khmer Rouge, the IRA, the Contras and Renamo (the insurgency group operating in Mozambique with US approval and support and with a seemingly mindless degree of brutality).

[7] see T. Franck, Legitimacy in the International System, AJIL 82, 1988, p746.

secession[8] and by a failure to define it in a way that would be meaningful in the contemporary world.

This definitional lacuna has several disturbing consequences. First, self-determination has been emptied of moral content. The principle has been unable to resist adoption by a host of international actors whose strategic ambitions have only a superficial connection with the ideas of democracy and human rights on which self-determination is founded. This has led to its transformation from legal principle to political weapon[9].

Second, while it is argued[10] that self-determination has acquired the status of jus cogens[11], in terms of clear definition it is relatively ill-equipped next to the principles with which it is most often in competition e.g. territorial integrity and international peace and security. These "hard" supernorms of international law are kinder to their adherents than the less well-defined concept of self-determination. This paper, then, seeks, what Franck describes as, "textual determinacy"[12]. As he points out,

---

[8] See Chapter III, infra.

[9] See earlier examples note 4, supra.

[10] See H.G.Espiell, Self-Determination and Jus Cogens, in UN Law Fundamental Rights, Two Topics in International Law, ed.A.Cassese, supra, p167-171.

[11] i.e. "a peremptory norm of general international law". See Article 53, Vienna Convention on the Law of Treaties.

[12] See T.Franck, Legitimacy in the International System, supra, p713.

> "Rules with a readily ascertainable meaning have a better chance than those that do not to regulate the conduct of those to whom their rule is addressed or exert a compliance pull on their policy-making process"[13].

Finally, this absence of substance has reduced its credibility as a mediating principle in conflicts. Here, I do not refer to conflicts between principles. Rather, I refer to direct conflicts between competing selves[14]. Usually both sets of adversaries in these conflicts can at present support a right of self-determination without risking ridicule. It may be that proclamation of the shibboleth[15] of self-determination is cynically self-serving[16]. However, it can lend itself equally to sincere enunciations of allegiance by two diametrically opposing sides in a civil war. As with any legal statute,

> "confusion over the nature of the process, and misapplication of its meaning, have distorted self-determination in practice and weakened its potential resolutory role as a legal remedy"[17].

---

[13] Ibid, p713.

[14] See Chapter V, infra, where the Nigerian state and the Biafran people were selves each with a recognizable claim to respect and legitimacy.

[15] See, Van Dyke, Human Rights, The United States and World Community, New York,London,Toronto, 1970, p77, " Self-Determination has become an emotion-laden term in the field of human rights, a shibboleth that all must pronounce to identify themselves with the virtuous."

[16] See Pakistan and Ethiopia.

[17] See Alexander and Friedlander, Self-Determination: National ,Regional and Global Dimensions, supra, pxiii.

This distortion and confusion has come as a direct consequence of attempts to outline a right of self-determination while denying a remedy of secession. This right without a remedy has proved worthless to national liberation groups whose right to self-determination seems incontestable.

With a clear definition would come the possibility of meaningful application[18] and a consistent application of the principle of self-determination, incorporating a limited right to secession, would have a number of positive practical consequences.

(1) It would enhance the role of the United Nations in internal struggles which, by virtue of the presence of a human rights element, would fall within the category of those activities characterized as a threat to international peace. A precise definition would assign legitimacy to one of the parties in such a struggle. Under these circumstances

---

[18] "...it is certainly safe to assert that the removal of confusion and uncertainty from a definition tends to heighten considerably the expectation of a clear and unambiguous application of the principle". See W. Ofuatey-Kodjoe, The Principle of Self-determination in International Law, supra,pviii.

the UN would, at the very least, be given a legal mandate for expressing moral disapproval[19].

(2) Clearer guidelines would be established for the right of third parties to give aid and support either to the original state or seceding entity. Already, according to at least one important United Nations Resolution there is a right to seek support for self-determination. The 1970 Declaration of Principles of International Law states,

> "Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against, and resistance to, forcible action in pursuit of the exercise of the right to self-determination, such peoples are entitled to seek and receive support in accordance with the purposes and principles of the Charter[20]".

Customary international law, however, does not favour the extension of this right to interfere beyond the colonial situation and only the removal of the proscription against

---

[19] See H.Blix, Sovereignty, Aggression and Neutrality, 1970 who states, " [the right of self-determination] is an example of a rule which, for its proper application to concrete cases, requires international institutions. Which people is entitled to self-determination ? If, on one hand, dangerous fragmentation of states is to be avoided, and on the other, the rule is to have practical significance, there needs to be a third party to assess the concrete cases and apply the rule. While a political organ like the General Assembly may not be ideal in the role it seems to be the only one which has assumed it for the time being." But note that first we need a rule which the it can usefully apply. Such a rule does not yet exist.p13-14

[20] See G.A. Resolution 2625, 24 October, 1970, supra.

secession would permit outside interference[21] on behalf of secessionist groups. While such interference would prolong some struggles, its overall effect would be to truncate conflict. If a secession is to be legitimate it must satisfy a strict set of criteria. Popular support, viability and political infrastructure are important determinants for the seceding group. If such groups satisfy these criteria (amongst others) they will not only qualify for support but also be more likely to succeed without that support. External influence would therefore precipitate the conclusion of the conflict. The case studies already presented illustrate this point. For example Bangladesh's secession from Pakistan succeeded primarily due to Indian intervention. Had this intervention not been forthcoming it is possible a long and bitter insurgency would have ensued which, given the political climate in 1970, would have been fuelled by an inexhaustible supply of grievances against Pakistani repression. Likewise, support for the Eritrean rebels would probably lead to the defeat of the Ethiopian Army and the recognition of an Eritrean state, not to mention the conclusion of a civil war which has led to anguish and torment for the Eritrean people.

Conversely, military aid for hypothetical insurgents in Scotland and Quebec would simply up the ante in terms of government response and lead to unnecessary bloodshed in

---

[21] Though not armed intervention. See however the doctrine of humanitarian intervention for a different possibility.

pursuit of secessions which would, providing limited forms of autonomy remained genuinely available, be denied legitimacy under the premises of the index of validity presented here.

The Biafran case would appear less illustrative of this point but this is not the case. Under the guidelines proposed Biafran independence would be denied legitimacy and, therefore, so too would external support for the insurgency. But if the autonomy compromise[22] favoured by this writer failed to satisfy legitimate Biafran demands not only would a remedy of secession arise but the right of third parties to support this second attempt would be established. The effect such a rule might have on the government is likely to be a salutary and positive one.

