The Idea of the People

The Right of Self-Determination, Nationalism and the Legitimacy of International Law

Doctoral Dissertation, submitted with the permission of the Faculty of Law of the University of Helsinki, to be defended in a public examination at 10.00 a.m. on Saturday, 11 December 2004 in Auditorium XIII of the University’s Main Building.

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As part of the requirements for the Doctor of Laws degree 50 paper copies of this booklet have been produced. It can also be viewed electronically at ethesis.helsinki.fi. A revised version of this thesis will be subsequently published by Martinus Nijhoff as part of the Erik Castrén Institute’s Monographs on International Law and Human Rights series.

ISBN 952-91-8043-8 (paperback)
ISBN 952-10-2220-5 (PDF)

Helsinki 2004
In memory of my grandparents George and Joan Senter.
Abstract

The thesis is an in-depth survey of the law of self-determination from the perspective of the interaction between nationalism and international law. It argues that, as nationalism (the doctrine that the nation is the basis for the state) provides the basic legitimacy for the modern state and as the state is, in turn, the basic unit of international law, one would expect to see nationalist arguments in that law. International bodies may use the language of nations and peoples to legitimise their positions, whether this is the drafting of an instrument or a decision by a court. However, it is also argued that while these bodies may refer to peoples, they remain essentially elite institutions disconnected from mass politics. Therefore, the peoples they cite may be no more than an idea of a people, a political idea whose function is to legitimise a particular action or decision, and whose characteristics may be subjectively shaped to fit that decision.

The interaction between nationalism and international law creates certain tensions in the law of self-determination. Nationalism requires that self-determination be exercised by all authentic peoples and that states conform to those peoples. Positive international law is ultimately based on states and their intent, and seeks to establish a certain degree of clarity and consistency in that intent. These are two very different standards and there is no stable middle ground between them. Thus, self-determination can alternatively be criticised for falling short of a right of “all peoples” and for the lack of clarity and consistency in its obligations.

The thesis also considers the close relationship between national ties and legal principles. National ties used to identify a nation, such as language, territory, religion, identity etc., can readily relate to principles, like self-determination, territorial integrity and state sovereignty. The law of self-determination usually presents these principles in an antagonistic relationship with each other: self-determination v. territorial integrity etc. However, it is argued that these balances merely represent the different weight attached to various ties in the definition of a nation: self-determination highlights subjective ties, territorial integrity emphasises territorial ties etc.

The thesis also looks at the consequences of this interaction, first its historical context, then in the drafting of instruments, the decisions of courts and legal obligations. It is argued that in the drafting of instruments, various bodies use a technique of “balancing”, in which self-determination is balanced by other principles. This allows self-determination to be proclaimed as a right of “all peoples” (satisfying nationalism), while effectively limiting it to certain situations (satisfying positive law). However, there are two problems with this approach. First, despite this formula of words, the balance is still evidently intended to restrict self-determination. This has lead, in turn, to attempts to establish more sensitive balances. Second, these balances of principles may encapsulate national ideas and far from establishing legal clarity can simply boil down to competing interpretations of “people” and “country”.

These problems become more evident in decisions by courts and similar bodies. It is argued that balancing in this case becomes unsatisfactory because it does not address nationalist perceptions of legitimacy. If self-determination is to be promoted or contained, it does matter whether the groups in question are peoples or not. It cannot simply be left to principles. As a consequence, courts and similar bodies often seem to supplement these balances with nationalist rhetoric, in which peoples are identified and shaped to support particular principles. Finally, for these reasons, the law of self-determination is seen as one in which the right can alternatively be used to support or to challenge existing obligations, but is highly problematic as a source of obligations in itself.
“Ideas might be used as weapons... as a weapon, ‘self-determination’ should be handled with care.”

H. F. E. WHITLAM

Acknowledgements

There seems to be a popular myth that writing a doctorate has something to do with being clever. However, after some years writing my thesis, I have come to the conclusion that it is more than anything else a test of stamina. Thesis writing can seem like a long, arduous and lonely journey over often difficult and unfamiliar terrain. The surroundings may be relatively unremarkable, a room and a computer or a desk in a library, but it does require commitment, a certain penchant for poverty, a considerable amount of what the Finns call sisu, and, above all, a sense of excitement.

I began the doctoral programme at the Faculty of Law in Helsinki University in Autumn 1997, although work on this thesis did not really start until January 1999. Towards the end of 2003 it was basically complete, with some of the final polishing taking place while I was lecturing in international law at the University of Zambia in the autumn of that year. A great deal of the present introduction was written in the remote village of Nambo deep in the African bush in Zambia’s Central Province. During this time I am happy to say that, while the subject of national self-determination has often left me confused and exasperated, it has never left me bored. I only hope that I can convey this sense of interest in the present work (hopefully leaving out the confusion and exasperation).

I am extremely grateful for all the support I have received in writing this book. Finance for the project came in part from an International Student Grant from Helsinki University and a grant from the Chancellor to finalise this thesis. I would like to thank my supervisor Jan Klabbers who has always been available with suggestions and, I have to admit, also helped me to considerably improve my English. I would also like to thank my pre-examiners Martti Koskenniemi and Iain Cameron for their very useful comments. Professor Koskenniemi has also provided me with his insights at several key points in this project. I am extremely pleased that Karen Knop has agreed to be my opponent for the public defense and I await her critique with great interest. I have also received many invaluable ideas from Eyassu Gayim from our many long conversations about self-determination and other things. I would also like to thank Tarja Långström for guidance on the Russian cases and Pamela Norris for help with the Italian. I am deeply indebted to my parents Peter and Catherine Summers for all their support and encouragement. Finally, I would like to thank my wife Paula Väänänen who has always been there for support and always shown total faith and confidence in this project.

James Summers
Helsinki, 17 November 2004
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<td>Special Committee on Defining Aggression, Summary Records.</td>
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<td>CESCR</td>
<td>Committee on Economic, Social and Cultural Rights.</td>
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<td>Comm.HR</td>
<td>Commission on Human Rights.</td>
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<td>Comm.PSNR</td>
<td>Commission on Permanent Sovereignty over Natural Resources.</td>
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<td>COREMO</td>
<td>Comité Revolucionário de Moçambique.</td>
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<tr>
<td>CSCE/I/PV.</td>
<td>Conference on Security and Co-Operation in Europe/ First Stage (II = Second Stage, III = Third Stage)/ Provisional Verbatim Records.</td>
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<td>CTS</td>
<td>Consolidated Treaty Series.</td>
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<td>DLR</td>
<td>Dominion Law Reports.</td>
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<td>ECOSOC</td>
<td>Economic and Social Council.</td>
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<tr>
<td>ELF</td>
<td>Eritrean Liberation Front.</td>
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<tr>
<td>EPLF</td>
<td>Eritrean People’s Liberation Front.</td>
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<td>ESCOR</td>
<td>Economic and Social Council Official Records.</td>
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<td>ESCR</td>
<td>Economic, Social and Cultural Rights.</td>
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<td>FNLA</td>
<td>Frente Nacional de Libertação de Angola.</td>
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<tr>
<td>FRELIMO</td>
<td>Frente de Libertação de Moçambique.</td>
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<tr>
<td>FRG</td>
<td>Federal Republic of Germany (West Germany).</td>
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<tr>
<td>GA Dec.</td>
<td>General Assembly Decision.</td>
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<td>GAOR</td>
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<td>GDR</td>
<td>German Democratic Republic (East Germany).</td>
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<td>HRCOR</td>
<td>Human Rights Committee Official Records.</td>
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<td>ICJ</td>
<td>International Court of Justice.</td>
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<td>ILC</td>
<td>International Law Commission.</td>
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<td>ILM</td>
<td>International Legal Materials.</td>
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<td>International Law Reports.</td>
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<td>JNA</td>
<td>Yugoslav People’s Army.</td>
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<td>MANU</td>
<td>Mozambique African Nationalist Union.</td>
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<tr>
<td>MPLA</td>
<td>Movimento Popular de Libertação de Angola.</td>
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<tr>
<td>OAU</td>
<td>Organisation of African Unity.</td>
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<td>PRC</td>
<td>People’s Republic of China.</td>
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<td>RIAA</td>
<td>Reports of International Arbitral Awards.</td>
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<td>ROC</td>
<td>Republic of China.</td>
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<td>Acronym</td>
<td>Full Form</td>
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<td>SDS</td>
<td>Serb Democratic Party.</td>
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<td>SR.100</td>
<td>Summary Records, 100th Meeting.</td>
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<td>SSR</td>
<td>Soviet Socialist Republic.</td>
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<td>SWANU</td>
<td>South West Africa National Union.</td>
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<td>SWAPO</td>
<td>South West African People’s Organization.</td>
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<td>UAR</td>
<td>United Arab Republic.</td>
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<tr>
<td>UDENAMO</td>
<td>União Democrática Nacional de Moçambique.</td>
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<td>UNITA</td>
<td>União Nacional Para A Indepência Total de Angola.</td>
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<tr>
<td>UNTAET</td>
<td>United Nations Transitional Authority in East Timor.</td>
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<tr>
<td>USSR</td>
<td>Union of Soviet Socialist Republics.</td>
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<tr>
<td>YBUN</td>
<td>Yearbook of the United Nations.</td>
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<tr>
<td>YHRC</td>
<td>Yearbook of the Human Rights Committee.</td>
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<td>YILC</td>
<td>Yearbook of the International Law Commission.</td>
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Introduction: The Idea of the People

There are few concepts so widely used, but little understood as the right of peoples to self-determination. The right, by which peoples freely determine their political status and freely pursue their economic, social and cultural development, undoubtedly occupies a key position in some of the most prominent international instruments. It features in article 1 of the United Nations Charter 1945, among the purposes of the organisation. It is the first right in the twin Human Rights Covenants 1966, one of seven basic legal principles in the Friendly Relations Declaration, GA Res. 2625(XXV) 1970 and one of ten in the Helsinki Final Act 1975. It has been variously described as the basis for friendly relations, peace and development, and a prerequisite for human rights. It is also hotly contested around the world: from the heights of the Caucasus Mountains to the Pacific island of New Caledonia, from the indigenous peoples of the Arctic to the deserts of Western Sahara, and numerous points in between.

At the same time, self-determination is not just contested, but notoriously ambiguous. The right itself not only remains an open concept, but its subject, the “people” is effectively undefined and legendarily indefinable. This certainly hasn’t been for a lack of academic interest. Self-determination commands a vast and rapidly expanding literature. However, too often this literature tends to skirt around certain issues, most notably the people. This is unfortunate. As self-determination is a right of peoples, the people not only provides a logical starting point for a study of the right, but it is, in fact, hard to see how much headway can be made without at least some explanation for it. Another notable weakness in the literature has been the lack of comprehensive accounts of the sources of the law of self-determination. This field has been dominated for some years now by Antonio Cassese’s Self-Determination of Peoples: A Legal Reappraisal. While the commanding position of this book is undoubtedly well deserved, the dependence of so much of the recent literature on a single secondary source is also clearly a limitation.

This work is, therefore, intended to have four goals. First, it seeks to give the reader an in-depth account of the law of self-determination, looking in detail at the sources of the law. Second, it aims not only to be in-depth but also with depth, digging down to the ideas and historical context which underlie the law. The reader will be able to find details on how self-determination was interpreted in, say, article 1(2) of the Human Rights Covenants or in Re. Secession of Quebec. But, he or she will also find, among other things, the theory behind the American Declaration of Independence, or Edmund Burke’s criticisms of popular sovereignty or Emmerich de Vattel’s views on patriotism. Third, this study will take a critical look of the law of self-determination. It will examine the right, consider its rhetoric and application, and the assumptions behind it to develop a theory that explains its role in international law. Fourth, despite the fact that self-determination sometimes almost seems to revel in ambiguity, the intention throughout this
work is to be as clear and accessible as possible.

Having proposed these goals, it is worth outlining the basic approach of this work. Its starting point is the proposition that the law of self-determination is the product of the interaction between the doctrines of national self-determination and international law. This hopefully should be fairly self-evident, and this is important because it has major implications for how the law should be studied. If the law of self-determination is the product of this interaction, the best method for analysing it would presumably not only be from the perspective of positive international law (the law as binding legal obligations), but also from that of self-determination and its close associate nationalism. (Nationalism here refers not to national prejudice, but to a doctrine which argues that nations and peoples are the basis for the state and all other forms of legitimate political authority.) It also means that legal studies of self-determination, in order to examine the law, must necessarily look outside it, and those that do not may miss an important dimension. They might tell only half the story. This can be seen in many legal studies on the law of self-determination, and to highlight this it might be useful to take a quick look at three of the best.

Take, for example, Michla Pomerance’s hard-hitting *Self-Determination in Law and Practice*, which delivers a compelling critique of the inconsistencies of the law of self-determination. Pomerance concludes with the observation: “Even if, as a legal right, ‘self-determination’ cannot really swim, as a moral right or political desideratum, it will not, and in the opinion of most people should not, sink.”

This, though, suggests that whatever self-determination’s problems with international law, and Pomerance argues that there are many, there is another force which works to keep it afloat. But, in Pomerance’s work this force (nationalism) remains in the shadows, hinted at but never explicitly analysed. Moreover, although Pomerance efficiently catalogues the problems caused by nationalism’s interaction with international law, this interaction is presented from a purely legalistic, and thus solely negative perspective.

The importance of the nationalist dimension can also be seen in Antonio Cassese’s *Self-Determination of Peoples: A Legal Reappraisal*, which has set the standard (and much of the content) for recent work in the field. Cassese describes his approach as, “positivist – a commitment to the ‘is’”, in international law, while still taking a wider perspective: discussing the law’s failings and, “the direction in which the international community’s conception of the right seems to be moving.”

In this vein he outlines what he considers to be the flaws in the law of self-determination. Interestingly, Cassese dismisses the lack of a definition of a people as only one of the “alleged flaws” in the law. However, the concept of the people clearly does play an important role, and when he turns to what he calls the “real flaws”, Cassese delivers an essentially nationalist critique. The law is, “blind to the demands of ethnic groups, and national, religious, cultural or linguistic minorities”, “international law takes a ‘statist view of self-determination’”, it “ultimately lacks universality”, and is, “frustrated by the existence of other rules that prevent its application in some specific areas.” Arguably, none of these issues actually pose much of a problem for the law as such. The fact that the law of self-determination ignores the demands of ethnic groups, is not universally applicable and is viewed in relation to other legal principles may actually make the task of the international lawyer considerably easier. However, where they do appear to pose a problem

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5 Ibid. pp. 328-32.
is in terms of the law’s legitimacy, and that legitimacy is, in turn, shaped by nationalism.

Karen Knop does not neglect nationalism as such in her perceptive study, *Diversity and Self-Determination in International Law*. Her analysis of peoples in terms of the interpretation of identity by legal bodies and international lawyers also, in fact, covers a similar ground to this study. Nonetheless, nationalism does remain largely in the background. Knop prefers to deal with issues of identity in relation to colonialism and the participation of women and indigenous peoples, rather than how it is used by nationalism in international law. The impact of the doctrine on the interpretation of peoples and self-determination is never really fully explored.

This can be seen, for example, in her examination of the International Court of Justice’s *Western Sahara* Advisory Opinion and arguments about whether Mauritania had been a “legal entity”. Despite noting Mauritania’s claim that, “a category of people or nation existed in nineteenth-century international law... appropriate to the Mauritanian entity”, and that it connected this people to nationalist struggles in Italy, Germany and the Balkans, Knop never examines this claim as a nationalist argument. She also does not seem to consider that the Court’s treatment of the concept of a “legal entity” may have been shaped by national considerations, even though its decision explicitly referred to, “ties of a racial, linguistic, religious, cultural and economic nature”. These are, of course, ties that are normally used to identify a nation.

Nationalism, therefore, is not simply an optional extra in the legal study of self-determination. The doctrine plays such an important role in shaping the law of self-determination that its fingerprints can still be seen even in a purely legal study. It is, of course, better if this role is acknowledged because then it is possible to produce a much more accurate picture of the law. Consequently, although this work is a legal study of the law of self-determination, it is also necessarily a hybrid, which will look at the doctrine of nationalism and its interaction with international law. This interaction will be looked at in a number of areas, including the drafting of instruments, adjudication and legal obligations.

Nationalism is itself an enormous field and there are a variety of approaches to it. The one taken by this work, and which forms its basic theory for the role of the people in international law is as follows: Nationalism is a doctrine of political and legal legitimacy, which proposes that the basis for legitimate authority is a nation or a people. However, to do this it must first of all have an image of that nation or people to provide a blueprint for this authority. This means that a people, or its image, necessarily assumes the role of a political idea, which is used to legitimise the existence and actions of political and legal institutions. This idea, the idea of a people is absolutely central to nationalist politics and provides, in the words of Lord Acton, no less than, “the mould and measure of the State”. Nationalism means that the interpretation of peoples is inherently a political matter, which determines the legitimacy of political and legal institutions and what they can do. As the Canadian Supreme Court noted in *Re. Secession of Quebec* and the International Court of Justice in *Western Sahara*, it is the “characterizing” or the “consideration” of a population as a “people” that is the key to self-determination in international law. The focus, then,

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7 Ibid. pp. 147-8.
8 *Western Sahara* (Advisory Opinion), ICJ Reports (1975) p. 63, para. 149.
is on the use of peoples as a rhetoric.

Contrary to what might be the preferred self-image of international lawyers, international law is, in fact, institutionally orientated towards this type of argument. The basic unit of international law is the sovereign state, and today these are invariably legitimised in national and nationalist terms. Moreover, international organisations not only incorporate these national structures into their organisation (e.g. the Russian, French, Chinese etc. representative in the UN General Assembly, Security Council etc.), but also provide forums (most notably the UN General Assembly) for the expression of nationalist principles. One might expect, then, that nationalist rhetoric could be used in relations between states and that this may extend into international law. And nationalism does appear to occupy a central position in international law. This is reflected in both article 1 of the UN Charter, which makes self-determination the basis for friendly relations among nations, and the twin Human Rights Covenants, which declare it the first human right. If the nationalist argument can function in international law, then one would also expect see peoples being used as political ideas to legitimise various activities, including the drafting of instruments and the adjudication of disputes.

The idea of the people is, therefore, central to the nationalist argument, but it is more than simply the lowest common denominator in the study of nationalism and national self-determination. It is argued here that treating the people or nation as a political idea is the most productive way of looking at self-determination in international law. Indeed, it may be more useful than looking at peoples as sociological entities, which the rhetoric of self-determination suggests, and there are three reasons why this may be the case.

First, the politics of international law displays two particular features which make it likely that the rhetoric of peoples will be used. Firstly, as we have seen, is that it is structurally orientated towards the nationalist argument. If one can generally talk of a double-edged process of “‘politicizing’ law” and “‘legalizing’ politics”, then nationalism clearly has a place in this politics. Secondly, international law is a fundamentally elite affair. Self-determination may introduce the language of bottom-up mass politics, but international law is essentially a top-down doctrine created by elites, like states’ representatives and international functionaries, with very few, if any, mechanisms for direct popular participation. Despite its populist language, the law of self-determination is focussed on this elite plane and may not even require the direct involvement of peoples. The International Court of Justice notably described the principle as, “the need to pay regard to the freely expressed will of peoples”. It is evident that “need” falls someway short of “obligation” and “pay regard” is somewhat less than “respect”. Popular expressions of the will of the people, like plebiscites may be important for the right’s legitimacy, but elites, national or international, still have considerable discretion as to whether they use these mechanisms and the conditions under which they do so.

However, if peoples actually have little direct involvement in the creation of international law, the representation of nations and peoples is a standard feature of the political environment in

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which the law is developed. It is common for states’ representatives, the leaders of national
liberation movements and even representatives of international organisations to appeal to nations
and peoples to legitimise their positions. Nonetheless, despite this rhetoric, there is a notable
distance between this level of decision-making and the peoples in question. This distance
separates peoples and nations as political ideas from the actual people themselves.

The distance can be physical. Individuals, perhaps in the International Court of Justice in The
Hague, or the United Nations in New York, may make determinations about the rights of peoples
on the other side of the world. But connected to this, and more importantly, there may be a
mental distance. These individuals may not be intimately familiar with the peoples in question
and be reliant on information presented to them. They have, in other words, an outside perspective.
A striking illustration of this was provided by Judge Petren in his separate opinion in Western
Sahara:

“[E]ach judge has had to struggle – as far as his knowledge of languages would allow –
through the immense literature existing on the questions of African history to which
reference was made, and has been able to inform his colleagues of the fruits of his reading.
It is nevertheless striking that the Advisory Opinion should be based almost exclusively on
the documents and arguments submitted by interested States, which are accepted or
dismissed in light of an examination of the evidence adduced.”

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As to the standard of this evidence, Judge de Castro complained that:

“[T]he Court had nothing to go on, in my opinion, except vivid and touching descriptions of
desert life – but no concrete facts… which would fulfil the conditions required of evidence
to be submitted to a court.”

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This standard of evidence, though, did not prevent the court from making a number of
determinations as to the nature and rights of the populations of Western Sahara, Morocco and
Mauritania. A decisive factor in defining the rights of peoples, therefore, may be the perception
of those populations by elite international bodies. It can be noted that ignorance may be as powerful
as knowledge in shaping national rights. To cite a notorious example, Neville Chamberlain’s
description of Czechoslovakia in 1938 as “a far-away country” and a “people of whom we know
nothing”, and the policy that this rationalised, certainly had a profound effect on Czech and
Slovak self-determination.

The second reason for focussing on the people as a political idea relates to the rhetoric of
nationalist politics. It may be objected that, while much of the development of the law of self-
determination might take place on an elite level, this may only be a reaction to the success of
nationalist movements representing particular peoples. This may or may not be true. However, the
problem is that nationalist movements invariably claim to represent peoples regardless of their
level of popular support. Correspondingly, to see the success of a nationalist movement as
evidence in itself for sociological peoples may be to accept the rhetoric of self-determination too

Nationalist movements may succeed for a variety of reasons and in the right circumstances may not need mass support much less whether those masses form a sociological people (whatever that is).

In this regard it can be noted that some writers have found considerable differences between the peoples accorded rights in international law and their sociological composition. This criticism has been levelled, above all, at the colonial “people”. For example, Anna Michalska has argued that:

“One cannot ignore that colonial states were often artificially created: they were composed of different national, ethnic and religious groups (which sometimes remained markedly different)... Can such an exercise of the right to self-determination of colonial and dependent peoples fully satisfy peoples?”

A similar point was made by Karen Knop:

“Rather than as corresponding to a sociological fact, we might justify the colonial categories of ‘peoples’ as a normative designation. Whether or not a trust territory or non-self-governing territory had some identity apart from the purely administrative, its population was normatively joined together as a ‘people’ by virtue of suffering the collective injury of colonialism.”

However, the colonial “people” was not simply created in the minds of lawyers. It was the product of the success of nationalist movements in colonial territories which usually acceded to independence as one unit. Even if one accepts that colonial peoples were not sociological peoples (whatever those are), one is still faced with the fact that they represent probably the most successful application of self-determination in international law. Similar objections may be made to other legal peoples. The peoples of many, perhaps most, of the world’s states may have dubious sociological credentials. If self-determination in Eastern Europe is looked from a purely sociological perspective, it may be hard to explain why an apparently sociological nation, Romania and Moldova failed to reunite, or why Latvia and Estonia’s very large Russian minorities acquiesced in, and in some cases supported Baltic independence. In fact, surprisingly little of the law of self-determination corresponds exactly with sociological peoples, and yet the right has been successfully invoked again and again. One conclusion from this might be that the law of self-determination is artificial or contrived: that it is not really national self-determination. This may or may not be true, but unfortunately it does not take us very far in understanding self-determination in international law, which is, after all, the goal of this study. From this perspective, we might conclude that there is, in fact, only a limited mileage in an approach simply based on a sociological concept of peoples: whatever that is.

This leads to the third point. Treating a people or a nation as a sociological entity quickly runs into the dead end that there is no agreed definition of what such an entity is. Charles Tilly has

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21 Knop *op. cit. no. 6* at pp. 56-7.
called the nation, “one of the most puzzling and tendentious items in the political lexicon.”

22 Eric Hobsbawm compared attempts to quantify them to mapping floating clouds. And Hugh Seton-Watson found himself, “driven to the conclusion that no ‘scientific definition’ of a nation can be devised; yet the phenomenon has existed and exists.”

23 The one point on which experts generally seem to agree is the lack of any agreement on a definition of a nation or a people.

This is not for a lack of imagination. There are formidable barriers to any definition of a people or a nation. Peoples are groups which are typically composed of millions of individuals, and these individuals may associate with each other a multitude of ways. A national identity may be only one of several identities: social, occupational, religious, political, regional, gender etc., and their value, content and consequences may vary according with the circumstances in which people find themselves.

24 The extreme example is a civil war in which people are prepared to kill each other, but are still considered one nation.

Moreover, a national identity itself is not fixed. Various ties, like language, religion, politics, history or race, can be used to identify a nation, but different people within the same nation may have their own views on which of these are important in defining it. Is the essence of a nation in its culture or in its institutions and values? Is it traditional or modern, religious or secular, uni- or multicultural? Each position would emphasise different ties and people may have very different perspectives on what it means to be part of a nation. The importance of these ties may also vary situationally. Language, for example, might not seem important to a person surrounded by people of the same speech, but put that person together with individuals speaking a different tongue and it may suddenly become much more relevant. On top of all this, individuals may have more than one national or ethnic identity: hyphenated Americans, Swedish Finns, Swiss Germans etc. The concepts of peoples and nations are extremely complex and do not lend themselves to easy formulation.

Nonetheless, in spite of this lack of a definition, self-determination still seems to play an important role in international law. More to the point, perhaps it performs this role because there is no definition. Perhaps if there were such a definition, maybe its role would be very different. The lack of an agreed scientific definition for a people is not simply an academic failure, for intellectuals to ponder. It is also a spectacular opportunity. If a nation or a people is the basis for the state, as self-determination implies, if self-determination is the basis for friendly relations between nations, as the UN Charter asserts, and if, as is frequently claimed, it is the prerequisite for human rights: if it is so important: would such a vacuum stand unfilled? It seems unlikely. The lack of a definition provides the room for peoples to be used as political ideas. One might even say without contradiction that a defining feature of the people and its role in international law is that it is undefined. If it is claimed that a group is a people there is no agreed standard against

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which that claim can be measured. It is purely a matter of perception. The lack of a definition of a people may be a problem for lawyers, but it can lubricate the politics of nationalism. Oscar Schachter, for example, has complained that:

“[P]rinciples of self-determination do not provide a regulative norm to determine which ‘people’ are entitled to self-determination... It leaves the UN door open for any self-defined ‘nation’ to claim sovereign rights based on the universal right of self-determination.”

This may frustrating for Schachter and other lawyers trying to identify legal norms, but how is it a disadvantage for nationalists?

An example of this is provided by the UN draft Declaration on the Rights of Indigenous Peoples. This drafting process, which is still ongoing, brings in not only the representatives of states, but also of indigenous peoples. The latter derive their legitimacy directly from representing a group and, in the drafting process, have sought to maximise their rights in two consistent ways. First, they have rejected any objective definition of an indigenous “people”, demanding, that these populations define themselves. Second, they have insisted that the right of self-determination should have no express limitations. This would seem to underline that objective definitions only seem to limit the possibilities of what can be achieved with self-determination.

To sum up, this work is intended as an in-depth study of the law of self-determination centred on the people. As this law is the product of the interaction between nationalism or the right of self-determination and international law, it is argued that a hybrid approach, combining both a nationalist and a legal perspective, will be most productive. As a study of nationalist politics in international law, the focus will be away from peoples as sociological entities towards their role as political ideas. This, of course, does not mean that ideas of peoples should be divorced from the social, cultural, political or economic roots of self-determination. However, at the same time, this political rhetoric, especially in the context of international law, may be somewhat removed from the peoples in question and this makes the approach particularly productive. In legal practice on self-determination nationalist politics and international law have become so interconnected that it is hard to see where one ends and the other begins. Nationalist considerations, it will be shown, can shape the drafting of instruments, the decisions of judicial bodies and international legal obligations. The right of self-determination allows, perhaps even requires nationalists and international lawyers to step into each other’s shoes. This work will see how they do so.

The study is divided into five chapters. Each one will look at a different aspect of the law of self-determination from the perspective of the interaction between nationalism and international law. The first chapter, “Nationalism and the Right of Self-Determination” is intended to explore


some of the basic concepts necessary for any investigation of the law of self-determination, including the doctrines of nationalism and self-determination, and the relationship between the national ties used to identify peoples and legal principles. The second chapter, “The Historical Development of Self-Determination” will look at the historical basis for the interaction between nationalism and international law, charting the evolution of national self-determination from the medieval period to the end of the First World War. In particular, it will consider the role of the modern state in this development and the relationship between three products of this institution: the doctrines of nationalism, liberalism and international law. The third chapter, “Self-Determination and International Instruments: A Question of Balance” will consider the drafting of international instruments on self-determination and the tensions in that process. The fourth chapter, “Self-Determination and Courts: Tipping the Balance” will investigate how courts and other international bodies respond to cases involving self-determination. The fifth chapter, “The Law of Self-Determination: A Contradiction in Terms?” examines the ambivalent attitude of nationalism in the creation of legal obligations and asks how well the law of self-determination can actually be understood in legal terms.
Nationalism and the Right of Self-Determination

Introduction

This chapter might be called the conceptual one. Its basic aim is to outline a number of concepts which are essential for a study of self-determination in international law. First there will be a brief explanation of the terms “people”, “nation”, “country” and “minority”. This will be followed by an examination of the doctrines of nationalism and national self-determination and their impact on international law. Finally, the chapter will consider the hand in glove relationship between the national ties used to identify a nation and many legal principles. Together this will provide the reader with both the vocabulary and the underlying philosophy behind the interaction between nationalism and international law.

1. A Few Basic Terms: “People”, “Nation”, “Country” and “Minority”

“People”: The focus of this work is on the people as a political idea, which forms the basis for and legitimises states and other political institutions and the relations between them. It is not necessary for this theory to provide a concrete definition of a people, and there will be no attempt to do so. The chapter, though, will examine the various national ties used to identify peoples.

“Nation”: In general this work will use the terms “people” and “nation” synonymously and not seek to draw a distinction between them. There are a number of reasons for this. First, the right of self-determination and also other rights have been accorded to both peoples and nations.¹

¹ E.g. “[T]he right of peoples and nations to self-determination is a prerequisite to the full enjoyment of all fundamental human rights.” GA Res. 637(VII), 7 GAOR (1952) Supplement No. 20, (A/2361) p. 26; “The right of peoples and nations to permanent sovereignty over their natural resources”. GA Res. 1803(XVII), 17 GAOR (1962) Supplement No. 17, (A/5217) p. 15; “All States shall respect the right of self-determination and independence of peoples and nations, to be freely exercised without any form of foreign pressure”. GA Res. 2131(XX), 20 GAOR (1965) Supplement No. 14, (A/6014) p. 12. Saudi Arabia: “[T]he right of nations to self-determination” 5 GAOR (1950) 3rd Cmte., 309th mtg., (A/C.3/SR.309) para. 54; France: “[I]t was clear from its very name that ‘the right of nations to self-determination’ was not even a collective human right, but a right of nations as such.” Ibid. para. 62; USSR: “[T]he right of peoples and nations to national self-determination” 6 GAOR (1951) 3rd Cmte., 359th mtg., (A/C.3/SR.359) para. 8; Byelorussian SSR: “[S]uch rights as that of peoples and nations to self-determination”. Ibid. para. 21; Ecuador: “[T]he right of peoples and nations to self-determination proclaimed in Articles 1 and 73 of the Charter”. Ibid. 366th mtg., (A/C.3/SR.366) para. 52; US: “…[T]he principle of the self-determination of peoples and nations stated in the Charter”. Ibid. 367th mtg., (A/C.3/SR.367) para. 46; Afghanistan: “The question of a distinction between a people and a nation might be raised. With regard to self-determination the terms were identical.” Ibid. 396th mtg., (A/C.3/SR.396) para. 58; Syria: “With regard to the word ‘people’… in its context the word clearly meant the multiplicity of human beings constituting a nation”. Ibid. 397th mtg., (A/C.3/SR.397) para. 5; UK: “Peoples’ might be equated with nations as in the Charter of the United Nations”. 7 GAOR (1952) 3rd Cmte., 444th mtg., (A/C.3/SR.444) para. 24; Netherlands: “The concept of ‘nation’ gave rise to some difficulties. The subject of internal self-determination was the nation already constituted, the State, whereas
Second, legal studies have been unable to make a clear distinction between the two. The main difference appears to be that “nation” can be a broader concept, which can refer not only to groups of people, but also to political institutions. While “nation” has been used synonymously with “state”, a distinction may be drawn between a “people” and a “state”. It is possible to talk of the “people of the state”, but not the “people” as the “state”. Third, as self-determination is a doctrine about the perception of legitimacy, the colloquial use of the term may be as important as its legal usage. In the normal usage, again, “people” and “nation” have been used synonymously.

“Country”: Connected to a nation or a people is the term “country”. “Country” like “nation” or “people” may refer to a national entity. However, the most notable distinction is that “country” seems to place more emphasis on the territorial aspects of nationality. Thus, while it may or may not be possible to talk of the world-wide Jewish diaspora as a “nation” or a “people”, it would be harder to call them a “country”. A “Jewish country” would seem to refer to the state of Israel.

“Minority”: A legal line may not have been drawn between a people and a nation, but there certainly have been attempts to draw one between a people and a minority. The line is that, while “peoples” have a right to self-determination, persons belonging to minorities do not, but have other, minority rights. There is again no generally accepted definition of a minority, although the subject of external self-determination was the nation which wished to constitute itself as such or was in the process of doing so.”

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1. See Cristescu: “‘Nations’ – entities to which the Charter refers at several points – are also holders of equal rights and the right of self-determination. Although they are not expressly mentioned in the formulation of this principle in the International Covenants on Human Rights, they are implied, being covered by the term ‘peoples’.” A. Cristescu, The Right to Self-Determination (E/CN.4/Sub.2/404) vol. I, p. 143, para. 280.
2. A. Cristescu: “A people should not be confused with ethnic, religious or linguistic minorities, whose existence and rights are recognized in article 27 of the International Covenant on Civil and Political Rights.” op. cit. no. 2 vol. I at p. 142, para. 279.
3. Op. cit. no. 2 vol. I at p. 142, para. 279; the Committee, General Comment No. 23 (50): “Article 27 of the Covenant [on Civil and Political Rights] provides that, in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language. The Committee observes that this article establishes and recognizes a right which is conferred on individuals belonging to minority groups and which is different from, and additional to, all other rights which, as individuals in common with everyone else, they are already entitled to enjoy under the Covenant. In some communications submitted to the Committee under the Optional Protocol, the right protected under article 27 has been confused with the right of peoples to self-

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there are some authoritative ones, such as those proposed by Francesco Capotorti⁶ and Jules Deschênes.⁷ This work is not intended as a general examination of the concept of a “minority” and for its purposes a minority can be considered to have three features. First, it is a collection of individuals defined by the possession of certain national or ethnic characteristics. Second, they exist in the context of a political institution. Usually this is a state, but it could also be a colony, a federal unit, an autonomous region or any other political unit in which they form a numerical minority. Third, despite the possession of these national or ethnic characteristics, they are not generally considered to be “peoples” with a right to self-determination.

These characteristics are, of course, based on arbitrary and indeterminate values. A minority is defined in relation to something else: the majority population of a state or other political unit. It is defined negatively by not being a people. And its positive features are hard to define. What are national or ethnic characteristics? These might include language, culture, race or religion, but not all religious minorities, for example, are considered to be national or ethnic groups. Some are, but many are not. These flaws are, however, important for this rough definition because they reflect the characteristic tensions between the concepts of “peoples” and “minorities” in international law.

2. Nationalism

a. The Basic Doctrine

Some clarification of the term nationalism is also needed. Nationalism here is not used to refer to xenophobia, jingoism or national prejudice. A nationalist may, of course, display some or all these inclinations, but another may not and they are in no way integral to the doctrine.⁸ Indeed, in some circumstances that they may work against it.⁹ Nationalism is not even

⁶ Capotorti: “A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.” F. Capotorti, Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities (United Nations, New York, 1991) p. 96, para. 568.

⁷ Deschênes: “A group of citizens of a State, constituting a numerical minority and in a non-dominant position in that State, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one another, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law.” J. Deschênes, Proposal Concerning a Definition of the Term “Minority”, UN Doc. E/CN.4/Sub.2/1985/31, (1985) p. 30, para. 181.


necessarily opposed to cosmopolitanism. It merely demands that a cosmopolitan order should have a national basis. If that sounds like a contradiction in terms, consider the United Nations, the leading example of a world organisation, which presents itself as the product of the genius of the world’s peoples, reflects national differences in its organisation and proclaims as one of its purposes the self-determination of peoples.

A final clarification can be made between nationalism and patriotism, the latter being defined as a sense of affection or loyalty to a person’s state or country. The two are often used synonymously, or nationalism is presented as the dark side of patriotism: a patriot loves a country, a nationalist does the same but also hates others. The main difference is that, while a patriot may be loyal to either a nation or a state, a nationalist distinguishes the roles of the former and the latter. Patriots may act, to use a British expression, “for Queen and country”, but a nationalist draws a distinction between the country and the Queen (or president, government, state or any other political institution). The latter is only legitimate to the extent that it represents the former. Nonetheless, nationalism and patriotism do often support and merge into each other, and historically patriotism has in many cases laid the foundations for the subsequent development of nationalism.

Nationalism is a political doctrine is a fairly recent one, which emerged in Europe in the late eighteenth century. It is also an extremely successful one, which plays a major role in defining how the world is seen today. It is a mark of that success that many people who might not call themselves nationalists can, nonetheless, readily relate to its values. The basic assumptions of

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10 Sun Yat-sen: “We, the wronged races, must first recover our position of national freedom and equality before we are fit to discuss cosmopolitanism… We must understand that cosmopolitanism grows out of nationalism; if we want to extend cosmopolitanism we must first establish strongly our own nationalism. If nationalism cannot become strong, cosmopolitanism certainly cannot prosper.” Sun Y-s, “The Principle of Nationalism” in E. Kedourie ed., Nationalism in Asia and Africa (Frank Cass, London, 1970) pp. 304-17 at p. 311; Thomas Masaryk: “History further shows that the strengthening of national feeling does not prevent the growth of internationalism and internationalization… True nationalism is not opposed to internationalism, but we abhor those nationalist jingoism who in the name of nationalism oppress other nations, and we reject that form of internationalism and cosmopolitanism, which in fact recognizes only one – its own nation – and oppresses the others. True internationalism is not oppression, but neither is it a-nationalism nor anti-nationalism.” T. G. Masaryk, The Problem of Small Nations in the European Crisis (Lecture given on 19 October 1915), (The Althone Press, London, 1966) at p. 27;


12 E.g. former German President Johannes Rau: “I never want to be a nationalist but rather a patriot. A patriot is someone who loves his fatherland. A nationalist is someone who condemns the fatherland of others.” Toby Helm, “President in Row over German Patriotism” Daily Telegraph (Tuesday, 20 March, 2001).


nationalism, as Ernest Gellner noted, “are so much part of the air we breathe that they are taken for granted quite uncritically.” To put it quite simply, if you believe that in principle peoples and nations should have a right to self-determination, you have probably absorbed at least some nationalist ideas. The reason for this success is nationalism’s simplicity. Benedict Anderson complained of the “philosophical poverty” of the doctrine: that, “unlike most other isms, nationalism has never produced its own grand thinkers”.