This is not an argument for success as a determinant of legitimacy but rather an explication of the fortunate coincidence between legitimacy and likely success and the need to make that coincidence a more fruitful one.

Finally, (3) it would allow secessionist movements to claim a right to secede as a human right in international fora such as the UN General Assembly. This would make any resort to armed conflict a last resort rather than the first option it is now. Arbitration between the parties could take place under the auspices of the UN which could then apply these guidelines to resolve the dispute. It is not claimed here that secessionist conflicts would disappear. Rather the

---

[22] See Chapter VI, infra.

seceding group would, at the very least, be able to predict the likelihood of international support and make a decision as to whether a secessionist uprising is advisable.

The rules by which legitimacy for secession are established derive substantive force from the index of validity referred to and applied throughout this paper. I shall now turn in the following section to an analysis of this index and its capacity to resolve secessionist claims.

.....

The theory of legitimacy proposed differs from those of other writers in a number of ways. First, it is based, not on principles derived from liberalism[23] or democracy[24], but on the idea that a new world order should satisfy the demands not of ideology but of human rights and human dignity. Second, it recognizes political realities as factors in the process, if not determining ones. Finally, it is a theory based on a teleological reading of international

---

[23] See Berans,H. A Liberal Theory of Secession, supra,p21-31.

[24] See Birch,A. Another Liberal Theory of Secession, supra, p596-602.

law rather than a construct responding exclusively to the dictates of realpolitik[25].

The connection between human rights, political reality and international law is not always an obvious one and each phase in the development of self-determination has tended to reflect a prevailing philosophy which neglects a comprehensive treatment. The most recent United Nations declaration concerning self-determination, the 1970 Declaration on Principles of International Law[26], reaches a compromise only through an equivocal rendering of competing normative standards. Nevertheless, it does permit an interpretation of the right to self-determination in which the above connection is realized. The theory of secession developed in this study takes such an interpretation as its starting point.

The basis in international law for a right to secede can be traced through the development of international relations and the problems of political organization since Grotius. The principle of self-determination is pregnant with the possibilities of re-organization and each of its

---

25 See Buchheit,L. Secession, The Legitimacy of Self-determination, supra, n. Buchheit is not the most guilty party in this regard but his thesis depends too much on political exigencies and too little on international law. See Also,Emerson,R. Self-determination, AJIL Vol 65, 1971,who states, "the realistic issue is still not whether a people is qualified for and deserves the right to determine its won destiny but whether it has the political strength, which may well mean the military force, to validate its claim" p475.

26 See G.A. Resolution 2625, 24 October, 1970,supra.

developments has reflected a basic human need to re-invent the social model. Its birth as a political concept came about because of a revolutionary urge to reclaim sovereignty for the people in more advanced nation-states. National integration gave way to international revision following the First World War when self-determination was advocated as the moving principle behind the dismantling of the central European empires[27]. The post-Charter era marked the end of empire and the period of self-determination as de-colonization. Each of these developments was a response to political necessity arising out of human desire and in each case a human need became a human right as defined by international law. The human rights of the colonial entities were satisfied by this process but as Bibo recognizes,

> "colonial liberation created some fifty new states...their formation reflecting the right to self-determination without any advance in the technique of applying the principle"[28].

In the post-colonial phase of self-determination the human rights of "peoples" had been abandoned in favour of a crude supplication to the norm of territorial integrity and with the severing of the link with human rights has come a theoretical crisis[29].

---

27 In fact it was never used as such. See Chapter II , infra.

28 See I Bibo, The Paralysis of International Institutions and the Remedies, New York: Wiley & Sons, 1976, p31.

29 Internal self-determination continues to have meaning but its connection with external self-determination has also been severed.

The intimate connection between the right to secede as the ultimate exercise of external self-determination and human rights must be reasserted.

The 1970 Declaration on the Principles of International Law[30] is a tentative move towards such a reassertion. It states,

> "nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour"[31].

The right of states to maintain their territorial integrity is enshrined in the United Nations Charter[32] and has become a sacred norm of international law. This right is the predominant international more in the OAU Charter and a series of UN instruments. The principle of territorial integrity is the antithesis of the right to secede but it is not imperative that either be rejected outright in order that a stable international system based on human rights be maintained. The maintenance of territorial integrity is a preferred value given the disruptive consequences of breaches of that integrity. However, territorial integrity

---

30 G.A. Resolution. 2625, October 24,1 1970, supra.

31 Ibid, Principle 3, The principle of equal rights and self-determination of peoples.

32 See Article 2(4).

cannot be an end in itself. There must be exceptions to promotion of that value if we are to avoid passive acceptance of human rights catastrophes like the killing fields of Cambodia and the carnage in East Pakistan. It is important not to lose sight of the original raison d'etre of territorial integrity. This point is emphasized by Umozurike:

> "...the ultimate purpose of territorial integrity is to safeguard the interests of the peoples of a territory. The concept of territorial integrity is...meaningful [only] so long as it continues to fulfill that purpose to all the sections of the people"[33].

The 1970 Declaration makes territorial integrity a presumption which can only be invoked by States who act in accordance with the principle of self-determination[34]. This thesis posits secession as a remedy[35] when the state's actions extinguish that presumption. The index of validity should therefore furnish the 1970 Declaration with content and resolve the dialectic between territorial integrity and self-determination through a reaffirmation of human rights.

---

[33] See Umozurike,U. Self-Determination in International Law, supra, p236.

[34] See Ofuatey-Kodjoe,W. The Principle of Self-determination in International Law, supra, who describes self-determination as "a right that justifies the remedying of a deprivation by restoring self-government."

[35] Buchheit calls this "remedial secession", see Buchheit,L. Secession, supra, p220-223.

An assertion of the right of secession would be a remedy[36] of the last resort[37], an exercise of the ultimate collective human right as a means to secure basic individual human rights. This exercise of the right of secession should satisfy the criteria outlined in the index to acquire legitimacy.

.....

B.THE INDEX OF VALIDITY.

The indices to be abstracted from the case studies made above are of two distinct varieties. The first group are the essential conditions of any legitimate right of secession. The second are variables which weigh in the balance of any decision as to legitimacy but are not decisive in themselves.

I intend to arrange them in the following groups:

I. Essential Conditions.

(1) The existence of a "people".

---

36 See Cobban,A. The Nation-State and National Self-Determination, supra, who states, "self-determination comes into play not as a panacea for all national dissatisfactions, but as the remedy, to be administered in extremis, when all else has failed", p74.

37 See White,R. Self-Determination: Time for a Reassessment, Netherlands International Law review, 28, 1981, p148.

(2) The existence of a discrete territorial base occupied predominantly by the seceding group.

(3) The presence of substantial human rights abuse.

(4) The absence of realistic alternatives: remedy of the last resort.

.....

II. Critical Variables.

(1) Economic viability.

(2) Geo-strategic destabilization.

(3) Political stability and legitimacy.

(4) Motive.

(5) Bona fides (good faith) of state and seceding entity.

(6) General variables

.....

The following detailed analysis of these indices should be read with a caveat in mind. While the index of validity is proposed as a theoretical tool for establishing legitimacy, it is not a mathematical model and can only be applied with this in mind. These standards are as objective as possible but only imaginative implementation could bring a measure of success.

I.Essential Conditions.

(1) The Existence of a People.

The right of secession is the collective right of a people to separate territorially from a parent state. As such it obviously requires the existence of a people. This

begs the question: How are we to define "people" for this purpose?

The various instruments on self-determination drafted at the United Nations have omitted defining the status of the possible beneficiary of the right of self-determination. Some writers feel that peoples refers only to states[38]. However, most agree that "peoples" can also refer to groups under alien or colonial rule. Recently the trend has been towards according "people" a still wider definition[39].

For the purpose of this study "peoples" has been defined in a sociological sense. Additional stress is laid on the concepts of subjective self-identification and efficacy which are discussed below.

The International Commission of Jurists in its study of the Bangladesh secession listed common features based on (a) history, (b) race or ethnicity, (c) culture or language, (d) religion or ideology, (e) geography or territory, and (f) economy as possible elements in the existence of a people[40]. These objective criteria are not important in themselves[41]

---

[38] See Kelsen,H. The Law of The United Nations: A Critical Analysis of its Fundamental Problems. London: Stevens, 1950.

[39] See e.g. Nawaz, The Meaning and Range of the Principle of Self-determination, Dukes Law Journal,1965 supra.

[40] See ICJ, A Legal Study, supra, p70.

[41] See e.g. the idea of a common history. Sometimes this itself is artificially created in service of the secession. To a certain extent this is true of the Eritrean secession. There probably needs to be some self-identification with the past even if the link with objective common history is tenuous.

but rather as determinants of a subjective self-identification[42]. This self-identification is derived from positive and/or negative referents. The group solidarity that "is an essential precondition for secessionist alienation"[43] can be the result of collective antipathy towards alien rule and oppression (Eritrea) or a positive association with fellow group members based on common goals or objective characteristics (e.g.Bangladesh). The extent of self-identification may also be relevant if the population identifies itself with two groups. There must be a strong feeling of differentiation from the people of the parent state[44].

There must also exist effective self-identification (i.e. a self-image as political unit). As Mancini warns,

> "The nationalities which do not possess a government issuing from their inmost life...have become means for the purposes of others and, therefore, mere objects"[45].

If a collection of individuals is to be assigned the status of "people" in international law it must be organized

---

[42] They have greater importance to other aspects of the index of validity.

[43] See Wood,J. Secession: A Comparative Analytical Framework, Canadian Journal of Political Science XIV:1,March, 1981,p116.

[44] See e.g. Scotland where the Scots identify themselves as both British abd Scottish.

[45] See Mancini, On Nationality as the Foundation of International Law, in H.Kohn, The United Nations and National Self-Determination in Review of Politics 1956, p527.

as a political unit capable of acting at an international level. A disparate group without this structure will be unable to claim a right to secede[46]. Such a group does not lack legitimacy but will be unable to exercise the right to secede without a political cadre[47].

To summarize,the objective appearance of a group is of only limited importance. What is required is self-perception combined with a representative political structure[48]. In this way genuine self-identification will be given political efficacy leading to international legitimacy.

(2) Existence of a Geographically Discrete Territorial Base Occupied Predominantly by the Seceding Group.

This is an essential precondition for the exercise of the right of secession because territorial separability is the essence of the right to secede. The absence of this condition makes it impractical for groups such as the black

---

46 This structure need not be particularly sophisticated but it should be both representative and capable of representing.

47 See e.g. Afghanistan where the Mujahdeen caanot be said to possess a right to self-determination because the beneficiary of the right is so ill-defined and disparate.

48 But see J.Wood, Secession: An Analytical Framework, supra , who notes that, "ethnic identities can be political artifacts, manipulated by ethnic leaders or government policy". p115. See also A.Cobban, Historians and the Causes of the French Revolution, in which he argues that the French Revolution far from being a popular uprising was a revolt directed by a tiny portion of the middle-classes,p8. Similar revolutions have been witnessed in this century, particularly in the Third World.

Americans to secede from the United States even if the political will existed.

The presumption against the legitimacy of secession by a group occupying an area with no external boundaries is strengthened if it is likely to cause "unacceptable harm"[49] to the residue state. In fact, it may force a de facto secession on other territorial units and therefore deny self-determination to these units[50].

The length of occupation and the level of predominance are moot points. The first point is often referred to as the problem of the "critical date"[51]. What is the relevant population for ascertaining predominance? The United Nations has offered few solutions in dealing with this problem. In the case of Gibraltar, a right of self-determination has been denied the residents because the population of Gibraltar is characterized as an imported colonial population. The Indian Fijians on the other hand, who now outnumber the indigenous Fijians, have never faced this problem despite arriving in Fiji long after the British occupation of Gibraltar. White suggests that the seceding

---

[49] See Wood,J. Secession: An Analytical Framework, supra, p112.

[50] One need only imagine the effect a Quebec secession might have on the Atlantic provinces in Canada who would find themselves detached from the remainder of of central and western Canada.

[51] See Pomerance,M. Self-Determination in Law and Practice, supra, p1-3. See also, B.Neuberger, National Self-Determination in Post-Colonial Africa, supra, p57-60.

group should have "historic ties"[52] with the territory but he is unable to elaborate on what this might entail.

Ultimately, the issue of the critical date is not one which offers any easy standards. Fortunately, in the case of secession, it is rarely an issue. Most seceding groups do have historic ties with their territory. Without these ties it is unlikely that the process leading to secession could begin. The critical date is an important concept only where imported colonial nationals have become the majority group in a territory. This study is concerned with the post-colonial age in which the right of secession has been claimed primarily by indigenous peoples.

The issue concerning the predominance of a seceding group in a territory is a more contentious one. What if some groups within the territory do not wish to secede[53]? This was certainly an issue in Biafra where the Ijawes were ambivalent about the secession. A similar problem occurred in Eritrea where only Ethiopian atrocities turned Christian Eritreans against the idea of union with Ethiopia.