One might counter that a number of important political philosophers have incorporated elements of nationalism into their theories, but this poverty is, in fact, its strength. With, no more than a couple of basic premises, it is highly flexible and can be adopted, and has been adopted, by politicians of every shade of the political spectrum.

The basic principles of political nationalism can not only be seen in nationalist works but also in international instruments and legal commentaries. There are two core beliefs: first, that the world is divided into nations or peoples, and, second, that the nation or people is the basis for the state. Correspondingly, the nation obtains freedom by the establishment of its own state, and the only legitimate form of statehood is the nation-state. Other important elements are that individuals can only obtain freedom and self-realisation through their nation, and that they owe

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Cambridge: Mass, 1992) at p. 3.


20 Johann Gottfried von Herder (influential cultural nationalist): “Nature had distributed its gifts differently according to climate and culture. How could they be compared to one another? Rather we should rejoice, like Sultan Suleiman, that there are such varied flowers and peoples on the gay meadow of this earth, that such different blossoms can bloom on both sides of the Alps, and that such varied fruits can ripen. Let us rejoice that Time, the great mother of all things, throws now these and now other gifts from her horn of plenty and slowly builds up such varied flowers and peoples on the gay meadow of this earth, that such different flowers and peoples on the gay meadow of this earth can ripen. Let us rejoice that Time, the great mother of all things, throws now these and now other gifts from her horn of plenty and slowly builds up mankind in all its different component parts.” Quoted in Kohn op. cit. no. 8 at p. 434.


21 Adam Mickiewicz (Polish national poet): “For a universal war for the freedom of nations, We beseech Thee, oh Lord. For national arms and eagles, We beseech Thee, oh Lord. For a happy death on the field of battle, We beseech Thee, oh Lord. For a grave for our bones on our own earth, We beseech Thee, oh Lord. For the independence, integrity and freedom of our country, We beseech Thee, oh Lord.” A. Mickiewicz, “Litany of the Pilgrim” in A. Mickiewicz, Selected Poetry and Prose (S. Helsztynski ed.), (Polonia Publishing House, Warsaw, 1955) at pp. 115-6.

GA Res. 1514(XV): “All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development...Immediate steps shall be taken in Trust and Non-Self-Governing Territories... to transfer all powers to the peoples of those territories... in order to enable them to enjoy complete independence and freedom (emphasis added).” GA Res. 1514(XV), 15 GAOR (1960) Supplement No. 16, A(4684) at p. 67.

22 Johann Gottlieb Fichte (German nationalist and pioneer of national self-determination): “Only in so far as each one of these nations, left to itself, develops and takes shape in accordance with its own peculiarities, and in so far as each individual in each of these nations also develops and takes shape in accordance with this common peculiarity as well as with his own particular peculiarity, is the phenomenon of divinity reflected in the way it should be...” J.
to it certain duties, above all loyalty.\textsuperscript{23} Finally, and especially important for international law, peaceful and friendly relations between states, and progress and development can only be achieved by free nations.\textsuperscript{24}

Nationalism is ultimately a doctrine about statehood: whether it is legitimate and what form it should take. Its basic prescription for the non-national state is still statehood, but in a different form. Non-national states should be broken up or merged, as appropriate, until they form nation-states, which coincide with peoples. Nationalism, however, is not exclusively concerned with statehood and may also involve other political institutions. Nationalists within a state may for tactical or practical reasons press for autonomy rather than full independence.\textsuperscript{25} On the other hand, nationalists seeking the unification of several states may establish an international organisation, both as an expression of the common bond between those states and as a forum for further political integration.

\textbf{b. The Idea of the People and the Nationalist Argument}

Nationalism, then, is a political doctrine and it proposes a political argument about how states and other institutions should be structured. In this argument the people assumes the role of a political idea which provides a blueprint for action. However, what does this argument look like and why is it made?

Although there are numerous variations, the nationalist argument is ultimately fairly simple: identify a nation, identify with it and make demands in its name. The people in this argument has two basic features. First, it is usually presented as a homogeneous group with similar experiences and aspirations. Second, it is fundamentally subjective and its features may be shaped to support a particular position. In both cases, the idea of the people is an interpretation rather than a

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reflection of the population in question.

A case in point is the 1808-9 *Addresses to the German Nation* by German nationalist and pioneer of national self-determination Johann Gottlieb Fichte. Fichte argued that:

“We are a conquered nation; whether we want to be despised and despised rightly, whether we want to lose all honour in addition to all our other losses: all that will still depend on ourselves. The war with arms is decided; now a new war of principles, of morals and of character begins, and this is a war that we want.”

This speech contained all the elements of the nationalist argument. Fichte identified a German nation, identified with it and proposed a course of action in its name. But what was the German nation that Fichte was addressing? His battle cry, delivered as a series of lectures at the University of Berlin, fell largely on deaf ears: for the basic reason that the nation in his addresses existed mostly in his mind.  

The Germany of the time was deeply divided. Politically, it was fragmented into different states with their own histories, laws and traditions. It was split along religious lines between Protestants and Catholics and the different states’ churches reinforced separate identities. Socially, there was a wide gap between the political elite, which embraced French culture, and had no interest in German unification, and the voiceless and apathetic peasantry. The nationalist vision which Fichte promoted was basically the preoccupation of a small and marginalised group of educated men wedged between antagonistic rulers and the indifferent masses.

A more contemporary example is provided by a letter sent by Yugoslavia to the UN Secretary General in 1993:

“The proclamation of new states in the territory of the former Yugoslavia has been welcomed by the international community as a kind of achievement in the exercise of the democratic right of nations to self-determination, whereas the Serb nation’s invocation of the same right aimed at resolving its own political and legal status has been met with open opposition and the strongest condemnation. Thus, Serbs became a people who were denied the right to self-determination and continuation of life in their own state. They were accused of ‘aggression’ and ‘occupation’ of territories in which they had lived for centuries as the majority population. The world public welcomed the demolition of the Berlin Wall and the unification of the German people. Therefore, it is absurd that the same public supports the erection of another wall which divides an European people – Serbs.”

It can be seen again in the rather loaded question posed by the Serbian government to the “Badinter” Arbitration Commission on Yugoslavia:

“Does the Serbian population in Croatia and Bosnia-Herzegovina, as one of the constituent

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26 Fichte op. cit. no. 22 at p. 110.
27 Minogue op. cit. no. 14 at p. 64.
peoples of Yugoslavia, have the right to self-determination?"  

Both again show the elements of the nationalist argument. Serbia/Yugoslavia identified a people, the Serb people, located in the republics of Croatia and Bosnia-Herzegovina, and having identified it as such demanded its unification into one state, or rhetorically questioned whether this people had a right to self-determination. But again, what was the Serb “people” in the former Yugoslav republics of Croatia and Bosnia-Herzegovina? While there were differences, and sometimes tensions, between Serbs, Croats and Muslims in those republics, there were also important differences between the people in the towns and the countryside. 

In Croatia most of the Serb population lived in urban centres where they were generally integrated into Croatian society. Intermarriage was common and these people were dubbed Hrbi, a conflation of the words for Serb and Croat. Urban Serbs showed little sympathy for Serb nationalism. The Serb nationalist party, the Serb Democratic Party, or SDS made little impression in these areas, and they generally proved un receptive to propaganda either from these nationalists or from those in Belgrade. The area around the town of Knin, which became the breakaway republic of Krajina, was a different story. There, the peasants in this isolated and impoverished region, known for its fierce gun culture, proved receptive to the incitements of local politicians. Nonetheless, they constituted only about 15% of the Serb population in Croatia. Moreover, rather than engaging in “self-determination”, they were following a policy which was directed from the outside by authorities in Belgrade.

Bosnia-Herzegovina also revealed similar differences. This republic was generally less developed and more rural than Croatia, and had three large national groups: the Muslims, Serbs and Croats. However, Bosnia also had its own identity. Of all the Yugoslav republics, it had the longest history as an independent state. A medieval Bosnian state existed between 1180 and 1463. The three peoples of this republic, alongside their Muslim, Croat and Serb identities, also had a Bosnian identity, although this was generally weakest among the Serbs. In elections the population largely divided along ethnic lines, with the nationalist SDS gaining most of the Serb vote. However, the SDS stood only on a vague platform of national rights and the elections did not necessarily signify popular support for partition or Serb independence.

Again in Bosnia-Herzegovina there was a big divide between the people in the towns and the country. In towns, especially the capital Sarajevo, 30% of marriages were mixed and most people had relatives with different national backgrounds. In Sarajevo 10.7% of Sarajevans,

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31 C. Bennett, **Yugoslavia’s Bloody Collapse: Causes, Course and Consequences** (Hurst and Co., London, 1995) at p. 63.
33 Bennett op. cit. no. 31 at pp. 125-7, 148-9.
34 Glenny op. cit. no. 32 at pp. 3, 6-7, 11.
35 Bennett op. cit. no. 31 at pp. 134-5.
36 Ibid. p. 182.
37 Glenny op. cit. no. 32 at p. 143.
40 Malcolm op. cit. no. 38 at p. 222.
41 Bennett op. cit. no. 31 at p. 181; Glenny op. cit. no. 32 at p. 155.
42 Malcolm op. cit. no. 38 at p. 222.
43 Bennett op. cit. no. 31 at p. 192.
typically children from mixed marriages, identified themselves as “Yugoslav”, the highest rate in the whole of Yugoslavia. In the siege of Sarajevo, Serbs fought alongside Croats and Muslims in defence of their homes against the invasion from the countryside. In the independence referendum of 1992 thousands of urban Serbs voted in favour of Bosnian independence. Indeed, the SDS rather than allowing the exercise of the, “democratic right of nations to self-determination”, set up roadblocks to prevent people from voting.

A similar point can also be made about the Croat people in Bosnia-Herzegovina. Croats in the towns and in central and northern Bosnia generally had a strong Bosnian identity and supported a united, independent Bosnia. On the other hand, the peasants in the harsh, barren land of western Herzegovina were strongly nationalist and resisted inclusion into a Bosnian state. The western Herzegovinans, though, were again a clear minority, about a third, of the Croat population in Bosnia-Herzegovina.

The point is that the people in the nationalist argument is essentially a subjective and political one, and its presentation as a homogeneous group ignores the complexity that is inherent in large bodies like nations. There will always be a difference between a people and its presentation by nationalists. In some cases this difference can be enormous, so much so that some nationalists have compared the two and had their faith shaken. For example, in the nineteenth century it was fashionable to believe that the Slavs were one people. However, for Czech Pan-Slav nationalist Karel Havlíček this idea was exposed when he actually travelled in other Slav lands:

“I learned to know Poland and I did not like it. With a feeling of hostility and pride I left the Sarmatian country, and in the worst cold I arrived in Moscow, being warmed mostly by the Slav feeling in my heart. The freezing temperature in Russia and other Russian aspects extinguished the last spark of Pan-Slav love in me. So I returned to Prague as a simple Czech, even with some secret sour feeling against the name Slav which a sufficient knowledge of Russia and Poland has made suspect to me. Above all, I express the conviction that the Slavs, that means the Russians, the Poles, the Czechs, the Illyrians, etc., are not one nation.”

However, there are ways to bridge these gaps, in particular, it can be argued that a people is already a unified entity, but has just not yet been “awakened”. An excellent example of this is provided by UN Special Rapporteur Aureliu Cristescu: “We live in an age of the awakening of national awareness, of the manifestation of the personality of nations which for centuries were not subjects but objects of international law.” This is the nationalist version of the history of self-determination: one in which peoples are presented as pre-existing givens which are somehow sleeping, but when roused rise and demand their rights. It certainly should not be taken at face value. The history of self-determination: from the French Revolution, to Italian

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44 Glenny op. cit. no. 32 at pp. 142, 160; Bennett op. cit. no. 31 at p. 182.
45 Bennett op. cit. no. 31 at p. 192.
46 Malcolm op. cit. no. 38 at p. 231.
47 I. Goldstein, Croatia: A History (N. Jovanović trans.), (Hurst & Co., London, 1990) at pp. 239-40; Bennett op. cit. no. 31 at p. 199; Glenny op. cit. no. 32 at p. 155.
48 Quoted in H. Kohn, Pan-Slavism: Its History and Ideology (University of Notre Dame, Notre Dame, Indiana, 1953) at p. 27.
49 E. Gellner, Nations and Nationalism (Basil Blackwell, Oxford, 1983), at p. 48; Smith op. cit. no. 14 at p. 146; Breuilly op. cit. no. 19 at p. 405.
50 Cristescu op. cit. no. 2 vol. I at p. 146, para. 283.
unification, the Versailles Peace Conference, the post-war decolonisation process, the collapse of the Soviet Union and Yugoslavia reveals many peoples whose national identity may be mixed or weak, divided or even non-existent. A more accurate picture is a history of nationalist movements who have legitimised their claims to power by ideas of peoples which, to varying degrees, may or may not correspond with the identity and aspirations of the peoples in question.

So far we have seen the nationalist argument as a positive set of demands, but the same argument can also work the other way round. If there is no nation, or if those who claim to represent it do not, then their demands will not be legitimate. This nationalist counter-argument was summed up by Mr. Virally, the French delegate in the drafting of the Friendly Relations Declaration, GA Res. 2625(XXV): “there was always a risk that a few isolated and unrepresentative individuals might profess to speak on behalf of a people for reasons of a personal nature or even in order to defend the interests of foreign states, and not the true interests of that people.”

A good example of this counter-argument in application is provided by Sir Hugh Clifford, the British governor of Nigeria in 1920. In a speech to the Nigerian Council, he considered the West African National Conference, a nationalist movement composed of educated, westernised Africans, and with the paternalistic sneer of a colonial administrator, declared:

“I will leave Honourable Members to imagine what these gentlemen’s experiences would be if, instead of travelling peacefully to Liverpool in a British ship [they] could be deposited, unsustained by [British]… protection, among… the… cannibals of the Mama Hills…. the determinedly unsocial Mumuyes of the Muri Province, or the equally naked warriors of the inner Ibo country, and there left to explain their claims to be recognized as the accredited representatives of these, their ‘fellow nationals.’”

Another example, this time in a legal context, is provided by Australian pleadings in the East Timor (Portugal v. Australia) case. This case concerned the former Portuguese non-self-governing territory of East Timor, which was invaded by Indonesia in December 1975. In 1989 Australia concluded a treaty with Indonesia on the division and exploitation of the occupied territory’s oil resources, and this formed the basis for the Portuguese action against Australia in the International Court of Justice. One of the arguments which Australia made in court was to attack Portugal’s right to bring the case by drawing a distinction between the Portuguese government and the East Timorese people. In a section of its counter memorial entitled, “Portugal’s rights are not identified with those of the people of East Timor”, it claimed that:

“Portugal can point to no basis on which its position can be identified with that of the people of East Timor. Its alleged sovereignty has not been accepted by the East Timorese people. Indeed, it was very shortly after Portugal’s withdrawal that Portugal’s sovereignty was repudiated by political groups in East Timor.”

And later on in its rejoinder:

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“What Portugal must show is that international law allows a State, whose only basis for acting is its description by the United Nations as administering Power, to bring an action before the Court on behalf of a separate and distinct entity such as a people amounting to a self-determination unit against a third State… It asserts that States have a right to bring a dispute before the Court on behalf of the people of a separate and distinct territory ‘dont ils ont l’administration’ [‘of whom they are the administration’]… The people of East Timor and the United Nations have rejected such a role for Portugal.”

Thus, the counter-argument can be used in both a legal and a political context to undermine the legitimacy of the rights of an organisation or institution by separating them from the people which they claim to represent.

Both the nationalist argument and counter-argument can be conveniently seen in GA Res. 3210(XXIX), inviting the PLO to participate as an observer at UN General Assembly and the Israeli reaction to it. GA Res. 3210(XXIX) based its invitation on the existence of a Palestinian people and its representation by the PLO:

“The General Assembly, Considering that the Palestinian people is the principal party to the question of Palestine, Invites the Palestine Liberation Organization, the representative of the Palestinian people, to participate in the deliberations of the General Assembly on the question of Palestine in plenary meetings.”

On the other hand, Israel pointedly drew a distinction between the organisation and the Palestinian population:

“The so-called Palestine Liberation Organization did not emerge from within the Palestinian community. It was the first summit meeting of Arab Governments held at Cairo in January 1964 that decided to establish an organization under the cover of which terror warfare would be pursued and intensified against Israel… There was no pretence at the time of its establishment that the PLO was in any way representative of the Palestinians. There is no room for such pretence today. The organization has never been anything other than a mere instrument of those who have been conducting a campaign of savage atrocities, aimed explicitly at the destruction of Israel. It represents only itself, namely, the approximately 10,000 murderers trained and paid for the slaughter of innocent human beings. To equate them with the Palestinian community is to do a grave injustice to the latter.”

Nationalism here is presented as a series of arguments and counter-arguments based on ideas of peoples. This might make it seem somewhat detached. It can be noted that Thomas More’s fantasy people, the Utopians were also a homogeneous mass, “identical in language, customs, institutions and laws.” However, the idea of a people in nationalism is not a “Utopia”, a “no

place”). Nationalism is ultimately very much grounded in the practical politics of the real world, and it is these ideas, however detached they may sometimes seem, that drive it.

The textbook example is Pakistan. This was an idea which related to Muslims in the former colony of British India. These populations, distributed as they were across a subcontinent varied enormously: differing in language, customs, social and economic circumstances, physical appearance and even practice of Islam. Nonetheless, although they formed majorities in large areas of the colony, they were a minority in India as a whole. In this position, Muslim politicians reacted in different ways to the prospect of Hindu power and domination. For Choudhary Rahmat Ali the answer lay in a separate state. In 1933 he formally named this state “Pakistan”, or “Land of the Pure”, which also worked as an acronym for the territories it was to include: P(unjab), A(fghania), K(ashmir), I(ran), S(ind), (T)urkharistan, A(fghanistan) and (Baluchista)N. Other Muslims did not immediately accept this idea. The Muslim League did not adopt a Pakistan policy until 1940 and even then it was subject to different interpretations. Nevertheless, in 1947 Pakistan became an independent state, making the transition from a political idea to a sovereign institution in a mere fourteen years. This is a particularly striking example, but every nationalism performs this same role, building ideas of peoples which form the basis for political action.

The rhetoric of nationalism, then, consists of various arguments and counter-arguments based on peoples as political ideas, which are presented as single, homogeneous groups. This presentation is, in part, due to the fact that, as nationalism proposes that the people is the basis for legitimate political authority, it needs a clear blueprint for that authority. However, it also derives from the nature of the nation. Nations are both incredibly complex and anonymous: people simply do not know the vast majority of their fellow nationals, and given this there is an inherent tendency to simplify these groups: to see a nation as a nation not as millions of individuals.

This simplification of things is a recurrent theme in nationalism and is expressed, in particular, in the idea of national government as a natural state of affairs. As Irish playwright George Bernard Shaw put it: “All demonstrations of the virtues of a foreign government, though often conclusive, are as useless as demonstrations of the superiority of artificial teeth, glass eyes, silver windpipes, and patent wooden legs to the natural products.” Nationalism proposes that there is a natural political order based on nations against which states can be judged. However, considering that all states are the product of human endeavour: created by people and maintained by people: to what extent could any state really be described as natural? Moreover, this argument curiously only seems to apply to states as institutions. One would not expect a bank to be a

58 Smith op. cit. no. 14 at pp. 110-1.
59 “Nationalism… appears to be a love for an abstraction of the nation, and that abstraction may have none but the tenuous connection with the concrete national life. Clemenceau loving France and rather disliking Frenchmen expresses this paradox of nationalism.” Minogue op. cit. no. 14 at p. 23.
61 Breuilly op. cit. no. 19 at p. 208.
64 See Smith loc. cit. no. 8 at p. 10.
natural system of banking to put money there, or for hospitals to need an organic cohesion between doctors to treat patients. The fact is that there is no inherent distinction between natural and artificial states. It is a judgment which is intended to reflect on their legitimacy.

Connected with this idea of a natural political order is the perception of progress. Although some nationalist movements have been deliberately regressive, in general nationalism relies on the perception that it represents “the tide of history” (to cite one phrase used in debates on self-determination). The most derogatory term in the nationalist lexicon, after all, and one which is specifically used to discredit nationalists, is “tribalism”: a label which envisages a movement as being primitive and unenlightened: a step backwards.

The theme running through this rhetoric of homogeneous nations, natural government and a march of progress is simplicity. Nationalism likes to make things simple. It seeks to hide complex political realities behind nations and peoples. The politics by which nationalist goals are achieved: the various personalities and organisations, the different interests and motivations, the particular and conditional circumstances, the opportunities that are exploited: all these are reduced to nations achieving this or that according to a natural scheme of things. The break up of Yugoslavia or the Soviet Union, for example, which as we will see involved the interplay of a variety of factors, can simply be reduced to the claim that those states were multinational, artificial and thus doomed.

The nationalist argument is one in which nations and peoples are used to legitimise certain political goals. And on this basic level one can easily single out individuals who have used it for nothing more than political power or social advancement. These might include M. Ender and Moise Kapenda Tshombe, who lead secessionist movements from Austria and Congo (Zaire), respectively, only later to become those countries’ leaders. There is also no necessary contradiction between Slobodan Milošović leading Serbia into a series of overtly nationalist wars in the former Yugoslavia and his wife telling EC envoy David Owen: “I gather you accuse my husband of being a nationalist… He’s not a nationalist. If he was, I’d never have married him.”

Nonetheless, this does not really explain why national self-determination is a right for which, as John Humphrey put it, “poets have sung and for which patriots have been ready to lay down their lives.” The people may be used in nationalism as a political idea, but the idea obviously

66 See Kedourie op. cit. no. 60 at p. 93.
67 Hughes op. cit. no. 28 at p. 145.
71 Quoted in B. Johnson, “Getting to Know the Tyrant” The Spectator (7 July 2001).
also has deeper significance, relating to such fundamental issues as a person’s identity, place in society and indeed place in the universe. Humans do have a strong tendency to associate in groups, and, although nationality is not inevitable, it is extremely important for how people define themselves. Different theories have highlighted that nationalism has often emerged at times of change and upheaval when people have needed a sense of purpose and identity in a confusing world. Indeed, it may have many elements of a secular religion with its own hymns, icons, martyrs and shrines.

Likewise nationalism and the right of self-determination in international law cannot simply be understood in terms of the acquisition of statehood. Independence has a value in itself. It means freedom and dignity. The drafting of UN instruments on decolonisation, in particular, the Colonial Independence Declaration, GA Res. 1514(XV), of 1960, are full of painful references to the basic indignity of foreign rule: “Indonesia was a nation of coolies and a coolie among the nations”,” Africa... became a laughing-stock for other nations”, “men are born free and people are all equal and should be treated as such”, and turning these sentiments into a right: “The right of peoples to self-determination is based, above all, on respect for human dignity, which must come before all other considerations.” The nationalist demand for self-government may not simply be one for better government. Philippine President Manuel Quezon once proclaimed: “I prefer a government run like hell by Filipinos than a government run like heaven by Americans!” And this attitude, has certainly informed the drafting of instruments on self-determination.

c. Nationalism and International Law: Two Standards of Legitimacy

Nationalism’s attitude to the state is quite ironic. The doctrine is actually built around and obsessed with states and the form that they should take. However, this is concealed by an outward ambivalence towards the state as an institution. States are only legitimate to the extent that they represent nations and peoples. If they do not then they are disposable and should be disposed of in favour of national states.

International law’s approach to the state in somewhat different. States provide the basic unit of international law, and its two principal sources, conventions and custom, depend on the intentions and practice of sovereign states. Many of the forums of international law, especially

74 Greenfeld op. cit. no. 15 at p. 20.
75 Kedourie op. cit. no. 60 at pp. 23-8; Gellner op. cit. no. 49 at p. 38.
76 Hayes op. cit. no. 28 at pp. 164-8; A. D. Smith, “The Diffusion of Nationalism: Some Historical and Sociological Perspectives” 29 British Journal of Sociology (1978) pp. 234-48 at p. 238; B. C. Shafer, Faces of Nationalism: New Realities and Old Myths (Harcourt Brace Jovanovich, New York, 1972) at p. 319; Anderson op. cit. no. 17 at pp. 11-2; Hughes op. cit. no. 28 at pp. 3, 17; Smith op. cit. no. 63 at p. 175; Arendt op. cit. no. 19 at pp. 233-5, 242.
78 Congo (Brazzaville) 15 GAOR (1960) Plenary Meetings, 938th mtg., (A/PV.938) para. 59.
82 See Emerson op. cit. no. 62 at p. 43; Horowitz op. cit. no. 73 at p. 131.
the International Court of Justice, are open only to states.\textsuperscript{84} Moreover, positive international law has its own standards of legitimacy, based on institutions and procedures. The legal status, for example, of a treaty, as laid out in the 1969 and 1986 Vienna Conventions, depends on the conclusion of the instrument by representatives with full powers, that the parties have expressed consent to be bound, and so on. Similarly, the status of a rule of customary law depends on the practice of states accompanied by evidence for their \textit{opinio juris} (legal intent).\textsuperscript{85} Underlying these procedures are basic requirements of clarity and consistency, so that the intention of the relevant parties can be understood.

International law and nationalism are, therefore, two very different doctrines: one fundamentally state-based and state-orientated, the other based on nations and peoples and ambivalent about the existence of states. However, both are fundamentally connected by the state, which provides their nexus. States are central to international law and nationalism is central to the legitimacy of states.

Nonetheless, if nationalism has become, via the state, important for the legitimacy of international law, the law of self-determination is also the product of states. If the perennial problem is that, “the people cannot decide until someone decides who are the people”,\textsuperscript{86} it is states who appear to have that power in international law. The effect of this is to divide nationalists in two: into those who control a state and those who do not. And this clearly effects the content of the law of self-determination. As one might expect, states’ populations regularly feature among the groups considered to be legally entitled to the right.\textsuperscript{87} For nationalists without a state, access to the law depends on sponsorship from states. States have often sponsored the rights of non-state nationalists, such as those in colonial territories or in Palestine. Motives for sponsorship may be shared experiences and aspirations, such as those between colonies and African and Asian states, or a national affinity, such as that between Palestinians and Arab states, or it may be for tactical reasons, to foster alliances and weaken enemies. Nonetheless, access to international law depends on states and they are unlikely to extend sponsorship if it is against their interests to do so.\textsuperscript{88}

From the nationalist perspective the idea that the content of the right of self-determination should be decided by states, the very objects it is aimed against, is perverse. This impression is particularly important because self-determination is a fundamentally nationalist argument. It is an argument about legitimacy, but its own legitimacy depends on being seen to be the genuine expression of authentic peoples. If those elements are lacking there is little point in even raising it.

The law of self-determination is, therefore, subject to two different standards of legitimacy: those of nationalism and those of positive international law. On one hand, its nationalist

\begin{footnotesize}
\textsuperscript{84} Article 34(1), Statute of the International Court of Justice.

\textsuperscript{85} \textit{North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) (Judgment)} ICJ Reports (1969) p. 44, para. 77.


\end{footnotesize}
legitimacy depends on all authentic peoples being able to exercise the right without any arbitrary restrictions. On the other, its legal legitimacy requires that the “peoples” who enjoy the right can be divided into clear, well-defined categories to which the right can be consistently applied. These are quite clearly different standards and there is no secure middle ground between them. As a result, the law of self-determination can, on the one hand, be criticised for falling short of a right enjoyed by all groups who might be identified as peoples. On the other, it can also be

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criticised for the absence of clear criteria for identifying the subjects and scope of the right and the incoherent practice in its application.\textsuperscript{90} Both criticisms can also be made simultaneously and can be summed up in one word: inconsistency.

Such tensions undermine any attempt to produce a coherent and credible legal definition of a people. Consider, for example, the widely cited definition by Aureliu Cristescu:

“(i) The term ‘people’ denotes a social entity possessing a clear identity and its own characteristics;
(ii) It implies a relationship with a territory, even if the people in question has been wrongfully expelled from it and artificially replaced by another population;
(iii) A people should not be confused with ethnic, religious or linguistic minorities, whose existence and rights are recognized in article 27 of the International Covenant on Civil and

\textsuperscript{90} See Thomas Franck: "...[T]he principle of self-determination began its descent into incoherence – in the sense of inconsistency of application – almost from the moment of its greatest apparent ascendance... As a rule of state conduct, it began to lose its power to obligate when it became a checkerboard of incoherent practice.” T. M. Franck, “Legitimacy in the International System” 82 American Journal of International Law (1988) pp. 705-59 at pp. 746-8; R. Y. Jennings; “It must be emphasized, however, that this again, though it [self-determination] has legal overtones, is essentially a political principle which may be useful to guide political decisions. It is not capable of sufficiently exact definition in relation to particular situations to amount to a legal doctrine; and it is therefore inexact to speak of a ‘right’ of self-determination if by that is meant a legal right.” R. Y. Jennings, The Acquisition of Territory in International Law (Manchester University Press, Manchester, 1963) at p. 78; J. H. W. Verzijl: “The ‘right of self-determination’ has... always been the right of national or international politics and has never been recognized as a genuine positive right of ‘peoples’ of universal and impartial application, and it never will, nor can be so recognized in the future. It would indeed in its general implementation prove a constant source of disruption and subversion, and the international legal order of established States will never be prepared to acknowledge with sincerity its universal existence as a matter of law or right. ‘Peoples’ may fight for it and win or lose; they may succeed in persuading their own State to grant it by peaceful argument, or fail, completely or in part, to do so. But it is one of those realities of international life which do not lend themselves to to rigid regulation by law, that is, by a mandatory rule impartially applying and applied to all identical cases and susceptible of a juristic definition. And for the sake of the law itself it is better that it should remain so, for, worse than leaving the issue at the mercy of the unceasing political game would be to create a rule of law which would from the outset be inevitably infected by an ineradicable taint of international hypocrisy, and therefore unworthy of the appellation of a rule of law.” J. H. W. Verzijl, International Law in Historical Perspective (A. W. Sijthoff, Leyden, 1968) vol. I, at pp. 324-5; Michla Pomerance: “It may well be doubted, however, whether any of these definitions [‘colonial peoples’, ‘peoples under colonial and alien domination’] can provide objective criteria by which to circumscribe significantly, or even in any manner at all, the universe of eligible claimants to the ‘right of self-determination’” M. Pomerance, Self-Determination in Law and Practice: The New Doctrine of the United Nations (Martinus Nijhoff, The Hague, 1982) at p. 14; Antonio Cassese: “...[T]he wording... [By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.] ...is so sweeping and indefinite that... it does not offer any concrete indication as to what is really meant by self-determination.” A. Cassese, “Political Self-Determination - Old Concepts and New Developments” in A. Cassese ed., UN Law/Fundamental Rights: Two Topics in International Law (Sijthoff and Noordhoff, Alphen aan den Rijn, 1979) pp. 137-65 at pp. 143-4; M. Akehurst, A Modern Introduction to International Law (George Allen and Unwin, London, 1982) at pp. 254-5; Crawford op. cit. no. 89 at p. 20.
Political Rights.”

From a legal perspective, element (i) is extremely vague and the inclusion of territory in element (ii), except perhaps for the Gypsies, does not add much. They could refer to any number of populations: the inhabitants of states, colonies, federal units, autonomies, geographical regions or ethnic and tribal groups: and provide little assistance in separating competing claims. Only element (iii) contains any clear criteria, making a distinction between a people and a minority. However, this distinction has attracted considerable criticism because it has been seen as arbitrary, artificial and an attempt to deny populations their inalienable rights. The word legitimacy is used a lot here and it is worth clarifying what is meant by it. Legitimacy has been defined in various ways, but for the purposes of this work it will be assumed to have four characteristics. First, the legitimacy of a rule or institution presumes the existence of certain normative standards. These give legitimacy its content and provide the criteria against which rules or institutions can be judged to be legitimate or illegitimate. Both nationalism and legal positivism contain these standards. Political nationalism is certainly a diverse doctrine, but at its core is the belief that a nation or a people provides the basis for legitimate political authority. Legal positivism, on the other hand, looks for legitimacy in the institutions and procedures involved in the establishment of rules and principles.

Second, these standards are held or internalised by individuals effecting their perception of those rules or institutions. This subjective content may pose a problem as actors may not explain their motives and legitimacy may be only one of a number of factors that effect their behaviour. Information on the reasons behind particular decisions in international bodies varies. The drafting of many instruments may often be accompanied by considerable discussion of the various provisions. On the other hand, the reasons behind court decisions may typically have to be inferred from the text or from the individual opinions of judges.

Nonetheless, third, although these standards are subjectively held, they also exist within a context. That context may be the influence of the views of other individuals, what Max Weber has called “convention.” We have already seen that legal commentators have criticised international law for failing to reach nationalist or positive legal standards of legitimacy. (Interestingly lawyers seem more ready to criticise the law for deviating from nationalist standards than from legal ones). States in the drafting of instruments or judges in courts have also been ready to criticise drafts or judgments which deviate from nationalist or legal standards.

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91 Cristescu op. cit. no. 2 vol. 1 at pp. 141-2, para. 279.
Moreover, these standards may also be visibly codified in documents and decisions. Aside from its legal implications, the position of self-determination in article 1 of the UN Charter, as one of the purposes of the organisation is an important statement on international standards of legitimacy. The same can be said about article 1 of the Human Rights Covenants.

More broadly, there might be an institutional context. There may well be an inherent reciprocity between doctrines which legitimise particular institutions and the institutions themselves. Nationalism and international law grew in the institutional context of the modern state and neither perhaps would have much meaning without it. More specifically in the law of self-determination, nationalism and legal positivism are concerned with the creation and status of international legal rules and obligations. Here the standards of legal positivism and nationalism are very different. Legal positivism is concerned with the legal legitimacy of obligations, in other words, whether they are legally binding. Nationalism involves their political legitimacy and whether they should be followed regardless of whether they are legally legitimate.

Fourth, these standards effect the behaviour of individual actors. This is more than simply the question of whether particular rules are complied with, but also how actions are justified, explained and accepted. Even if an actor does not comply with a particular standard, how that non-compliance is justified, the excuses that are made, may also point to standards of legitimacy. In the law of self-determination the issue of compliance is, in any case, particularly tricky because peoples are undefined and it is possible in many cases to argue totally opposite positions in terms of self-determination. However, if both sides use the rhetoric of peoples to support, explain and justify their position they are influenced by nationalist perceptions of legitimacy. Thus, regardless of the particular position, one might see, for example, actors building up and shaping specific ideas of peoples to support their actions or decisions.

### 3. National Self-Determination

#### a. Rhetoric and Application

The doctrine that peoples had a right to self-determination came to international prominence at the end of the First World War. An early legal analysis by the Commission of Rapporteurs in the Åland Islands dispute in 1921 described it as, “a principle of justice and of liberty, expressed by a vague and general formula which has given rise to the most varied interpretations and differences of opinion.” And that remains largely accurate today.

An authoritative legal statement of the right may be seen, for example, in article 1(1) of the Human Rights Covenants. This provides that all peoples have the right of self-determination, and by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. However, the concept of self-determination does

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97 Beetham op. cit. no. 93 at pp. 14-5, 104.
98 Hurd loc. cit. no. 94 at p. 391.
100 An almost identical formula was used in the Colonial Independence Declaration, GA Res. 1514(XV), 15 GAOR (1960) Supplement No. 16, (A/4684) at p. 67; and the Vienna Declaration, 32 ILM (1993) at p. 1665. Similar formulas were used in the Friendly Relations Declaration, GA Res. 2625(XXV), 25 GAOR (1970) Supplement No. 28, (A/8028) at p. 123; and the CSCE Helsinki Final Act, 14 ILM (1975) at p. 1295.
101 Article 1(1), International Covenant on Economic, Social and Cultural Rights, and article 1(1), International
not lend itself well to legal formulation. Like nationalism, it is not intended to be shaped by international law, but to shape it. Again like nationalism its strength lies in its flexibility, which is based on the doctrine containing only a few basic elements which are capable of various interpretations.

Ironically, the language of what is basically a practical political doctrine about how states should be structured derives from elaborate theories of metaphysical speculation, in particular, the philosophy of Immanuel Kant (1724-1804). Kant pioneered a theory of self-determination in which he repudiated the imposition of external morality on the individual. People, he argued, should not to be guided by other people’s standards, but rather act according to a process of self-determination in which they followed a universal law which they found inside them. Only by choosing of their own free will to follow this inner law could individuals follow the path of virtue.102

This was a theory of individual self-determination. However, it was given a new twist by one Kant’s students and self-proclaimed successor Johann Gottlieb Fichte (1762-1814). Fichte argued that the universe of the past, the present and the future was the product of a universal consciousness called the Ego. This consciousness was all embracing and nothing existed outside it. Freedom for the individual was to be achieved by self-realisation, which involved complete absorption into this universal consciousness. This theory may seem otherworldly, but for Fichte it could also have political consequences. States were the institutions which facilitated this self-realisation and this lead him to the paradoxical argument that individuals could only be free when their lives were closely regulated by the state. As Fichte’s philosophy took on an increasingly nationalist character, these individuals were also seen to be bound together by “inner frontiers” created by language, which united them together as an indivisible whole. Thus, individuals could only achieve self-realisation in a state which corresponded to the frontiers of their people or volk. Individual self-determination had become national self-determination.103

As the birth of an explosive political doctrine, however, this was less of a bang than a whimper. Fichte’s philosophy is notoriously difficult and inaccessible to the reader and his nationalism was also obscurely intellectual. Indeed, his most famous nationalist work, Addresses to the German Nation even managed to pass Napoleon’s censors because it was considered essentially academic.104 His immediate followers were also a marginalised group of intellectuals completely isolated from any realistic prospect of power.105

It is ironic that nationalism, which as been accused of lacking intellectual depth, should find one of its principal expressions in such intricate philosophical concepts. In fact, self-determination, as outlined in the UN Charter and the Human Rights Covenants, is in many ways somewhat removed from that of Kant or Fichte. The right of self-determination in its present form came to international prominence at the end of the First World War. However, the new

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Covenant on Civil and Political Rights, 6 ILM (1967) at pp. 360, 368.
104 Hughes op. cit. no. 28 at pp. 25-6.
105 Minogue op. cit. no. 14 at pp. 62-9.
rhetoric of the time already seemed bound up with established ideas of political authority such as popular sovereignty and the nationality principle. American President Woodrow Wilson, who is usually credited with doing most to popularise the doctrine, seemed to consider it nothing more than the Anglo-American principle of government with the consent of the governed. Commentators at the time complained that for a right to self-government, which is what it effectively was, a right to self-determination sounded unnatural. Since then it has been appealed to across the globe and the political spectrum: by fascists, communists and liberals; by governments, liberation movements and indigenous tribes. The fact that it has been appealed to in such a variety of situations suggests that whatever its metaphysical language, the right of self-determination is not burdened with a great deal of ideological baggage.