The controversy between competing selves can be addressed by looking at imaginative alternatives (e.g. a further secession by the Ijawes should they so desire). Failing this only a sophisticated utilitarian solution can

---

[52] See White,R. Self-Determination: Time for a Reassessment, supra, p160

[53] Suzuki describes these people as "residual individuals". See Suzuki,E. Self-Determination and World Public Order: Community Response to Territorial Separation, supra, p276.

be offered (i.e. which solution will most satisfy the values of self-determination for the largest number of people). In these cases the majority can only be permitted to self-determine if the rights of the minorities to a limited form of self-determination (e.g. autonomy) are entrenched.

Against possible accusations that this method has the makings of an offensive human calculus, it should be noted that a legitimate secession is a response to large scale human rights deprivations by the original state. Such violations generally have the effect of alienating all peripheral communities[54].

Throughout this dissertation there has been emphasis on the link between human rights and the right of secession. This nexus will now be investigated more fully.

(3) Human Rights and the Right of Secession.

The right of secession has been variously described as a right to self-preservation[55], a variant of self-defence[56] and a right to self-help. In this study the right of secession has been conceived of as a fetter on abusive government behaviour. Obviously, it is crucial then to

---

[54] Unless one of these communities has been indulged by the central government with the intention of playing it off against the secessionists.

[55] See Ojukwa, Biafra, Selected Speeches, p76.

[56] See Neuberger,B. National Self-Determination in Post-Colonial Africa,supra, p71.

establish what behaviour might activate the human rights component in the index of validity.

The right to self-preservation[57], asserted by the Biafran leader, General Ojukwa, has its roots in a philosophical heritage descending from Grotius. He said that a right to secede was based on gross acts of tyranny such that a province could "not otherwise preserve itself"[58]. Similarly, Cobban recognized a right of secession when the state,

> "...does not protect and promote, in reasonable measure, the rights of the individual citizens, included among which are their interests as members of a national community"[59].

These writers converge on the aspect of general human rights. Others make secession a remedy when the right of self-determination cannot be executed effectively e.g. Umozurike states,

> "A people whose development is stultified by the official policy of the state to which they belong do not enjoy the right to self-determination"[60].

Gros Espiell, in an official United Nations study, reinforces this tie, noting,

---

57 See Ojukwa, Biafra, Speeches, supra.

58 See Wells,B. United Nations Decisions On Self-Determination, supra, p322.

59 See Cobban,A. The Nation State and National Self-Determination, supra, p71.

60 See Umozurike,U. Self-Determination in International Law, supra,p269.

> "If the right of peoples...to self-determination is in the last analysis a basic human right , as well as a prerequisite for all other rights and freedoms, the conclusion must be drawn that it is meaningful only in a system aimed at ensuring full respect for all human beings"[61].

The right to secede arises, argues White, when there is,

> "a sustained campaign of discrimination making it unreasonable to expect the people to be able to attain self-determination within the existing state"[62].

There are several dimensions of the human rights-self-determination-secession matrix which should be extracted in developing a legal theory of secession. The human rights indice is activated only if there are (a) fundamental, endemic and discriminatory abuses against (b) a territorially discrete, people[63] within a state. This abuse should either be (c) state-sponsored (e.g.Bangladesh) or the state must be responsible for (1) a loss of control, authority or ability to govern or (2) negligence in acting to constrain those responsible (e.g.Biafra).

By fundamental abuses is meant those involving the sacrifice of civil-political rights and, in particular, personal security rights. In simpler terms, a large

---

61 See Gros Espiell,H. The Right to Self-Determination, E/CN.4/Sub.2/405/Rev.1, p66.

62 See White,R. Self-Determination: Time for a Reassessment, supra, p160.

63 See above definitions.

proportion of the people in question must possess a reasonable fear for their personal safety.

This may seem too strict a standard but there is no basis in international law for asserting a right to secession based on the mere absence of democratic rights. The state system is the basis for international law and relations and the state is sanctified within this system. Territorial integrity is a "value preference"[64] of the international community and rebuttal of the presumption in favour of it must be supported by evidence of behaviour of which the majority of states have demonstrated abhorrence. A standard permitting secession in cases where democratic values are absent would be unacceptable and therefore unworkable in all but the most ideal of worlds. The normative appeal of these standards unfortunately has little bearing on their practicability.

Instead, as I have said, fundamental and discriminatory abuse must be present. The discrimination should be directed predominantly, but not necessarily exclusively, at the relevant people.

Human rights deprivations are impossible to quantify and such an exercise would be futile. Instead, I would encourage adoption of the Human Rights Commission criterion which requires as its ground for investigation,

---

64 See R.A.C. White, Self-Determination: Time for a Reassessment, supra, p163.

"...a consistent pattern of gross and reliably attested violations of human rights"[65].

Evidence of such abuses directed against a territorially separate people would satisfy the human rights-based criterion of the index of validity.

(4) Remedy of the Last Resort: Absence of Realistic Alternatives.[66]

The last of the essential conditions requires the exhaustion of all modes of self-determination short of secession. In other words, can the rights of the people in question not be satisfied by greater autonomy or provincial status within a federal framework or a devolution of power from the centre to the peripheries?

Has the seceding entity channeled its grievances domestically using its constitutional rights and/or capacity as a pressure group? Has it attempted to access resolutory mechanisms in international fora?

Associated with these criteria, is the attitude of the central government. What has the parent state offered by way of compromise ? How sincere is this offer [67]?

---

[65] See ECOSOC Resolution 1503.

[66] See the earlier discussion on secession as a remedy of the last resort for additional comments.

[67] See the question of "bona fides", infra.

The salience of this indice is obvious from an examination of the case studies made above. In the cases of Eritrea and Bangladesh the right to secede would have been legitimated only after several constitutional compromise were aborted by the parent-State. The federal compromise advanced by the United Nations for Eritrea was undermined by Ethiopia so that it could no longer be effective as a means to secure self-determination. Subsequent actions by the Ethiopian Government made it clear that an armed struggle for secession was the only possible method of acquiring self-determination for the region. In Bangladesh, The Awami League's proposals for greater provincial autonomy met with a virulent military response from the Pakistan authorities, licensing secession as the only remaining remedy for Bangladesh's grievances.

Conversely, in the case of both Quebec and Scotland, the respective states (UK and Canada) have shown a willingness to negotiate realistic alternatives to secession which makes recourse to that right by the people in question unreasonable.

Finally, in the Nigerian civil war of 1967-70, the legitimacy of the Biafran secession was weakened by the failure of the Biafran leadership to respond to the 12-State solution offered by General Gowon on behalf of the Nigerian State.

As evidenced by the above discusion, the remedy as a last resort principle formulated must be seen as an advisory guideline designed to exclude a capricious decision to secede rather than a bureaucratic tangle intended to stifle a legitimate right of secession.

.....

The series of indices to be analyzed now are those I have termed "critical variables". These are not preconditions for the right to secede but rather formulae which should weigh in the balance of any equation to assess legitimacy.

II. Critical Variables.

(1) Economic Viability.

The economic viability of both the seceding region and the parent state must be reckoned with here.

For the state, independence would be meaningless without an economic infrastructure capable of supporting that independence. More importantly, a secession which destroys the economic capacity of the parent state must surely be denied legitimacy on humanitarian and geo-strategic grounds.

(i) Viability of Seceding Entity.

This cannot be a strict standard. No state is completely independent economically. Indeed many states are economic invalids. What must be avoided are situations where newly-created states become economic, and therefore political, proxies of larger sponsors. Secession should not be a cover for vicarious superpower expansion through economic leverage. Ideally the seceding entity should be large enough to both carry the responsibilities of statehood and reject the expansionist overtures of dominant states.

Viability in this case should be measured against the comparative economic position of the parent state and other states in the region. However the the position relative to that of the seceding entity prior to secession is perhaps the most critical factor in this assessment.

These antecedent calculations may not, of course, be reflected in the changing world following secession[68].

As Wood indicates,

> "...the retaliatory potential of the loyalist area and the reaction of external economic actors are only two unknowns which leave the economic future in doubt for secessionists"[69].

---

68 See e.g. Bangladesh which given its superior economic performance to West Pakistan up until 1970 ,might have anticipated economic success. Instead the effects of the civil war combined with natural causes to severely undermine Bangladesh's economic viability.

69 See Wood,J. Secession: An Analytical Framework, supra, p118.

Often the transition to independence can be economically traumatic and it is perhaps best to look at the long-term potential of the seceding area in assessing viability rather than the short-term effects, many of which will be negative.

The case studies presented point up the difficulties in this calculation. Bangladesh appeared, antecedently, to possess economic viability but it is now one of the world's most under-developed states. However it is unlikely that continued union with Pakistan would have changed this picture given the absence of concern displayed by the Pakistan government up to the secession in 1971. Furthermore Bangladesh's potential for development is greatly increased by the renewed sense of identity and political awareness that comes with the long-term effects of independence.

Eritrea's economic position could only improve following a victory in the civil war and a subsequent secession. Eritreans are forced to tolerate a state of seige in which there is no possibility of economic development.

(ii) Effect on Original State.

If a secession has the effect of depriving the state of its economic base this will weigh upon the legitimacy of that secession quite profoundly[70]. This applies only if the revenues from that economic base had not been distributed in

---

[70] It will not exclude it however.

a manner which discriminated against the seceding group. This was the case with Bangladesh which received only a tiny proportion of the wealth it created. The cases concerning Biafra and Scotland are instructive. Both possess huge oil reserves whose contribution to the economic well-being of the state is great. Secession by these entities would have an initially negative impact on Nigeria and the UK respectively but it is doubtful whether the economic infrastructure would collapse in either case.

Ethiopia claims the Eritrean region is necessary to the survival of the Ethiopian state. Certainly Eritrea's port facilities hold an obvious attraction for the Ethiopians but such facilities are not necessary for economic survival and cannot be allowed to trump humanitarian considerations in a calculation of legitimacy.

(2) Motive.

Few writers have felt obliged to address the question of motive for secession. As a consequence its connection with the previous discussion is not apparent.

Morally, the motive of the seceding entity must be permitted a role in the index of validity. Briefly, a secession carried out for exclusively mercenary motives should be denied legitimacy. A secession with a large mercenary component cannot attract sympathy or legitimacy particularly in a study whose prime concern is the

protection of human rights. There must exist a threat to self-determination not just an ill-defined feeling that the lot of a particular people could be improved through territorial separation. To permit secession in such instances would be to trivialize the principle of self-determination and undermine the legitimacy of a right to secede.

(3) Political Stability and Legitimacy.

The concepts of stability and legitimacy have been partially dealt with in the discussion on the existence of a people. A few additional points will be made here.

The state system is predicated on the permanence of the states within it and the establishment of a new state carries with it certain responsibilities. It is therefore important that the seceding entity be politically viable. Stability and legitimacy are the two most vital, mutually-supportive, components of this viability.

It is desirable that the new state should survive as a relatively stable political unit capable of recovering and subsequently securing the human rights lost under the old regime. Relative stability is is the critical factor here. It would be inequitable to expect a greater degree of stability in the new regime than that present in the original state. In the case of Bangladesh, instability does

not become an obstacle to legitimacy because of the similar level of instability in Pakistan. These factors are therefore neutralized in this example.

Nevertheless, the incidence of human rights deprivations often directly correlates with the level of instability in a state[71] and if the strife caused by the transition is likely to be severe then the secession may have a counterproductive effect on human rights.

The legitimacy of the new regime will predict the likelihood of a stable political future. Does it have "political coherence"[72] ? If it is both representative and capable of instituting effective decision-making procedures then both legitimacy and stability will be assured.

It will be difficult to gauge whether these two requirements will be met. Support for the secession will not always be reflected in support for the regime established after its successful completion. However the only evidence available will be the secessionist organization's ability to mobilize the people of the region behind the secession. Ideally the results of a plebiscite should determine the legitimacy of a new regime but, predictably, states facing

---

[71] This is not always so. Often the most stable governments are the most oppressive e.g. North Korea, Saudi Arabia and Albania. However on the whole this correlation holds up well when we discuss states whose creation comes about after a legitimate struggle for independence.

[72] See Ofuatey-Kodjoe,W. The Principle of Self-Determination in International Law, supra, p156

secessionist threats within their borders have shown no readiness to submit to the results of plebiscites.

(4) Geo-Strategic Destabilization.

The question of stability has an international as well as an internal dimension. The prescription in favour of international peace and security is a norm of international law carrying great weight and any theory of secession must incorporate a concern for the possibility of geo-strategic destabilization.

There are two major strands to this problem. The first concerns what is termed the domino theory. The domino theory refers to the phenomenon of a successful act of secession from one state encouraging repetition in other states. According to proponents of this idea, to characterize secession as legitimate further weakens the dominoes. The second, and most obvious, encompasses the general fear of widespread conflagration and conflict escalating from the initial act of secession.

(i) The Domino Theory.

Despite its metaphorical attractiveness the domino theory has rarely been reflected in reality. It found great currency as a justification for the United States presence

in Vietnam but fifteen years after the departure of the last marine all the dominoes remain standing[73].