However, if self-determination is essentially a practical political right to self-government, why wrap it up in such a rhetoric? If international instruments are looking for clarity, why not simply refer to a right to self-government and leave out the metaphysics? In fact, the combination of a practical right and the metaphysical language provides a particularly effective formula, and to understand why one has to look at the political landscape in which self-determination operates.

b. Self-Determination as a Process

The right of self-determination in international law relates primarily to two political doctrines. The first is nationalism and the second is liberalism. Liberalism may be defined here as a doctrine, which began to take shape around the time of the Enlightenment in the seventeenth and eighteenth centuries. It proposes that the basis for legitimate political authority ultimately rests with individuals. Its starting point is the freedom and equality of the individual, and that the purpose of political institutions is to protect those freedoms. A liberal state is characterized by constitutionalism and the rule of law, as the best means of guaranteeing the protection of individual rights, as well as its representative nature. The authority of government is seen to derive from the people, who are the group of individuals composing the state. Liberalism and nationalism are not unrelated. The two may, in fact, cover considerable common ground. A liberal society of autonomous individuals might need a sense of identity and cohesion in order to function. A liberal may be concerned that a state with a population without national sentiment or a common language may not be able to develop effective representative government or protect individual rights. Similarly the belief that power derives

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109 Koskenniemi loc. cit. no. 89 at p. 258.
from the people may pit the liberal against non-national rule.

The language of the two may also be very close. There is a deceptive similarity between saying that government derives from the people (i.e. a state has a democratic basis) and that it derives from a people (i.e. a state should correspond with a nation). Both can easily be wrapped in the language of self-determination. Nonetheless, there are also ways of distinguishing the two, most notably in the supposed twofold division of self-determination into “internal” and “external” aspects. Internal self-determination is generally seen to correspond to individual liberties and representative government (liberal government), while external self-determination is seen as a right of peoples to their own state (national government).

Both nationalism and liberalism use the rhetoric of the people. Nationalism, in particular, presents (or disguises) political activities as the actions of collective bodies called peoples and this can be very effectively complemented by self-determination. The right proposes that a “self”, a people or a nation, is engaged in a process of determination. In keeping with nationalism it assumes that the nation or people is the basic unit for political action and the primary object with which individuals identify. What it is to be determined is conveniently for nationalists a matter for the nation or people. Moreover, the right of peoples to freely determine their political status and freely pursue their economic, social and cultural development, as provided in article 1(1) of the Covenants, covers, and provides cover for, an enormous range of activities. This, then, is the crucial distinction between a right to self-determination and a right to self-government. A right to self-government points to a goal, but a right to self-determination

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highlights a process.\textsuperscript{112} This process provides a rhetoric to legitimise various political and legal activities.

c. Towards Freedom

A process, though, is obviously directed towards some end. On one level, self-determination is a practical political right and its practical end is the achievement of particular political, economic, social or cultural goals. On another level, however, the rhetoric of self-determination is also intended to legitimise this politics and the achievement of these goals. The obtaining of a particular status, therefore, has a deeper significance. The language of self-determination suggests that its end is some form of self-realisation for a people and this self-realisation is usually expressed by the idea of freedom.

Freedom itself is an abstract idea. “No word”, Montesquieu noted, “has received more different significations and has struck minds in so many ways as has liberty.”\textsuperscript{113} Having such a noble but ambiguous goal ensures that self-determination will not only be, “a principle of justice and liberty”, as the Rapporteurs considered, but also, “vague and general”, and give rise to, “the most varied interpretations and differences of opinion”. Freedom itself may be defined situationally by the absence of a particular constraint, or ideologically by a particular goal. Nationalism, of course, holds that freedom is obtained in a nation-state. The formula in article 1(1) of the Covenants and repeated in other instruments that peoples “freely” determine their political status and “freely” pursue their economic, social and cultural development suggests that at least one element in this freedom is the absence of constraint. This is supported by the Human Rights Committee in its General Comment No. 12 (21) on article 1 that interference in the internal affairs of states adversely affects the exercise of the right to self-determination.\textsuperscript{114} On the other hand, though, there is a strong ideological element in the freedom associated with self-determination. The Colonial Independence Declaration, GA Res. 1514(XV), for example, freely


equates “independence and freedom”\textsuperscript{115} and the Friendly Relations Declaration, GA Res. 2625(XXV), refers to, “self-determination and freedom and independence”.\textsuperscript{116}

The nature of the self-determination process, therefore, is defined by the various statuses which are associated with the freedom of a people. If freedom is a united, independent nation-state, then self-determination may involve the process by which that state is achieved and maintained. If a people is not self-governing, self-determination may be a short process involving the attainment of independence.\textsuperscript{117} Alternatively if a state should not only be independent, but also possess fully developed institutions of self-government, self-determination may be a longer process based on political development.\textsuperscript{118} If a united, independent nation-state already exists, self-determination may take the form of the protection of its unity.\textsuperscript{119} However, if

\textsuperscript{115} GA Res. 1514(XV), 15 GAOR (1960) Supplement No. 16, (A/4684) at p. 67.
\textsuperscript{117} Honduras: “The people of Honduras exercised the right to self-determination in the nineteenth century by means of a process which led to its independence from Spain and to statehood.” CESC, E/1990/5/Add.40, (1990) p. 3. Ukraine: “Relying on article 1 of the International Covenant on Civil and Political Rights and basing its actions on its domestic legislation in accordance with internationally recognized procedures, the people of Ukraine gave effect in 1991 to their right to self-determination. The independent statehood of Ukraine is recognized by the world community. Ukraine has become a member of the international community with full rights.” CCPR/C/95/Add.2, (1994) p. 6. Kenya: “The object of exercising the right of self-determination was full sovereignty and independence. All must strive to ensure that as a result of the exercise of that right, the people exercising it could, so far as was practicable, choose to live under a form of government that was truly sovereign and independent.” A/AC.125/SR.69, (1967) p. 23.
\textsuperscript{118} US: “The United States, for its part, had supported the application of that principle [of equal rights and self-determination] to peoples of dependent territories and has sought to encourage exercise of the right of self-determination as an initial step towards independence and self-government... Article 73 bound those Members responsible for the administration of Non-Self-Governing Territories to bring about a full measure of self-government for the peoples of those Territories, while Article 76 set forth, as part of the basic objective of the Trusteeship System, the obligation ‘to promote the political, economic, social and educational advancement of the inhabitants of Trust Territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned’. That reference to the ‘freely expressed wishes of the peoples concerned’ stated the heart of the principle of self-determination.” A/AC.125/SR.92, (1968) pp. 128-9. Australia: “...[I]n laying down both the objectives and the methods to be followed by administering States, the Charter had said nothing as to the time within which the objectives were to be attained in a particular territory. That was plain to be determined according to the stage of development and the particular circumstances of the Territory and to be worked out by agreement between the United Nations and the administering State. The Charter gave no authority to the General Assembly to bind unilaterally either an administering State or the people of a dependent territory to any particular date by which the act of self-determination was to be made and completed.” A/AC.125/SR.70, (1967), p. 8. Denmark: “...[T]he right of self-determination should apply to Non-Self-Governing Territories as well as to other territories when a sufficient level of economic, social, cultural and, at the same time, political, maturity has been reached.” 10 GAOR (1955) 3rd Cmtee., 644th mtg., (A/C.3/644) para. 1.
\textsuperscript{119} Azerbaijan: “...[R]ealization of the right of self-determination must not be used as a pretext for infringement of the territorial integrity, national unity or ethnic harmony of independent States. In its view, the right of peoples to self-determination should be given its original, true significance; that would not erode, but on the contrary strengthen the national independence, sovereignty and territorial integrity of States whose governments reflect the interests of all members of their populations without distinction.” CCPR/C/AZE/99/2, (2000), p. 10. Iran: “The right should never be used to attack the legitimate sovereignty of independent nations over their traditional territories; the ultimate goal of self-determination being freedom, justice and peace, it should never be used by a dissident minority to undermine the political stability of an independent and democratic country or in any way to further aggression, sedition or subversion.” 10 GAOR (1955) 3rd Cmtee., 645th mtg., (A/C.3/645) para. 30. Yugoslavia: “...[A]ll peoples had the inalienable right to self-determination and complete freedom... the ultimate purpose of the principle was to ensure the exercise of full sovereignty and the integrity of their national territory.” A/AC.125/SR.69, (1967) p. 5.
n.a nation-state is not fully united, but has part of its national territory separated from it by another state or by a colony, self-determination might take the form of irredentist claims against those states or colonies.  

If freedom is the freedom of a nation’s political system from outside interference, self-determination is a continuous process satisfied by the absence of the offending foreign actions, presence or interference. If it is the liberal vision of the enjoyment of representative government and political freedom for individuals, self-determination is again a continuous process this time based on the practice of the nation’s political and legal institutions. Finally, if

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120 Argentina: “For Argentina the restoration to a State of territories belonging to it that have been wrongfully occupied means no more than the enjoyment by a people of that State of the rights conferred on it by the principle of self-determination. Therefore Argentina will continue to oppose claims involving use of a mandatory standard of international law, such as self-determination, to the detriment of the territorial integrity of sovereign States, as occurs with part of the Argentine territory which has been occupied by the United Kingdom for over 150 years. We refer to the case of the Malvinas Islands, South Georgia and the South Sandwich Islands.” (CCPR/C/45/Add.2), 37-9 HRCOR (1989-90) II, p. 128. Armenia: “…[T]he right to self-determination is not vested in the State but in the nation or people. Hence it is not by chance that the question of self-determination generally arises when a people or nation finds itself in a position of dependence or other forms of exploitation are practiced in its respect and, consequently, when its status as a subject in law is not recognized by the dominant State. Nagorny-Karabakh, which, like Nakhichevan, had formed an integral part of the Armenian State for thousands of years, was incorporated in the former Soviet Union in 1920 and, by an arbitrary decision of an unconstitutional and unauthorized party organ… was transferred to the Soviet Republic of Azerbaijan… As a result, the right of peoples to self-determination was flouted and the will of 95 per cent of the population of Nagorny-Karabakh and the population of Armenia was not taken into consideration.” CESCR, E/1990/5/Add.36, (1990) p. 3. Morocco: “The right to self-determination has been exercised throughout the recent history of the Kingdom by various acts that give expression to the freely expressed choice of Moroccans. The following may be instanced purely by way of illustration: …The advent of independence in 1956 and the progressive recovery of Moroccan territories remaining under foreign domination”. CESCR, E/1990/5/Add.13, (1990) p. 4.

121 El Salvador: “El Salvador has been one of the keenest defenders of the right of peoples to self-determination enshrined in the Charter of the United Nations. On numerous occasions… El Salvador has reiterated its attachment to this fundamental principle of international law and has condemned any outside interference in the internal affairs of countries, a situation of which the Republic has been and still is a victim.” (CCPR/C/14/Add.7) 29-30 YHRC (1987) II, p. 69. Iraq: “Iraq has been the victim of a series of flagrant violations of the principles of international law and, in particular, of its right to self-determination and national sovereignty. These violations have been committed by the Iranian authorities which began their aggression by bombarding Iraqi cities on 4 September 1980 and openly announced their intention of occupying Iraq and changing its system of government. This flagrant violation of the right to self-determination constitutes aggression in the full sense of the term as understood in international law.” (CCPR/C/37/Add.3) 29-30 YHRC (1987) II, p. 33. Nigeria: “The principle of self-determination of peoples entailed the right of States freely to choose their own political, economic and legal systems; the right to continue their development and to conduct their foreign policies without foreign intervention or intimidation; and the right freely to dispose of their natural wealth and resources.” A/AC.125/SR/70, (1967), p. 22.

122 Iceland: “The nation’s right of self-determination is secured by free and direct election of the President of the Republic, members of the Althing and local authorities at intervals of four years.” CESCR, E/1990/5/Add.14, (1990), p. 16. Federal Republic of Germany: “The exercise of self-determination requires a democratic process, and this democratic process is inseparably linked with the unrestricted exercise of human rights. The political will of the people can only find free expression where human rights are respected. Observance of the following human rights is of primary importance in this context: The right to freedom of thought, conscience and creed; The right to freedom of expression, which includes the right to seek, receive and disseminate ideas by all means of communication, without regard for frontiers; The right to peacefully exercise the freedom of assembly and association; The right to participate in cultural life; The right of liberty and safety of the individual; The right of freedom of movement in one’s own country, and the right to leave any country, including one’s own, and to return there.” (CCPR/C/52/Add.3) 37-9 HRCOR (1989-90) II, p. 163. Guyana: “The Constitution guarantees the right to form political parties and the freedom of action of those parties, a right which is considered to be one of the strongest indicators of the right to self-determination.” CESCR, E/1990/5/Add.27, (1990) p. 6.
it is freedom to control a national economy, self-determination is the right to regulate a nation’s industry, trade and investment.\textsuperscript{123}

The concept of freedom, however, creates some problems for the doctrine. If freedom means the absence of constraint and the freedom of a people (and the national movement which represents it) to act as it chooses, there is no guarantee that this freedom will not be used to the detriment of others. What is to prevent the right of national self-determination becoming a selfish determination of national rights? The charge has been levelled that self-determination creates narrow and exclusionary societies.\textsuperscript{124} The solution to this problem appears to be that a distinction is made between the “exercise” and the “abuse” of the right.\textsuperscript{125} This fits in well with the original Kantian concept of self-determination in which the essential element of free will was the possibility to choose to follow the path of good. As Kant said: “Only freedom in relation to the internal lawgiving of reason is really an ability; the possibility of deviating from it is an inability.”\textsuperscript{126} The assumption surrounding self-determination in international law is that the “exercise” of the right will work to the general benefit of international society, underpinning friendly relations, development and human rights. However, if it does not it can be written off as “abuse”.\textsuperscript{127} This, of course, means that the right of self-determination is not actually completely self-determined, but can be held up to external standards.

\textsuperscript{123} Peru: “[T]he United Nations Conference on Trade and Development, in its resolution 46 (III), had endorsed the principle that every country had the sovereign right freely to dispose of its natural resources and that any external pressure brought to bear on the exercise of that right was a violation of the principles of self-determination of peoples and non-intervention”, 27 GAOR (1972) 6th Cmtee., 1349th mtg., (A/C.6/SR.1349) para. 47. Bolivia: “The right of political self-determination, that is sovereignty, had been a fiction throughout Bolivia’s history as an independent country, because political power had always been subordinate to the economic power wielded by large mining concerns.” 10 GAOR (1955) 3rd Cmtee., 651st mtg., (A/C.3/SR.651) para. 17. Poland: “His delegation attached the greatest importance to the sovereignty of peoples over their natural resources, believing that it was often a necessary condition for securing full self-determination and equal rights.” A/AC.125/SR.93, (1968) p. 142.


\textsuperscript{125} US: “The principle of self-determination must not be abused by irredentists or other secessionists who would redraw settled boundaries between independent State. He pointed out that between the two wars in Europe there had been cases where aggressors had used the common bonds of language and culture with groups in neighbouring States to justify their expansionist aims and give a semblance of rationality to policies of annexation based on unbridled nationalism.” A/AC.125/SR.92, (1968) p. 132. Turkey: “[T]he Third Committee should make sure that the article in question [on self-determination] would further the ends for which it had been conceived and could not in any way be perverted for the benefit of selfish interests incompatible with purposes and principles set forth in the United Nations Charter. Unless accompanied by adequate safeguards, political and juridical concepts might lead to serious abuses, as evidenced by Hitler’s expansionism, the purpose of which had been to subject peoples in the name of self-determination.” 10 GAOR (1955), 3rd Cmtee., 649th mtg., (A/C.3/SR.649) para. 2. France: “The Special Committee must... exercise extreme caution in order to prevent any abuse or distortion of the principle and must ensure that its formulation did not, through, clumsiness or carelessness, result in furthering a deterioration of friendly relations among States and that it did not produce effects that were contrary to the real will of peoples.” A/AC.125/SR.106, (1969), p. 65.


\textsuperscript{127} Joseph Raz and Avishai Margalit, for example, have argued that: “The right is conditional on being exercise for the right reasons, i.e. to secure conditions necessary for the prosperity and self-respect of the group. This is a major protection against abuse. Katanga cannot claim a right to self-determination as a way of securing its exclusive control over uranium mines within its territory. This condition does not negate the nature of the right. The group is still entrusted with the right to decide, and its decision is binding even if wrong, even if the case for self-government does not obtain, provided the reasons that motivate the group’s decision are of the right kind.” J. Raz and A. Margalit, “National Self-Determination” in J. Raz ed., Ethics in the Public Domain (Clarendon Press, Oxford, 1994) pp. 110-30 at p. 128.
Moreover, the distinction between “exercise” and “abuse” is a subjective one. The alleged benefits of self-determination represent nationalist articles of faith concerning the advantages of the nation-state and are somewhat more questionable as statements of fact.\textsuperscript{128} As S. James Anaya has noted, the, “self-determination rhetoric is more often heard in association with turmoil and destruction than with peace and prosperity.”\textsuperscript{129} Indeed, the label of “abuse” is usually attached to secessionist movements, which suggests that the real criteria are states’ interests. For example, it was argued in the Human Rights Committee that: “the abuse of that right could fundamentally jeopardize international peace and security”. This was because such “abuse” gave, “States the impression that their territorial integrity was threatened”.\textsuperscript{130} This is not, of course, to deny that secession may be destabilising. In any case, a distinction like “exercise” and “abuse” is probably necessary in a doctrine whose strength lies in its flexibility and which is appealed to across the political spectrum by the liberal and illiberal, democratic and totalitarian alike. With such divergent political applications, there needs to be some mechanism to separate those uses of the right which are seen as admirable from those considered abhorrent.

d. The Will of the People

A third key element in the self-determination process is the will of the people. This again reveals the interplay between the practical political goals of the right and its metaphysical language. The concept of national self-determination proposes that a “self”, in this case a nation or a people, actually determines something. This language suggests that the will of a nation or a people is self-evident and is simply there to be acted upon. This again complements nationalism. Nationalist movements always claim to represent a nation and self-determination adds a democratic-sounding and dynamic aspect to nationalist politics. Self-determination also makes a number of nationalist assumptions. It assumes that the relevant unit for political action is a nation or a people, that individuals primarily identify with the nation, and that the will of the people will be based on national rather than individual concerns.

However, looked in practical terms, the will of the people in self-determination is not self-evident and is not actually treated as such in nationalist politics. The determination of the wishes of any people requires an institutional framework: polling stations, election monitors, electoral commissions to set rules, courts to settle disputes etc. The circumstances of the vote: the election rules, who is entitled to vote, timing, party organisation and funding, access to the media, the attitude of the media, the question asked on the ballot, the economic situation, the personalities of politicians, the fortunes of the parties: all these may effect the result. It would be a very confident nationalist who trusted in the self-evident will of the people took none of these factors into account. In fact, the determination of the will of the people is a highly political process and is treated as such.

These factors can produce remarkable swings in the expressed will of a people. In undeveloped agricultural societies it might, of course, be expected that national issues may only have a limited effect on the vote. For example, the 1956 plebiscite in the trust territory of British Togoland revealed a pattern where neighbouring wards would vote almost unanimously in

\textsuperscript{129} Anaya \textit{op. cit. no.} 112 at p. 3.
\textsuperscript{130} Mr. Mavrommatis, 17-22 YHRC (1983-4) I, SR.503, para. 32.
opposite directions simply due to local issues or the influence of village leaders.\textsuperscript{131}

However, even in industrial societies the vote may dramatically swing for various non-national reasons. A good example is the Ukraine. On 1 December 1991 the people of the Ukraine voted overwhelmingly for independence by 90% on an 84% turnout.\textsuperscript{132} This represented a final blow to the Soviet Union and opened the way for negotiations on the formation of the Commonwealth of Independent States (CIS). Such a large vote would appear to be an unambiguous expression of the will of the people for independence. However, what had, in fact, previously stood out in the attitude of the Ukrainian people was its general apathy to nationalism. In elections in March 1990 the Ukrainian nationalist movement, \textit{Rukh} won only 24% of seats in parliament and this was considered to be an accurate reflection of its strength.\textsuperscript{133} It also fitted with the character of the population. \textit{Rukh} did well in western Ukraine, which until the Second World War had been part of Poland and retained a strong Ukrainian identity, but elsewhere, except in Kiev, it struggled to make an impression. A number of factors, though, may explain why this non-nationalist population swung behind independence, at least for the December 1991 vote. Undoubtedly the decisive factor was the adoption of Ukrainian nationalism by local communist authorities. In the campaign the population was presented with the political elite and the media forming a united front in favour of independence, while opposition was disorganised and ineffective. Moreover, the population accepted the (incorrect) claim by the authorities that independence would leave them better off. In this way a population which contained a large number of Russians and Russified Ukrainians voted overwhelmingly for independence.\textsuperscript{134}

Non-national motives can again be seen in the Baltic Republics. In Lithuania, Latvia and Estonia nationalists clearly did have mass support. This was demonstrated early on when two million people in August 1989 joined hands in a human chain stretching 370 miles from Vilnius to Tallinn to demand independence.\textsuperscript{135} In elections in spring 1990 nationalist parties took power in all three republics, and this was followed by declarations of \textit{de jure} independence.\textsuperscript{136} However, despite mass support and their appeal to self-determination, these movements were reluctant to hold referenda due to the risks involved. Estonia and especially Latvia had large, prominently Russian, national minorities. Ethnic Estonians formed 61.5% and Latvians only 50.7% of their respective republics.\textsuperscript{137} A vote held a real danger that it might not produce a clear majority for independence, which, of course, would seriously damage the legitimacy of the movements. In fact, the republics resisted holding referendums for a year and then only did so in March 1991 under pressure from Mikhail Gorbachev, who organised his own referendum to

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\textsuperscript{131} J. S. Coleman, “Togoland” 509 \textit{International Conciliation} (1956) pp. 1-91 at p. 74.  \\
\textsuperscript{133} A. Wilson, \textit{Ukrainian Nationalism in the 1990s: A Minority Faith} (Cambridge University Press, Cambridge, 1997) at p. 67.  \\
\textsuperscript{135} A. Lieven, \textit{The Baltic Revolution: Estonia, Latvia, Lithuania and the Path to Independence} (Yale University Press, New Haven, 1993) at p. 219.  \\
\end{flushright}
support a restructured Soviet Union, (endorsed by 73% on a 75.3% turnout), which the republics boycotted. The referenda held in both Estonia and Latvia, however, produced large majorities for independence: 78.6% and 73.7%, respectively, on turnouts of over 80%. These majorities, though, could only have been obtained because a significant percentage of the Russian minority did not vote according to nationality, but supported independence, mainly for economic motives or because of personal ties to the republics.

The same considerations can be seen in the referendum held in the autonomous republic of Tatarstan in Russia in March 1992, but this poll reveals another factor, the question asked on the ballot. Like the Ukraine Tatar nationalists were politically marginalised and nationalism was promoted by a communist elite. Indeed, Tatar leader, Mintimer Shaymiev was a hard-liner who publicly endorsed the August 1991 coup against Gorbachev. In August 1990 the Tatar authorities issued a declaration of state sovereignty based on the right to self-determination. However, it was not until a year and a half later, in February 1992, that they announced their intention to put it to a vote. This was fiercely resisted by Moscow, which referred the matter to the (First) Russian Constitutional Court in the Tatarstan case. What concerned the Russian authorities was that the sovereignty declaration and referendum question made no reference to Tatarstan as part of Russia, and the Court held that this formula was unconstitutional. Nonetheless, the referendum took place on 21 March 1992. Despite the fact that ethnic Tatars constituted only 49% of the republic and ethnic Russians 43%, sovereignty was endorsed by 61.4% on an 81.7% turnout. This mobilisation again crossed national lines and was achieved by emphasis on economic benefits, control of the media, concern by local Russians for good ethnic relations with the Tatars, and also because the referendum question left the term “sovereignty” open. It could allow for independence, satisfying Tatar nationalists, but it could also mean autonomy so as not to alienate ethnic Russians.

These three cases represent the use of a referendum to legitimise political decisions based on self-determination after they have been made, in some cases a considerable time after they have been made. An alternative strategy can be seen in the Slovenian referendum on 23 December 1990: the use of a referendum as political insurance. In this case voters endorsed the declaration of “an independent and sovereign state” by 94.6% on a 93.5% turnout, but only after six months if the ongoing negotiations with the other republics failed. These negotiations, at least on the Slovenian side centred on the reorganisation of Yugoslavia as a confederation, and the general expectation in Slovenia at the time was that this could be achieved. The

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138 Commission on Security and Cooperation in Europe op. cit. no. 132 at p. 35.
139 Ibid. p. 12.
143 Glenny op. cit. no. 32 at p. 86.
144 Keesing’s (December 1990), p. 37924.
A referendum was, therefore, used a political chip to bolster the hand of the Slovenian government in its negotiations with the other Yugoslav republics. It was only after the continued failure of these negotiations that Slovenia declared its independence on 25 June 1991.

The referendum as a political process and the dynamics of that politics can again be seen in the UN’s attempt to hold a referendum in Moroccan occupied Western Sahara, a process which has been going on for more than 12 years and, by its own estimates, cost the organisation over $½ billion. Superficially, the sticking point in this referendum has been the identification of voters and disagreement between Morocco and the POLISARIO liberation movement as to who is entitled to vote. But, underlying all this is the nature of the referendum as a political process, and as UN reports repeatedly complain, this means that it is structured towards a “winner-take-all” solution:

“The process thus became a zero-sum game, which each side felt it absolutely had to win since, owing to the nature of the agreement... the referendum would produce one winner and one looser and the stakes were therefore extremely high.”

In this regard it is telling that the UN Secretary-General’s former envoy James Baker III notably pointed out that the process of self-determination could, in fact, be achieved by other political methods:

“It could be achieved through war or revolution; it could be achieved through elections, but this required good will; or it could be achieved through agreement, as had been done by parties to other disputes.”

A referendum, therefore, may be useful for conferring legitimacy on the rhetoric of self-determination, but it may also be tangential to it. Moreover, it remains a political tool, and when, how and if one is held is a political decision. It should also be borne in mind that nationalist movements always claim to represent a people regardless of their level of popular support and may make various assertions as to its wishes. A good example is Judge Ammoun in his separate opinion in the Western Sahara Advisory Opinion in which he argued that:

“Nothing could show more clearly the will for emancipation than the [national liberation] struggle undertaken in common, with the risks and the sacrifices it entails. That struggle is more decisive than a referendum, being absolutely sincere and authentic.”

However, the background to the judge’s comments were the national liberation wars then being carried out in southern Africa. Although these struggles were presented as being conducted by a “people”, they were typically divided between rival organisations often based on ethnic or tribal loyalties. In Namibia there was SWAPO (mainly Ovambo) and SWANU (Herero and

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147 Ibid. p. 5, para. 30.
Mbandu). In Angola there was the MPLA (*mestíc*)s), FNLA (Bakongo) and UNITA (a splinter of the FNLA). In Mozambique there was FRELIMO (mostly Makonde and Nyanja), which itself splintered into an alphabet soup of other groups, UDENAMO, MANU, COREMO etc. Could it really be argued that the military victory of one of these movements was a more decisive expression of the will of the people than a referendum?

Other assertions can be seen in international instruments. The Colonial Independence Declaration, GA Res. 1514(XV) of 1960, for example, contained, in principle 2, a provision on the right of peoples to self-determination. However, this provision was preceded, in the preamble, with the Declaration’s own determination of the wishes of peoples:

“The **Recognizing** the passionate yearning for freedom in all dependent peoples and the decisive role of such peoples in the attainment of their independence…

**Recognizing** that the peoples of the world ardently desire the end of colonialism in all its forms and manifestations”.

These assertions supported the basic orientation of the Declaration, which virtually equated the right to self-determination with a right to independence. This orientation can also be seen in another General Assembly resolution passed around the same time, GA Res. 1541(XV). This resolution outlined three methods by which non-self-governing territories could obtain self-government: integration, free association and independence. It also provided that if self-government was achieved by integration or free association with a state it should be accompanied by a referendum. This was not, however, the case if self-government was attained by independence. The evident assumption was that independence automatically represented the wishes of the people.

e. Self-Determination and International Law

By putting together the three elements of process, freedom and the will of the people, and taking into account the distinction between its rhetoric and political application, self-determination may summed up as:

A doctrine concerning the legitimacy of political institutions, which asserts a process by which nations and peoples based on their free will attain, maintain and enhance their self-realisation and freedom by the organisation and practice of those institutions.

It must be added straight away that this is not a legal definition. Self-determination undoubtedly relates to international law, it attempts to dictate the form it should take, but it is fundamentally not a legal concept and fits into a legal framework as comfortably as a person into a straight-jacket. An indication of just how uncomfortably it sits with international law can be seen in the reaction in the Human Rights Committee to the suggestion by Peru that its legislation was an

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expression of the right.\textsuperscript{154} One of the Committee’s members, Mr. Buergenthal responded that such an interpretation would allow Peru to legislate international law into oblivion:

“The argument… that national law adopted pursuant to a country’s constitution by its legislature must be deemed to be an exercise of the right of self-determination had no basis in international law and, if valid, would do away with international law altogether.”\textsuperscript{155}

The implications of this for international law are far reaching. Self-determination, like nationalism, provides a basis for the legitimacy of international law, but this “higher law”,\textsuperscript{156} as it has been called, remains profoundly ambivalent about the law itself. The standard by which it judges the law is the rights of peoples and nations and from this perspective it performs a dual role. On one hand, it can support and lend extra legitimacy to the law. If international law supports national freedom, for example by the principle of non-intervention, then, it is also an expression of self-determination. On the other hand, if international law restricts national freedom, self-determination challenges the law and its basic validity.\textsuperscript{157} In this process self-determination can be compared to the application of an all-purpose legal solvent. Apply as directed and an offending piece of international law should just melt away: an unwanted tie of sovereignty, a disliked treaty and some have even argued uncomfortable human rights obligations.\textsuperscript{158} In this double-sided relationship with self-determination, international law is riding the proverbial tiger. Self-determination may support international legal rules, but it is profoundly ambivalent in doing so, and if those obligations should ever cause it to bear its teeth, then with a flick of the tail and a lurch of the back they may be gone: at least in theory.

4. National Ties and Legal Principles

The law of self-determination is, therefore, the product of the interaction between nationalism and international law, but how exactly does this interaction take place? This depends on two concepts essential, respectively, for nationalism and international law: national ties and legal principles. It is the relationship between these two which effectively defines the law of self-determination.

National ties, or ties which identify a nation (e.g. language, religion, race, history, territory, politics and identity), are fundamental to the politics of self-determination. Self-determination

\textsuperscript{154} Peru, CCPR/C/SR.1547, (1997) paras. 22-3.

\textsuperscript{155} Mr. Buergenthal, CCPR/C/SR.1548, (1997) para. 59.

\textsuperscript{156} Emerson \textit{op. cit.} no. 89 at p. 1; Pomerance \textit{op. cit. no.} 90 at p. 13.

\textsuperscript{157} See more generally on the supporting and challenging roles of self-determination Koskenniemi \textit{loc. cit.} no. 89 at pp. 248-9.

\textsuperscript{158} Iraq: “[T]he Special Rapporteur [on the situation of human rights in Iraq] had failed to take account of the circumstances in Iraq following a destructive war and the imposition of economic sanctions. His reports were incompatible with his mandate and had also failed to respect the people’s right to self-determination and to choose their political system freely.” CCPR/C/SR.1627, (1997) para. 13. Zaire: “There seemed to be a problem of interpretation of the Covenant, article 1 of which clearly stated that all peoples had the right of self-determination and freely determined their political status. Members [of the Committee on Economic, Social and Cultural Rights] had every right to discuss questions concerning free education, the extent and safeguarding of equality for women, agricultural programmes etc., but there was no reason to comment on the political organization of the country. It was for each country to ensure that basic rights were guaranteed under its own political system.” CESC\textit{R}, E/C.12/1998/SR.19, (1998) para. 14.
assumes that the basis for legitimate political authority is a nation or a people and, in doing so, the nation or people is used as a model for that authority. Correspondingly, how peoples are defined, which national ties are used, also defines this politics.

International law, in turn, is composed of legal principles and how those principles fit together determine the shape of the law. This has been especially the case in the law of self-determination, which has invariably been defined as a series of balances between different legal principles: self-determination v. territorial integrity, self-determination v. state sovereignty, self-determination v. inviolability of frontiers etc.

Thus, the interpretation of national ties shapes self-determination, and the reading of legal principles works to define international law. The law of self-determination is, in turn, is moulded by both. However, national ties and legal principles are not mutually exclusive. On the contrary, it is argued that legal principles are quite capable of encompassing national ties. For example, subjective ties have a clear affinity to self-determination, territorial ties to territorial integrity, political ties to state sovereignty. Indeed, different national ties can relate to all the legal principles involved in the law of self-determination. As a result, the use of principles may be no more than an extension of the use of national ties in nationalism.

The question of national ties is itself complicated. There are, at least, four levels to the identification of nations. First, there is the functional role of ties in uniting or dividing a people. This is the role that national ties are usually presented as performing, but, in fact, it cannot be looked at in isolation from a second factor, the symbolic use of ties. A variety of ties may act to unite or divide a people, but that does not necessarily mean that they are national ties. A state may unite people under a common government and political life, but those people might not see themselves as a nation. Linguistic ties obviously effect the ability of people to communicate with each other, but different nations may speak the same language or mutually intelligible ones and linguistic differences do not always become national ones. Religion may give people common values and institutions, but in most cases religion is not the principal basis for nationhood. Culture and traditions may be shared by a nation, but they may equally be local or regional, or held in common by a group of nations. Moreover, there are other ties, which can clearly unite or divide people, like class, regional or tribal loyalties, which are not normally considered national. A crucial factor, then, is not simply that ties unite and divide people, but that they are seen as “national”. There is a common tendency to divide national ties into subjective ties

160 Indeed these non-national loyalties may be stronger than national ones. E.g. Some German speaking representatives in the Tyrolean Diet have been said to have approached the King of Italy in order to urge the inclusion of not only South Tyrol but the whole of Tyrol within Italy on the grounds that, “they were Tyrolese long before they were Austrians”. J. W. Cole and E. R. Wolf, The Hidden Frontier: Ecology and Ethnicity in an Alpine Valley (Academic Press, New York, 1974) at p. 56. Refugees in Copenhagen from the 1848 Dano-German dispute over Schleswig protested that they would have preferred unity under Germany than a division of the duchy. S. Wambaugh, A Monograph on Plebiscites with a Collection of Official Documents (Carnegie Endowment for International Peace, New York, 1920) at p. 149.
(how people identify themselves) and objective ties (based on certain “objective” features). But, in fact, this division is not as neat as it might appear. Objective ties may functionally act to unite or divide people, but a crucial factor in their role as national ties is how they are subjectively interpreted.

A third dimension is provided by nationalism and national self-determination. As a nation or a people is the basic source of political legitimacy, so how one is identified is a political issue. Works on the right of self-determination of a particular population usually include a definition which establishes it as a people and thus legitimises its exercise of self-determination. How peoples are defined, which ties are used and which are not, also defines what self-determination means. Even within the same nation peoples may have different ideas of nationality and select different ties to legitimise different political goals.

A good example is Ernest Renan’s famous description in his 1882 work _Qu’est-ce qu’une nation_ of the nation as, “a plebiscite of every day”. This widely quoted interpretation evidently highlighted the subjective elements in nationality. But, it also tied in with the politics of the day. In the Franco-Prussian War of 1870-1 France had lost to Germany the provinces of Alsace and Lorraine, which were German in speech but French in sentiment. Renan’s emphasis on the subjective aspects of nationality evidently supported the recovery of these territories by France. However, this was not the only possible solution. Another Frenchman, the racial nationalist Maurice Barrès, himself a native of Lorraine, pursued the same goal with an opposite approach, rejecting the voluntary aspects of the nation in favour of race and territory. The provinces should be returned to France, not because of the wishes of the people, but because the nation’s ancestors were buried there.

There may, of course, be limitations to this. The interpretation of nations and their national ties may be situational, but other ties may shape that situation. “National consciousness will be more effective”, Karl Deutsch noted, “the more it is based on the existing separateness and cohesion of a country or a people.” There is an obvious logic to this. Nationalism may work better if it runs with the grain of society, and incorporates established identities and loyalties,

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166 Hayes _op. cit. no._ 14 at pp. 189-93; Deutsch _op. cit. no._ 161 at p. 4.

167 Deutsch _op. cit. no._ 161 at p. 147.
than if it runs against it. Nationalists may, therefore, not have a completely free hand in their interpretation of a nation.\textsuperscript{168}

The law of self-determination adds a fourth dimension. Legal principles may encompass national ties and correspondingly national ties may be used to legitimise those principles. Four principles might, in particular, have a close relationship with national ties: (1) the right of peoples to self-determination, (2) the territorial integrity of states or countries, (3) state sovereignty, and (4) the inviolability of frontiers and the related principle of \textit{uti possidetis}, which upholds political boundaries on independence. Often these principles are presented in an antagonistic relationship with each other, most usually with self-determination: self-determination v. territorial integrity, self-determination v. state sovereignty etc. However, it is argued that what appears to be a clash of principles may, in fact, merely reflect the different ranking of national ties in the interpretation of nations.

\textbf{a. Subjective Ties}

Subjective ties, or how peoples identify themselves most obviously connect with the principle of the self-determination of peoples. They connect rather less well with principles like territorial integrity, the preservation of frontiers and the concept of a “country”. Thus, a balance between self-determination and these principles, or between the concepts of “people” and “country” may well hinge on the question of whether the identity and views of a population should be taken into account or not. In other words, such a balance might represent a weighing of how important subjective ties are in the interpretation of a nation.

A great deal has been said already about the identity and the wishes of a people and little remains to be covered here. One of the problems with national sentiment is that it may be one of a number of possible identities and loyalties. The determination of the wishes of a people may also be influenced by a variety of political factors. The assumption of self-determination is that of all the identities and loyalties that a person may have, their national identity is the most important, but this need not necessarily be the case.

As said earlier also, there is no specific rule in the principle of self-determination which requires an objective assessment of the wishes of the people. Nonetheless, subjective ties are important for the legitimacy of the right for two reasons. First, the language of self-determination itself suggests some sort of popular, democratic process. A right which did not appear to have popular support might also lack legitimacy. Second, nations are usually thought of as communities. If a group had no communal spirit and behaved as if it had none, then its nationhood and consequently any claims to self-determination might be called into question. Thus, while as a legal matter subjective ties may not be essential for the principle of self-determination, as a political matter, they may be important for its legitimacy.

\textbf{b. Politics and Government}

Of all the national ties, political ties seem to have had the most influence in defining self-determination in international law. Whether in the decolonisation process, Eastern Europe, states’ peoples, or secessions like Eritrea, the peoples who have exercised self-determination

\textsuperscript{168} Smith \textit{op. cit. no.} 14 at p. 45.
have usually equated to political units.\textsuperscript{169} Political ties also seem to relate most readily to the four legal principles. This is not particularly surprising. International law is a fundamentally state-based doctrine and, therefore, its principles connect most easily with national political ties. It has even been argued that: “Most of the proclaimed peoples’ rights are in fact that rights of states in disguise.”\textsuperscript{170} National political ties may be reflected most obviously in the principles of state sovereignty and territorial integrity and, as states are also territorial units, the inviolability of frontiers and \textit{uti possidetis}. However, they are also prominent in the principle of self-determination and there are two reasons, in particular, why this should be the case.

First, political ties are undoubtedly one of the most important ties in nationality. Many of the institutions of the state and other similar bodies have played a major role in developing national consciousness, including parliaments, legal systems, the administration, schools and the army.\textsuperscript{171} Nations and nationality are often divided into two types: political (or civic) and ethnic (or cultural). In political nations peoples are defined by political and legal ties: a common political life, shared institutions, values and traditions and nationals are defined by citizenship. In ethnic nations, on the other hand, nationality is defined by the possession of certain linguistic, racial or religious features.\textsuperscript{172} The distinction between these two forms of nationality should not be overemphasised.\textsuperscript{173} Consciously political nations, such as America, Britain or France have developed from a linguistic and cultural core. Equally the development of ethnic nations may also be shaped by political ties, and, if those nations form a nation-state or a national autonomy, they also necessarily have a political component.

Second, regardless of these two concepts of nationality, self-determination is a political argument, which operates in an environment defined by states and other similar institutions.\textsuperscript{174} Nationalism may downplay the role of institutional ties in its development. Flemish nationalist F. A. Snellaert’s claim that, “[t]here is a unit folk and a unit state; the latter is the work of man, the former is the work of God”,\textsuperscript{175} reflects this orthodoxy. Nonetheless, nationalism is very much the work of man, and, as it is based on the organisation of political institutions, one might also


\textsuperscript{171} E. Weber, \textit{Peasants into Frenchmen: The Modernization of Rural France 1870-1914} (Stanford University Press, Stanford, 1976) at p. 486; Seton-Watson \textit{op. cit. no. 14} at pp. 8-9; Breuilly \textit{op. cit. no. 19} at pp. 20-1, 84-6.


\textsuperscript{174} See Breuilly \textit{op. cit. no. 19} at pp. 1-2.

\textsuperscript{175} Quoted in S. B. Clough, \textit{A History of the Flemish Movement in Belgium: A Study in Nationalism} (Richard R. Smith, New York, 1930) at p. 79.
expect to see some reciprocity in its relationship with them. In particular, as self-determination is a rhetoric for determining the status of political institutions, the people who might be best placed to use it are those within these institutions. Politicians may be in a strong position to use the language of peoples’ rights to defend or increase their power, especially if their institutions have a national basis. As a result, a right of self-determination may follow these institutions whatever the supposed characteristics of the people invoked. This can also be reflected in legal principles.

The role of political institutions can be seen most obviously in the self-determination of colonial peoples. The nationalist movements, which emerged in the former colonies were usually lead by a western educated elite which developed within the institutions of the colonial state.

These movements struggled within the context of the political and institutional basis of these colonies to gain control of the state using the rhetoric of self-determination. As a consequence the “people” in that right was identified with the whole population of a colony. The succession of the colony to independence as one unit was then protected by the principles of territorial integrity, sovereignty and, especially in Africa, *uti possidetis*. The principles of self-determination, and territorial integrity, *uti possidetis* and sovereignty were, therefore, essentially complementary and acted to both legitimise and stabilise, respectively, the succession of colonies to statehood within their existing frontiers. This is reflected, for example, in article III(3) of the OAU Charter 1963, which affirmed respect for the sovereignty and territorial integrity of states, and the OAU’s Cairo Resolution 1964, which pledged to uphold existing borders at the time of independence. The preservation of borders was also reaffirmed in article 4(b) of the Constitutive Act of the OAU’s successor, the African Union in 1999.

These may be seen to be examples of political nations. A contrast has sometimes been made this “decolonisation” model of self-determination and the “ethnic” model which seemed to prevail in Eastern Europe in the late 1980s and early 1990s. However, even this form of self-determination, despite appearing to be based on ethnically-defined peoples, was similar in its balance of principles and the role of political institutions to decolonisation. Political structures played a major role in defining secessionism in the Soviet Union, Yugoslavia and Czechoslovakia and irredentism in Germany. The organisation of these states made self-determination a logical response to the political and economic changes that followed the collapse of communism. The Soviet Union, Yugoslavia and Czechoslovakia were all consciously

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179 OAU Resolution on Border Disputes, Cairo Meeting 17-21 July 1994: “The Assembly of Heads of State and Government at its First Ordinary Session, held in Cairo, U.A.R., from 17 to 21 July 1964; Considering that the border problems constitute a grave and permanent factor for dissension; Conscious of the existence of extra-African manoeuvres aiming at dividing the African States; Considering further that the borders of African States, on the day of their independence, constitute a tangible reality… 1. Solemnly reaffirms the strict respect by all Member States of the Organization for the principles laid down in Article III, paragraph 3 of the Charter of the Organization of African Unity; 2. Solemnly declares that all Member States pledge themselves to respect the frontiers existing on their achievement of national independence.” Quoted in ibid. pp. 360-1.


181 See e.g. the Soviet report to the Human Rights Committee: “The voluntary character of the Union of Soviet
multinational federations which legitimised themselves by the right of self-determination. Similarly, West Germany based its relationship with the East on the principle. As self-determination was so clearly marked out as a course of political action, it was hardly surprising that politicians should follow it.

In their constitutions the Soviet Union, Yugoslavia and Czechoslovakia were all conceived of as multinational federations based on a union of sovereign republics and the self-determination of their constituent nations. The Soviet federation was composed of 15 Union Republics (SSRs) which represented its large, peripheral nations. These were considered as sovereign states, with a right to secede, and many of the trappings of statehood such as flags,
parliaments, educational and scientific institutions and ministries. The Ukrainian and Byelorussian SSRs even had seats at the UN. Smaller or more centrally located nations were represented in 20 Autonomous Republics (ASSRs), 16 of which were in Russia. These were not sovereign, but had their own constitutions and institutions. Below them was the autonomous oblast (region) and the autonomous okrug (district). Yugoslavia was a federation of six nations and six sovereign republics, and these coincided with each other, with the sole exception of Bosnia-Herzegovina, where no single nation dominated, although Muslims were the largest group. There were also two autonomies within Serbia, Vojvodina and Kosovo, which corresponded to two nationalities, Hungarians and Albanians. These “nationalities” unlike “nations” were not supposed to have a right of self-determination, although the distinction became confused and the 1974 Constitution referred to “nations and nationalities having equal rights.” Czechoslovakia was a federation of two nations, the Czechs and Slovaks, and their respective republics, which had their own governments, prime ministers and legislatures.

Much of this federalism was, of course, superficial. The structure of the Soviet state was summed up in the slogan “national in form and socialist in content.” This meant that despite its paper federalism, the USSR was run as a unitary state under the communist party, with decision-making and economic planning made centrally even on minor issues. It was also an essentially Russian state, even though Russians formed only a bare majority (50.8%) of the population. The centre and security in the republics were dominated by Russians, and, although a native normally held the position of First Secretary in the republics, his deputy was usually Russian. Yugoslavia was different in that its federal structure was intended to limit the power of its dominant nation, Serbia, which formed about a third of the population. The creation of the two autonomies and the republic of Macedonia out of what had previously been southern

191 Article 82, op. cit. no. 185 at p. 748.
193 Nations: Slovenes, Croats, Serbs, Montenegro, Macedonians and Muslims. Republics: Slovenia, Croatia, Serbia, Montenegro, Macedonia and Bosnia-Herzegovina.
195 Articles 1, 3 and 245, Constitution of Yugoslavia 1974.
Serbia were all intended to reduce Serb power. Nonetheless, like the USSR, it functioned as a centralised state based on the “Trinity” of the Communist party, the police and the army. In Czechoslovakia too the various national institutions were seen merely as rubber stamps for decisions of the communist party. Nevertheless, all these states created institutions based on nationality and established rights, such as sovereignty and self-determination, which politicians in these institutions could appeal to in order to increase their powers.

Thus, despite these differences between what were presented as multinational federations and their reality as highly centralised states, national institutions were, in fact, able to build up considerable authority. Central control in a country the size of the Soviet Union required an enormous amount of information from the regions, so much that the centre was unable to process it. This effectively devolved power to the local bureaucratic elites, who provided this information, and the dependency of the centre allowed them to build up their power still further.\(^{200}\) In the Brezhnev era (1964-82) republican elites were able to build up considerable systems of patronage,\(^ {201}\) and one even can talk of local “mafias”, especially in Central Asia.\(^ {202}\)

In Yugoslavia apparatchiks in the republics were also able to establish considerable independence from the centre,\(^ {203}\) and their potential to challenge it had already been demonstrated in the late 1960s. In 1966 in an effort to restructure the dysfunctional Yugoslav economy, Josip Broz Tito had thrown his support behind reformist republican leaders, particularly in Slovenia and Croatia, to bypass the conservative federal bureaucracy. However, this devolution of power only encouraged demands for more and this was expressed by republican elites in terms of national rights. In Croatia the communist leadership even allowed the formation of nationalist movements leading to student unrest in 1971. Tito responded with a crackdown and a purge of the Croat leadership.\(^ {204}\) Nonetheless, power still haemoraged to the republics\(^ {205}\) and Tito presided over a system which not only institutionalised nationalism, but one where a weakened centre depended increasingly on his personal authority.\(^ {206}\) On his death in 1970 central authority fell to the republics in the form of an eight member collective presidency composed of a representative from each of the six republics and the two autonomies. Of the three pillars of Yugoslavia, the police were brought under the control of the republics, while the communist party was torn by infighting.\(^ {207}\) The only remaining strong federal institution was the Yugoslav People’s Army, the JNA.\(^ {208}\)

In Czechoslovakia the communist elite was swept from power in the Velvet Revolution of 1989. However, the National Councils, or legislatures of the two republics became the forums for separate Czech and Slovak party formation which worked to divide Czechoslovak political

\(^ {201}\) J. Hutchinson, Modern Nationalism (Fontana Press, London, 1994) at p. 105.
\(^ {202}\) Gitelman op. cit. no. 192 at p. 254.
\(^ {203}\) Meier op. cit. no. 39 at pp. 2-3.
\(^ {205}\) Ramet op. cit. no. 194 at p. 118; Bennett op. cit. no. 31 at p. 74.
\(^ {207}\) Meier op. cit. no. 39 at pp. 3-4, 10-1; Goldstein op. cit. no. 47 at pp. 187-9.
\(^ {208}\) Bennett op. cit. no. 31 at p. 75.
life along national lines.\textsuperscript{209}

In the Soviet Union the basis for confrontation between the republics and the centre were Gorbachev’s \textit{perestroika} reforms.\textsuperscript{210} These were aimed at restructuring the ailing Soviet economy and this brought him into conflict with the bloated bureaucracy. Gorbachev took a two-pronged approach: replacing First Secretaries in the republics with people more open to reform,\textsuperscript{211} and allowing greater freedom to bring public opinion to bear against official corruption and incompetence.\textsuperscript{212} However, a more open political climate also allowed the expression of national aspirations. Previously expressions of (non-Russian) nationalism had been ruthlessly crushed, but after 1988 nationalist movements could form without being completely suppressed.\textsuperscript{213} Greater openness also exposed past injustices, such as the Molotov-Ribbentrop pacts, which challenged the whole legitimacy of Soviet rule in the Baltic Republics. Gorbachev believed that he could mobilise the people against the recalcitrant republican elites, but what the autocratic leader did not appreciate was that political freedom allowed people to follow their own agendas, and nationalism allowed the elites to mobilise against him.

In some republics nationalist opposition movements quickly assumed a mass character. Nationalists took power in the Baltic Republics in spring 1990 and in Georgia between October 1990 and January 1992.\textsuperscript{214} A mass movement also developed in Armenia over the conflict in the Armenian-populated enclave of Nagorno-Karabakh in Azerbaijan. However, in other republics, especially the key republic of the Ukraine, nationalist opposition had a more limited impact. Instead, communist elites adopted nationalism, expressed as rights to self-determination and sovereignty, to co-opt the opposition and increase their power.\textsuperscript{215} This was reflected in various declarations of sovereignty. In April 1991 Gorbachev and the leaders of nine republics agreed the Novo-Ogarevo, or “Nine-Plus-One” Agreement, which committed them to negotiations on a New Union Treaty. On 24 July these negotiations resulted in an agreement to restructure the Soviet Union as looser federation of sovereign republics.\textsuperscript{216}

The cue for the dissolution of the Soviet Union was the hardline coup of 19 August 1991, which was staged to prevent this new treaty from being signed. Its failure, however, radically changed the relationship between the republics and the centre.\textsuperscript{217} The Baltic Republics used the collapse of the centre to finally cut their ties to the USSR. Other republics also made declarations of independence. These did not necessarily mark the end of the Soviet Union, but were responses to a weakened centre and also attempts by local communists to shield themselves from events in Moscow.\textsuperscript{218} Some of these declarations were followed by referenda, although these were considered mere formalities to bolster the republic’s position in negotiations. In some Central Asian republics populations which a few months before had voted by over 90% for Gorbachev’s


\textsuperscript{211} White \textit{op. cit. no.} 198 at p. 21.

\textsuperscript{212} Motyl \textit{op. cit. no.} 19 at pp. 176-7.

\textsuperscript{213} Ibid. pp. 157-60, 174.


\textsuperscript{215} Motyl \textit{op. cit. no.} 19 at pp. 175-6, 179-82; Wilson \textit{op. cit. no.} 133 at pp. 24-5.

\textsuperscript{216} White \textit{op. cit. no.} 198 at p. 179; Smith \textit{op. cit. no.} 189 at pp. 18-9.

\textsuperscript{217} Smith \textit{op. cit. no.} 189 at p. 19.

\textsuperscript{218} Duncan \textit{op. cit. no.} 134 at pp. 198-9.
Soviet Union now voted by an equally large margin for independence.\textsuperscript{219}

The key referendum was, however, the one in Ukraine on 1 December 1991 in which a largely nationally apathetic population voted by 90\% for independence. After this vote, the leaders of Russia, Ukraine and Byelorussia, as original signatories to the Union Treaty which created the Soviet Union in 1922, declared its dissolution in Minsk on 8 December 1991.\textsuperscript{220} In its place they established the Commonwealth of Independent State (CIS). The basic principles of the new organisation, spelled out in its 1993 Charter, included self-determination, the sovereignty of member states, the inviolability of frontiers and territorial integrity.\textsuperscript{221} The apparent compatibility between the principles reflected the fact that the CIS was the product of nominally sovereign union republics, in most cases governed by a communist elite, asserting their independence. The principles of self-determination and sovereignty, and the inviolability of frontiers and then territorial integrity functioned, respectively, to legitimise and stabilise this succession of established political units.

In Yugoslavia instead of a conflict between the republics and the centre, nationalism was used in a power struggle between the republics. The first faction to play the nationalist card were, in fact, conservatives within the Serbian communist party, lead by Slobodan Milošović. Milošović used the issue of Serb rights in the predominantly Albanian autonomy of Kosovo to secure his position as undisputed party leader in 1987. In January 1989 his supporters staged a coup in Montenegro,\textsuperscript{222} followed in March by the abrogation of the autonomy of Kosovo and Vojvodina.\textsuperscript{223} In June Milošović, in front of a million Serbs celebrating the 600\textsuperscript{th} anniversary of the Battle of Kosovo Polje, issued a stark challenge to other republics. He claimed that the Serbs were again engaged in battles and quarrels, and added ominously that, while they were not armed battles, yet, this could not be ruled out.\textsuperscript{224} Milošović’s adopted platform was based on a document called the “Memorandum” orginally drawn up by Serbian academics in 1986. This was a blueprint for Serb hegemony in Yugoslavia, which could be achieved in one of two ways: either a recentralised, Serb-dominated Yugoslavia or a greater Serbia carved out of the other republics.\textsuperscript{225} With control of two republics and two autonomies, and thus four out of the eight

\begin{footnotesize}
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\item \textsuperscript{219} A. Bohr, “Turkmenistan and the Turkmen” in G. Smith ed., The Nationalities Question in the Post-Soviet States (Longman, London, 1996) pp. 348-66 at p. 354; Commission on Security and Cooperation in Europe op. cit. no. 132 at pp. 53, 85, 145,
\item \textsuperscript{220} Minsk Declaration, 8 December 1991, 31 ILM (1992) pp. 142-6.
\item \textsuperscript{221} Article 3, Charter of the Commonwealth of Independent States: “With the view to attain the objectives of the Commonwealth and proceeding from the generally recognized norms of international law and from Helsinki Final Act, the member states shall build their relations in accordance with the following correlated and equivalent principles: respect for sovereignty of member states, for imprescriptible right of peoples for self-determination and for the right to dispose their destiny without interference from outside inviolability of state frontiers, recognition of existing frontiers and renouncement of illegal acquisition of territories, territorial integrity of states and refrain from any acts aimed at separation of foreign territory, refrain from the use of force or the threat of force against political independence of a member state, settlement of disputes by peaceful means, which can cause no danger to international peace, security and justice, domination of international law in interstate relations non-interference into domestic affairs of each other ensurance of human rights and fundamental freedoms for all, without distinction as to race, ethnic background, language, religion, political or other views, fulfilment in good faith of the obligations assumed in accordance with the documents of the Commonwealth, the present Charter being on of them...”. 34 ILM (1995) pp. 1282-95 at pp. 1283-4.
\item \textsuperscript{222} Meier op. cit. no. 39 at p. 82.
\item \textsuperscript{224} Glenny op. cit. no. 32 at p. 35; Malcolm op. cit. no. 38 at p. 213.
\item \textsuperscript{225} Meier op. cit. no. 39 at p. 40; Malcolm op. cit. no. 223 at pp. 340-1.
\end{itemize}
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seats in the collective presidency, Milošović had gone a long way towards the first option.

Milošović’s attempt to create a centralised Serb-controlled Yugoslavia met with resistance, however, from the leaders of the other republics, in particular, from Slovenia. National communists in Slovenia responded that they would only live in a Yugoslavia which guaranteed their sovereignty and self-determination. They called for an “asymmetric federation” in which the republics could establish more flexible and looser relations with each other, and to that end declared their legislative sovereignty in September 1989. Serbia responded by calling for an economic boycott of Slovenia. In January 1990 Slovene delegates walked out of the congress of the Yugoslav communist party, causing its collapse. The only pillar of Yugoslavia now left standing was the army.

Tensions between the republics significantly changed when free elections in April 1990 brought nationalist parties to power in both Slovenia and Croatia. The conflict was now not between different stripes of communists, but nationalists in Slovenia and Croatia and communists in Serbia and Montenegro. Slovenia and Croatia pressed for Yugoslavia to be restructured as a confederation, while Milošović threatened that if this happened Serbia’s borders with the other republics would be an “open question”. This was not an idle threat. Serbian authorities began a massive propaganda campaign to create unrest among Croatia’s large Serb minority. Caught between the two sides were Macedonia and Bosnia-Herzegovina. Bosnia by geography and its mixed Muslim, Serb and Croat population stood in the line of fire in any conflict between Serbia and Croatia and opposed any changes to the federation. Macedonia also supported the federation, but would not remain in a Serb-dominated Yugoslavia if Slovenia and Croatia left. In December 1990 Slovenia took out political insurance against the failure of negotiations by securing support for independence in a referendum.

However, deadlock continued into 1991, with Milošović apparently emboldened in his hardline approach by international support for the integrity of Yugoslavia. Matters came to a head in May when Serbia and Montenegro refused to accept Stipe Mesić, a Croat, as the next head of the rotating presidency. Slovenia, which was wealthy, compact, homogeneous and peripheral, was always the best placed of the republics to secede and now pushed for independence. It was followed by Croatia, which on 19 May held a referendum in which 93.2% supported independence on an 83.6% turnout. This republic, however, shaped like curve around Bosnia, Serbia and Montenegro, and with a large Serb minority, was less readily detachable. Nonetheless, on 25 June both Slovenia and Croatia declared their independence based on the right of self-determination. This pushed Macedonia reluctantly towards

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226 Ramet op. cit. no. 194 at p. 69; Bennett op. cit. no. 31 at p. 100.
227 Meier op. cit. no. 39 at pp. 113-9.
228 Bennett op. cit. no. 31 at p. 12.
229 Meier op. cit. no. 39 at pp. 141-7.
231 Ibid. pp. 163, 170.
232 Bennett op. cit. no. 31 at p. 153.
233 Malcolm op. cit. no. 38 at p. 225.
235 Republic of Slovenia Assembly Declaration of Independence, 25 June 1991: “On the basis of the right of the Slovene nation to self-determination, of the principles of international law and the Constitution of the former SFRY and of the Republic of Slovenia, and on the basis of the absolute majority vote in the plebiscite held on December 23, 1990, the people of Republic of Slovenia have decided to establish an independent state, the Republic of Slovenia, which will no longer be a part of the Socialist Federal Republic of Yugoslavia...” S. Trifunovska, Yugoslavia through Documents: From its Creation to its Dissolution (Martinus Nijhoff, Dordrecht, 1994), at p. 286.
separation with a referendum on independence (95% support on 75% turnout) and declaration of sovereignty in September and a muted declaration of independence, by way of a new constitution, on 20 November.  

Bosnia-Herzegovina had since elections in November 1990 been run by a government of national unity involving parties from its Muslim, Serb and Croat communities. However, this middle ground collapsed once Slovenia and Croatia had left the federation. Bosnia had to choose whether to declare independence, to stay in a Serb-dominated Yugoslavia or to accept partition between Serbia and Croatia. All these options were unacceptable to one community and would lead to conflict. On 14 October its parliament voted for legislative sovereignty prompting a walkout by Serb nationalists. On 20 December, in response to EC guidelines on recognition, the country applied for recognition as an independent state.

This was self-determination as the politics of the succession of established political units to independence. It was also the framework of international recognition policy. The EC Declaration on Guidelines on the Recognition of New States in Eastern Europe of December 1991, proclaimed the principle of self-determination, but within the inviolability of existing frontiers. This was developed by the Arbitration Commission of the Conference on Yugoslavia, the so-called Badinter Commission, which extended uti possidetis to the dissolution of Yugoslavia. Self-determination took place within the borders of the republics, protected by uti possidetis. The principles of self-determination and inviolability of frontiers/uti possidetis were again used to legitimise and stabilise, respectively, the succession of political units.

In the case of Czechoslovakia the political crisis focussed on the system of representation and the framing of a new constitution. The federal legislature in Czechoslovakia was divided into two houses: the Chamber of the People, elected in nation-wide elections; and the Chamber of Nations, divided equally between Czech and Slovak members. This dual arrangement was intended to compensate for the 2:1 ratio in the size of the Czech and Slovak populations. Czechs would naturally dominate the Chamber of the People, while Slovaks would be equally represented in the Chamber of Nations. Minor legislation required a simple majority in both houses. Important legislation needed a qualified majority in the Chamber of Nations, i.e. a majority of both Czech and Slovak members. Constitutional amendments had to be supported by three-fifths of the Chamber of the People and three-fifths of both the Czechs and Slovaks in the Chamber of Nations. This meant that a relatively small number of members of the Chamber of Nations (31 out of 150 on constitutional matters) could block legislation.


236 Keesing’s (September 1991), p. 38420.
237 Trifunovska op. cit. no. 235 at pp. 345-7; Meier op. cit. no. 39 at p. 182.
238 Malcolm op. cit. no. 38 at pp. 218-23.
239 Glenny op. cit. no. 32 at pp. 143, 148.
The problem with the system was that it institutionalised politics along lines of nationality, yet could only work with a high degree of consensus. It encouraged nationalism, but was particularly vulnerable to gridlock. None of this mattered when it was first set up. The legislature was just a rubber stamp for the communist party. However, with the emergence of separate Czech and Slovak parties in the Velvet Revolution, subsequent attempts to draft a post-communist constitution became paralysed by the disproportionate power of Slovak members to block legislation. This paralysis at the federal level allowed the National Councils in the two republics to attempt to increase their own powers at the expense of the federal government.  

The major political difference between Czechs and Slovaks in post-communist Czechoslovakia was the economy. Slovakia was originally poorer and less industrialised than the Czech lands. To some extent it remained so, but the gap had been significantly reduced under the communist regime with investment in industry. However, this meant that Slovakia was left with large, inefficient industries, which were hit disproportionately hard by economic modernisation. In June 1992, for example, Slovak unemployment stood at 11.3% compared with 2.7% for Czechs. While the Czechs favoured rapid economic reform, Slovaks found it more painful and wanted to move more cautiously.

These perspectives were reflected in the programmes of Czech and Slovak parties. In Slovakia the largest party was the Movement for a Democratic Slovakia (HZDS) lead by Vladimír Mečiar on a platform of gradual economic reform and a looser Czechoslovakia. The HZDS proposed a declaration of Slovak sovereignty followed by negotiations on a confederation. This suited prospective HZDS voters, of whom only 19% favoured independence, as well as Slovaks in general of whom only 9% had voted for separatist parties in previous elections. The largest group in Czech Republic, a coalition of the Civic Democratic Party (ODS), lead by Václav Klaus, and the Christian Democratic Party, on the other hand, was focussed on rapid economic reform and favoured a centralised political structure which would do least to impede this. However, after elections in June 1992 the coalition was faced with the HZDS on a platform of decentralisation and slower reform. For Klaus and the ODS, Czechoslovakia itself had become an institutional obstacle to economic reform.

Klaus and Mečiar began negotiations on a future constitution for Czechoslovakia, but instead agreed on its dissolution. This was essentially an elite agreement. Separation at the time was supported by only 16% of the population. Klaus and Mečiar also did not even have an absolute majority in their respective republics. Nonetheless, the dissolution was described by Czechoslovakia as “one of the forms” of the implementation of self-determination, and Slovak independence was legitimised as an exercise of the right and the culmination of the historic
development of the Slovak nation.\footnote{Slovakia, CCPR/C/81/Add.9, (1996) pp. 3-4.} On 1 January 1993 the Czech Republic and Slovakia became independent states within their existing frontiers which had been confirmed by a treaty in October 1992.\footnote{M. N. Shaw, “Peoples, Territorialism and Boundaries” 8 \textit{European Journal of International Law} (1997) pp. 478-507 at p. 500.} Self-determination and sovereignty, and the inviolability of frontiers again provided principles by which politicians in established political units could legitimise and stabilise, respectively, the accession of the republics to statehood.

This model of the succession of political units was challenged by secessionists in many former Soviet republics and, in particular in Yugoslavia. However, many of these challenges were also based on political units. With the break up of the Soviet Union, Moscow’s weakness provided an opportunity for elites in Russia’s autonomous republics and oblasts to also increase their power with rights of self-determination and sovereignty.\footnote{G. Smith, “Russia, Ethnoregionalism and the Politics of Federation” 19 \textit{Ethnic and Racial Studies} (1996) pp. 391-409 at pp. 406-7; V. Tishkov, “The Nature of Ethnic Conflict” 33:1 \textit{Sociological Research} (1994) pp. 52-71 at p. 54.} Even though only four of Russia’s ASSRs actually contained a majority of their eponymous nation,\footnote{Connor op. cit. no. 199 at p. 40.} this national character was vital to the legitimacy of their claims. When the region of Sverdlovsk declared itself an autonomous Urals Republic in July 1993, its governor was simply dismissed.\footnote{Tishkov op. cit. no. 192 at p. 262.} In March 1992 the autonomous republics with the exception of Tatarstan and Chechnya signed the Federal Treaty. (Tatarstan signed later in 1994).\footnote{Bennigsen Broxup op. cit. no. 142 at p. 85.} This conceded a variety of rights, including control of natural resources and a right to secede, not granted to non-national regions.\footnote{M. Mandelstam Balzar, “From Ethnicity to Nationalism: Turmoil in the Russian Mini-Empire” in J. R. Millar and S. L. Wolchik eds., \textit{The Social Legacy of Communism} (Cambridge University Press, Cambridge, 1994) pp. 56-88 at p. 60; Smith loc. cit. no. 253 at pp. 395-6.} The 1993 Constitution recognised 21 autonomous republics, which represented an upgrade for five of them. However, some rights, in particular secession, were limited, with self-determination in article 5(3) balanced with the integrity and inviolability of the federation in article 4(3).

The Checheno-Ingush ASSR also initially followed this pattern, with the communist elite declaring the republic’s sovereignty in November 1990.\footnote{M. Mandelstam Balzar, “From Ethnicity to Nationalism: Turmoil in the Russian Mini-Empire” in J. R. Millar and S. L. Wolchik eds., \textit{The Social Legacy of Communism} (Cambridge University Press, Cambridge, 1994) pp. 56-88 at p. 60; Smith loc. cit. no. 253 at pp. 395-6.} However, Chechnya stands out among the autonomous republics as in this case the communist elite was replaced by nationalists who declared independence on 1 November 1991.\footnote{R. Seely, \textit{Russo-Chechen Conflict, 1800-2000: A Deadly Embrace} (Frank Cass, London, 2001) at pp. 99-107.} Various reasons can be advanced for the apparent stridency of Chechen self-determination. The Chechens were one of the least integrated of Russia’s ethnic groups (unlike the ‘Tatars) and carried the memory of their mass deportation under Stalin, (although they were not unique in this respect). However, despite these features, it is not clear whether the majority of Chechens, whatever their feelings about Russia, actually wanted a war with Moscow. No vote was ever held on Chechen independence and the subsequent conflict may in large part be attributable to the failure the Russian and Chechen governments and, in particular, Presidents Boris Yeltsin and Dzhokhar Dudayev to negotiate a solution.\footnote{Tishkov op. cit. no. 142 at pp. 198-9.}

Secessionist challenges in other republics also reflect the role of political structures. In August
1990 the assembly in the Abkhaz ASSR in Georgia declared the region a separate Soviet socialist republic,\(^{261}\) even though ethnic Abkhaz formed only 17.3% of its population.\(^{262}\) The secession of the Russophone Trans-Dniestr region from Moldova reflected a division in the ruling communist elite between the left and right banks of the Dniestr River, and indeed, was not inspired by Russian nationalism but international socialism.\(^{263}\) The conflict over the Armenian populated enclave of Nagorno-Karabakh in Azerbaijan did have a mass character and was a focus for wider ethnic conflict between Armenians and Azeris. Nonetheless, the Nagorno-Karabakh Autonomous Oblast was also a compact political unit with local institutions controlled by an Armenian elite.\(^{264}\) This meant that local grievances over the economy and discrimination within Azerbaijan could easily be focussed by this elite into a political programme for unification with Armenia.\(^{265}\) Another factor in these secessions was Russian intervention. The Russian 14th Army played a decisive role in the Trans-Dniestr secession.\(^{266}\) Russian forces also appeared to be actively involved in Abkhazia, forcing Georgia into the CIS and a more dependent relationship with Moscow.\(^{267}\) Russia is also the main arms supplier to both Armenia and Azerbaijan in the Nagorno-Karabakh conflict creating considerable political leverage over the two.\(^{268}\)

This was equally true of Serb secessions in Croatia and Bosnia. Croatia certainly behaved dangerously when it seceded with Slovenia, without attempting to accommodate its Serb minority. Indeed, many of its policies worked to alienate this group.\(^{269}\) Nonetheless, a crucial factor for the Croatian and Bosnian Serb secessions was the active intervention of Serbia in support of the secessionists. Much of the ethnic cleansing that took place was carried out by paramilitary criminal gangs, initially funded by the Serbian interior ministry.\(^{270}\) And most of the

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264 Joffé op. cit. no. 262 at p. 28.


267 Goldenberg op. cit. no. 265 at pp. 108-13; Goltz loc. cit. no. 262 at pp. 104-10; Jones and Parsons op. cit. no. 214 at pp. 305-7; Lieven op. cit. no. 260 at pp. 244.


269 Glenny op. cit. no. 32 at pp. 12-4, 81, 92.

fighting in what was presented as an ethnic conflict was, in fact, conducted by regular forces of the JNA. 271

Political structures, therefore, played an important role in defining secessionism in the Soviet Union, Yugoslavia and Czechoslovakia. They also played a major role in shaping irredentism in Germany. A key element in the reunification of Germany in October 1990 was the West German constitution which not only provided a roadmap for unification but also forced the pace. The West German constitutional document, the Basic Law of 1949 provided in its preamble that: “The entire German people are called upon to achieve in free self-determination the unity and freedom of Germany.” It also outlined two methods by which this could be achieved. Article 23 provided that the Basic Law would apply to “other parts of Germany after their accession” to West Germany. Another route was contained in article 146, which stated that the Basic Law would lose its validity once a constitution adopted by the German people in free self-determination entered into effect. There were, then, two models for reunification. East German lands could join the Federal Republic under the Basic Law, or the people of the two states could agree to create a single state with a new common constitution. However, perhaps the most significant provision was article 116, which granted citizenship to all citizens of the 1937 German Reich, their spouses and descendants. 272

This became significant in the summer of 1989 when reformists in neighbouring Hungary to begin dismantling the Iron Curtain and opened its borders with Austria. The result was an exodus of East Germans and by September 50,000 had arrived in the West. On 9 October 100,000 people gathered in Leipzig in the first of a series of mass demonstrations chanting “Wir Sind das Volk!” (We are the People!), a demand for democracy. A month later, on the night of 9-10 November the most potent symbol of the Cold War division of Europe, the Berlin Wall was breached. In December the entire East German Politburo and Central Committee resigned and in January a government of national responsibility was formed. 273 However, in addition to these political changes 2,000 people were leaving for the West every day, undermining the viability of the East German state. 274

East German opposition groups, such as New Forum, showed little interest in reunification, as, initially, did the East German population. 275 These movements had struggled against the communist regime and wanted to resolve the East’s political, economic and social problems themselves. However, what drove reunification on to the agenda was this continued stream of people, which put an unbearable burden on the West and threatened the East with economic collapse. 276 In November 1989 West German Chancellor, Helmut Kohl raised the goal of reunification: not immediately but eventually through a progressive process. On 22 November the chant in Leipzig changed subtly but significantly to the nationalist “Wir Sind ein Volk!” (We are one People!). East Germans began to see that reunification could be a quick and easy route to

271 Goldstein op. cit. no. 47 at pp. 225, 229, 233, 243; Malcolm op. cit. no. 38 at pp. 235-8.
275 In December 1989 in an opinion poll over two-thirds of East Germans opposed unification. When asked how they envisioned the future of the two states in ten years, 44% saw a confederation, 22% two sovereign states and 20% a single state. McCurdy loc. cit. no. 272 at p. 283.
the benefits of the West. In this respect Germany can be compared with the other Cold War divided nation, Romania, which was split between Romania and the Moldavian SSR. When Moldavia (Moldova) obtained independence in the collapse of the USSR it was widely expected that unification would soon follow. However, momentum behind this faded when it became clear to Moldovans that it would involve significant economic costs.

Kohl responded to this situation with a proposal for reunification to take place quickly by the five East German Länder joining the West under article 23 of the Basic Law not through a new constitution, and for the exchange of East German Marks for Deutschmarks at a 1:1 rate. This gave East Germans greater buying power and expanded the market for West German goods. This fast and apparently painless track to reunification proved extremely popular and Kohl was rewarded with a resounding victory for his CDU party in elections in the East in March 1990. Reunification took place on 3 October by the accession of East German Länder to the Federal Republic on the basis of article 23 of the Basic Law, a process described by Kohl as conforming with the right to self-determination. This short-term policy, however, held longer-term costs. The 1:1 exchange rate, in particular, made East German industry uncompetitive and caused its economic collapse, which, in turn, became a burden on the West.

Within Germany the abstract principle of self-determination provided the basis for constitutional articles on reunification. Externally, it provided a basis for non-intervention in the reunification process by outside powers. But, it also related to other principles, in particular, the inviolability of frontiers. These principles were explicitly connected in the so-called “Four-Plus-Two” Agreement of September 1990 between the two Germanies and the United States, Britain, France and the USSR, which as occupying powers retained certain rights in the two states. This instrument, on one hand, welcomed German reunification based on the exercise of self-determination, and, on the other, affirmed Germany’s external borders as those of the GDR and FRG.

The right of self-determination in international law is undoubtedly primarily attached to political units. This may be, in part, because many peoples are defined by political nationality. But, even if they are not, political ties do effect the context in which the right is exercised. Self-

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277 Breuilly op. cit. no. 19 at pp. 353-5.
278 Eyal and Smith op. cit. no. 266 at pp. 239-40.
279 Carr op. cit. no. 273 at p. 399.
280 Germany, (CSCE/SP/VR.3) p. 55.
282 “Resolved in accordance with their obligations under the Charter of the United Nations to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace…Welcoming the fact that the German people, freely exercising their right to self-determination, have expressed their will to bring about the unity of Germany as a state so that they will be able to serve the peace of the world as an equal and sovereign partner in a united Europe…” Preamble, Treaty on the Final Settlement with Respect to Germany, 29 ILM (1990) pp. 1187-92 at pp. 1187-8.
283 “The united Germany shall comprise the territory of the Federal Republic of Germany, the German Democratic Republic and the whole of Berlin. Its external borders shall be the borders of the Federal Republic of Germany and the German Democratic Republic and shall be definitive from the date on which the present Treaty comes into force. The confirmation of the definitive nature of the borders of the United Germany is an essential element of the peaceful order of Europe.” Article I(1).
284 Article I(3).
determination is a doctrine about the legitimacy of political institutions and regardless of its rhetoric about peoples it appears that the tail often wags the dog. Politicians in political institutions may be well placed to use this right to increase their own power. Consequently self-determination may reflect those institutions regardless of whether its peoples are defined in ethnic or political terms.

c. Language

Language is widely considered to be one of the most important national ties, but its relationship with legal principles has been less straightforward than political ties. Language has been a major element in defining peoples for self-determination. In the Versailles Conference, after the First World War in 1919, when borders between the new nation-states were being drawn by nationality, that nationality was invariably decided by the language spoken. However, this use of language has not been characteristic of the subsequent development of the law of self-determination. Thus, in Eastern Europe in the 1990s, while language was the primary identifying feature of a large number of peoples: Slovenes, Macedonians, Latvians, Estonians, Ukrainians, Belorussians, Azerbaijani,s Kazakhs, Tadjiks, Kyrgyz, Uzbeks, Turkmen and Slovaks: the units that actually exercised self-determination were defined along political lines.

Language has not only been used to define a “people” for the principle of self-determination. It has also been used to identify a “country” for the principle of the territorial integrity of a country, as outlined in principle 6 of the Colonial Independence Declaration, GA Res. 1514(XV). Language has been used to identify a country on this basis, for example, by Mauritania in its claims over Western Sahara in the Western Sahara Advisory Opinion.