In the case of secession the "demonstration effect"[74] has proved negligible. The secessions of Bangladesh, Singapore, Norway, Ireland and Senegal in this century have had no discernible effect on similar movements in proximate areas. Similarly, failed secessions in Nigeria and Katanga have not discouraged secession in other states.

There are three reasons for this. First, each situation is different and a different set of circumstances is likely to lead to a different set of perceptions and dissimilar outcome. Second, there is minimal contact between secessionist elites in the same way as there is between military elites[75]. Finally, secessionist organizations have a tendency to regard themselves as entirely unique with little to learn from other separatist movement. This often leads them to condemn other secessions while simultaneously pursuing their own.

These factors make the domino theory irrelevant to this problem.

(ii) Geo-strategic Disruption.

---

73 Thailand was regarded as the next target of the Vietnamese; instead they are contemplating a retreat from Kampuchea (1989).

74 See Kamanu, Secession and the Right of Self-Determination: An OAU Dilemma, supra, p356.

75 Ibid, p368-369.

If a secession appears likely to cause a major war, the force of its legitimacy must be re-evaluated. The humanitarian-utilitarian teleology of this study risks subversion if it permits a people to secede where the collective human misery will be increased by permitting the secession.

This is one of Buchheit's major points but he overstates the centrality of this construct[76]. Disallowing (otherwise legitimate) secession on the grounds that it will cause geo-strategic disruption may be counterproductive. Instability and conflict will continue to fester[77] and with this will come the risk that the superpowers may be drawn into the conflict on a partisan, basis rather than a legally-predicated one.

This is a legal theory of secession therefore justice must play a greater role than it might do in a political theory. The risk of major conflict must be substantial.

Ultimately, as the UN itself recognizes, the greatest threat to peace and security is the abuse of human rights. Stability is not an end in itself. A stable world order which does not protect the notion of human dignity is a

---

76 See Buchheit.L, Secession: The Legitimacy of Self-Determination, supra,231-249.

77 This is inevitable in cases where the secession is legitimate under the index of validity since this legitimacy presumes a high level of organization and commitment on the part of the people pursuing it. .

morally empty vessel. The right to secede is a threat only to a version of "order" which oppresses the human spirit.

(5) The Bona Fides of the State and the Seceding Entity.

The claims to the right of self-determination advanced by competing selves must be assessed according to the good faith evinced by the "self" up to that point. I call these the bona fides of the competing selves. The credibility of solutions proposed by the state will be dependent on its past performance[78]. The most pungent example from our case studies is Eritrea where the Ethiopian state, by its failure to heed the terms of the autonomy compromise and numerous examples of bad faith since then, has extinguished its own bona fides.

In contrast the EPLF's bona fides are high because of its proven ability and will to cater for the human needs and rights of the Eritrean people[79].

---

[78] To take an example directly concerned with the right of self-determination, see debate in the UN over the Vietnamese occupation of Kampuchea (Cambodia) where the Kampuchean Representative of the Khmer Rouge argued that the Vietnamese should leave Kampuchea in order that free elections take place. This proposition was supported in the UN. Under an index of validity the Khmer Rouge would have the lowest bona fides possible. Any promise to hold free elections would be deemed worthless. See 17 UN Monthly Chronicle 122 (Jan, 1980).

[79] See Chapter IV, infra.

The question of bona fides will not always be so easy to resolve as in the Ethiopian case. Often a new government will promise changes or make constitutional amendments in order to placate the seceding group. These changes may be largely cosmetic or easily revocable. They may be persuasive but never decisive. Past performance of the state must remain the critical factor.

The bona fides of the seceding group may be just as questionable and will be somewhat diminished by a record of human rights abuse, discrimination or international terrorism[80].

An intuitive sense of the difference between the sincere and the bogus may have to be relied on by future adjudicators to bridge any factual gaps. However, again it should be stressed that in the case studies investigated determining the respective bona fides has not proved difficult[81].

The above list is far from comprehensive and each case tends to amplify a different set of variables. In applying the index of validity a certain flexibility must be displayed once the essential conditions have been satisfied.

---

[80] Eritrean action against aid aircraft is harmful in this regard.

[81] With the notable exception of Biafra where the Gowon 12-State solution appeared to come with a spirit of compromise but may have simply been a delaying tactic.

This may involve taking into account one or more of the variables found below.

(6) General Variables.

(i) The Level of Integration Achieved and Length of Time as Single State.

This can work in two opposing ways. A high level of integration and a long history of assimilation will work against the seceding group because of the difficulty in separating and the degree of intermingling in the population[82].

Conversely, if a union has existed for only a very short time the secessionists may be accused of precipitating a national crisis without allowing the state a period of grace in which to unify the nation[83].

(ii) Non-Alignment.

A stronger case can be made for a seceding unit which professes non-alignment. Rules of legitimacy should discourage the formation of clientele states as part of the international system. Furthermore, a seceding unit whose

---

[82] See Scotland and Quebec and compare these two to the case studies made of Bangladesh and Eritrea.

[83] See Biafra and Katanga where these arguments were employed.

independence does not depend on sovereignty-threatening deals struck with major powers is likely to operate more effectively as a positive force in international affairs. A successful secession accomplished without external support would seem to indicate a high level of internal support.

(iii) A Previous Act of Self-Determination.

Self-determination has been described as a once-only right[84]. Gros-Espiell refutes this notion in his authoritative study for the United Nations where he states,

> "The right of peoples to self-determination has lasting force [and] does not lapse upon first having been exercised to secure political self-determination"[85].

It seems inconceivable that a decision made several generations previously should become an obstacle to a renewed exercise of self-determination by a completely different collection of individuals under new circumstances[86]. The latin maxim, rebus sic stantibus[87],

---

[84] See e.g., generally, Trudeau,P. Federalism and the French Cnandians, supra.

[85] See Gros Espiell,H. The Right to Self-Determination, supra, p8.

[86] See e.g. can it seriously be argued that Scotland self-determined definitively in an 18th century treaty (the 1707 Treaty of Union) ?

[87] Change of circumstances frustrates the contract. See Levin, The Principle of Self-Determination of Nations in International Law, 1962, Soviet Yearbook of International Law, p45.

operates to rebut pacta sunt servanda, the rule that an agreement once reached and complied with by the parties can no longer be tampered with. It is as applicable to the social contract as it is to the private contract.

.....

C. CONCLUSION.

The index of validity outlined above is as comprehensive and quantifiable as a legal-political concept can be. It should serve to, at worst, darken the shade of grey areas inherent in the principle of self-determination. At best it provides a new code with which to ascertain the legitimacy of secession. This code, if applied with political and legal dexterity, should have the effect of advancing the cause of human rights in the world through a renascence of the right of self-determination.

.....

BIBLIOGRAPHY

Books

Alexander,Y, and Friedlander,R. (eds.). Self-determination: National, Regional and Global Dimensions, Boulder,Colo.: Westview, 1980.

Arangio-Ruiz, G. The United Nations Declaration on Friendly Relations and the System of the Sources of International Law. Alphen aan den Rijn, The Netherlands: Sijthoff & Noordhoff, 1979.

Barros,J. The Aaland Islands Question: Its Settlement by the League of Nations, New Haven and London: Yale University Press, 1968.

Bibo,I. The Paralysis of International Institutions and the Remedies, New York: Wiley & Sons, 1976.

Blix,H. Sovereignty, Aggression and Neutrality, 1970.

Brownlie,I. Principles of Public International Law. 3rd ed. Oxford: Clarendon Press, 1979.

----------.(ed.) Basic Documents on Human Rights, 2nd ed., Oxford: Clarendon Press, 1981.

Buchheit,L. Secession: The Legitimacy of Self-determination. New Haven: Yale University Press, 1978.

Cameron,D. Nationalism, Self-Determination and the Quebec Question, Canada: MacMillan, 1974.

Cassese,A. (ed.), Un Law/Fundamental Rights. Two Topics In International Law, Alphen aan den Rijn: Sijthoff & Noordhoff, 1979.

Choudhary, S.R. The Genesis of Bangladesh, London: Asia Publishing House, 1972.

Cobban, A. The Nation State and National Self-determination. New York: Crowell, 1969.

----------. The Nation State and national Self-Determination. London, 1945.

----------. Historians and the Causes of the French Revolution, London: Routledge and Kegan Paul, 1958.

Davidson,Cliffe and Selassie, Behind the War in Eritrea, Nottingham: Spokesman. 1980.

Drucker,H. Breakaway, The Scottish Labour Party, Edinburgh: EUSB, 1978.

Erlich,H. The Struggle over Eritrea - War and Revolution in the Horn of Africa. Stanford: Hoover Institution Press, 1983.

Espiell,G. The Right of Self-determination-Implementation of United nations Resolutions. New York: United Nations, 1980.

Firebrace and Holland, Never Kneel Down - drought, development and liberation in Eritrea, Nottingham: Spokesman,

Goodrich,L and Hambro,E. Charter of the United Nations: Commentary and Documents. 2nd ed. Boston: World Peace Foundation, 1949.

Gros Espiell,H. The Right to Self-Determination, Implementation of United Nations Resolutions, New York: United nations, 1980.

Grotius,H. De Jure de Belli et Pacis (trans. W. Whelwell), Cambridge: CUP, 1853.

Gutteridge, J.A.C. The United Nations in a Changing World. Manchester: Manchester University Press, 1969

Hailey,Lord. An African Survey Revised, London: Oxford University Press, 1957.

Hall, A Treatise on International Law, 8th ed., ed. A. Pearce Higgins, Oxford: Clarendon Press, 1924.

Hobbes,T. Leviathan, Baltimore: Penguin Books, 1968.

Higgins, R. The Development of International Law through the Political Organs of the United Nations. London: Oxford University Press, 1963.

Johnson, H. Self-determination within the Community of Nations. Leiden: Sitjhoff, 1967.

Khan,D.C.A. The Disintegration of Pakistan, Meerut: Meenakshi Prakashan.

Kellas,J.G. The Scottish Political System,3rd ed., Cambridge: Cambridge University press, 1984.

Kelsen, H. The Law of the United Nations: A Critical Analysis of its Fundamental Problems. London: Stevens,1950.

Lenin, I.V. The Rights of Nations to Self-Determination, New York: International Publishers, 1951.

Levine, D. Greater Ethiopia, Chicago: 1974.

Locke,J. Two Treatises of Civil Government, London: Dent, 1960.

Loshak,D. Pakistan Crisis, London: Heinemann, 1971.

Lonrigg,S. A Short History of Eritrea, Oxford: Clarendon Press, 1945.

Meijers H. & Vierdag, E.W.(eds.), Essays on International Law and Relations in Honour of A.J.P. Tammes, The Hague: Sitjhoff & Leyden, 1977.

Mercer,J. Scotland: The Devolution of Power, London: J.Calder, 1978.

Nairn,T. The Break-up of Britain, London: Verso, 2nd ed, 1981.

Neuberger,B. National Self-determination in Postcolonial Africa. Boulder,Colo.: Lynne Reinner Inc.,1986

Notter,H. The Origins of the Foreign Policy of Woodrow Wilson, Baltimore: John Hopkins Press, 1937.

Ofuatey-Kodjoe,W. The Principle of Self-determination in International Law. New York: Nellen, 1977.

Ojukwa,G. Biafra: Selected Speeches and random Thoughts, 1969.

Pomerance, M. Self-determination in Law and Practice. The Hague: M.Nijhoff, 1982.

Rigo-Sureda, A. The Evolution of the Right of Self-determination: A Study of United Nations Practice. Leiden: Sitjhoff, 1973.

Ronen, Dov. The Quest for Self-determination. New Haven: Yale University Press, 1979.

Rousseau,J.J. The Social Contract, London:Penguin Books.

Rowatt,D.C.(ed.) The Referendum and Separation Elsewhere: Implications for Quebec, Dept. of Pol Sc.: Carleton University.

Saxena,J. Self-determination from Biafra to Bangladesh. Delhi: University of Delhi, 1978.

Simeon,R.(ed.) Must Canada Fail? Montreal: Queens University Press, 1977.

Stalin,J. Marxism and the Colonial Question, New York: International Publishers.

Stowell,E.C. International Law: a restatement of principles in confromity with actual practice, New York: Holt & Co, 1931.

Trudeau,P. Federalism and the French Canadians, Toronto: Macmillan, 1968.

Umozurike,U. Self-determination in International Law. Hamden,Conn: Archon Books, 1972.

Verjizil,J.H.W. International Law in Historical Perspective, vol 1. Leiden: Sijthoff, 1968.

Walters, A History of the League of Nations, London: Oxford Universuty Press,1952.

Walzer,M. Just and Unjust Wars: A Moral Argument with Historical Illustrations, New York: Basic Books, 1977.

Wambaugh,S. A Monograph on Plebescites. New York: Oxford University Press, 1920.

Wells,B. UN Decisions on Self-Determination, University Microfilms:Ann Arbor Michigan, 1963.

In Defence of the Eritrean Revolution, New York 1978.