Language clearly does play an important functional role in uniting and dividing people. However, it does not appear to irrevocably shape human behaviour, nor does it inevitably translate into national ties. Different nations may share the same language, such as English, French or Spanish, and a single nation can speak different ones, like Scotland or Ireland. Many national languages are also extremely close: Czech and Slovak, Serb and Croat, Danish and Norwegian, Lithuanian and Latvian, Bulgarian and Macedonian. Whatever the differences between the Krajina Serbs and Croats, language was not one of them. The Serbs in Knin spoke the Croatian variant of Serbo-Croat and used, like the Croats, the Latin alphabet. A crucial factor, therefore, may not simply be the functional role of language, but the value placed on it.

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286 “6. Any attempt aimed 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.” GA Res. 1514(XV), 15 GAOR (1960) Supplement No. 16, (A/4684) at p. 66-7.
290 Glenny *op. cit. no. 32 at pp. 8, 12.
291 J. A. Fishman, “Sociolinguistics and the Language Problems of Developing Countries” in J. A. Fishman, C.
The difference between a dialect and a language may not be so much linguistic as political. A language may identify a nation with a right to self-determination, while a dialect may not.

Languages may also be manipulated and changed according to nationalist ideas. These reforms may reflect more an idea of a people than the characteristics of the population themselves. A programme in the 1930s to purge Turkish of “foreign” Arab and Persian words (the equivalent of stripping English of all its Latin and Greek based words) only produced total confusion. (A retreat was organised under the “Sun-language” theory that Turkish was the origin of all languages and the words were therefore not foreign after all). An attempt to create an indigenous language for Norway, Nynorsk, instead of literary Danish (Riksmål), actually resulted in two. Nynorsk failed to replace Riksmål, and remained the minority language, with Riksmål being simply known as Norwegian (Norsk).

Romanian has been twisted several times according to national or political motives. In the eighteenth century, scholars switched the alphabet from Cyrillic to Latin and stripped the language of Slavic words to reflect the theory that Romanians, a Latin people, were descended from the Romans. However, when the Soviet Union annexed Moldavia from Romania in 1944, the alphabet in the republic was switched back to Cyrillic and Slavic words added to promote the idea of a separate Moldavian nation. When the USSR broke up, though, the Moldavians asserted their independence from Moscow by switching their alphabet back to Latin, although the idea of a separate language remained.

This is not to diminish the significance of linguistic divisions. For states or political nations encompassing different linguistic groups language may create significant barriers to political society. Moreover, these are divisions which can be readily presented in national terms. Different strategies may be used by these states, each with their benefits and costs. One language may be selected as the sole official language. This may have the advantage of making the state accessible to a large part of the population, perhaps a large majority, but the cost may be the exclusion of other groups both in practical and symbolic terms. A result may be ethnic conflict.
national or regional level. This may make the state more inclusive, but at increased administrative and educational costs. Additional language learning may be both time-consuming and expensive. Alternatively, a neutral language may be used, such as the colonial language in former colonies.\textsuperscript{299} Although not indigenous, this language has the advantage of not elevating one group above another. However, again it may be difficult to learn and create a cultural barrier between the governing elite and the mass of the population.\textsuperscript{300} This may be reduced if a pidgin can be used, such as Swahili in Tanzania or Bahasa in Indonesia, which has an affinity with the majority of local languages.\textsuperscript{301}

d. Religion

Religion again may be used to identify both a “people” for the principle of self-determination and a “country”\textsuperscript{302} for the principle of territorial integrity. Religious ties have in the past been used to define borders in the UN partition plan for Palestine\textsuperscript{303} and, together with elections, in the partition of British India.\textsuperscript{304} Some peoples, like the Israeli, Pakistani and Bosniac peoples, have been primarily identified by religion, and religious ties have been particularly prominent in many others, such as the Irish, Croat and Serb peoples.

There are some obvious parallels between religious communities and nations. Both are groups which may have shared identities, customs, values, loyalties and aspirations. Religion may also assist the development of nations in a number of ways. Missionaries in Africa and Asia and Christian scholars in Europe have been instrumental in codifying the first written texts of many national languages.\textsuperscript{305} Religious institutions, in particular state churches, have provided a framework for socialising a population into a nation,\textsuperscript{306} and can also provide an infrastructure for nationalism. Religious figures can, on one hand, be close to a population in a position of authority and respect and, on the other, be part of an organisational structure designed to transmit ideas to large numbers of people.\textsuperscript{307} Even supranational institutions, like the Catholic Church, have engaged with nationalism when nationalists have been struggling against Protestants, as in Ireland, or Orthodox, as in Poland and Lithuania.\textsuperscript{308}

However, there are also important differences. Islam or Christendom may span the globe, but

\textsuperscript{299} Fishman \textit{op. cit. no.} 161 at pp. 45-6.
\textsuperscript{300} Hobsbawm \textit{op. cit. no.} 298 at p. 1074.
\textsuperscript{302} \textit{Western Sahara} (Advisory Opinion), ICJ Reports (1975) p. 44, paras. 95-6, p. 58, para. 132.
\textsuperscript{303} United Nations Special Committee on Palestine, Report to the General Assembly, 2 GAOR (1947) Supplement No. 11, (A/364).
\textsuperscript{304} C. M. Ali, \textit{The Emergence of Pakistan} (Columbia University Press, New York, 1967) at pp. 149-221.
\textsuperscript{307} Hroch \textit{op. cit. no.} 13 at pp. 139, 144.
nations are seen as specific divisions of mankind. Nationalism may also be seen to divide religious communities, as in the case of Arab nationalism in the Ottoman Empire. Alternatively, religious divisions may split a nation and weaken a nationalist movement, for example, in the Flemish movement in Belgium. Indeed, only a small number of religious communities have, in fact, directly become national ones.

There is also a subtle but fundamental difference between a religious community and a national one. If religion plays a defining role in nationality, it also takes on the role of a group marker like language or race. The crucial factor in a nationalised religious identity is the identity itself not necessarily the belief behind it. As contradictory as it may sound, a national-religious identity can be just as much secular as religious. Indeed, in Yugoslavia, the drive to establish a Muslim nation was lead by communists and secular Muslims and opposed by Islamic revivalists. Many of the early Zionists were also socialists. Muhammad Ali Jinnah, who is regarded as the father figure of the Indian Muslim nation, envisaged Pakistan as a secular Muslim state. Moreover, the identity of the religion itself may also be interpreted in this secular nationalist way. For example, in Arab nationalism and Zionism, the significance of Mohammed and Moses, respectively, changed from prophets of God to expressions of an Arab or Jewish national genius. This is not to say that members of a religious nation will necessarily be secular, but they need not be religious either and there is a tension, for example, in states like Israel and Pakistan as to what their national identity means.

e. Territory and Geography

Territorial ties play a particularly important role in the interaction of legal principles. A common geography obviously connects to principles like the inviolability of frontiers and uti possidetis. It is a key component in the concept of a “country”, which together with the “state” is considered to be the basis for territorial integrity. It is a necessary element in statehood and state sovereignty. As Harold Johnson noted: “All questions of sovereignty are sooner or later territorial.” It is also extremely important for self-determination. The legal right of peoples to self-determination has normally been attached to defined territorial units: colonies, sovereign states or federal states. Moreover, in international law this territorial aspect is reinforced by

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309 Anderson op. cit. no. 17 at p. 7.
310 Breuilly op. cit. no. 19 at p. 151.
311 Horowitz op. cit. no. 73 at p. 19; Hroch op. cit. no. 13 at pp. 107, 115-6.
312 Malcolm op. cit. no. 38 at pp. 200-1.
314 Breuilly op. cit. no. 19 at p. 208.
315 Kedourie op. cit. no. 60 at pp. 64-5, 69; Smith op. cit. no. 14 at pp. 102, 113.
316 Johnson op. cit. no. 112 at p. 112.

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self-determination being balanced with the principles like territorial integrity, sovereignty and the inviolability of frontiers. The balance between self-determination and these principles, however, is more than just a balance of principles: it reflects the interpretation of nations.

The role of territory in nationality is underlined in the story of the idea of “Mother India”, as recounted by Jawaharlal Nehru:

“Sometimes as I reached a gathering, a great roar of welcome would greet me: Bharat Mata ki Jai – ‘Victory to Mother India.’ I would ask them unexpectedly what they meant by that cry, who was this Bharat Mata, Mother India, whose victory they wanted? My question would amuse them and surprise them, and then, not knowing exactly what to answer, they would look at each other and at me. I persisted in my questioning. At last a vigorous Jat, wedded to the soil for immemorial generations, would say that it was the dharti, the good earth of India, that they meant. What soil? Their particular village patch, or all the patches in the district or the province, or the whole of India? And so question and answer went on, till they would ask me impatiently to tell them all about it. I would endeavour to do so and explain that India was all this that they had thought, but it was much more. The mountains and the rivers of India, and the forests and the broad fields, which gave us food, were all dear to us, but what counted ultimately were the people of India, people like them and me, who were spread over this vast land. Bharat Mata, Mother India, was essentially these millions of people, and victory to her meant victory to these people. You are parts of this Bharat Mata, I told them, you are in a manner yourselves Bharat Mata, and as this idea slowly soaked into their brains, their eyes would light up as if they had made a great discovery.”

Nehru may or may not have successfully imprinted his own ideas of India on to the villagers as he claimed, but the tale highlights that nations are usually conceived of as having two elements: population and territory.

Territory plays an important functional role in defining nations. It obviously provides a population with their physical location and resources, and shapes their lifestyle, customs and culture. But, it also plays a major symbolic role. Moreover, of the two elements in a nation, territory is the unthinking part: it does not express its own wish to be part of a nation. National territory is territory to which people have ascribed a national role. In the age of dynastic politics and empire-building a territory might have been derided as, “a little patch of ground That hath in it no profit but the name”, but in the nationalist era the name provides all the necessary value. A nation’s territory is undoubtedly one of its important symbols. Austria’s Prince Metternich once famously dismissed the Italian peninsular as a “geographical expression” But, for Italian nationalists the boot of Italy had an altogether different significance, in the words

at p. 270; Crawford op. cit. no. 87 at p. 90; Chowdhury loc. cit. no. 289 at p. 74; Akehurst op. cit. no. 90 at p. 248; A. Rigo Sureda, Evolution of the Right to Self-Determination (A. W. Sijthoff, Leiden, 1973) at p. 216; Bhalla op. cit. no. 112 at p. 98; M. Rady, “Self-Determination and the Dissolution of Yugoslavia” 19 Ethnic and Racial Studies (1996) pp. 379-390 at p. 385; Alfredsson op. cit. no. 89 at p. 45.

319 Fishman op. cit. no. 161 at p. 41; Armstrong op. cit. no. 14 at p. 9; Smith op. cit. no. 63 at p. 183.
of Guiseppe Mazzini:

“God… divided Humanity into distinct groups upon the face of our globe, and thus planted the seeds of nations. Bad governments have disfigured the design of God, which you may see clearly marked out, as far, at least, as regards Europe, by the courses of great rivers, by the lines of lofty mountains, and by other geographical conditions; they have disfigured it by conquest, by greed, by jealousy of the just sovereignty of others… But the divine design will infallibly be fulfilled. Natural divisions, the innate spontaneous tendencies of the peoples will replace the arbitrary divisions sanctioned by bad governments… To you who have been born in Italy, God has allotted, as if favouring you specially, the best-defined country in Europe… God has stretched round you sublime and indisputable boundaries; on one side the highest mountains of Europe, the Alps; on the other the sea, the immeasurable sea.”

The significance attached to geographical features has also shaped the application of self-determination in international law. Many nations, such as Japan or the Philippines, cover different islands, but in General Assembly resolution 1541(XV) it was geographical separation by sea, the “salt-water test”, which was effectively used to define non-self-governing peoples. On the other hand, in the Åland Islands dispute the Commission of Rapporteurs considered that the crucial factor in defining a nation was not a stretch of sea in itself, but the number of islets and rocks that it contained.

Territory may also be connected with other ties, such as history and descent. Robert Redslob remarked that: “[t]he history of a people is simultaneously the history of its soil”, and there may be visible reminders of this in battlefields, monuments and ruins. Similarly, the soil may be the resting-place for a nation’s ancestors and provides a crucial link between past and present. In the Zimbabwean independence struggle, for example, nationalists used ancestral spirits tied to the land to mobilise peasant support. The role of territory in symbolising the identity of a nation is graphically illustrated an a tale by Czechoslovakia’s first president Thomas Masaryk about his time in Serbia:

“During the last war against the Turks I happened to be in Serbia, and a Serbian officer told me his experience on the battlefield. When at the head of his regiment of peasant soldiers he reached the plain of Kosovo, the famous ‘Field of the Blackbirds’, a deathlike silence seized the whole detachment; men and officers, without any command, uncovered

323 Mazzini op. cit. no. 24 at p. 52.
their heads, crossed themselves, and each of them tried to tread softly, so as not to disturb
the eternal sleep of their heroic ancestors. (Here my friend, quite lost in the remembrance
of that great experience unconsciously imitated their gait, and his voice fell to a whisper as
he recalled the silence of his soldiers.) Many of the weather-beaten faces were bedewed
with unconscious tears, as was my friend’s face as he spoke.”

Kosovo, of course, also shows the problem in the significance attached to a national territory. In
the ethnic cleansing conducted by Serb authorities in 1999 the territory of Kosovo was seen as
more valuable than the people who lived on it.

Territory, then, plays an important role in nationhood and this has significant implications for
the shape of the law of self-determination. The law of self-determination is usually characterised
by a series of balances between the self-determination of peoples, and territorially based
principles like territorial integrity and the inviolability of frontiers. However, this may be more
than just a balance of principles. How the principles are weighed may reflect the relative
importance of the elements of population and territory in the definition of a nation.

f. History

In 1998 Armenia submitted a report to the Human Rights Committee, in which it outlined the
historical background to the conflict over the disputed Armenian enclave of Nagorno-Karabakh
in Azerbaijan:

“Nagorny-Karabakh, which like Nakhichevan, had formed an integral part of the Armenian
state for thousands of years, was incorporated in the Soviet Union in 1920 and, by an
arbitrary decision of an unconstitutional and unauthorized party organ, the Caucasian
Bureau of the Central Committee of the Russian Communist Party (Bolsheviks) dated 5
July 1921, was transferred to the Soviet Republic of Azerbaijan… As a result, the right of
peoples to self-determination was flouted and the will of 95 per cent of the population of
Nagorny-Karabakh and of the population of Soviet Armenia was not taken into
consideration.”

This provoked Azerbaijan to write a letter to the Secretariat of the Commission on Human Rights
in which it rejected the historical basis of Armenian claims:

“If we look back to ancient times, historical facts confirmed by the research of Strabon and
Plutarch unequivocally testify the existence at those times of the Albanian state on the
territory which included present-day Nagorno-Karabakh region, the population of which
was the precursor of the modern Azerbaijan nation.

Independent Azerbaijani Khanate that was created later and covered the territory of the
present-day Nagorno-Karabakh region of the Republic of Azerbaijan, during the days of
feudal division on the threshold of XIXth century became the arena of strategic rivalry
between Russian and Persian Empires. Under this circumstances, in accordance with the
Agreement of 1805 the Karabakh Khanate was transferred to the Russian Empire. Gulistan

Masaryk op. cit. no. 10 at p. 32.
and Turkmenchay peace treaties of 1813 and 1828, that ended the Russian-Iranian wars fixed Azerbaijan, including the Karabakh Khanate, as a part of Russia. During this period the mass migration of Armenians started from the Middle East to Transcaucasia including, *inter alia*, the territory of the present-day Armenia and the region of Azerbaijan which is known today as Nagorno-Karabakh. It is a matter of historical fact that only in 1828-9, 130,000 Armenians from Middle East were resettled in Transcaucasia; later another 600,000 were also resettled. Thus, taking into account that the settlement of Armenians in Transcaucasia began only in the first part of the XIXth century, Nagorno-Karabakh region and any other part of the Azerbaijani territory could not be ‘…an integral part of the Armenian State for thousands of years…’

These statements by Armenia and Azerbaijan contain very different interpretations of Nagorno-Karabakh and national ties. One highlights the characteristics and will of the population, the other emphasises territory. However, the common thread running through both is their use of historical ties to add legitimacy to national ideas. It was not enough to emphasise territory or the characteristics of the population, those ties also had to have historical depth. Whether Azerbaijani possession dated from ancient times or 1920, or whether Armenian occupation had been for thousands of years or from the nineteenth century was important for the legitimacy of those claims.

Historical ties, then, play an important role in adding depth and legitimacy to national ideas. They also add weight to legal principles. For the principle of self-determination historical ties have been considered particularly significant for establishing a relationship between a population and a territory. The argument has often been made that populations which lack a historic connection to a territory, “settlers” do not have a right to self-determination. Equally, historical ties may bolster territorial integrity. It has been claimed that, in a balance between self-determination and territorial integrity, the latter may prevail to allow the recovery of the territory by a state regardless of the wishes of the population if that state has a historic connection to it. These are, of course, legal arguments. The position of historical claims in

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333 Smith *op. cit. no.* 63 at pp. 200-1.

334 Argentina: “A Colonial Power from outside the continent which drove out the indigenous population and replaced it by an imported population in a territory more than 8,000 miles away from the metropolitan country could not invoke the right to self-determination in order to preserve an anachronistic colonial situation by using a military force which outnumbered the population by two to one. Nor was it possible to classify as self-determination the expression of the wishes of the officials and employees of the company exploiting the territory, who made up the majority of that population. A population was not necessarily a people, as was made clear by the position taken by the United Nations during the decolonization process: the word ‘people’ described a social entity possessing a clear identity and distinct characteristics, it presupposed a relationship to a territory, even if the people in question had been unjustly expelled from that territory and replaced by a non-indigenous population… Paragraph 6 of resolution 1514(XV) moreover excluded from the definition of the right to self-determination ‘any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country…’.” 37 GAOR (1982) 3rd Cmtee., 11th mtg., (A/C.3/37/SR.11) para. 16. Spain: “Gibraltar, geographically and historically an integral part of Spain, differed from other colonial Territories that had been seized by force in that it had been made into a military base by the colonial Power. Gibraltar was a colony of the United Kingdom, even if the real inhabitants of the Territory were not a colonial people. That people was not an indigenous population; it was composed of descendents of British settlers and others whom the colonial Power had brought to Gibraltar.” 6 *Spanish Yearbook of International Law* (1998) at p. 140.
international law, as will be seen further on, is not entirely clear. Indeed, considering that many nations have been shaped by migrations, this raises the question of how long a population must live in a territory to have a connection to it?

Aside from legitimacy, historical ties undoubtedly perform an important functional role in the creation of nations. The consolidation of states, the development of languages and their literature, the emergence of customs and traditions may be the product of a string of events and processes. However, these may not necessarily be the historical ties that are highlighted by nationalists. As history is important for political legitimacy, historical facts may be selected or discarded, not according to their original importance, but whether they fit a particular idea of a people.

Even new nations need a sense of history. Many African states, although undoubtedly the creations of European colonialism, have, nonetheless, appealed to an earlier heritage, however spurious. The former British colony of Nyasaland renamed itself “Malawi” on independence in 1964, after the Maravi people, who founded a seventeenth century empire in the south of the country, and who are considered the ancestors of many of its tribes. (There is no present Maravi tribe). The Maravian Empire did, at least, encompass part of the modern Malawian state (as well as bits of Zambia and Mozambique). The former British colony of the Gold Coast, however, changed its name to “Ghana” after a great medieval empire, despite the fact that historical Ghana had never formed part of its territory, lying 350 miles to the north-east. The name, though, was intended to establish, “a glorious past for the Gold Coast, which would provide a symbol around which nationalists could draw inspiration.”

Continuing in this tradition, the west African state of Dahomey in 1975 became “Benin” after a powerful fifteenth-eighteenth century kingdom, which lay 200 miles east of its borders in present day Nigeria. History in nationalism, therefore, performs a distinct role. Traditions may be manipulated or invented, and historical figures may be ascribed different motives from those they originally had. Sometimes the creation of a national history has even been helped by blatant forgery.

This symbolic role of historical ties may obscure their functional role in the development of a nation. Slovakia, for example, claimed before the Human Rights Committee that Slovak independence was the accomplishment of, “the 1,000-year efforts of the Slovak nation”. And over a thousand years before an event did take place, which profoundly effected the future development of the Slovak people. By the ninth century a powerful state known as the Moravian Empire had emerged in the region around the watersheds of the Vah and Moravia rivers, an area which includes the Slovak capital, Bratislava. The people of the empire were local Slavs, and

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335 Judge Petén, Separate Opinion, Western Sahara (Advisory Opinion), ICJ Reports (1975) p. 110; Musgrave op. cit. no. 128 at p. 255.
337 Smith op. cit. no. 63 at p. 147.
341 Slovakia, CCPR/C/81/Add.9, (1996) p. 4.
Slovak nationalists viewed them as their ancestors and the empire as the original Slovak state.\textsuperscript{342} However, ironically, it was not the creation of this empire that was crucial for the emergence of a Slovak people, but its destruction.

By the tenth century the empire had been overrun by Hungarians and their kingdom was established in 905 AD. It was this division of the Slovaks in Hungary from the Czechs, who lived in neighbouring Bohemia and Moravia, that lead to the development of separate Czech and Slovak identities. Czech nationalism in the nineteenth century grew out of the Kingdom of Bohemia and an existing sense of Bohemian patriotism. However, it made slower progress to the east in Moravia, which was a separate political unit in the Hapsburg Empire,\textsuperscript{343} and for Slovaks in Hungary, with completely different political circumstances, it made less impression still.

Ethnic Hungarian, or Magyar nationalists in the nineteenth century were often decidedly hostile to other ethnic groups, which, depending on how they were counted, formed either a large minority or the majority of the kingdom. On separate occasions the Hungarian government had pursued a policy of Magyarisation against these groups. In the words of radical nationalist Louis Kossuth, “a Slovak nation has never existed even in a dream.”\textsuperscript{344} Slovaks spoke a language close to the Moravian dialect of Czech.\textsuperscript{345} But, Slovak nationalists faced with this political climate believed their best prospect to avoid assimilation was to develop a language as close to the people as possible. A written language already existed in biblical Czech, but even in Bohemia this was seen as archaic. These people were, if anything, sympathetic to the Czechs, but their different political circumstances demanded that they develop separate languages and identities.\textsuperscript{346} Slovaks may look back to the Moravian Empire as the predecessor of their state, but if that state had survived one might today talk of “Moravians” rather than separate Czech and Slovak peoples.\textsuperscript{347}

Returning to the original example of Armenia, Azerbaijan and Nagoro-Karabakh, it can be noted that many of the historical ties used by both sides to support their claims were somewhat spurious. Azeri claims to be the successor to the ancient Caucasian Albanian state (no relation to Albania in the Balkans) were somewhat undercut by the fact that Caucasian Albanians adopted the script and eventually the language of the Armenians.\textsuperscript{348} The Azerbaijani nation was, in fact, an essentially twentieth century phenomenon. It was only around the time of the First World War that the idea of the Azeris as a Turkic Azerbaijani nation, rather than simply Tatars or Caucasian Muslims, really developed.\textsuperscript{349} The Azerbaijan SSR also played an important role in the consolidation of an Azerbaijani people, which may explain the particular significance of territorial integrity in the Azerbaijani concept of nationhood.\textsuperscript{350} However, the Azeris are correct in their assertion that the large Armenian population in Nagoro-Karabakh only dated from immigration.

\textsuperscript{342} H. Kohn, “Romanticism and Realism among the Czechs and Slovaks” 14 Review of Politics (1952) pp. 25-46 at pp. 26, 35-6; Seton-Watson op. cit. no. 14 at p. 169.
\textsuperscript{343} Kohn loc. cit. no. 342 at p. 25; Hroch op. cit. no. 13 at pp. 44, 60.
\textsuperscript{345} Kohn loc. cit. no. 342 at p. 25.
\textsuperscript{346} Seton-Watson op. cit. no. 344 at p. 261.
\textsuperscript{347} S. H. Thomson, Czechoslovakia in European History (Princeton University Press, Princeton, 1953) at pp. 239-41.
\textsuperscript{349} Goldenberg op. cit. no. 265 at pp. 11, 30.
\textsuperscript{350} Ibid., at p. 41; Dragadze op. cit. no. 268 at p. 282.
in the nineteenth century. In the 1820s Muslims formed a large majority, perhaps more than 90%, of the population of the region.\footnote{Goldenberg op. cit. no. 265 at p. 158.}

There is also a difference between the use of history to bolster the legitimacy of political claims and the historical basis of that politics. As the two statements were intended for the former, they neglected a historical event which is crucial for understanding the present conflict because it involved the actions of a third party: Turkey. In 1915 the Young Turk regime, in what was the first act of genocide inspired by a nationalist ideology (Pan-Turanism), and which lead to the coining of the phrase “crimes against humanity”,\footnote{E. Schwelb, “Crimes Against Humanity” 23 British Yearbook of International Law (1946) pp. 178-226 at p. 181.} killed over a million Armenians.\footnote{R. Melson, Revolution and Genocide: On the Origins of the Armenian Genocide and Holocaust (University of Chicago Press, Chicago, 1992); H. Fein, “Genocide: A Sociological Perspective” 38:1 Current Sociology (1990), pp. 1-126 at pp. 69-75.} The Azeris are a people closely related to the Turks and Armenians do not tend to draw a distinction between them. Nagorno-Karabakh was not the only Armenian irredentia outside the Armenian SSR. Georgia had an Armenian population over twice the size, forming 8% of its population.\footnote{Joffé op. cit. no. 262 at pp. 15, 27; Goldenberg op. cit. no. 265 at p. 101; E. M. Herzig, “Armenia and the Armenians” in G. Smith ed., The Nationalities Question in the Post-Soviet States (Longman, London, 1996) pp. 248-68 at p. 263.} However, the possession of Nagorno-Karabakh by Azerbaijan was especially galling for the Armenians because it symbolised that the “Turks” (as the Azeris were seen) were “getting away” with the genocide.\footnote{Herzig op. cit. no. 354 at p. 255; Walker op. cit. no. 348 at p. 105.}

In conclusion, Ernest Renan once wrote that: “Forgetting, and, I would even say, historical error are an essential factor in the creation of a nation”.\footnote{Renan op. cit. no. 164 at p. 50.} Historical ties are undoubtedly important in defining peoples and nations, but this very importance means that their significance may change from their original context. National self-determination itself is not a particularly old doctrine and the use of historical ties in the right, it should be noted, is to use them in the context of post-eighteenth century politics.

\section*{g. Race and Descent}

The ideas of race and descent play a number of roles in nationality and have also informed the principle of self-determination. First, like history, ideas of a shared descent add depth to national ideas and may also provide a connection to a glorious past. Descent, for example, has allowed Greek nationalists to claim the heritage of the Hellanic city-states, Romanians to connect themselves to Rome and the legions of the Emperor Trajan,\footnote{Seton-Watson op. cit. no. 14 at p. 15.} and the Welsh to dream of ancient Celtic warriors.\footnote{P. Morgan, “From Death to a View: The Hunt for the Welsh Past in the Romantic Period” in E. Hobsbawm and T. Ranger eds., The Invention of Tradition (Cambridge University Press, Cambridge, 1983) pp. 43-100 at pp. 67-9.} Such claims, though, should not be overplayed. The idea of a Greek ancestry, in particular, overlooked the role of a number of peoples, Macedonians, Romans, Teutons, Goths, Albanians and Slavs, in forming the modern Greek nation.\footnote{J. Campbell and P. Sherrard, Modern Greece (Ernest Benn, London, 1968) at p. 21; W. Connor, Ethnonationalism: The Quest for Understanding (Princeton University Press, Princeton, 1994) at pp. 215-6.}
In fact, nations as large human groups have over time inevitably tended to assimilate other groups and individuals. The assimilated are generally lost from view and this obviously helps racial theories. Their legacy, though, may remain in a name: the names of individuals or in some cases the name of a nation. The Bulgarians and Croats are thought of as Slavic peoples. But, the original Bulgarians were a Turkic people who conquered the Slav population in Bulgaria and then totally assimilated with them, while name Croat (Hrvat) has Iranian origins. Likewise, the French are thought of as a Latin people, although their name comes from the Germanic Franks.

A second feature of ties of race and descent, though, is most significant for international law and that is their fundamentally exclusionary nature. Of all national ties, ties of race and descent are the most exclusive. A person can learn another language or perhaps change religion, but they cannot change their descent. It has even been argued in the drafting of the UN draft Declaration on the Rights of Indigenous Peoples that to use race in the definition of a people was to violate the principle of non-discrimination. This has been particularly significant in defining colonial self-determination. As outlined earlier, anticolonial nationalism in Asia and Africa was typically lead by western educated native elites. These elites were the product of the colonial system and to various degrees received a western education and filled a variety of positions in colonial society. However, at the same time, they were also excluded by the ingrained racism of the colonial regime.

This racial discrimination had two effects on the development of nationality and nationalism. First, race became in opposition a defining feature in national identity. Black nationalists, not just in Africa but also in Europe and the Americas, developed a variety of doctrines around a Black identity: from the Pan-African idea of a single African/Black people to theories like Leopold Senghor’s Negritude or those of Edward Blyden, which celebrated a Black genius. Second, race became a defining feature in the right of self-determination in international law. In colonial self-determination “peoples” were usually defined politically and territorially as the population of a colony. However, they undoubtedly also had a racial element, as essentially non-white populations. Accordingly, self-determination was effectively interpreted as freedom from...
white arbitrary rule and was closely connected with the elimination of racial discrimination. Thus, in the Colonial Independence Declaration, GA Res. 1514(XV), and especially in the Friendly Relations Declaration, GA Res. 2625(XXV), the satisfaction of self-determination was defined as the absence of distinctions of “race, creed and colour”. It also meant that self-determination in decolonisation was not restricted to colonial territories, but extended to peoples under other “racist régimes”. These categories will be examined in more detail later on, but they underline the importance of race in the law of self-determination.

Concluding Remarks

This chapter has looked at the doctrines of nationalism and self-determination and their relationship with international law. The law of self-determination is the product of the interaction of these doctrines, but this also puts it in an unfortunate position. Self-determination and international law, although sharing a nexus in the state, are fundamentally different in their approach, one focussed on the people, the other on the state. Between them they provide two standards of legitimacy which any position in the law of self-determination can never completely fulfil. Nonetheless, as the nation-state is rooted at the foundations of international law, self-determination necessarily occupies a central position in the legitimacy of that law. From this position, the doctrine, which is itself profoundly ambivalent about international law, can be appealed to either to support or to challenge legal rules.

The basis for the interaction between nationalism and international law is the relationship between national ties and legal principles. National ties and legal principles enjoy a close connection and the four legal principles examined here, self-determination, territorial integrity, state sovereignty and the protection of frontiers, are quite capable of encapsulating different national ties. Correspondingly different configurations of legal principles and the weight attached to each principle may reflect different interpretations of nations and national ties. In addition these principles may shaped by the institutional context in which the right of self-determination is exercised. Self-determination is essentially a rhetoric for the achievement of certain political goals. In this regard legal principles may support the political structures which form the basis for nationalist politics.

This chapter has outlined the basic framework in which nationalism/national self-determination and international law interact. The following chapters will examine details of this interaction: how it shapes the drafting of instruments, the behaviour of courts and tribunals and the concept of legal obligations. However, the next chapter will first look at the historical context

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370 Michael Eisner: “While the theory of international law evolved to forbid all colonial subjugation, international law in practice focused only on Western imperialism in the Third World. The development of the ‘pigmentational sovereignty test’, which emphasizes the racial differences between ‘Europeans’ and the Third World in assessing whether or not a colonial relationship exists, reflects this focus. Accordingly, alien means white, and subjugation involves white hegemony over people of color.” Eisner loc. cit. no. 89 at p. 410; Higgins op. cit. no. 169 at p. 106; Pomerance op. cit. no. 90 at p. 16; Emerson loc. cit. no. 176 at p. 204; A. A. Mazrui, “Consent, Colonialism and Sovereignty” 11 Political Studies (1963) pp. 36-55 at pp. 48-9.

371 See, for example, the preamble, the International Covenant on the Elimination of All Forms of Racial Discrimination: “Considering that the United Nations has condemned colonialism and all the practices of segregation and discrimination associated therewith, in whatever form and wherever they exist, and that the Declaration on the Granting of Independence to Colonial Countries and Peoples of 14 December 1960 (General Assembly Resolution 1514(XV)) has affirmed and solemnly proclaimed the necessity of bringing them to a speedy and unconditional end…” 5 ILM (1966) pp. 350-68 at p. 352.
in which this interaction developed.
2

The Historical Development of Self-Determination

“In the old European system, the rights of nationalities were neither recognised by governments nor asserted by the people. The interest of the reigning families, not those of nations regulated the frontiers... and a princess, in the words of Fénelon, carried a monarchy in her wedding portion.”

LORD ACTON, 1862.¹

“The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.”

THE COLONIAL INDEPENDENCE DECLARATION,
GA RES. 1514(XV), 1960.²

**Outline**

These two comments, made just over a century apart, point to a radical change in the perception of political authority. “The principle of the right of a people to self-determination”, the International Commission of Jurists noted, “seems self-evident”.³ But, the fact that it seems natural now does not mean that it has always been so. Rather what is self-evident today has actually been the product of a long historical process. This chapter will chart that process. It will begin with the formation of nation-states in western Europe in the late middle ages and conclude at the point where self-determination gained international currency at the end of the First World War.

The aim of this chapter, then, is about challenging perceptions. It seeks to peel back and scrutinise what initially appears self-evident. In this regard, it will connect two doctrines which superficially seem polar opposites: nationalism and international law. The two have, in fact, far more in common than one might think. Both, in different ways, are doctrines defined by the modern state and arguably represent necessary responses to the emergence of that type of organisation. Indeed, the histories of nationalism and international law are often so closely connected that they can be incorporated into a single narrative. This narrative consists of the rise of the modern state, and the relationship between three doctrines which seek to make sense of that institution. These are international law, nationalism and liberalism, and the interaction

² GA Res. 1514(XV), 15 GAOR (1960), Supplement No. 16 (A/4684) at pp. 66-7.
between the three has defined the context in which self-determination has developed.

1. The Foundations for National Self-Determination

The end of the First World War, then known as the Great War, in 1918 released new hopes and aspirations. The old empires of Europe had crumbled and nation-states were emerging from their ruins. In a phrase for the times peoples had a right to “self-determination”. The idea held the promise that henceforth peoples could live under the government of their choice.

A necessary element, though, in letting the people decide is to first find out who they are. To that end, ethnographers were dispatched to the far corners of Europe to determine the nationality of the people there. In some of the more far-flung of those corners they met peasants in small, isolated villages living a way of life little different from that of the previous centuries. Now the outside world intruded into theirs and brought strange men asking strange questions. When they were asked about their nationality, the peasants replied, perhaps with a look of bemusement or with a shrug of the shoulders, “we belong here”, or we are “from hereabouts”. In the towns people were generally more helpful, but if they identified themselves with a nation, was that answer any more instinctive than that of the peasants?

The right of peoples to self-determination is a political argument and one based on a very particular idea. It presumes that nations and peoples constitute a single homogeneous unit, the “self”, which forms the basis for political authority. This is, in fact, a very specific vision, and although self-determination presents it as a natural one, it actually relies on a number of conditions. Nationalism first emerged in the eighteenth century, with some elements appearing in the seventeenth, and it arrived at that time because the necessary conditions for the argument were then in place.

Throughout history there have been groups which have distinguished their own culture from that of others. The ancient Greeks, for example, made a clear distinction between their own civilisation and the “barbarians” around them. Indeed, the word nation (natio), itself, dates from Roman times, and referred to people united by birth, although in Roman and even medieval usage it was applied to people from the same town or area. Self-determination, though, is more than simple ethnocentrism. The right, in fact, would have been meaningless to the ancient Greeks. These populations were undoubtedly patriotic, but their political life was centred on their respective city-states not on their culture or a Greek people. Indeed, they would have found the very idea of Greek nationhood incomprehensible and insulting. They believed that they were a unique civilisation, not one nation among others, alongside the barbarians.

A similar distinction between a country and barbarian outsiders was made in medieval Italy.

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Niccolò Machiavelli (1469-1527) in *The Prince* famously called for a leader to drive the barbarians out of Italy, but this also did not mean that he necessarily saw Italy as a nation in the modern sense. Even in the nineteenth century, after the first abortive attempt at unification in 1848, the historian Luigi Blanch commented on the Italian identity: “the patriotism of the Italians is like that of the ancient Greeks, and is the love of a single town, not of a country; it is a feeling of a tribe, not of a nation. Only by foreign conquest have they ever been united. Leave them to themselves and they split into fragments.” Although the right of self-determination presents itself as natural, it is the product of particular political, economic, social and cultural circumstances.

The first of these relates to the state. Self-determination proposes that a nation or a people is the basis for legitimate political authority. But, the other side of this is that it presumes the existence of political units, which can accommodate a national political life. However, where the story of self-determination begins, which is in early medieval western Europe, this was not how states, at least large ones, could be described. The feudal state, rather than a forum for national politics, was typically a loose collection of provinces with different laws and traditions, united only by the fairly distant authority of a monarch. In such states self-determination was largely meaningless. There was no centralised national power, rather it was diffused through different levels of the feudal structure. It was only when states developed institutions to exercise national authority, i.e. on a uniform basis throughout their territory, that the rhetoric of self-determination could acquire relevance. This was the context of the modern state.

Second, self-determination assumes that individuals are organised into nations and peoples, and that these groups are the primary focus for their identity and the principal basis for political action. However, for most of human history, life for most people centred on the locality. As John Armstrong, who made a case for *Nations Before Nationalism*, noted: “Generally… a lower class (especially in sedentary agricultural societies) cannot constitute a group as persistently conscious of its identity as an ethnic collectivity”. This was, though, “a matter of degree rather than absolute.” Peasants in agricultural societies may have had an awareness of a wider national community, but for them it was likely to be something distant and abstract compared to local loyalties. And there were good reasons for this. Physical mobility was low and for most people their world rarely stretched far beyond their immediate surroundings. The locality was something readily tangible: the place of their family, friends and neighbours; the land that gave them sustenance and formed the background against which they lived their lives. This intimate homeland was very different from the large, anonymous homeland of the nation.

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9 G. Bull, “Introduction” in Machiavelli *op. cit. no. 8* at p. 11.
14 Kohn *op. cit. no. 8* at p. 8.
The shift in identities from the local to the national may be seen in various words expressing the concept of a homeland. A good example is the Bengali word *desh*. *Desh* has a meaning equivalent to “home” or “place of origin”, both in a geographical and social and cultural sense. Traditionally, it was applied to a village or district. However, by the beginning of the twentieth century it was increasingly attached to Bengal province or India, and, in 1971 was incorporated into the name of a state: Bangla Desh.\(^{16}\) Similarly the French word *pays* (country, land, region) was originally used by most Frenchmen simply to refer to their locality and not to describe France.\(^{17}\) The factors which helped people develop these wider identities, improved transport and communications, mass literacy, increased trade etc., belong more to the modern era.