Articles

Amber,P. Modernization and Political Disintegration: Nigeria and the Ibos, 2 Journal of Modern African studies (1967), p163

Arangio-Ruiz,G. The Normative Role of the General Assembly of the United Nations and the Declaration of Friendly Relations, Hague Academy, Recueil des Cours, vol 137, (1972-III), p419-742.

Barnds, Pakistan's Disintegration, World Today 27 1971.

Baasiouni,M Cherif. Self-Determination and the Palestinians, Proceedings of the American Society of International Law, vol 65 (1971) p31-40.

Beloff,M. Self-Determination Reconsidered, Confluence: An International Forum, vol 5 (1956) p195-203.

Beran,H. A Liberal Theory of Secession, Political Studies, 1984, XXXII, p21-31.

Berger,S. Bretons,Basques, Scots and Other Nations, Journal of International History 3 1972.

Birch A. Another Liberal Theory of Secession, Political Studies 32,no 4, 1984, p596-602.

Blum,Y.Z. Reflections on the Changing Concept of Self-Determination, Israel Law Review, vol 10 (1975),p509-14.

Bos, M, Self-Determination by the Grace of History, Netherlands Law Review, vol 15 (1968) p362-73.

Bowett,D. Self-Determination and Political Rights in Developing Countries, Proceedings of the American Society of International Law, vol 60, (1966), p129-135.

Brown,P. The Aaland Islands Question, AMJ Int'L L, vol XV, 1921,p268-272.

Brownlie,I. An Essay in the History of the Principle of Self-Determination, In C.H. Alexandrowicz (ed.), Grotian Society Papers: Studies in the History of the Law of Nations, 1968. The Hague: Nijhoff, 1970, p90-99.

Carey,T. Self-Determination in the Post-Colonial Era: The Case of Quebec, ASILS International Law Journal,Vol 1, 1977,47.

Connor,W. Self-Determination: The New Phase, World Politics, vol 20 (1967), p30-53.

--------. The Politics of Ethnonationalism, Journal of International Affairs, XXVII, (1973), p1-21.

Eagleton,C. Excesses of Self-Determination, Foreign Affairs, vol 31 (1953) p88-93.

---------. Self-Determination in the United Nations, American Journal of Int.Law, vol 47 (1953), p88-93.

Emerson,R. Self-Determination Revisited in the Era of Decolonization, Occasional Papers in International Affairs, no 9. Harvard University, Centre for International Affairs, December, 1964.

--------. Self-Determination, American J of Int'l Law, vol 65 (1971), p459-75.

--------. Self-Determination, Proceedings of the American Society of International Law, vol 60, (1966), p135-41.

Franck,T. Legitimacy in the International System, AJIL,82,1988, p705-59

Franck,T., and Hoffman,P. The Right of Self-Determination in Very Small Places, NYU J Int'L Law and Politics,vol 8, (1976), p331-86.

Gregory,C.N. The Neutralization of the Aaland Islands, AJIL vol XVII, (1923),p63-76.

Gross,L. The Right of Self-Determination in International Law in New States in the Modern World, ed. M. Kilson, New York: Harvard University Press.

Hanham,H.J. The Scottish Nation Faces the Post-Imperialist World, 23 International Journal, 1967/68.

Higgins,R. The United Nations and Lawmaking: The Political Organs, 64 AJIL. 43, Sept (1970).

Hula,E. National Self-Determination Reconsidered, Social Research, vol 10 (1943), p1-21.

Kamanu,O. Secession and the Right of Self-Determination: An OAU Dilemma, Journal of Modern African Studies, vol 12 (1974), p355-76.

Kohn,H. The United Nations and National Self-Determination, Review of Politics, vol 20 (1958) p526-45.

Lachs,M. The Law in and of the United Nations: Some Reflections on the Principle of Self-Determination, Indian Journal of International Law, vol 1 (1961) p429-42.

Levin,D.B. The Principle of Self-Determination in International Law, Soviet Year-book of International Law, 1962, p45-48.

Mackintosh, Scottish Nationalism, 38 Political Quarterly, 1967.

Matas,D. Can Quebec Separate? Mcgill Law journal, vol 21, 1975.

Murray Greenwood,F. The Legal Secession of Quebec, A Review Note, UBC Law Review, vol 12, p71.

Mustafa, Z. The Principle of Self-Determination in International Law, International Lawyer, vol 5 (1971), p479-87.

Nanda,V.P. Self-Determination in International law: The Tragic Tale of Two Cities: Dacca and Islamabad, 66 AJIL, p321.

Nawaz, The Meaning and Range of the Principle of Self-Determination, Dukes law Journal, LXXXII, 1965, p82-102.

Nayar, M.G.K. Self-Determination beyond the Colonial Context: Biafra in Retrospect, Texas Int Law J. vol 10, 1975.

Nixon,C. Self-Determination: The Nigeria/Biafra Case, World Politics, vol 24, (1972), p479-97.

O'Brien,C.C. The Right to Secede, New York Times, Dec 30,1971.

Panter-Brick,S.K. The Right to Self-Determination: Its Application to Nigeria, International Affairs, vol 44 (1968), p254-66.

Pomerance,M. Methods of Self-Determination and the Argument of Primitiveness, Canadian Y.BK. of Int'l L., vol 12 (1974) p38-66.

---------. The United States and Self-Determination: Perspectives on the Wilsonian Conception, AJIL, vol 70 (1976), p1-27.

---------. Self-Determination Today: The Metamorhosis of an Ideal, 19 Israel Law Review, p310.

Post,K. Is There a Case for Biafra ? International Affairs, vol 44 (1968), p26-39.

Rivlin,B. Self-Determination and Colonial Areas, International Concilliation, no.501, Han 1955.

Schwarz, The SNP, Nonviolent Separatism and Theories of Violence, 22 World Politics, 1970.

Sinha,S. Prakesh. Is Self-Determination Passe? Columbia Journal of Transnational Law, vol 12 (1973), p260-273.

Suzuki,E. Self-Determination and World Public Order: Community Responses to Territorial Separation, VA Journal of Int'l L. Vol 16:4, p779-862.

Tamuno, Separatist agitiations in Nigeria since 1914, 8 Journal of Modern African Studies, 1970, p566.

Toynbee,A. Self-Determination, The Quarterly Review (London), no 484. (April 1925), p317-38.

Van Dyke,V. Self-Determination and Minority Rights, International Studies Quarterly, vol 13 (1969), p223-253.

White,R. Self-Determination: Time for a Reassessment, Netherlands Int'l L. Review, 28, (1981), p147-170.

Wood,J. Secession: A Comparative Analytical Framework, Canadian Journal of Political Science XIV:1, March, (1981), p107-134.

Woolsey,T.S. Self-Determination, AJIL, vol 13, (1919) p302-5.