Third, self-determination proposes that the basis for political authority is a single homogeneous people. This does not mean that the rhetoric of self-determination cannot be used by elites, but those elites must justify their authority on the basis of a people. This emphasis on power being held by the whole people, rather than a privileged section of it, is a specific repudiation of aristocratic privileges. However, in the medieval period and for a long time afterwards these privileges defined political life. Even in the nineteenth century British statesman Benjamin Disraeli wrote of two nations: “between whom there is no intercourse and no sympathy; who are as ignorant of each other’s habits, thoughts and feelings as if they were… inhabitants of different planets; who are formed by a different breeding, are fed by different food, are ordered by different manners, and are not governed by the same laws”.\(^{18}\) He was talking about rich and poor.

This idea of two nations, though, was quite an accurate reflection of the political and social situation even at that time. In many European countries for centuries the ruling and lower classes had been literally two nations. Ethnic Swedes ruled over Finns in Finland, Magyars (ethnic Hungarians) over Slavs and Romanians in Hungary, Germans over different Slav peoples in various lands and French-speakers over Germans in the German states. Holy Roman Emperor Charles V (r. 1519-56) even claimed that he only ever spoke German to his horse.\(^{19}\) In a literal example of these divisions Transylvania in 1437 was divided into a union of three nations: Magyars, Saxons, and Székels (Magyar speakers of Avarian descent). But, this only related to the identity of the ruling classes. Romanians were excluded from this union because they were only the common people.\(^{20}\) National self-determination assumed relevance once this social stratification started to erode. Indeed, it was the part of the population least tied to feudal divisions and with the greatest social and economic mobility that took the lead in using the language of nations and peoples to gain political power.

In fact, the effect of “two nations” on self-determination can be seen in Poland around Disraeli’s time. The country at the time was divided between Prussia, Russia and Austria. In 1846 nationalists in Austrian Poland, who were drawn mainly from the land-owning class, planned a national uprising to shake off foreign domination and restore their country’s


\(^{17}\) Weber *op. cit. no. 13* at p. 46.

\(^{18}\) B. Disraeli, *Sybil; or the Two Nations* (Longmans, Green, and Co., London, 1877) at p. 76.


independence. However, their revolt was pre-empted and they were massacred: not by the Austrians, but by peasants, by definition the Polish people themselves, who considered the tyranny of their landlords for more serious than anything exercised by Austria. This is the substance behind the nationalist counter-argument that if there is effectively no people or those who claim to represent it do not, self-determination cannot function.

Fourth, the basic assertion of self-determination that a people or a nation is the basis for political authority is also essentially a secular one. Even though, as has been seen, nations can encompass religious ties and nationalism can ally itself with religious institutions, self-determination finds the basis for authority in peoples not in faith. However, in medieval Europe monarchs claimed their powers from God, the so-called divine right of kings. Self-determination, therefore, depended on the development of a rational, secular approach to political authority. This took place with the Enlightenment of the seventeenth and eighteenth centuries, which rooted power not in the divine, but in natural laws, which could apply to nations and peoples. It may be, as Alfred Cobban put it, that, eighteenth century nationalism replaced the, “Divine right of Kings”, with the, “Divine right of the People”, but it did shift the basis of authority from the otherworldly to this world.

Thus, while self-determination presents itself as a natural political argument, it, in fact, depends on particular circumstances. It needed national political institutions, a broadening of identities, social and economic mobility and a secular approach to politics. It was only when those conditions were in place that the rhetoric of national self-determination could become relevant.

2. The Nation-State and Internal and External Sovereignty

The Peace of Westphalia 1648, which recognised a system of independent states, is usually seen as a watershed in the development of international law. However, it was also representative of a far wider process. The sovereign states of western Europe at the time of Westphalia were the product of major changes over the preceding centuries. These were changes that laid the foundations for the doctrines of liberalism, nationalism, international law and the right of self-determination.

The medieval European state, unlike the modern nation-state, was not a consolidated political unit. Politics and culture in medieval Europe was profoundly split. Life for most people was centred on the locality. This was good for small, localised states, like the Italian city-states, which could evoke a strong sense of patriotism in their inhabitants, but large kingdoms were often a loose patchwork of regions, with different laws, cultures and traditions. The authority of a king was limited by the power of the nobles and so remote from many of his subjects that they

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21 Kann op. cit. no. 20 vol. I at p. 228. Similar tensions were also evident in the 1863 uprising in Russian Poland. See also R. F. Leslie, Reform and Insurrection in Russian Poland 1856-1865 (Athlone Press, London, 1963) at pp. 208, 216-8, 221, 226, 236-43.
22 Kohn op. cit. no. 8 at p. 3
could pass from one kingdom to another without much sense of loss. Not only were the powers of kings limited, and their states politically and culturally fragmented, but above them was the Pope and a Latin lingua franca. In 800 A.D. Pope Leo III crowned the Frankish king, Charlemagne as Emperor, successor to the Caesars, establishing the idea of the dual universal authority of Pope and Emperor.

However, in the centuries prior to Westphalia a parallel process was taking place. Monarchs in European kingdoms were consolidating their powers. By taking control of justice and taxation and expanding the administration, they redirected political life away from feudal structures towards a centralised state. And people were drawn into this life, most obviously a growing body of officials and lawyers, but also ordinary people whose rights and obligations were transferred from the local to what is tellingly known as the “national” level. The erosion of feudal divisions and the growth of towns, in turn, created new social and economic opportunities for an emerging middle class. As for the monarchs themselves, this nation-building was not guided by a sense of national destiny, but the simple need to increase their power and incomes, and, far from being a natural process, it was achieved in the face of concerted and sometimes violent opposition. The kingdoms were also developing their own cultural identities, with English becoming the language of the English parliament in 1362 and French becoming the sole official language of France in 1539. These vernacular languages gained prestige at the expense of Latin as mediums of culture and knowledge.

The consolidation of authority at the national level was not only taking place internally. The emergence of these states as European powers challenged the pretensions of the Pope and Emperor to universal authority. Thus, the Catholic kings of Spain and Portugal in the treaties of Tordesillas and Saragossa in 1494 and 1529 explicitly excluded the Pope’s dispensation in their division of the new world. The challenge to papal and imperial authority in those countries also

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27 Hayes op. cit. no. 15 at p. 31; C. A. Macartney, National States and National Minorities (Oxford University Press, London, 1934) at pp. 35-6.
30 Shafer op. cit. no. 29 at pp. 36-8.
31 Macartney op. cit. no. 27 at p. 38.
33 Tilly op. cit. no. 29 at pp. 21-5.
35 Kohn op. cit. no. 8 at p. 155.
36 Seton-Watson op. cit. no. 32 at p. 48.
38 Nussbaum op. cit. no. 28 at p. 53.
came from juridical thinkers, like Jean Bodin (1530-96) in France. Bodin’s theory of sovereignty (written tellingly in French) expressed the consolidation of power in the hands of the absolute monarchs, both internally within their kingdoms and externally against other powers. Sovereignty was, on the one hand, “the most high, absolute and perpetuall power over the citizens and subjects in a Commonweale”, and on the other, there was “nothing upon earth… greater or higher, next unto God, than the majestie of kings and soveraigne princes”.

These internal and external aspects of sovereignty laid the political foundations for liberalism, nationalism and international law. For liberalism, the internally sovereign monarchy and the breaking of feudalism and growth of a middle class, meant that politics could be redirected from collective, hierarchical feudal ties towards individualism and equality. The centralisation of power and growth of a bureaucracy created the possibility of a direct relationship between king and subjects governed by law. Once this had been established, there was then possible to curb the power of the absolute monarchy with the rule of law, constitutionalism and representative government. For international law, the external aspect of sovereignty created the potential for a new system of law, which had the independent, sovereign state as its basic unit. For nationalism, like liberalism, internal sovereignty, the breaking of feudalism and the growth of the middle classes allowed people to think in national rather than traditional social terms. Without the obstacles of feudalism, political power could be seen to be between a government and a nation. External sovereignty meant that states or nations were seen as distinct self-governing units.

Finally, the development of all three doctrines was boosted by the Reformation. The religious conflict between Protestantism and Catholicism of the sixteenth and seventeenth centuries allowed state-building monarchs to increase their independence, while Protestantism’s use of the vernacular gave a new dignity to national cultures at the expense of Latin. The conflict also impressed liberalism with the values of religious tolerance and freedom of conscience and expression. The culmination of this religious struggle was the Thirty Years War (1618-48), and its outcome, the Peace of Westphalia 1648, gave recognition to a long developing system of sovereign states. This was not only a victory for Protestantism, but also the political and cultural power of the nation-state. Indeed, it was a Catholic kingdom, France which emerged as the dominant European power, and French which began to replace Latin as an international lingua franca. “The Nation”, as Thomas Alfred Walker put it, “stood forth the
ripened product of the work of centuries”.  
There is no better illustration of these three interconnected aspects of the emerging nation-state than the work of the lawyer, politician, diplomat and “father of international law” Hugo Grotius (1583-1645). Grotius’ 1625 work *De Jure Belli ac Pacis* underlined the emergence of a system of sovereign states. The “human race” had become synonymous with “many nations [states]”. Sovereignty, the attribute of a state, meant that it was a power “whose actions are not subject to the legal control of another.” And it was this “great society of states” which was to be the main focus for international law. However, in his earlier years as an aspiring national politician, Grotius had also been actively involved in the development of a Dutch national identity. In particular, he helped in efforts to establish the idea of the Dutch nation as the successor to an ancient Batavian people, who lived on the frontiers of the Roman Empire, and justify the 1609 War of Independence from Spain as a national revolt. He was also influenced by liberal ideas, especially religious tolerance, and his definition of a state was clearly a liberal one: “a complete association of free men, joined together for the enjoyment of rights and for their common interest.” (This, though, must be weighed against many concessions to absolutism, such as allowing a people to be enslaved to a ruler and denying a general right of rebellion or that the desire for liberty was a just cause for war).

Thus, by the seventeenth century western Europe had developed the model of the territorially delimited, sovereign nation-state. This was a model that would later be exported to the rest of the world through European colonialism, and it was so effective that even those countries which escaped direct colonial rule still adopted it. Nationalism, international law and liberalism developed different aspects of this model and were similarly exported as part of a package of European ideas. Thus, in countries like China and Japan, nineteenth century national reform movements, which sought to restructure those states along European lines, learned their international law alongside their nationalism.

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54 Ibid. vol. II, prolegomena, p. 15, para. 17.


56 Grotius *op. cit. no.* 51 vol. II, bk. I, ch. I at §. XIV.


59 Ibid. vol. II, bk. II, ch. XXII, §. XI.


Government with the Consent of the Governed

Liberalism, nationalism and international law were not only connected at their foundations, but also developed together. As the delegates assembled in Westphalia in 1648, they could also look to political changes then taking place in Britain. In England, the changes of the past few centuries, the consolidation of the state with a focus on parliament and the growth of the middle classes, laid the foundations for revolution. The English Civil War of 1642, between Parliament and King Charles I (r. 1625-49), was largely a religious affair conducted between members of a political elite. However, at least among that elite, the revolution revealed an intense awareness of a national community and ideas of a national destiny which resembled those of later secular nationalism. It also saw a major reassessment of the nature of political authority, witnessed most dramatically with the execution of the king. Charles I may have said on the scaffold that a subject and a sovereign are clean different things, but new political theories found the basis for government in the consent of the people.

In a second English revolution, the Glorious Revolution of 1688-9, James II (r. 1685-8), who ruled by the divine right of kings, was deposed and replaced by Parliament, which, while again representing an elite, legitimised itself as representative of the nation. The revolution’s philosopher was John Locke (1632-1704). His theory of government with the consent of the governed in his *Two Treatises of Government*, published within months of the revolution, became the standard interpretation of those events.

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65 John Milton: “It being thus manifest that the power of Kings and Magistrates is nothing else, but what is only derivative, transferr’d and committed to them in trust from the People, to the Common good of them all, in whom the power yet remains fundamentally, and cannot be tak’n from them, without a violation of thir natural birthright”. J. Milton, “The Tenure of Kings and Magistrates” in *Complete Prose Works of John Milton* (Yale University Press, New Haven, 1962) pp. 189-258 at p. 202.

Henry Parker: “I conceive it is now sufficiently cleared, that all rule is but fiduciarie, and that this and that Prince is more or lesse absolute, as he is more of lesse trusted, and that all trust differ not in nature or intent, but in degree only and extent: and therefore since it is unnaturall for any Nation to give away its owne propertie in it selfe absolutely, and to subject it selfe to a condition of servilitie below men, because this is contrarie to the supreme of all Lawes, wee must not think that it can stand with the intent of any trust, that necessarie defence should be barred, and naturall preservation denied to any people; no man will deny, but that the People may use meanes of defence, where Princes are more conditionate, and have a sovereigntye more limited, and yet these being only lesse trusted than absolute Monarchs, and no trust being without an intent of preservation, it is no more intended that the Pople shall be remedilessly oppressed in a Monarchy, than in a Republike.” H. Parker, “Observations upon Some of his Majesties late *Answers and Expresses*” in W. Haller ed., *Tracts on Liberty in the Puritan Revolution 1638-1647* (Columbia University Press, New York, 1933) vol. II, pp. 167-213 at p. 186.
67 G. N. Clark, *The Later Stuarts 1660-1714* (Clarendon Press, Oxford, 1934) at p. 142. John Locke: “These… I hope are sufficient to establish the throne of our great restoror, our present King William; to make good his title, in the consent of the people... and to justify to the world the people of England, whose love of their just and natural
Locke presented an archetypal liberal theory of government, based on individual freedoms, the rule of law and the wishes of the people. Government was a trust instituted for the benefit of the governed and founded in their consent. Its object was the protection of the people’s lives, liberties and estates. If a government exercised power beyond its right (by definition “tyranny”), or infringed on the rights of the governed, then this trust was forfeited. Power returned to the hands of the governed, who could establish a new government in whatever form suited them best.

Although the basis for government ultimately rested with individuals, Locke explicitly grounded his theory in “the body of the nation”. A sense of nationhood effectively underpinned his system of representative government and the rule of law. However, this role of the nation supporting liberal government was significantly different from later theories of nationalism and national self-determination. The people in Locke’s theory was not collective body with corporate rights. Power did revert to society as a whole if the trust of government was forfeited, but the people were not conceived of as sovereign with the right to change and abolish institutions as they saw fit. Indeed, although government with the consent of the governed implied that this consent might be withdrawn, Locke believed that the removal of governments was exceptional and should not be undertaken lightly. His theory was essentially conservative. “Great mistakes in the ruling part, many wrong and inconvenient laws, and all the slips of human frailty”, could be tolerated by a people. Only, “a long train of abuses, prevarications and artifices, all tending the same way”, might lead to the dissolution of government.

Nonetheless, government with the consent of the governed meant that the people was a standard of legitimacy against which governments could be measured and found wanting. The 1776 Declaration of Independence by the American Continental Congress appealed to this doctrine to explain and legitimise the independence of thirteen American colonies from Britain, proclaiming that:

“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter it or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form as to them shall rights, with their resolution to preserve them, saved the nation when it was on the very brink of slavery and ruin.” J. Locke, Two Treatises of Government: A Critical Edition with an Introduction and Apparatus Criticus (P. Laslett ed.), (Second Edition), (Cambridge University Press, Cambridge, 1967) at Preface. However, it appears likely that most of the Two Treatises was written before 1688 and was in fact originally a call for a revolution than its later use as justification of one. Laslett in ibid. pp. 47, 65; M. Cranston, “John Locke and Government by Consent” in D. Thomson ed., Political Ideas (Penguin Books, Harmondsworth, 1969) pp. 67-80 at pp. 74-5.
seem most likely to effect their safety and Happiness...”  

Like Locke’s defence of the Glorious Revolution, its theory of revolt was essentially conservative:

“Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shown, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security. Such has been the patient sufferance of these colonies; and such is now the necessity which constrains them to alter their former Systems of Government.”

The Declaration continued that the colonies’ experience under the British King, George III, was, “a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States.” It then listed at length the acts which marked the king as a “Tyrant… unfit to be the ruler of a free People”. The “people”, like the English revolutions, was used as a basis for political legitimacy. Although many inhabitants of the colonies were indifferent, and a significant minority hostile, to the actions of Congress, the people were presented as a homogeneous group with identical experiences. However, despite these references to the people, the Declaration was an appeal for liberal rather than national government. Unlike later applications of the people, it did not argue that the colonies should be independent simply because they were a people, nor that nations were sovereign and the basis for states. The Declaration explicitly referred to “our British brethren” and stressed the Colonists’ loyalty to the British crown, which it asserted had not been reciprocated. Like the previous revolutions, the American Revolution was essentially fought to preserve existing liberties rather than innovate new ones. The elevation of the nation to the basis for the state would come with the French Revolution.

4. Liberalism, National Patriotism and the Law of Nations

The eighteenth century saw an enormous development in liberal and nationalist thinking. The nation was contemplated in the theories of key liberals like Thomas Paine and David Hume.  

78 Ibid. p. 272.  
82 “[T]he plain truth is, that it is wholly owing to the constitution of the people, and not to the constitution of the government, that the crown is not as oppressive in England as in Turkey.” T. Paine, “Common Sense” in T. Paine, The Complete Works of Thomas Paine (Freethought Press, New York, 1954) vol. II, pp. 1-66 at p. 7; “Every
Liberalism is a profoundly law-based philosophy and these considerations were also explored in legal works. French philosopher Charles de Montesquieu (1689-1755) in *The Spirit of the Laws* developed both the internal and external aspects of sovereignty with the “political” or “civil right”, within the state, and the “right of nations”, an elementary international law, outside it. Montesquieu’s notion of the “political right” was shaped by ideas of liberty and a general preference for democracy. However, this liberty was also closely connected with national patriotism. The foundation for popular government was what Montesquieu called “virtue”: “love of the laws and the homeland.” Moreover, the laws of each state were animated by “the spirit of laws”, which in large part derived from the country’s national character. Legislators were, “to follow the spirit of the nation”, as much as possible within their system of government, “for we do nothing better than what we do freely and by following our natural genius.”

A similar blending of liberalism, national patriotism and an emerging international law can also be seen in the 1758 *Le droit des gens* by Swiss jurist Emmerich de Vattel (1714-67). Vattel developed the internal aspects of sovereignty with many of the elements of liberalism. Sovereignty was established, “for the common good of all citizens”, and, even if it passed into the hands of certain people, Vattel argued that it was, “absurd to think that it could change its nature”, in doing so. The nation only has a duty to obey a monarch who acted within his authority (though Vattel did concede that in an absolute monarchy this could be very wide indeed). If he exceeded his authority, they had no obligation to follow him and the nation had the right to resist a tyrannical king. Integral to this constitutional order, as well as the relations between states, which were based on sovereign equality and non-intervention, was national identity. Vattel praised, “love of our country – a virtue so excellent and so necessary in a state”, and his descriptions of England and Switzerland clearly spoke of the rise of national societies.
He believed that a nation “ought to know itself”,93 that its government and laws should reflect its character,94 and that both rulers and citizens should labour for its glory.95 Externally, states were not only free, independent and equal,96 but also had their own will, a moral personality,97 and a majesty derived from the representation of a nation.98 Thus, Vattel produced a theory of the internal and external relations of of states with much of the colour of liberalism and national patriotism.

However, although liberalism and nationalism could be complementary, there was also a tension between them and this can be seen, in particular, in the work of the Swiss philosopher Jean-Jacques Rousseau (1712-78). Rousseau also developed a theory of popular self-government, but unlike Locke, his people was a collective sovereign entity, with a general will,99 and the right to erect, change or abolish institutions as desired.100 Rousseau even advocated that the people should be asked if they wanted to do this in each public meeting.101

Rousseau also recognised that this people needed a common identity and loyalty to function. His model was taken from the patriotic city-states of ancient Greece and his own native Geneva.102 Thus, in Considerations on the Government of Poland he argued for an education system to imprint children with a strong national identity.103 This became most developed in his Social Contract with a proposal for a “civil religion” to instil people with a sense of patriotism. However, if patriotism underpinned popular sovereignty, it could also seriously infringe on those individual liberties that Rousseau saw as the founding purpose for society. Organizations which promoted separate interests among the people could be banned.104 People who refused to adopt the civil religion could be banished for being “antisocial”, and those who did accept it but them acted against it could be put to death.105 The central theme in the Social Contract was how to

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92 “The example of the Swiss is very capable of showing how advantageous glory may prove to a nation. The high reputation they have acquired for their valour, and which they still gloriously support, has preserved them in peace for above two centuries, and rendered all the powers of Europe desirous of their assistance.” Ibid. bk. I, ch. XV, §. 190.
94 “Nations cannot be well-governed without such regulations as are suitable to their respective characters; and in order to this, their characters ought to be known.” Ibid. bk. I, ch. I, §. 25; bk. I, ch. II, §. 13; bk. I, ch. IV, §. 44.
95 Ibid. bk. I, ch. XV, §§. 186-91.
96 Ibid. preliminaries, pp. 1-vi, §. 4-5, xii-xiii, §§. 18-21.
98 Vattel op. cit. no. 88 bk. II, ch. III at §. 35
100 Rousseau “[T]his act of association creates an artificial and collective body composed of as many members as there are voters in the assembly, and by this same act that body acquires its unity, its common ego, its life and its will… Those who are associated in it take collectively the name people, and call themselves individually citizens, in so far as they share in sovereign power, and subjects, in so far as they put themselves under the laws of the state.” Rousseau op. cit. no. 99 bk. I, ch. 6, at pp. 61-2.
101 Ibid. bk. III, ch. 18, p. 148.
102 Thomson op. cit. no. 99 at p. 98; Cobban op. cit. no. 99 at p. 40; Kohn op. cit. no. 8 at pp. 242, 249.
104 Rousseau op. cit. no. 99 bk. II, ch. 3, pp. 73-4.
105 “There is thus a profession of faith which is purely civil and of which it is the sovereign’s function to determine the articles, not strictly as religious dogmas, but as sentiments of sociability, without which it is impossible to be either a good citizen or a loyal subject. Without being able to oblige anyone to believe these
reconcile individual liberty with social obligations, and it famously opened with the paradox: “Man was born free, and he is everywhere in chains.” But, Rousseau also highlighted the tension that could exist between liberalism and national patriotism as the sovereign people was elevated to the basis of government.

5. The French Revolution

   a. The Revolution

   In 1787-8 a power struggle erupted between the King of France, Louis XVI (r. 1774-92) and the nobility over their privileges. In August 1788 the king summoned the Estates General: composed of the nobility, clergy and the Third Estate (the middle classes): which had last convened in 1614, to assemble in May 1789. They met at a time of instability, with grain in short supply and a general breakdown in order throughout the country. The Estates General created a forum by which each estate could press for its rights and the Third Estate supported its demands by presenting them as those of the nation (defined as the body of people in a territory represented by a legislature). Abbé Sieyès (1748-1836), a prominent spokesman for the Third Estate, argued that: “The Third Estate includes everything that belongs to the nation; and everything that is not of the Third Estate cannot consider itself as being of the nation. What is the Third Estate? Everything.”

   A triangular power struggle subsequently developed between the king, the nobility and the Third Estate. On 17 June the Third Estate called itself a National Assembly and appealed to Louis XVI for the “natural alliance of Throne and People” against the aristocracy. However, on 23 June the king sided with the nobles and annulled the Third Estate’s decision to call itself a National Assembly. This was followed by a revolution in Paris, in which royal authority crumbled and the Third Estate assumed power. On 26 August 1789 political authority was transformed with the adoption of the Declaration of the Rights of Man and the Citizen, which laid out the rights of individuals and a liberal basis for the French state. This liberal order was underpinned by a national one. Power came from the citizens, and this included the innovative introduction of universal manhood suffrage, but the revolutionaries, or Jacobins also vigorously sought to unite the people with a common identity.

   Individual rights and national patriotism went hand in hand, as expressed in the slogan “liberty, equality, fraternity”. In that vein the Declaration, in articles I and II, outlined the basic principles of liberal government: “Men are born, and always continue, free, and equal in respect to the external sovereign can banish from the state anyone who does not believe them; banish him not for impiety but as an antisocial being, as one unable sincerely to love law and justice, or to sacrifice, if need be, his life to his duty. If anyone, after having publicly acknowledged these same dogmas, behaves as if he did not believe in them, then let him be put to death, for he has committed the greatest crime, that of lying before the law.”

   106 Ibid. bk. I, ch. 1 at p. 49.
   108 Quoted in Kohn op. cit. no. 107 at p. 21.
   110 Ibid. vol. 1, p. 144.
of their rights.” “The end of all political associations, is, the preservation of the natural and inprescriptible rights of man”. Article III, in turn, proclaimed the basic principle of political nationalism: “The nation is essentially the source of all sovereignty; nor can any INDIVIDUAL, or ANY BODY OF MEN, be entitled to any authority which is not expressly derived from it.”

Thomas Paine, in his 1791 commentary, called the three articles, “the basis of Liberty, as well individual as national”. Nationalism and liberalism were integral and interconnected elements of the revolutionary order.

As the sovereign nation was the basis of all legitimate political authority, institutions became only an expression of its will. Under dynastic absolutism Louis XVI had reigned as “King of France and Navarre”, now he became, “King of the French”. The basis for his crown was the nation and representatives of the nation could (and later would) strip him of it. This was an important innovation on government with the consent of the governed. The sovereign people could erect or dismantle institutions and rewrite laws literally at will. In the words of Abbé Sieyès:

“The Nation exists before all things and is the origin of all. Its will is always legal, it is the law itself... Nations on earth must be conceived as individuals outside the social bond, or as is said, in the state of nature. The exercise of their will is free and independent of all civil forms. Existing only in the natural order, their will, to have its full effect, only needs to possess the natural characteristics of a will. In whatever manner a nation wills, it suffices that it does will; all forms are valid and its will is always the supreme law.”

However, if the people assumed a fundamental political and legal role, it also did so as a political idea and this idea did not necessarily have to match the people who actually lived in France. As Liah Greenfeld noted:

“The People worshipped, however, was not the same as the people actually existing; it was some other – quite imaginary – twenty-four million Frenchmen. And since both the term ‘people’ in its new, lofty meaning and ‘nation’ referred to an abstraction, rather than an empirical reality, the glorification of the People did not necessarily imply a belief in the equal dignity of all those who composed it, the masses and elite alike.”

This new concept of the “people”, though, had profound implications for international law. On the basis of the principle of equality, the National Constituent Assembly abolished feudal privileges throughout France. However, in Alsace the rights of German Princes had been guaranteed by the Treaty of Westphalia and the solemn promises of Louis XIV. The princes claimed that if the French government abolished those rights, it would be in breach of its treaty commitments. If their rights were to be changed, they argued, a new treaty would have to be negotiated. The Assembly referred the matter to a special committee. On 31 October 1790 its rapporteur, Philippe Antoine Merlin de Douai, concluded that under the traditional law the

111 Declaration of the Rights of Man and of Citizens quoted in Paine op. cit. no. 82 at pp. 94-5.
112 Ibid. p. 98
113 Cobban op. cit. no. 109 vol. 1 at p. 164.
115 Quoted in Cobban op. cit. no. 109 vol. 1 at p. 165.
116 Greenfeld op. cit. no. 37 at p. 169. See also Weber op. cit. no. 13 at p. 112.
princes would indeed have a valid claim. However, this law was only the product of the errors of kings and the ministers. The French nation had declared itself sovereign and the will of the people was the basis for the union with Alsace not a treaty. Moreover, as the will of the people (expressed by the Assembly) was that the princes should not be compensated, they should receive nothing.\footnote{E. Kedourie, \textit{Nationalism} (Hutchinson, London, 1960) at pp. 16-7; Kohn \textit{op. cit. no.} 107 at p. 48.}

This principle of the sovereign people allowed France to acquire new territories, not by treaties, but by expressions of popular will. Plebiscites were held in the Papal enclaves of Avignon and the Comtat Venaissin, in July 1791\footnote{S. Wambaugh, \textit{A Monograph on Plebiscites with a Collection of Official Documents} (Carnegie Endowment for International Peace, New York, 1920) at pp. 33-40.}, and in the Sardinian territories of Savoy and Nice in September 1792\footnote{Ibid. pp. 43-5.} and January 1793.\footnote{Ibid. pp. 45-51.} Each recorded positive votes for union with France. In those territories the people generally welcomed the new régime. It was a different story, however, in Belgium where people proved stubbornly attached to their existing laws and traditions. The will of the people there for union in spring 1793 was obtained by systematic repression.\footnote{C. J. H. Hayes, \textit{The Historic Evolution of Modern Nationalism} (MacMillan, New York, 1931) at p. 80; Cobban \textit{op. cit. no.} 109 vol. 1 at p. 213.}

By this time the character of the revolution was changing dramatically. The revolution was being resisted on a number of fronts. In April 1792 the Legislative Assembly had declared war on Austria. This was a revolutionary war to bring the light of the revolution to the rest of the world and a year later France would be fighting most of Europe.\footnote{R. R. Palmer, \textit{The Age of Democratic Revolution: A Political History of Europe and America 1760-1800} (Princeton University Press, Princeton, 1959) vol. I at p. 501; Schama \textit{op. cit. no.} 114 at p. 475.} However, within France the idea of the people was also creating conflict. A single people demanded a single political system and to this end provinces and regional liberties were abolished.\footnote{C. Tilly, \textit{Coercion, Capital, and European States, AD 900-1990} (Basil Blackwell, Cambridge: Mass., 1990) at pp. 112-3; Kohn \textit{op. cit. no.} 107 at p. 23.} But, people in the regions, especially those that had been recently incorporated into France, proved stubbornly attached to their traditional rights, and in many places this resistance erupted into violence.\footnote{Cobban \textit{op. cit. no.} 109 vol. 1 at p. 165.}

In other ways France was deviating from its original revolutionary idea. As the National Assembly expressed the will of the nation, its sovereignty was unlimited, without restrictions from either French or international law. Indeed, such restrictions were considered unnecessary because it was believed that a nation was incapable of exercising tyranny over itself.\footnote{Cobban \textit{op. cit. no.} 109 vol. 1 at p. 235.} However, by the time of the Belgian vote the National Convention, the successor to the National Assembly, had broken into deadly rival factions and the terror was beginning. Confronted with internal and external enemies, the Jacobin idea of the French people narrowed to only the virtuous patriot.\footnote{The \textit{Oxford Dictionary of Quotations} (E. Knowles ed.), (Fifth Edition), (Oxford University Press, Oxford, 2001) at p. 719.}

It had become a dangerous ideal. Abbé Sieyès, who at the start of the Revolution had been one of its greatest spokesmen, was fortunate enough to later reflect back on what he had achieved: “\textit{J’ai vécu} (I survived).”\footnote{Ibid. vol. 1 at p. 235.} But, Sieyès’ constitutional experiments would still provide yet another example of how national glory could sweep aside individual liberty. After the terror, he proposed
a new constitution in 1799. This time, instead of an unlimited legislature, there would be a powerful executive, and the man who would fill that role was Napoleon Bonaparte.128

b. Edmund Burke’s Reflections on the Revolution

The French Revolution proclaimed that the nation was the basis for legitimate political authority. This nationalist argument, however, created the possibility for a counter-argument and one was most notably raised by Irish-born British parliamentarian Edmund Burke. Burke’s perspective on nationalism was very different from that of the revolution. He supported the American colonists, condemned the partition of Poland,129 and criticised Genoa’s cession of Corsica to France.130 Significantly for future developments of self-determination he also pioneered the doctrine of “trusteeship”, extending the liberal notion of government as a trust to colonial possessions.131 Nonetheless, he also represented the conservative end of the liberal tradition and objected, in particular, to the innovation of the sovereign nation. Nations and states, in his opinion, could not be created or abolished at will, rather they grew out of a long historical development:

“[A] nation is not an idea only of local extent, and individual momentary aggregation; but it is an idea of continuity in time as well as in numbers and in space... it is made by the peculiar circumstances, occasions, tempers, dispositions, and moral, civil and social habits of the people, which disclose themselves only in a long space of time.”132

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128 Cobban op. cit. no. 109 vol. I at p. 258.
129 “[N]o wise or honest man can approve of that partition, or can contemplate it without prognosticating great mischief from it to all countries at some future time.” E. Burke, “Observations on the Conduct of the Minority” in The Works of Edmund Burke (George Bell & Sons, London, 1876) pp. 467-510 at p. 482.
130 “Thus was a nation disposed of without its consent, like the trees on an estate”. Quoted in A. Cobban, Edmund Burke and the Revolt against the Eighteenth Century (George Allen and Unwin, London, 1960) at p. 108.
131 “[T]hey must grant to me in my turn, that all political power which is set over men and that all privilege claimed or exercised in exclusion of them, being wholly artificial, and for so much a derogation from the natural equality of mankind at large, ought to be some way or other exercised ultimately for their benefit. If this is true with regard to every species of political dominion, and every description of commercial privilege, none of which can be original, self-derived rights, or grants for mere private benefit of the holders, then such rights, or privileges, or whatever you choose to call them, are all in the strictest sense a trust; and it is of the very essence of every trust to be rendered accountable; and even totally to cease, when it substancially varies from the purposes for which alone it could have lawful existence.” E. Burke, “Speech on Mr. Fox’s East India Bill” in The Works of Edmund Burke (George Bell & Sons, London, 1876) vol. II, pp. 173-248 at p. 178; “We ought to elevate our minds to the greatness of that trust to which the order of Providence has called us. By advertting to the dignity of this high calling, our ancestors have turned a savage wilderness into a glorious empire; and have made the most extensive, and the only honourable conquests, not by destroying, but by promoting the wealth, the number, the happiness of the human race.” E. Burke, “Speech on Moving His Resolutions for Conciliation with the Colonies”, in The Works of Edmund Burke (George Bell & Sons, London, 1876) vol. I, pp. 450-512, p. 509. See also C. E. Toussaint, The Trusteeship System of the United Nations (Frederick A. Praeger, New York, 1956) at pp. 5-7; H. D. Hall, Mandates, Dependencies and Trusteeship (Stevens & Sons, London, 1948) at pp. 33, 98-9; H. Kohn, “The United Nations and National Self-Determination” 20 Review of Politics (1958) pp. 526-45 at p. 531; D. Rauschning, “International Trusteeship System” in B. Simma ed., The Charter of the United Nations: A Commentary (Oxford University Press, Oxford, 1994) pp. 933-48 at pp. 933-4.
Burke evoked the idea of the nation as a permanent body composed of transitory parts: individuals. As a whole, a nation was, at any one time, neither old, middle aged nor young, but instead moved through the decay, fall, renovation and progression of its human elements. A national political system was passed from generation to generation: “We... wish, to derive, all we possess as an inheritance from our forefathers.” Without this link, men were, “little better than the flies of a summer.”

This did not mean that there was no opportunity for reform: “A state without the means of some change is without the means of its conservation.” However, political reform was to be based on a country’s heritage: “a good patriot, and a true politician always considers how he shall make the most of the existing materials of his country”. The two guiding principles were “conservation” and “correction”. If part of a system was defective, its replacement was to be modelled on the parts that worked well: “in what we improve, we are never wholly new; in what we retain, we are never wholly obsolete.” Invoking an analogy of organic natural growth, Burke cautioned against grafting on a, “scion alien to the nature of the original plant”, in other words, creating institutions not rooted in the national tradition. This reform was a practical business to be conducted by “great lawyers and great statesmen” not “warm and inexperienced enthusiasts”.

Historical development not universal principles lay at the root of national society. “I Never govern myself”, Burke claimed, “no rational man ever did govern himself, by abstractions and universals.” Society was highly complex: circumstances were infinite, infinitely combined, variable and transient. Principles might be necessary to prevent politics degenerating into a confused jumble, but government was to be guided by circumstances, not subordinated to a theory. Liberty might be desirable in the abstract, but the critical test was how it was combined with the practice of government. A statesman, he cautioned, should not be confused with a professor, and a person who attempted to govern on the basis of a theoretical principle, “may ruin his country for ever.”

In Burke’s opinion this is what the French Revolution had done. The French Kingdom, though flawed, was not an incurable despotism, and was open to reform. Nonetheless, the Jacobins had turned their backs on the nation’s history, and armed with, “the polluted nonsense of their most licentious and giddy coffee-houses”, created new institutions without roots in the French tradition. In doing so, he argued, the essence of France had been separated from the French state. This was, of course, a nationalist argument. The Jacobins derived their political

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134 Ibid. p. 305.
135 Ibid. p. 367.
136 Ibid. p. 295.
137 Ibid. p. 428.
138 Ibid. p. 295.
139 Ibid. p. 307
140 Ibid. p. 305.
141 Ibid. p. 290
144 Burke op. cit. no. 133 at pp. 398-403.
146 Cobban op. cit. no. 130 at pp. 50, 123.

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legitimacy from the French nation. Burke attacked that legitimacy by distancing them from it, and he did so in a very particular way. He placed the emphasis in the definition of a nation on historical and political ties, expressed through an evolutionary tradition, and, at the same time, reduced the significance of the will of the people at any given point in time. This formula might be called the “conservative counter-argument” against popular sovereignty, and, as will be seen later, it can also be used against self-determination.

6. The Nationality Principle

a. The Congress of Vienna 1815

The nationality principle, the principle that the nation and the state should be congruent, played little part in the Napoleonic Empire. Napoleon sometimes toyed with nationality, turning one of his own creations, the Cisalpine Republic into the republic and then kingdom of Italy. However, although he used plebiscites to cement his power and legitimise possessions, he distrusted the people and erected states and borders by convenience not nationality.

With Napoleon’s defeat a new European system was established at the Congress of Vienna in 1815. The 1815 settlement restored many territories to their former dynastic rulers and proposed a system of balance of power with the creation of buffer states between the self-styled Great Powers. Vienna was condemned by nationalists and liberals alike as reactionary; above all in its

147 Conversely, Thomas Paine, in his defence of the French Revolution, Rights of Man: Being an Answer to Mr. Burke’s Attack on the French Revolution, correspondingly criticised Burke by distancing him, in turn, from both the English and French nations: “There is a general enigma running through the whole of Mr. Burke’s book... If his assertions were as true as they are groundless, and that France, by her Revolution, had annihilated her power, and become what he calls a chasm, it might excite the grief of a Frenchman (considering himself as a national man), and provoke his rage against the National Assembly: but why should it excite the rage of Mr. Burke? Alas! it is not the Nation of France that Mr. Burke means, but the Court; and every Court in Europe, dreading the same fate, is in mourning. He writes neither in the character of a Frenchman nor an Englishman, but the fawning character of that creature known in all countries, and a friend to none, a Courtier. Whether it be the Court of Versailles, or the Court of St. James or Carlton-House, or the Court in expectation, signifies not; for the caterpillar principles of all Courts and Courtiers are alike. They form a common policy throughout Europe, detached and separate from the interest of Nations: and while they appear to quarrel, they agree to plunder. Nothing can be more terrible to a Court or a Courtier, than the Revolution of France. That which is a blessing to Nations, is bitterness to them”. Paine op. cit. at p. 126. More generally: “It is now very probable, that the English government (I do not mean the nation) is unfriendly to the French revolution.” Ibid. p. 232.


reconfirmation of the notorious partition of Poland by the “triple gang”, Prussia, Russia and Austria. These three states formed the Holy Alliance to resist what those governments saw as the dangerous principles of liberalism and nationality. Nonetheless, the settlement did make a modest concession to national rights, according Poles under Russian, Prussian and Austrian rule national institutions as those states considered it expedient and proper to grant them.

The nationality principle and popular sovereignty provided principles to challenge Vienna and the dynastic institutions it reaffirmed. This challenge was made by nationalist movements, but also by states in their diplomacy, above all by France which had most interest in breaking the system imposed after its defeat. With the rise to power of Napoleon III in 1848 the nationality principle became a centrepiece of French foreign policy. Nonetheless, despite being incorporated into some states’ constitutions, appealed to in diplomacy, implemented in treaties and promoted as the basis for international law by some jurists like the Italian P. S. Mancini, the nationality principle in the nineteenth century remained a political rather than a legal one.

Writing in 1910 John Westlake argued that it was better for it to remain so, raising the familiar legal criticism of, “the indefiniteness and instability of all the characters on which nationalities are based”. “Nationalities”, he continued, “though often important in politics, must be kept outside international law.” However, the line between international law and the politics of nationality was inevitably a thin one. Although a political principle, nationality did increasingly form the basis for the basic unit of international law, the state, and the reorganisation of states by nationality was duly recognised in legal instruments, like treaties.

b. Liberal Nationalism

The nationality principle encompassed a variety of nationalist doctrines, but one which was particularly important for the development of self-determination and its subsequent position in international law was liberal nationalism. The industrial revolution of the early nineteenth

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151 Johann Kaspar Bluntschli: “The Congress of Vienna, with utter disregard of national rights, distributed fragments of great peoples among the restored dynasties. As Poland had already been divided among Russia, Austria, and Prussia, so now Italy and Germany were cut up into a number of sovereign states, and Belgium and Holland pieced together into one kingdom, in spite of conflicting nationalities.” Bluntschli op. cit. no. 148 at p. 94; Jeremy Bentham: “Oh, how we used to talk, and talk of Poland! and how we used to curse the Fredericks great as they were, not to mention other persons.” J. Bentham, “Papers Relative to Codification of Public Instruction” in J. Bowring ed., The Works of Jeremy Bentham (William Tait, Edinburgh, 1838) vol. IV, pp. 450-533 at pp. 529-30.
152 Article I, Act of the Congress of Vienna, 9 June 1815, 64 CTS, pp. 453-93 at p. 457.
157 See Carty op. cit. no. 153 at p. 4.
158 See Hayes op. cit. no. 122 ch. 5, at pp. 120-63.
century brought a number of important social and political changes to developing national societies. Industrialisation and commercial farming broke down traditional ties to the land and encouraged the growth of cities. Social mobility enlarged and increasingly depended on education. New technologies, like the railways, and improved road systems lead to freer movement and expanded trade, breaking down local economies. Postal services and newspapers allowed the exchange of ideas. A new class of factory owners and businessmen emerged who challenged the constraints of traditional agricultural society and did so through political liberalism. By the 1830s liberal governments had been established in Britain and France, although elsewhere it made less of an impact. This revived liberalism stood above all for freedom: political freedom by individual liberties and representative government; economic freedom by freedom of trade and contract. It was not surprising, then, that liberals were also attracted to another type of freedom: national freedom.

Liberals were attracted to nationalism for a number of reasons. For one thing, liberals and nationalists were often on the same side. The most illiberal states in Europe were multinational ones, like Russia, Prussia and Austria, or fragments of a nation, like the German and Italian states. The nationality principle provided a basis to challenge the title of those emperors, kings and princes, and many national movements, especially the Risorgimento movement to unite Italy, had liberal leaderships. Liberals, therefore, had reason to believe that national government would enhance liberal government. But, there were also more fundamental considerations. Liberals were concerned with the establishment of representative government. Like Rousseau, they understood that popular self-rule required a sense of solidarity and a common identity among the population. Representative government was believed to be more effective in a state where the population shared an identity and where significant cultural barriers did not exist between them. As John Stuart Mill noted in his work Considerations on Representative Government: “Free institutions are next to impossible in a country made up of different nationalities. Among a people without fellow feeling, especially if they read and speak different languages, the united public opinion, necessary for the working of representative government, cannot exist.” Similarly, T. H. Green argued that: “In some states, from want of homogeneity or facilities of communication, a representative legislature is scarcely possible.”

Liberalism was not only attracted to nationalism. The law of nations also provided a doctrine for the realisation of liberal principles. These three elements, liberalism, nationalism and the

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161 Weber op. cit. no. 13 at pp. 212-21.
165 T. H. Green, Lectures on the Principles of Political Obligation (Longmans, Green & Co., London, 1917) at p. 126. See also pp. 130-1.
law of nations were synthesised, in particular, by the great liberal thinker and father of utilitarianism, Jeremy Bentham, who in 1789 coined the phrase “international law”.

Bentham’s international law was infused with liberal nationalist values. He envisioned a society of nations which worked together for the advancement of mankind: “nations are associates and not rivals in the grand social enterprise.”

Love of country could be compatible with love of humanity, while the, “unjust love of country which turns to hatred against other nations”, was to be rejected. In a series of essays later titled Principles of International Law Bentham developed this idea of a community of nations conducting their relations on the basis of mutual utilitarian benefit, facilitated by common institutions, like an international court.

“But ought the Sovereign of a State to sacrifice the interests of his subjects for the advantage of foreigners?” Bentham asked. “Why not? – provided it be in a case, if there be such an one, in which it would have been praiseworthy in his subjects to make the sacrifice themselves. Probity itself, so praiseworthy in an individual, why should it not be so in a whole nation?”

Liberal nationalism encompassed the nationality principle, but the rights of nations were balanced on two levels. Above the nation were the interests of humanity. “Your first duties”, Italian nationalist Giuseppe Mazzini argued, “are... to Humanity. You are men before you are citizens or fathers.”


171 Ibid. p. 563.

172 “1. The first object of international law for a given nation: – Utility general, in so far as it consists in doing no injury to the other nations respectively, saving the regard which is proper to its own well-being. 2. Second object: – Utility general, in so far as it consists in doing the greatest good possible to other nations, saving the regard which is proper to its own well-being. 3. Third object: – Utility general, in so far as it consists in the given nation not receiving any injury from other nations respectively, saving the regard due to the well-being of these same nations. 4. Fourth object: – Utility general, in so far as it consists in such state receiving the greatest possible benefit from all other nations, saving the regard due to the well-being of these nations. It is to the two former objects that the duties of a given nation ought to be recognised. It is to the two latter that the rights which it ought to claim may be referred.” Bentham op. cit. no. 150 at p. 538.

173 Ibid. p. 547.

174 Ibid. p. 537.

175 Hayes op. cit. no. 122 at p. 135.

176 “Your first duties – first, at least, in importance – are, as I have told you, to Humanity. You are men before you are citizens or fathers. If you do not embrace the whole human family in your love, if you do not confess your faith in its unity – consequent on the unity of God – and in the brotherhood of the Peoples who are appointed to reduce that unity to fact... you disobey your law of life, or do not comprehend the religion which will bless the future... But what can each of you, with his isolated powers, do for the moral improvement, for the progress of Humanity?...divided as you are in language, tendencies, habits and capacities, you cannot attempt this common work. The individual is too weak, and Humanity too vast. My God, prays the Breton mariner as he puts out to sea, protect me, my ship is so little, and Thy ocean so great! And this prayer sums up the condition of each of you, if no means is found of multiplying your forces and your powers of action indefinitely. But God gave you this means when he gave you a Country, when, like a wise overseer of labour, who distributes the different parts of the work according to the capacity of the workmen, he divided Humanity into distinct groups upon the face of our globe, and thus planted the seeds of nations.” J. Mazzini, “The Duties of Man” in T. Jones ed., The Duties of Man and Other Essays (J. M. Dent & Sons, London, 1912) at pp. 51-2.
historian František Palacký, “I place the interests of humanity and science forever above those of nationality.”\(^\text{177}\) National rights were to be exercised as members of an international community. “What is the reasonable limit of the law of nationalities?” Asked Italian jurist Pasquale Stanislao Mancini. “Other nationalities.” “What finally is the ultimate aim of the law of nations?” He continued. “The humanity of the nations of Vico; that is to say, the celebration of humanity and its civil progress in the free, harmonious and full development of nationalities.”\(^\text{178}\) Nationality not only respected humanitarian goals, the relationship was also considered to be reciprocal. Thus, Swiss jurist Johann Kaspar Bluntschli believed that: “The fact that we have begun to demand recognition for the rights of nationalities implies an advance in civilisation.”\(^\text{179}\) This was because civilisation was founded on different peoples: “The very fact that the one humanity parts into many peoples, enables it by means of their competition and their manifold energies to unfold all those hidden powers of its nature which are capable of common development, and to fulfil its destiny more abundantly.”\(^\text{180}\) Similarly, in the opinion of New York law professor Francis Lieber: “The civilized nations have come to constitute a community, and are daily forming more and more a commonwealth of nations, under the restraint and protection of the law of nations”.\(^\text{181}\) National societies, he continued, were “wholly independent, sovereign, yet bound together by a thousand ties.”\(^\text{182}\) But, this international society needed a national basis in order to properly function: “Without a national character, States cannot obtain that longevity and continuity of political society which is necessary for our progress.”\(^\text{183}\)

On the other hand, national rights were balanced from below by individual freedoms. “Where the sentiment of nationality exists in any force,” Mill argued, “there is a prima facie case for uniting all the members of the nationality under the same government, and a government to themselves apart.” “This”, he continued, “is merely saying that the question of government ought to be decided by the governed.”\(^\text{184}\) Pasquale Mancini, anticipating later discussions about “internal” and “external” self-determination, considered that there were two forms essential for the expression of nationality: “the free internal constitution of the Nation, and its independent autonomy in the face of foreign Nations. The union of both is the naturally perfect state of a Nation, to its ethnarchy”.\(^\text{185}\) Again for Francis Lieber: “The highest national polity yet developed is the representative national government”.\(^\text{186}\)

Not all liberals, though, were so convinced that nationality complemented individual liberty. British liberal historian Lord Acton, in reply to Mill’s reflections on nationality, argued that, “nationality does not aim either at liberty or prosperity, both of which it sacrifices to the imperative necessary of making the nation the mould and measure of the State.”\(^\text{187}\) He continued: “By making the State and the nation commensurate with each other in theory, it reduces practically to a subject condition all other nationalities that may be within the boundary. It cannot admit them to an equality with the ruling nation which constitutes the State, because the

\(^{177}\) Quoted in Kann op. cit. no. 20 vol. I at p. 176.

\(^{178}\) P. S. Mancini, Della Nazionalità come Fondamento del Dritto Delle Genti (Turin, 1851) at p. 63.

\(^{179}\) Bluntschli op. cit. no. 148 at p. 89.

\(^{180}\) Ibid. pp. 85-6.

\(^{181}\) F. Lieber, Fragments of Political Science on Nationalism and Inter-Nationalism (Charles Scribner & Co., New York, 1868) at p. 22.

\(^{182}\) Ibid. at p. 22.

\(^{183}\) Ibid. at p. 8.

\(^{184}\) Mill op. cit. no. 164 at pp. 360-1.

\(^{185}\) Mancini op. cit. no. 178 at p. 43.

\(^{186}\) Lieber op. cit. no. 181 at p. 5.

\(^{187}\) Acton op. cit. no. 1 at p. 299.
State would then cease to be national, which would be a contradiction of its existence. According, therefore, to the degree of humanity and civilisation in that dominant body which claims all the rights of the community, the inferior races are exterminated, or reduced to servitude, or outlawed, or put in a condition of dependence.”

“The co-existence of several nations under the same State”, in his opinion, “is a test, as well as the best security of its freedom.”

Other limits to the application of the nationality principle in liberal nationalism were expressed in relation to colonialism. Jeremy Bentham did not exclude the right to self-government from colonial peoples and in an address to the French people entitled *Emancipate Your Colonies* argued:

> “You choose your own government: why are not other people to choose theirs? Do you seriously mean to govern the world, and do you call that *liberty*? What has become of the rights of men? Are you the only men who have rights? Alas! My fellow citizens, have you two measures? ...

> …think then what may be the feelings of the colonists. Are they Frenchmen? – they will feel like Frenchmen. Are they not Frenchmen – then where is your right to govern them?

> …Do they like to be governed by you? Ask them, and you will know. Yes why ask them, as if you did not know? They may be better pleased to be governed by you than by anybody else; but is it possible they should not be still better pleased to be governed by themselves?”

Within Bentham’s critique was a coupling of the equal rights and self-determination of peoples, a formula which would later be taken up by the anticolonial declarations of the twentieth century. Indeed, the Saudi delegate to the United Nations later remarked in the debate on the Colonial Independence Declaration, that Bentham’s address, “was said just as though he were speaking to this Organisation in 1960.”

Other liberals, though, did not follow Bentham’s approach. The frequent references to civilisation, progress, science and humanity in liberal nationalism were not without their implications. The nationality principle was seen to be especially applicable to large, developed nations who could serve mankind. Conversely, size and development became the two principal factors limiting the application of the principle. “Not every people is capable of creating and maintaining a State”, Bluntschli argued, “only a people of political capacity can claim to become an independent nation. The incapable need the guidance of other and more gifted nations”.

John Stuart Mill argued that it was better for, “a Breton, or a Basque of French Navarre… to be a member of the French nationality, admitted on equal terms to all the privileges of French citizenship… than to sulk on his own rocks… revolving in his own little mental orbit,

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188 Ibid. at pp. 297-8.
189 Ibid. at p. 290.
193 Bluntschli op. cit. no. 148 at p. 103.
Mill outlined a liberal approach to colonialism, dividing British possessions into those which he considered were capable of representative government and those which were not. If colonies capable of representative government wanted to separate from the empire, he argued that justice and morality required that they should be allowed to do so. For those incapable of representative government, though, colonial rule was legitimate if it advanced their development. Mill invoked the Burkan concept of trusteeship. This, he claimed, was, “the highest moral trust which can devolve upon a nation” and those who did not aim for it were “selfish usurpers, on a par in criminality with any of those whose ambition and rapacity have sported from age to age with the destiny of masses of mankind.” This liberal notion of colonial government as a trust became prominent in Anglo-American thought. For example, in December 1900 President McKinley described the America’s possession of the Philippines as a, “trust which should be unselfishly discharged.”

Such ideas, however, were based on the assumption that good government could be an acceptable alternative to national government. This, though, was challenged in the Ionian Islands, a chain of islands off the west coast of Greece which had been assigned to Britain as a protectorate in 1815. In 1844 a nationalist movement emerged in the islands demanding union with the Greek Kingdom, which, at the time, under the rule of King Otho enjoyed neither good nor liberal government. In 1858 the leading British liberal statesman, William Gladstone was dispatched to the islands with the promise of building good government. However, Gladstone quickly found that Ionian politicians wanted not better British rule but Greek national government. With his reforms blocked by the Ionian parliament, he departed in early 1859. The Ionians, British Indian viceroy, Lord Lytton observed bitterly, preferred “a bit of bunting with the Greek colours on it” to the promise of British “good government”. The islands were later transferred to Greece in 1863 in a diplomatic agreement, the Treaty of London, which included the relatively innovative measure that the union was subject to the approval of the Ionian parliament.

The nationality principle was not itself inherently liberal. It only stated that the nation and the state should be congruent. It did not demand that government should be representative, nor that it should respect individual liberties. Nationalism did have affinities with liberalism, but it could equally be combined with illiberal doctrines. Moreover, there was always a tension in liberal nationalism. Which did a liberal nationalist value most: liberal government or national government? If he had to choose one at the expense of the other, which would it be? As Carlton Hayes noted, in practice in the nineteenth century, liberal nationalism’s, “liberalism waned as its

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194 Mill op. cit. no. 164 at pp. 363-4.
195 Ibid. at pp. 376-7.
196 Ibid. at p. 380.
197 Ibid. at p. 382.
198 Quoted in Toussaint op. cit. no. 131 at p. 7.
202 Wambaugh op. cit. no. 118 at pp. 129-32.
nationalism waxed.”

This became evident in 1848, when, following an uprising in France, revolution broke out throughout Europe: in the German and Italian states, the Hapsburg Empire and Prussia. This brought liberals and nationalists briefly to power and gave them a chance to put some of their ideas into practice. In Germany, German liberals established a National Assembly in Frankfurt. However, debates in the Assembly saw the majority eschew the idea of community of nations in favour of German rights over the Danes, Poles and Czechs. In 1849 the Assembly clearly opted for nationalism over liberalism when, in an attempt to unify Germany, it offered the German crown to the absolutist Prussian monarch Frederick William IV, who had earlier crushed the brief attempt to liberalise his kingdom. The king replied that would never accept a crown from the gutter.

In Hungary the swing from liberal to nationalism was even more dramatic. Liberals in the Hungarian Diet in Pressburg (Bratislava) adopted a programme of Magyarisation against non-Magyar (non-ethnic Hungarian) groups. When a delegation of Hungarian Serbs pressed for a limited autonomy, the leadership replied: “The sword will decide between us.” And so it did. Hungary’s Slavs and Romanians allied themselves with the reactionary governments of Austria and Russia to destroy the short-lived regime.

c. The Nationality Principle in Practice

In the nineteenth century nationality was a principle for the organisation of states, the basic units of international law, and, although it was not a legal one at the time, its effects were recognised in legal instruments. Its first legal success was in the London Protocol 1830 which recognised an independent Greek kingdom, the first of a number of peoples to prise themselves away from the ailing Ottoman Empire. The revolution of 1848 saw nationalists briefly assume power in the Italian and German states, various parts of the Hapsburg Empire and the Danubian principalities, before the old governments were restored. These movements failed in no small part because of their narrow social base, which drew from the towns and the middle classes but not the wider population. However, the revolution in France of 1848, which sparked the revolts also saw the rise to power of Louis Napoleon (1808-73), who assumed the mantle of his famous/notorious uncle as the Emperor Napoleon III. Napoleon III, who in his

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206 Hughes op. cit. no. 19 at pp. 87-93; Hayes op. cit. no. 162 vol. 2 at pp. 96-7.
207 Quoted in Kann op. cit. no. 20 vol. 1 at p. 121.
208 Kann op. cit. no. 20 vol. 1 at pp. 121-5; Hayes op. cit. no. 162 vol. 2 at pp. 94-5; Macartney op. cit. no. 27 at p. 117.
210 Hayes op. cit. no. 162 vol. 2 at p. 91; Minogue op. cit. no. 107 at p. 70; Wambaugh op. cit. no. 118 at p. 59; Mack Smith op. cit. no. 10 at pp. 12-3.
youth had taken part in a nationalist uprising in Italy, made nationality a cornerstone of French foreign policy and a principle of international diplomacy.

His first opportunity to apply the principle was at the Vienna Conference of 1855. This conference was called in the aftermath of the Crimean War (1853-6), which pitted Russia against the Ottoman Empire, Britain, France and Sardinia. One of the issues on the table were the two Danubian principalities of Moldavia and Wallachia, Russian protectorates under Ottoman suzerainty which had been occupied by Austria during the fighting. Both Moldavia (not to be confused with today’s Moldova, then known as Bessarabia) and Wallachia were isolated feudal societies, sharply divided between the land-owning classes and the peasantry. But, the two were largely ethnic Romanian and there was a small nationalist movement composed mainly of men from the lower levels of the land-owning class, especially those who had been educated abroad in Paris.

France at the conference argued that the two should be united on the basis of nationality. It was supported by Russia, who, although an opponent of nationality, saw a united principality as a barrier to Austrian influence. Austria for the same reasons wanted the two to remain separate. It was backed by the Ottomans, who also thought a single principality would weaken their suzerainty, and Britain, at the time, was keen to support the Ottomans. At a second conference in Paris in 1856, however, Britain changed sides leaving Austria and the Ottomans in a weaker position. Arguing against the unification of the principalities the two made the tactical mistake of claiming that the inhabitants of the territories themselves did not want union. (The vast majority of the population were oblivious to such issues). Russia seized on this error by proposing a vote, and a provision on a plebiscite, subject to a final disposition by the conference, was included in the Treaty of Paris 1856. This was considered above all a triumph for Napoleon III and his sponsorship of nationality.

The plebiscite of July 1857 was a victory for continued separation. But, the vote was so plainly flawed, involving widespread fraud and intimidation by Austria’s allies in the principalities that acceptance of the results became a test of strength between the powers. In August Britain and France reached a new agreement for a less substantial union between the principalities. A new vote, which was basically seen as an endorsement of this accord, was a victory for union. In October nationalists in the Moldavian and Wallachian assemblies passed a resolution declaring that they were a single people and calling for autonomy, union, representative government and (that vital symbol of political legitimacy in the old politics) a

213 Ibid. pp. 16-9; Fischer-Galati loc. cit. no. 20 at pp. 50-3
214 Riker op. cit. no. 212 at pp. 27-9; W. G. East, The Union of Moldavia and Wallachia, 1859: An Episode in Diplomatic History (Cambridge University Press, Cambridge, 1929) at p. 54; Wambaugh op. cit. no. 118 at pp. 103-4.
215 Riker op. cit. no. 212 at p. 67.
216 Ibid. pp. 41-5; Wambaugh op. cit. no. 118 at pp. 105-6.
217 Riker op. cit. no. 212 at p. 51.
218 Wambaugh op. cit. no. 118 at 110-5.
219 East op. cit. no. 214 at p. 131; Riker op. cit. no. 212 at pp. 131-5.
220 East op. cit. no. 214 at p. 145.
221 Wambaugh op. cit. no. 118 at p. 115.
prince from a ruling house. However, the union agreed to by the powers in the Convention of Paris 1858 was for a loose non-national union called the United Principalities of Moldavia and Wallachia, with separate flags, princes and assemblies. And this was what was created. Nonetheless, nationalists were able to exploit one loophole in the convention and elect a single individual as prince of both principalities.

Napoleon III’s intervention in Moldavia and Wallachia was followed by a more forceful one on the Italian peninsula, this time in support of Piedmont-Sardinia. Unlike France, Piedmont had done well out of the Vienna settlement. The state which grew out of the French-speaking Duchy of Savoy had enlarged its Italian territory with the addition of the port of Genoa and its protected status as a buffer state gave it the freedom to pursue an adventurous foreign policy. In 1848 it took the lead in the Italian nationalist movement with a war against Austria. That lead to a crushing defeat, but since then under the energetic leadership of its liberal nationalist prime minister Camillo di Cavour (1810-61) it had become the most dynamic of the Italian states and the strongest player in the Italian nationalist movement.

In 1856 Napoleon III and Cavour made an oral agreement at Plombières. Austria would be expelled from northern Italy. Piedmont could annex Lombardy, Venetia, the Duchies and the Legations, and a federation would be established with Tuscany, the Papal States and Naples. In return Sardinia would cede Savoy and possibly Nice to France. In April 1859 France intervened in northern Italy against Austria in support of Piedmont. However, the intervention also lead to nationalist revolts in Tuscany, Parma, Modena and the Papal State of Romagna. This was more than Napoleon III had planned. He wanted a federal not a unitary Italy and was concerned about the effects of the destabilisation of the Papacy on domestic opinion. Therefore, he retreated from Plombières and instead reached an agreement with Austria at Villafranca in July 1859 by which Piedmont could annex Lombardy, but the other Italian states would return to their former rulers.

However, the French were not the only ones who could use nationality in diplomacy. When the powers met at Zurich to confirm Villafranca Lord Russell, Foreign Secretary to a newly-elected British liberal government condemned the agreement for disposing of the Italian peoples without their consent. He prevailed on Napoleon III to allow plebiscites in Tuscany, Parma, Modena and Romagna, to which Napoleon III agreed with the stipulation that according to the French principle of popular sovereignty the vote take place by universal suffrage. However, in return Napoleon III demanded the cession of Savoy and Nice, which in accordance with both French and Sardinian principles was preceded by plebiscites.

The next stage in the unification of Italy was the conquest of Sicily and then Naples by troops lead by Guiseppe Garibaldi between May and September 1860, again endorsed by plebiscites. Despite the fact that Garibaldi marched under the banner of the king of Sardinia, he was a republican, and Cavour used this to pose as the moderate in Italian nationalism and gain French

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222 Riker op. cit. no. 212 at pp. 147-8.
223 Ibid. pp. 204-5; Wambaugh op. cit. no. 118 at pp. 118-20.
224 Mack Smith op. cit. no. 10 at pp. 18-22.
225 M. Salvadori, Cavour and the Unification of Italy (Van Nostrand, Princeton, 1961) at p. 76.
227 Wambaugh op. cit. no. 118 at pp. 67-75.
228 Ibid. pp. 75-89.
229 Ibid. pp. 89-94.

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support for his own invasion of the Papal States in September. The annexation of the remaining Papal States, except Rome, took place following a plebiscite in November 1860. In February 1861 the first Italian parliament in Turin elected the Sardinian King Victor Emmanuel King of Italy by grace of God and the will of the nation, reflecting the national and popular basis of his rule. Britain recognised the new state within a fortnight, France three months later and, although Russia, Prussia and Austria protested against a state founded on such principles, their recognition also followed. Only Venetia and Rome lay outside the new kingdom and would not be added until 1866 and 1870, respectively.

If the liberal nationalist leadership of the Italian Risorgimento fuelled expectations that the nationality principle would lead to liberal government, Otto von Bismarck (1815-98) showed that it could work equally well for rather less liberal purposes. The Prussian Chancellor was neither a liberal nor a nationalist. He hated German liberals who reciprocated the sentiment and his identity was that of a Prussian patriot. Nonetheless, he ably demonstrated that the French use of nationality could cut both ways, legitimising the annexation of the German states into a Prussian-lead German Empire and ultimately proving to be Napoleon III’s political nemesis. The creation of this new state took place in three stages. The first was the conquest of the duchies of Schleswig and Holstein.

The Schleswig-Holstein dispute involved both the old politics of dynastic title and the new politics of nationality. Significant for the old politics, the two duchies were bound to Denmark in a personal union under the Danish crown. Crucial for the new politics, both were culturally distinct from Denmark. Holstein was solidly German-speaking, while Schleswig was essentially German in the south and largely Danish in the north. Overlooked by both was the strong sense of local patriotism in the Duchies, especially in the towns. It was, in fact, the old politics that triggered the dispute. While the Danish throne could be inherited along the female line, the Duchies were only inheritable by the male line, and failure of this line in Denmark prompted the crisis. In 1848 the Danish King issued a single constitution for Denmark and the Duchies. This, however, clashed with German nationalism which supported the German Prince of Augustenburg who now stood in line for the Duchies. The crisis lead to Prussian intervention in the Duchies, but Russia and Britain guaranteed Danish possession, and in the Treaty of London 1852 it was agreed to reconfirm the Danish personal union.

In 1863 Denmark again integrated the Duchies into the kingdom. Prussia and Austria responded with a joint invasion and this time other powers were not willing to intervene. An international conference, though, was held and the issue of partitioning Schleswig by nationality discussed. The partition plans, however, underscored the enormous difficulty in defining borders by ethnic nationality. Danish and German populations in the Duchy were often mixed and any partition would inevitably leave large minorities. Both sides submitted proposals drawing a line through the population most favourable to them, but were unable to agree and the conference broke up, after which the two allies crushed Danish resistance. In the Treaty of Vienna 1864 Prussia and Austria established a condominium over the whole of Schleswig and Holstein,

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230 Trevlyan op. cit. no. 226 at p. 360.
231 Wambaugh op. cit. no. 118 at pp. 94-5.
232 Ibid. at pp. 95-6.
233 Kohn op. cit. no. 205 at pp. 6, 150-1.
234 Pflanze op. cit. no. 154 vol. 1 at pp. 67-9, 241.
236 Hroch op. cit. no. 4 at pp. 117-24.
237 Wambaugh op. cit. no. 118 at pp. 135-8.
respecting neither nationality nor the title of the Prince of Augustenburg.\footnote{This condominium did not last and became a centre for Prussian intrigue intended to provoke a further conflict between the two powers. In 1866 Prussia went to war with Austria and annexed Schleswig, Holstein and other north German states, establishing a North German Confederation. These states had a measure of autonomy, but were subordinated to a federal government lead by the King of Prussia, which, in particular, controlled their foreign and military affairs.}{238}

The construction of the German state was completed with the Franco-Prussian War 1870-1. The pretext for this conflict again involved dynastic politics, in this case the succession to the Spanish throne. The Prussian army inflicted a crushing defeat on the French, destroying Napoleon III’s Second Empire and annexing the French regions of Alsace and Lorraine. The south German states were added to the North German Confederation and its name changed to the German Empire. The King of Prussia’s title switched from “President of the Confederation” to “German Kaiser”.\footnote{However, Bismarck’s adherence to nationality was minimalist and used only to cement internal support and legitimise Prussian possessions. The German Empire lacked many of the trappings of a national state, and for years did not even have a flag or an anthem.}{240} The new Empire repudiated many of the basic assumptions of liberal nationalism. The belief that external independence would inevitably lead to internal political freedom was personally dismissed by Bismarck: “I told myself… once we had gained our independence from the rest of Europe, we could then move freely in our internal development, organizing our institutions in as liberal or reactionary manner as seemed just and suitable.”\footnote{The hope of German liberal nationalists that a national state would lead to a liberal one quickly amounted to nothing.}{242}

After its defeat at the hands of Prussia in 1866 it was clear that the Hapsburg Empire could not go on unreformed. In the Ausgleich (“Compromise”) of 1867 Hapsburg lands were reorganised into a dual monarchy between a non-national state, Austria, and a national one, Hungary. This was a limited concession to nationality, and much less than the five-state confederation envisaged by Slav leaders.\footnote{The five states in the proposed confederation were 1) German Austria, 2) Magyar Hungary, 3) Czech Bohemia, 4) Croat-Serb-Slovene Yugoslavia and 5) Polish Galicia. See Hayes op. cit. no. 162 vol. 2 at pp. 172-3.}{244} The main focus of nationality after the creation of the German Empire, however, was in the Balkans.

In the 1870s other groups sought to follow the example of Greek independence against the ailing Ottoman Empire. Nationality was appealed to by local leaders and ambitious powers, especially Russia, which styled itself as the defender of “oppressed nationalities”,\footnote{Indeed, this was a region that traditionally had been organised by religion rather than nationality, notably in the Ottoman Millet system of religious self-rule,}{244} as they picked bits off the sick man of Europe. Many of the uprisings against the Ottomans, which were put down with incredible cruelty, may have been motivated more by social or religious grievances than nationality.\footnote{S. J. Shaw, “The Ottoman View of the Balkans” in C. and B. Jelavich eds., The Balkans in Transition: Essays on the Development of Balkan Life and Politics Since the Eighteenth Century (University of California Press, Berkeley, 1963) pp. 56-80 at p. 61.}{246}

\footnotetext[238]{Ibid. pp. 139-45.}{238}
\footnotetext[239]{Hayes op. cit. no. 162 vol. 2 at pp. 165-71.}{239}
\footnotetext[240]{Ibid. vol. 2 at pp. 146-9, 176-7.}{240}
\footnotetext[241]{Hughes op. cit. no. 19 at p. 128.}{241}
\footnotetext[242]{Quoted in Pflanze op. cit. no. 154 vol. 1 at p. 410.}{242}
\footnotetext[243]{Hughes op. cit. no. 19 at p. 132.}{243}
\footnotetext[244]{Stravrianos op. cit. no. 209 at pp. 396-9.}{244}
where identities were largely defined by religion.\textsuperscript{248} Thus, for a long time being “Greek” simply meant being “Orthodox Christian”\textsuperscript{249} and a “Turk” was largely used to refer to an Anatolian peasant, with Turkish-speakers identifying themselves primarily as “Muslims”.\textsuperscript{250} Nonetheless, the Treaty of Berlin 1878 recognised the independence of Serbia, Montenegro and Romania, and an autonomous Bulgarian principality (independent in 1908).\textsuperscript{251} These small new states set their sights on territorial expansion and turned on each other in a series of irredentist conflicts. In 1885 Serbia attacked Bulgaria, and in 1913 Serbia, Greece, Montenegro, Romania and Turkey fought Bulgaria over Macedonia.\textsuperscript{252}

These Balkan wars challenged many of the nineteenth century preconceptions about the nationality principle. It was not large, advanced nations, but small, undeveloped ones which were claiming the rights of nationality.\textsuperscript{253} “Balkanisation” entered the political vocabulary as a derogatory term for nationalism leading to political fragmentation.\textsuperscript{254} Moreover, rather than promoting political progress and representative government, these states seemed marred in instability and violence. The powers offered a degree of protection to religious minorities in the new states by connecting their recognition in the Treaty of Berlin with respect for religious freedom.\textsuperscript{255} Yet, the wars in the Balkans would also set the big, advanced nations against each other in a war of unprecedented carnage. Serbia’s success in Macedonia in 1913 fuelled irredentist ambitions towards Bosnia-Herzegovina which had been annexed by Austro-Hungary. In June 1914 Archduke Francis Ferdinand, heir to the Hapsburg Empire, was assassinated by Serb militants in the Bosnian capital Sarajevo setting in motion a course of events that would lead to the First World War (1914-8).\textsuperscript{256}

### 7. The End of the First World War

#### a. From Nationality to National “Self-Determination”

The end of the First World War created new opportunities for the nationality principle. Four great multinational empires, the German, Austro-Hungarian, Russian and Ottoman, had been broken and nationalists were either building new nation-states or enlarging old ones on their territory.\textsuperscript{257} The nation-state was becoming the norm.\textsuperscript{258} Thus, when the victorious powers


\textsuperscript{249} Seton-Watson op. cit. no. 32 at p. 110; Breuilly op. cit. no. 159 at p. 143; Dakin op. cit. no. 209 at p. 9.


\textsuperscript{251} Articles 1, 26, 34 and 43 Treaty Between Austria-Hungary, France, Germany, Great Britain, Italy, Russia and Turkey for the Settlement of Affairs in the East, Berlin, 13 July 1878, 153 CTS pp. 171-91 at pp. 174, 181, 184 and 186.

\textsuperscript{252} Stavrianos op. cit. no. 209 at pp. 433, 539.

\textsuperscript{253} Hobsbawm op. cit. no. 192 at p. 102.

\textsuperscript{254} R. Emerson, “Self-Determination” 65 \textit{American Journal of International Law} (1971) pp. 459-75 at p. 468


\textsuperscript{256} Stavrianos op. cit. no. 209 at pp. 543-5; Hayes op. cit. no. 162 vol. 2 at pp. 504, 568.

\textsuperscript{257} Hayes op. cit. no. 15 at p. 125.

\textsuperscript{258} Hayes op. cit. no. 162 vol. 2 at p. 647.
gathered at Versailles outside Paris in 1919 to agree a new political order, it was an order that nationality would inevitably play a major role in shaping. This new climate also produced a new slogan in the shape of “self-determination”. The language of national self-determination (Selbstbestimmungsrecht) had been used by German nationalists in the previous century, but in its post-war usage it appeared to encompass both the nationality principle and existing theories of liberal government.

The nationality principle had been used by both sides in the Great War. British and French war aims included the protection of Europe’s smaller nations, especially Belgium and Serbia. In 1916 Britain explicitly recognised that: “The principle of nationality should... be one of the governing factors in the consideration of territorial arrangements after the war.” These war aims later expanded to the rights of subject nationalities of the Central Powers, such as Poles, Czechs and South Slavs, although the dissolution of Austro-Hungary was not contemplated until that process was already well advanced. In 1917 the British Foreign Secretary, Arthur Balfour, in an attempt to rally international Jewish support for the allied cause, also promised a Jewish national home in Palestine. The Central Powers, on the other hand, highlighted the plight of the Irish, Boers and Finns.

Anglo-French use of nationality was, however, somewhat restricted by their alliance with the Russian Czar, who, far from seeking to liberate nations, wanted to extend his empire to Constantinople. The Russian Revolution changed all this. In April 1917 the new Russian Provisional Government, under pressure from the Bolsheviks, declared that: “the purpose of free Russia [was] not domination over other peoples... but the establishment of a permanent peace on the basis of the self-determination of peoples.” This set the stage for a rhetorical battle as the allies appealed to self-determination, both against the Central Powers and to seize the initiative from the Bolsheviks, who overthrew the Russian Provisional Government in November 1917.

Support for self-determination in the socialist movement never ran particularly deep. Socialists divided the world by class not by nationality. Nations in their scheme were, at best, a temporary phenomena, the product of the transition from feudalism to bourgeois capitalism, which, in turn, would be replaced by international socialism. At worst, they were a division of the international proletariat.

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261 Lloyd George op. cit. no. 260 vol. 1 at pp. 31-2.
262 Macartney op. cit. no. 27 at p. 190.
264 Cobban op. cit. no. 23 at pp. 49-55.
Nonetheless, socialism as a movement could not remain indifferent to the political environment in which it operated. The Communist Manifesto was published into the storm of 1848 and many socialists realised that even, if they objected to nationalism in theory, in practice they might have to take it into account. Thus, Marx and Engels supported the national claims of the Irish and Poles: not because they saw any particular merit in them, but rather because the first was seen as a distraction from the class struggle in England, and the second, by diminishing Prussia, could advance German unification and thus the unity of the German working class. This reflected not only a purely tactical approach to nationality, but also that the two founders of socialism shared nineteenth century prejudices about large and small, and advanced and backward nations. It was also not surprising that the most developed socialist programme for national rights in the nineteenth century came from the nationally divided Austro-Hungarian Empire.

This multinational composition was, of course, equally true of the “prison of nations”, the Russian Empire, something not lost on Bolshevik leader Vladimir Ilyich Lenin (1870-1924). Lenin supported the adoption of self-determination into the Bolshevik programme as a response to the movement’s political situation. In western Europe, he believed, the goals of bourgeois nationalism had largely been achieved, but in eastern Europe and Asia this revolution had only just begun, and it served the Bolshevik interest to align itself with this struggle. Thus, when Lenin declared his support for self-determination, it was in a purely tactical way. If the right conflicted with the broader strategic goals of socialism, then it was expendable. This was not so much an embrace of self-determination as a temporary alliance with it. Nonetheless, nationality was incorporated into the structure of the Soviet Union, which was conceived of as a multinational federation, even if in reality this was a facade for a highly centralised state. The USSR also became a staunch advocate of self-determination to promote revolution overseas, particularly in European colonies. This again illustrates the incredible ability of nationalism to combine even with doctrines which theoretically conflict with it, not to mention also essentially illiberal ones.

The western allies, on the other hand, saw self-determination simply as an expression of their own principles of liberal and national government. Both American President Woodrow Wilson (1856-1924) and British Liberal Prime Minister David Lloyd George (1863-1945) understood it as government with the consent of the governed. Prior to the armistice Lloyd

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268 A. J. Motyl, Sovietology, Rationality, Nationality: Coming to Grips with Nationalism in the USSR (Columbia University Press, New York, 1990) at pp. 73-7.
269 Ibid. at p. 77.
George had, in fact, been most explicit about peoples’ rights, but it was Wilson who did most to popularise them. Wilson, with his intellectual background as President of Princeton, and stern Calvinist faith, fitted comfortably into the role of the preacher of a new political gospel. “I really think that at first the idealistic President”, the noted pragmatist Lloyd George recorded, “regarded himself as a missionary whose function it was to rescue the poor European heathen from their age-long worship of false and fiery gods.” Wilson liked to believe that he expressed the will of the Europe’s peoples and sometimes addressed them directly, much to the displeasure of European leaders. He also shared with the doctrine of self-determination a certain ambivalence about the law. As American Secretary of State, Robert Lansing recounted:

“Looking back over my years of intercourse with the President I can now see that he chafed under the restraints imposed by usage and even by enacted laws if they interfered with his acting in a way which seemed to him right or justified by conditions. I do not say he was lawless. He was not that, but he conformed grudgingly and with manifest displeasure to legal limitations.”

Wilson proposed a revolution in international relations, and without the unsavoury commitments that Britain and France had made to secure support for their alliance, was recognised as being in a unique position to achieve it:

“What we are striving for is a new international order based upon universal principles of right and justice – no mere peace of shreds and patches… Peoples are not to be handed about from one sovereignty to another by an international conference or an understanding between rivals and antagonists. National aspirations must be respected; peoples may now be dominated and governed only by their own consent. ‘Self-determination’ is not a mere phrase, which statesmen will henceforth ignore at their peril.”

Wilson fitted comfortably into the liberal political tradition and his approach to the rights of peoples was no more than a continuation of that tradition. Ironically, the political philosopher who had the most effect on his concept of self-government was Edmund Burke, and explaining it he used to quote from Burke’s Letter to the Sheriffs of Bristol: “If any ask me what a free government is, I answer that, for any practical purpose, it is what the people think so;

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275 Temperley op. cit. no. 263 at vol. I, pp. 189-92, vol. II, p. 227; Tillman op. cit. no. 263 at pp. 27-8; Mayer op. cit. no. 265 at pp. 324-7, 362.
276 Lloyd George op. cit. no. 260 vol. I at p. 223.
278 R. Lansing, The Peace Negotiations: A Personal Narrative (Houghton Mifflin, Boston, 1921) at pp. 41-2
279 Tillman op. cit. no. 263 at p. 405.
280 Wilson op. cit. no. 274 at pp. 320-1.
283 Ibid. at p. 68.
and that they, and not I, are the natural, lawful and competent judges of this matter.”

On the other side of the liberal nationalist coin, Wilson realised the dream of a community of nations with the League of Nations. This “general association of nations” was specifically envisioned in the preamble of its Covenant as not only an organisation of states, but also of peoples.

b. Self-Determination at the Conference

The principle of self-determination remained ambiguous at Versailles. It appeared to inform many of the Fourteen and the Four Points that Wilson proposed as the basis for a settlement,


285 The League of Nations followed a liberal nationalist pattern: “As nationalism was not sacrificed, but, rather when separated from provincialism, given a greater opportunity for self-realization through the development of internationalism, so nationalism and internationalism, as is clearly shown in the demand for the self-determination of peoples and for effective sanction for international rights, will not be sacrificed in the development of pan-nationalism [the League of Nations], but will be offered an opportunity for development to a degree hitherto unknown.” G. G. Wilson, “Pan-Nationalism” 13 American Journal of International Law (1919) pp. 91-3 at p. 93; Hayes op. cit. no. 15 at p. 127.


288 “…V. A free, open-minded and absolutely impartial adjustment of all colonial claims, based upon a strict observance of the principle that in determining all such questions of sovereignty the interests of the populations concerned must have equal weight with the equitable claims of the government whose title is to be determined……VII. Belgium, the whole world will agree, must be evacuated and restored, without any attempt to limit the sovereignty which she enjoys in common with all other free nations. No other single act will serve as this will to restore confidence among the nations in the laws which they have themselves set and determined for the government of their relations with one another. Without this healing act the whole structure and validity of international law is forever impaired……IX. A readjustment of the frontiers of Italy should be effected along clearly recognizable lines of nationality. X. The peoples of Austria-Hungary, whose place among nations we wish to see safeguarded and assured, should be accorded the freest opportunity of autonomous development. XI. Rumania, Serbia, and Montenegro should be evacuated; occupied territories restored; Serbia accorded free and secure access to the sea; and the relations of the several Balkan states to one another determined by friendly counsel among historically established lines of allegiance and nationality; and international guarantees of the political and economic independence and territorial integrity of the several Balkan states should be entered into. XII. The Turkish portions of the present Ottoman Empire should be assured a secure sovereignty, but other nationalities which are now under Turkish rule should be assured an undoubted security of life and an absolutely unmolested opportunity of autonomous development, and the Dardanelles should be permanently opened as a free passage to the ships and commerce of all nations under international guarantees. XIII. An independent Polish state should be erected which should include the territories inhabited by indisputably Polish populations, which should be assured a free and secure access to the sea, and whose political and economic independence and territorial integrity should be guaranteed by international covenant.” Wilson op. cit. no. 286 at pp. 537-8.

289 “First, that each part of the final settlement must be based upon the essential justice of that particular case and upon such adjustments as are most likely to bring a peace that will be permanent; Second, that peoples and provinces must not be bartered about from sovereignty to sovereignty as if they were mere chattels and pawns in a game, even the great game, now forever discredited, of the balance of power; but that Third, every territorial settlement involved in this war must be made in the interests of the populations concerned, and not as part of any mere adjustment or compromise of claims amongst rival states; and Fourth, that all well defined national aspirations
while never specifically featuring in any of them. It was never explicitly mentioned in any of the peace treaties either, even in the articles on plebiscites, and was not included in the League Covenant due to objections from Britain and Wilson’s own legal advisors.\textsuperscript{290} After the conference, two international commissions in the Åland Islands dispute in 1920-1 considered that it was not part of international law.\textsuperscript{291}

However, although self-determination was not a legal principle, it was crucial for the legitimacy of states and their boundaries, which lay at the foundations of the legal settlement. In this way a principle, which technically may not have been a legal one, nonetheless, shaped the content of the law. The principle proposed that peoples provided the model for states, and the conference relied on ethnographic maps and language, in particular, to draw boundaries between the new states.\textsuperscript{292}

These assumptions about nationality were, however, challenged by the actual consultation of peoples in the small number of plebiscites held to determine states’ borders.\textsuperscript{293} Plebiscites were held in Schleswig, Upper Silesia, Allenstein, Marienwerder, Klagenfurt and Sopron,\textsuperscript{294} and a significant proportion of them produced some unexpected results. In Sopron, in which a largely German-speaking region voted to join Hungary, this could be attributed to oppression,\textsuperscript{295} but this could not account for many of the other results. In Allenstein, Protestant Poles who called themselves “Mazurians” after their locality, the Mazurian Lakes failed to identify with the Polish national movement and voted \textit{en masse} to join Germany, largely for economic and security reasons.\textsuperscript{296} In Klagenfurt, Slovenes preferred to remain part of Austria than to join the new Kingdom of Serbs, Croats and Slovenes and divide their alpine valley and province of Carinthia.\textsuperscript{297} There was also little doubt that if more plebiscites had been held, they would have

\hspace{1cm} shall be accorded the utmost satisfaction that can be accorded them without introducing new, or perpetuating old, elements of discord and antagonism that would be likely in time to break the peace of Europe and consequently of the world.” Wilson \textit{op. cit. no.} 274 at pp. 322-3.

\hspace{1cm} \textsuperscript{290} Lansing \textit{op. cit. no.} 278 at pp. 94-5. Wilson had proposed the following provision for the draft of the League of Nations Covenant: “The Contracting Powers unite in guaranteeing to each other political independence and territorial integrity; but it is understood between them that such territorial readjustments, if any, as may in the future become necessary by reasons of changes in present racial conditions and aspirations or present social and political relationships, pursuant to the principle of self-determination, and also such territorial readjustments as may in the judgment of three fourths of the Delegates be demanded by the welfare and manifest interest of the people concerned, may be effected if agreeable to those peoples; and that territorial changes may involve material compensation. The Contracting Powers accept without reservation the principle that the peace of the world is superior in importance to every question of political jurisdiction or boundary.” Quoted in ibid. p. 55. On the draft see N. Berman, “Beyond Colonialism and Nationalism? Ethiopia, Czechoslovakia, and ‘Peaceful Change’” \textit{65 Nordic Journal of International Law} (1996) pp. 421-79 at p. 433.

\hspace{1cm} \textsuperscript{291} Report of the International Commission of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question, League of Nations Official Journal, Special Supplement No. 3, (October 1920) at p. 5; The Aaland Islands Question: Report Submitted to the Council of the League of Nations by the Commission of Rapporteurs, (League of Nations Doc. B7 [C] 21/68/106, (April 1921) at p. 27.

\hspace{1cm} \textsuperscript{292} Walworth \textit{op. cit. no.} 259 at p. 99; Churchill \textit{op. cit. no.} 273 at p. 205.

\hspace{1cm} \textsuperscript{293} E. H. Carr, \textit{Conditions of Peace} (MacMillan, London, 1942) at pp. 42-6; Cobban \textit{op. cit. no.} 23 at p. 70; Heater \textit{op. cit. no.} 266 at p. 111.

\hspace{1cm} \textsuperscript{294} See Wambaugh \textit{op. cit. no.} 4. A plebiscite was also held later in 1935 in the Saar. See S. Wambaugh, \textit{The Saar Plebiscite with a Collection of Official Documents} (Harvard University Press, Cambridge, Massachusetts, 1940).

\hspace{1cm} \textsuperscript{295} Wambaugh \textit{op. cit. no.} 4 vol. I, at pp. 271-97.

\hspace{1cm} \textsuperscript{296} Ibid. vol. I, at pp. 99-141.

\hspace{1cm} \textsuperscript{297} Ibid. vol. I, at pp. 163-205; T. Gullberg, \textit{State, Territory and Identity: The Principle of Self-Determination, The Question of Territorial Sovereignty in Carinthia and Other Post-Hapsburg Territories after the First World
revealed similar surprises. In Teschen, disputed between Poland and Czechoslovakia, a planned plebiscite had to be called off due to Polish objections, after it was found that people previously assumed to be Poles were planning to vote for Czechoslovakia. Indeed, there is evidence that for many populations, identity remained largely on the local level.

As a doctrine of political legitimacy, the legitimacy of self-determination itself depended on its universal character. However, the principle was only applied, in a way absolutely consistent with its previous usage, to reorganise the territories of the defeated empires. Following Burke’s dichotomy, Wilson was both a professor and a statesman. The former Princeton President proclaimed an abstract and high-minded principle, but the US President often applied it in a politically expedient fashion. There were, in particular, three types of limitation on self-determination: the principle was only one of a number of principles and considerations before the conference; size and development; and problems inherent in the principle itself.

Many other principles and considerations shaped the settlement. For reasons of balance of power, France supported making the Polish state as large as possible as a counterweight to Germany. For similar reasons, the allies refused to allow the rump Austria to join Germany. Some allies nursed territorial ambitions and these had been conceded in binding treaties. In the secret Treaty of London 1915 Britain, France and Russia conceded to Italy, as its price for joining the alliance, a shopping list of territories which went well beyond the Italian irredentia and sought to make it an imperial power. Likewise, Japan sought former German possessions in China and the Pacific. Even for Wilson, self-determination may have not been the prime consideration. He may have overlooked Italy’s annexation of ethnic German South Tyrol in order to secure Italian support for his pet project, the League of Nations, although he himself pleaded ignorance on the matter.

Another consideration was the power of the conference itself. Nationalist movements already stood in occupation of large territories, and as Lloyd George argued: “The task of the Parisian Treaty-makers was not to decide what in fairness should be given to the liberated nationalities, but what in common honesty should be freed from their clutches when they had overstepped the bounds of self-determination.” Often the conference had neither the will nor the resources to do this. Fear of the Bolsheviks, for example, made the conference sanction the Polish occupation of predominantly Ukrainian Eastern Galicia. A lack of allied troops allowed Poland to scupper the plebiscite in Teschen. Lloyd George estimated that a truly just settlement would have required over fifty plebiscites, but the six that were actually held stretched allied resources to

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297 Wambaugh op. cit. no. 4 vol. I, at pp. 142-62; Kedourie op. cit. no. 117 at p. 124.
299 Cobban op. cit. no. 23 at p. 92.
300 Temperley op. cit. no. 263 vol. VI, at pp. 10-2; Walworth op. cit. no. 259 at p. 50.
302 Lloyd George op. cit. no. 260 vol. I at p. 91.
303 Lloyd George op. cit. no. 260 vol. I at p. 917.
304 Lloyd George op. cit. no. 260 vol. I at p. 917.
breaking point.\footnote{Wambaugh \textit{op. cit. no.} 4 vol. I at p. 41; Churchill \textit{op. cit. no.} 273 at p. 209.}

Finally, there was the organisation of the conference itself. If a conference in Paris was to redraw the map of central and eastern Europe, then it required the collection and distribution of an enormous amount of information to the relevant decision-makers. But, this may not have been the case. It has been claimed, for example, that a simple lack of co-ordination between the different committees responsible for drawing up Hungary’s borders with its neighbours resulted in the country loosing far more territory than it otherwise would have done.\footnote{H. Nicolson, \textit{Peacemaking 1919} (Constable & Co., London, 1934) at p. 127.}

A second factor limiting the application of self-determination was size and development. Allied war aims may have been the protection of small nations, but small states were also frowned upon.\footnote{See Czech leader Thomas Masaryk’s wartime lecture against the perceived “problem of a small nation”. T. G. Masaryk, \textit{The Problem of Small Nations in the European Crisis} (Lecture given on 19 October 1915), (The Althone Press, London, 1966).} Luxembourg was considered too small to join the League of Nations and Lithuania’s admission set a precedent.\footnote{Temperley \textit{op. cit. no.} 263 vol. VI at p. 559.} It was recognised that the new states, wedged between Germany and Russia, needed population and resources to protect their independence from those two powers, and, indeed, they would later fall victim to them. A South Slav, or Yugoslav state, for example, was preferable to separate Serb, Croat and Slovene states. The Yugoslav annexation of the little Adriatic kingdom of Montenegro may have been seen as dubious at the time,\footnote{Nicolson \textit{op. cit. no.} 309 at pp. 148-52.} but then so were Montenegro’s prospects as an independent state.\footnote{Lloyd George \textit{op. cit. no.} 260 vol. I at pp. 37-8.} The cession of a Polish land corridor and the creation of the Danzig Free State, which gave Poland access to the sea, but detached substantial German populations from Germany, were both seen as essential for its viability as an independent state.\footnote{Temperley \textit{op. cit. no.} 263 vol. VI at p. 258; T. S. Woolsey, “Self-Determination” 13 \textit{American Journal of International Law} (1919), pp. 302-5 at p. 303.}

Political development also restricted self-determination. This was particularly evident in the mandates scheme proposed by South African statesman Jan Christian Smuts (1870-1950). Smuts graded the populations of the former Austrian, Russian, German and Ottoman Empires according to their development and interpreted the principle of self-determination accordingly. Finland, Poland, Czechoslovakia and Yugoslavia were sufficiently developed to be independent states. However, the populations of former Ottoman territories, he considered, were incapable of self-government, although this greatly varied: from Iraq (Mesopotamia), “barely capable of autonomy”, to Syria, “complete statehood is very close.” The territories were to be administered by a mandatory power and self-determination for those peoples meant the development of internal self-government.\footnote{J. C. Smuts, “The League of Nations: A Practical Suggestion” in D. H. Miller ed., \textit{The Drafting of the Covenant} (G. P. Putnam’s Sons, New York, 1928) vol. 2, pp. 23-60 at pp. 29-31.} At the bottom were the inhabitants of German colonies in the Pacific and Africa, who, in the opinion of Smuts were, “inhabited by barbarians, who not only cannot possibly govern themselves, but to whom it would be impractical to apply any idea of political self-determination in the European sense.”\footnote{Ibid. p. 28.}

Smut’s scheme, a fleshing out of the Anglo-American concept of trusteeship, also fitted into the liberal nationalist tradition of reconciling nationalism and colonialism through
development. The idea of mandates matched Woodrow Wilson’s policy of developing self-governing institutions in the Philippines, and the British government claimed it to be an extension of its colonial policy. Mandates, it was also argued, were the logical conclusion of the allied war aims of no annexations and the disposition of colonies in accordance with the wishes of the people.

The scheme, however, met with opposition from the British Dominions. Australia and New Zealand pressed for the annexation of neighbouring German colonies in the Pacific and the South African scheme notably did not extend to neighbouring South West Africa. In a compromise, article 22 of the League Covenant proclaimed three classes of mandate, A, B and C, ostensibly graded according to development. In Class A mandates, which covered former Ottoman territories, independence was foreseeable and the task of the mandatory was to render advice and assistance until they could become independent. Class B mandates, former German colonies in Africa, were less developed and their independence was not envisaged in the foreseeable future. Those territories were to be administered directly with the goals of protecting the inhabitants and their freedom of conscience and religion, and prohibiting the trade in slaves, liquor and arms. In the case of British Togoland and the Cameroons, this was simply done from an adjacent colony. Class C mandates, which included South West Africa and Pacific islands, formed the nub of the compromise. Due to their size, sparseness, remoteness or alternatively their proximity to a mandatory, these territories were to be administered as integral parts of that state, subject to safeguards for the indigenous population. This was annexation in all but name. Moreover, there no was procedure for mandates to graduate as they developed, from C to B to A. Nor did article 22 provide for the independence of Class A mandates, although individual mandate agreements contained clauses on termination.

The third factor limiting self-determination were problems inherent in the doctrine itself. What was a people? What did it mean for one to self-determine? If self-determination meant the reorganisation of states along the lines of nationality, then which elements of nationality were decisive? Czechoslovakia, for example, was constructed using two different interpretations of nationality. The Czech nation was defined by the historic states of Bohemia and Moravia, and to a lesser extent Austrian Silesia (which was partitioned with Poland). Slovakia, on the other hand, with no clear historical precedent, was constructed by ethnic nationality. However, either test of nationality, historic-political or ethnic, left substantial minorities in the new state: Germans and

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317 J. C. Smuts: “Its vital principles are: the principle of nationality involving ideas of political freedom and equality; the principle of autonomy, which is the principle of nationality extended to peoples not yet capable of complete independent statehood; the principle of political decentralization which will prevent the powerful nationality from swallowing the weak autonomy as has so often happened in the now defunct European empires; and finally an institution like the league of nations, which will give stability to that decentralization and thereby guarantee the weak against the strong.” Ibid. p. 36.
318 Notter op. cit. no. 282 at pp. 143, 178, 190-2, 260, 538.
319 Tillman op. cit. no. 263 at pp. 90-1, 402.
320 Temperley op. cit. no. 263 vol. II at p. 231; Tillman op. cit. no. 263 at p. 86.
322 Temperley op. cit. no. 263 vol. VI at p. 573.
Poles in the Czech lands, Hungarians and Ukrainians in Slovakia.\textsuperscript{324}

The basic problem of drawing borders by nationality was that, although nationalism proposed that different nations formed different states, nationalities did not naturally separate from each other geographically. Even if there was social separation, for example along class lines or by profession, nationalities still lived in the same location. It might be that, due to differences in occupation, one group may predominate in towns and another in the country, but even here there was the task of separating towns from the surrounding countryside. This was impossible without creating substantial minorities.

In fact, the settlement left between 20-30 million people in national states, with which they were unable to be connected for ethnic reasons.\textsuperscript{325} The solution was to accord them minority rights. Woodrow Wilson tried unsuccessfully to include an article on minority rights in the League Covenant. Instead, minority protection took the form of a series of separate treaties and declarations centred on the League. The peace treaties of Versailles, St. Germain, Trianion, Neuilly-sur-Seine and Lausanne all contained articles on minority protection. Specific minorities treaties were agreed with Poland, Czechoslovakia, Yugoslavia, Romania, Greece and Lithuania. Bilateral agreements were concluded between Germany and Poland over Upper Silesia, and Sweden and Finland over the Åland Islands. Moreover, in their accession to the League, Albania, Lithuania, Latvia, Estonia and Iraq made declarations on the protection of minorities.\textsuperscript{326} “The idea underlying the treaties”, the Permanent Court considered in \textit{Minority Schools in Albania} was:

“\textit{T}o secure for certain elements incorporated in a State, the population of which differs from them in race, language or religion, the possibility of living peacefully alongside that population and co-operating amicably with it, while at the same time preserving the characteristics which distinguish them from the majority, and satisfying the ensuing special needs.”\textsuperscript{327}

However, the legitimacy of the right of self-determination rested with its universal character. The different treatment of national populations, due in part to the interests of the powers, in part to the political situation and in part to the nature of self-determination itself threw the principle into question. Many of those who believed in the right felt betrayed by the settlement. Many of those who argued that without a definition of who was entitled to exercise it, self-determination could never be consistently applied and was fundamentally flawed felt vindicated. Foremost among these critics was Wilson’s Secretary of State, Robert Lansing who raised both the legal critique, that the right could not be sufficiently defined, and the nationalist one, that it could not satisfy all those who might claim it:

“When the President talks of ‘self-determination’ what unit has he in mind? Does he mean a race, a territorial area, or a community? Without a definite unit which is practical, application of this principle is dangerous to peace and stability…

\textsuperscript{324} Temperley \textit{op. cit. no. 263} vol. IV at pp. 267-72.
\textsuperscript{326} Thornberry \textit{op. cit. no. 255} at pp. 38-42; Modeen \textit{op. cit. no. 325} pp. 50-2; Temperley \textit{op. cit. no. 263} vol. VI at pp. 571-2; Tillman \textit{op. cit. no. 262} at p. 217.
\textsuperscript{327} \textit{Minority Schools in Albania} (Advisory Opinion), PCIJ (1935) Series A/B, No. 64, p. 17.
The more I think about the President’s declaration as to the right of ‘self-determination,’ the more convinced I am of the danger of putting such ideas into the minds of certain races. It is bound to be the basis of impossible demands on the Peace Conference and create trouble in many lands.

What effect will it have on the Irish, the Indians, the Egyptians, and the nationalists among the Boers? Will it not breed discontent, disorder and rebellion? Will not the Mohammedans of Syria and Palestine and possibly of Morocco and Tripoli rely on it? How can it be harmonized with Zionism, to which the President is practically committed? The phrase is simply loaded with dynamite. It will raise hopes which can never be realized. It will, I fear, cost thousands of lives. In the end it is bound to be discredited, to be called the dream of an idealist who failed to realize the danger until too late to check those who attempt to put the principle in force. What calamity that the phrase was ever uttered! What misery it will cause!”

Wilson himself conceded his surprise at the reaction to the doctrine:

“When I gave utterance to those words (‘that all nations had a right to self-determination’) I said them without the knowledge that nationalities existed, which are coming to us day after day… You do not know and cannot appreciate the anxieties that I have experienced as the result of many millions of people having their hopes raised by what I have said.”

In fact, the aftermath of the Versailles conference was a crushing time for the liberal nationalist assumptions which Wilson and other liberals associated with self-determination. The belief that national and liberal government were compatible was met with the fact that, of all the new national states created in the aftermath of the war, only Czechoslovakia and Finland remained fully democratic. Nations once freed did not necessarily associate on the basis of equality. For new states trying to mould an often-diverse collection of provinces brought together by nationality into a nation, the protection of national minorities was an unwelcome impediment to national cohesion. Poland’s denunciation of its minority treaty in 1934 marked the progressive demise of the minority protection régime. Wilson pioneered an organisation, which realised a community of nations, but the United States would not join it, nor did the League protect against the threat of war.

Moreover, the right of self-determination was used to legitimise the destruction of the whole system. In the nineteenth century Napoleon III had used the nationality principle to challenge the

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328 Writing after the Peace Conference, Lansing believed that his fears had been thoroughly vindicated: “Since the foregoing notes were written the impracticability of the universal or even general application of the principle has been fully demonstrated. Mr. Wilson resurrected ‘the consent of the governed’ regardless of the fact that history denied its value as a practical guide in modern political relations. He proclaimed it in the phrase ‘self-determination,’ declaring it to be an ‘imperative principle of action.’ He made it one of the bases of peace. And yet, in the negotiations at Paris and in the formulation of the foreign policy of the United States, he has by his acts denied the existence of the right other than as the expression of a moral precept, as something to be desired, but generally unattainable in the lives of nations.” Lansing op. cit. no. 278 at pp. 97-8.

329 Quoted in Temperley op. cit. no. 263 vol. IVat p. 429.

330 Emerson op. cit. no. 281 at p. 112.

331 Hayes op. cit. no. 162 vol. 2 at pp. 668, 733-9.


333 Thornberry op. cit. no. 255 at p. 47; Cobban op. cit. no. 23 at p. 87.
political order established at Vienna. In the 1930s Adolf Hitler used self-determination and the German “people” outside Germany, in Austria, Czechoslovakia and Poland, to break the Versailles system and lead the world back to war.\(^{334}\)

Concluding Remarks

This chapter is intended to illustrate that the right of peoples to self-determination is product of a particular set of historical circumstances. In particular, the development of the modern state gave the right its context and political significance. Three doctrines, nationalism, liberalism and international law developed from this type of organisation, and have been crucial for defining the doctrine of self-determination. Even if in the period investigated, self-determination was not strictly speaking a principle of international law, it had become increasingly essential for the legitimacy of the states which underpinned that law.

The next chapters will examine how self-determination has developed in international law, starting with the drafting of international instruments. However, this chapter illustrates that the right grew out of a western liberal nationalist tradition in which individual liberties, national equality and a community of nations provided the context in which the right was supposed to operate. This liberal nationalist matrix survived the Second World War and has continued to underpin the right in the United Nations era. This will be seen in the drafting of international instruments in the next chapter.

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\(^{334}\) D. Ronen, *The Quest for Self-Determination* (Yale University Press, New Haven, 1979) at pp. 4-5; Cobban *op. cit. no. 23* at p. 93; Morgenthau *loc. cit. no. 332* at pp. 487, 489-90.
Self-Determination and International Instruments: A Question of Balance

Outline

This chapter is a survey of international instruments on self-determination. It aims to give the reader a thorough account of provisions of the main instruments on the right in international law and their drafting. It will also consider how these instruments have been shaped by the interaction between nationalism and international law.

A particular problem posed by self-determination in the drafting of international instruments is how to proclaim the principle as a universal right, essential for its nationalist legitimacy, while restricting it to defined categories, important for its legal application. The general solution has been to balance self-determination with other principles, which effectively act to limit its application. Rupert Emerson and Gaetano Arangio-Ruiz have called this the “big print” and the “small print”. The “big print” is the proclamation of self-determination in a universal form essential for its nationalist legitimacy, while qualifying it, usually separately, with another provision, the “small print”. In this way instruments can attempt to limit self-determination, but still make a declaration that it is a right of all peoples.

There are, however, two problems with this approach. The first is legitimacy. Despite a formula of words, which avoids explicitly limiting self-determination, this is the obvious intention of the instrument as a whole. This makes self-determination in those instruments seem arbitrary and restrictive. As we will see, there have been efforts in instruments such as in the Friendly Relations Declaration to develop more sophisticated balances which aim to correct this perception of arbitrariness.

The second problem is that, as we have seen, the principles used to balance self-determination, territorial integrity, state sovereignty and the preservation of frontiers, can themselves encapsulate national ideas. As a result, a balance between self-determination and these principles may also be a conflict between two versions of nationalism. This will be seen, in particular, in the balance between self-determination and territorial integrity in the Colonial Independence Declaration, which hinges on whether a particular group is a “country” or a “people”. Both “country” and “people” represent fertile ground for nationalist politics, and, consequently, a balance between self-determination and territorial integrity may be more a political than a legal one.

There is a second feature of legitimacy which has implications for the drafting of provisions on self-determination. Self-determination is a principle, which runs to the very legitimacy of states. There is no better illustration of this than the fact that states in the drafting of international instruments frequently highlight their support for it by recounting its role in their own existence.

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2 See for example Algeria, 24 GAOR (1969) 6th Cmtee., 1163rd mtg., (A/C.6/SR.1163) para. 4; Argentina, 7
As a result, self-determination, as a concept, which all states can support, or at least not explicitly oppose, may play an important coalition-building role. States can unite in support of the right in the abstract, while retaining their own interpretations of what it means. This means that international instruments are more capable of building a consensus around self-determination, the more generally and abstractly it is put. On the other hand, the more specific the aspects of the right, the greater the potential for fragmentation. As a result, there appears to be a pressure in the drafting of instruments away from specific provisions on the content of self-determination towards more vague formulas capable of different interpretations.

1. The United Nations Charter

CHARTER OF THE UNITED NATIONS (EXTRACTS)

Preamble

WE THE PEOPLES OF THE UNITED NATIONS DETERMINED to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small…

Article 1

The Purposes of the United Nations are…
2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

Article 55

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote…


3 J. Breuilly, Nationalism and the State (Second Edition), (University of Chicago Press, Chicago, 1994) at pp. 69, 121, 123.
Article 73

Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and to this end:

a. to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;

b. to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement;

c. to further international peace and security;

d. to promote constructive measures of development, to encourage research, and to co-operate with one another and, when and where appropriate, with specialized international bodies with a view to the practical achievement of the social, economic, and scientific purposes set forth in this Article; and

e. to transmit regularly to the Secretary-General for information purposes, subject to such limitation as security and constitutional considerations may require, statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible other than those territories to which Chapters XII and XIII apply.

Article 76

The basic objectives of the trusteeship system, in accordance with the Purposes of the United Nations laid down in Article 1 of the present Charter, shall be:

a. to further international peace and security;

b. to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement;

c. to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world; and

d. to ensure equal treatment in social, economic, and commercial matters for all Members of the United Nations and their nationals, and also equal treatment for the latter in the administration of justice, without prejudice to the attainment of the foregoing objectives and subject to the provisions of Article 80.

a. The Atlantic Charter

Often seen as a prequel to the UN Charter, the Anglo-American Atlantic Charter affirmed national self-government, if not exactly national self-determination, as one of the wartime goals of the allies. The Charter was a joint declaration issued by US President Roosevelt and British Prime Minister Winston Churchill on 14 August 1941 and subsequently endorsed by the Soviet Union, the British dominions and European governments in exile.\(^4\) Self-determination was not specifically mentioned in the Charter, but it has been seen to be connected to the first three principles.\(^5\)

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

These principles were a fairly conservative declaration of national rights, as one commentator put it: “animated by the spirit of Burke, not of the Jacobins”. They sought to restore self-government to countries which had been deprived of it and to prevent forcible changes to borders, but did not seek to extend new principles of self-government. Indeed, they were drafted by Churchill, the defender of empire, who distinguished the restoration of self-government to European nations from the position of India and Burma.

b. We the Peoples...

In April 1945 delegates from fifty states assembled at San Francisco to shape a new peace. They had at hand the Dumbarton Oaks proposals agreed by American, Soviet, British and Chinese representatives the previous year, which served as a basis for negotiations. The Dumbarton Oaks proposals did not include self-determination. However, on the initiative of the Soviet Union, it was added to an amendment by the four powers in article 1 on the purposes of the organisation.


6 The Atlantic Charter, YBUN (1946-7) at p. 2.
8 Russell and Muther op. cit. no. 4 at p. 34.
9 Winston Churchill: “[T]he Joint Declaration does not qualify in any way the various statements of policy which have been made from time to time about the development of constitutional government in India, Burma or other parts of the British Empire. We are pledged by the Declaration of August, 1940, to help India to obtain free and equal partnership in the British Commonwealth with ourselves, subject, of course, to the fulfilment of obligations arising from our long connection with India and our responsibilities to its many creeds, races and interests. Burma also is covered by our considered policy of establishing Burmese self-government and by measures already in progress. At the Atlantic meeting, we had in mind, primarily, the restoration of the sovereignty, self-government and national life of the States and nations of Europe now under the Nazi yoke, and the principles governing any alterations in the territorial boundaries which may have to be made.” Parliamentary Debates, 5th Series, vol. 374, House of Commons Official Report, 8th vol., Session 1940-1, pp. 68-9.
10 “Chapter I… The purposes of the Organization should be… 2. To develop friendly relations among nations and to take other appropriate measures to strengthen universal peace”. YBUN (1946-7) at p. 4.
12 Amendments Proposed by the Governments of the United States, the United Kingdom, the Soviet Union, and China: “Chapter I… 2. To develop friendly relations among nations based on respect for the principle of equal rights
The Charter of the United Nations was a product of war, intended to contain the use of force in international relations, and its drafting was filled with a tangible sense of the cruelty and suffering of the period. The League of Nations had failed, but its idea endured. The Charter was a blueprint for, “a world of free countries”, US President Harry Truman argued in his closing address to the conference, “which will work and cooperate in a friendly civilized community of nations”. Moreover, it had, “given reality to the ideal of that great statesman of a generation ago – Woodrow Wilson.” Other delegates endorsed the idea of, “a community of nations where the rights of man shall be definitely established.” It was even proposed that the organisation should be called the “Community of Nations”.

The Charter not only outlined a community of states, or nation-states, but a world and self-determination of peoples and to take other appropriate measures to strengthen universal peace”. Doc. 2, G/29, UNCIO, vol. III, at p. 622.


14 Edward Stettinius, US Secretary of State: “We bring this Charter to a world that is still wracked by war and war’s aftermath. A few days ago I talked with some young Americans just back from the battlefront. They lay – wounded and in pain – in the beds of an Army hospital…..This Charter is a compact born of suffering and of war. With it now rests our hope for good and lasting peace……To the governments and peoples of the 50 nations here represented this Charter is now committed and may Almighty God from this day on and in the months and years to come sustain us in the unalterable purpose that its promise may be fulfilled.” US, Doc. 8, G/5, UNCIO, vol. I, p. 659.


16 Uruguay, Cmtee. I/1, 14 May, p. 10. (The minutes of the debates of the First Committee of the First Commission, available on microfilm at the Library of the Palais des Nations, Geneva.)


18 Nations and states in discussions were used interchangeably. However, an interesting variation on this was provided by Mexico. Appealing against the exclusion of Argentina from the conference, the Mexican delegate advanced the Burkean argument that Argentinian government had separated itself from the nation: “While Argentina has been branded a Fascist nation, we must bear in mind that here a distinction must be made between the nation and her government. Argentina is a nation of democratic traditions, long-standing democratic traditions. Also, she has distinguished herself by her contributions to international law – a great nation that works – a great nation that feels – a great nation with a people that feels full sympathy with the Allied cause. While it is true that the Government accidently divorced itself from the sentiments of her people, it would not be fair to punish the people for an accidental separation of the Government from those deep-rooted sentiments of her Nation.” Mexico, Doc. 8, G/5,
community of peoples. This was particularly evident in the preamble. The original proposal for the Charter to include a preamble was made by League Covenant veteran, Jan Christian Smuts, who advanced the view of an organisation which respected, “the equal rights of men and women and of nations large and small”. Smuts’ proposals began, as the League Covenant had done, with the phrase: “The High Contracting Parties...” This might have been an accurate reflection of the drafting process, but it was not very inspiring. It was felt that the preamble should have, “a language and tone which leads its way into the hearts of men”, which would, “awaken the imagination of the common man to the points at issue, kindle his feelings and move him.” The Charter, therefore, did not begin with “the high contracting parties”, or even the cosmopolitan ideal of, “we the people of the United Nations...”, but with a nationalist vision of a world of nations: “We the peoples of the United Nations...” The formula was proposed by the United States from the opening words of its constitution: “We the People...” The US argued that the phrase represented both the organisation’s “democratic basis” and that it was created by a “peoples’ war”. Nonetheless, despite this presentation of the Charter as the product of the genius of the world’s peoples, it was in reality drafted by states’ representatives at the conference. Reconciling the two, “we the peoples...”, was understood to be read with the preamble’s closing paragraph, “through representatives assembled in the city of San Francisco...”

The position of peoples at the centre of the UN system was underlined by articles 1(2) and 55 of the Charter. Both proposed that friendly relations between nations were based on respect for the principle of the equal rights and self-determination of peoples. This, of course, put self-determination at the foundations of the international community. Self-determination in article 1 formed part of the purposes of the United Nations, which were described as, “the raison d’être of the organization”, and, “the object of the Charter”. Other purposes, alongside respect for equal rights and self-determination of peoples, included maintenance of “international peace and
security” and “promoting and encouraging respect for human rights”. This, of course, fit the liberal nationalist vision of an international society of liberal nations.

Comments in drafting underlined this fundamental role. The principle, according to the Syrian Rapporteur of the committee responsible for drafting article 1, worked, “for progress and for development”, 28 and was, “one of the appropriate measures to strengthen universal peace” 29 Yugoslavia argued that it was, “one of the guiding ideas of peace and solidarity among nations and of a conciliation and cooperation… it should be definitely planted among the foundations of the Charter of the United Nations”. 30 “Where would many of us here be”, asked Egypt, “if it were not for a principle of self-determination?” 31

The Nazi regime had, of course, also appealed to self-determination, but it was argued that the National Socialists had not discredited the right but merely abused it. In the words of the Rapporteur:

“Looking at the Austrian example as it was set, the principle of self-determination might look very nasty, but it is that nasty principle of self-determination which would have helped, for which people fought the war, and which would help countries like Belgium, like Norway, like Greece, like Syria to be liberated. When we want to rule it out, unconsciously, without wanting it, we would be reverting to previous conditions which lead to many wars. We would be in the same way breathing the air of our enemies, and it is not fragrant air and we would not like to breathe it.” 32

“[A]n essential element of the principle in question”, he later added, distinguishing exercise from abuse, “is a free and genuine expression of the will of the peoples and thus to avoid cases like those alleged by Germany and Italy.” 33

A sceptical view was, however, expressed by Belgium. Its delegate questioned whether making self-determination the basis for friendly relations might not in fact encourage intervention by one state in the affairs of another. The Belgian delegate raised the possibility that a national minority in a state might claim certain rights. “Does it mean”, he argued, “that the organization should be expected to intervene… that other states in view of the phrase ‘friendly relations’ should not take it upon themselves to intervene.” 34

c. The Balance in the Charter

The equal rights and self-determination of peoples was framed in general terms in the Charter, without the peoples being specified. Definitions of what a people might be were particularly vague. A memorandum from Secretariat to the Co-ordination Committee stated that: “‘peoples’ refers to groups of human beings who may, or may not, comprise states or nations.” 35 The Rapporteur noted that the principle might extend to, “a possible amalgamation of nationalities if

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29 Rapporteur, Cmttee. I/1, 1 June, p. 17. (See note 16).
30 Yugoslavia, Cmttee. I/1, 15 May, p. 18. (See note 16).
31 Egypt, Cmttee. I/1, 14 May, p. 24. (See note 16).
32 Rapporteur, Cmttee. I/1, 15 May, p. 12. (See note 16).
33 Rapporteur, Cmttee. I/1, 1 June, p. 17. (See note 16).
34 Belgium, Cmttee. I/1, 14 May, p. 12. (See note 16).
they so freely choose – of course, by peaceful means.” Among states there was, not surprisingly, support for self-determination as the right of the people of a state to enjoy self-government, and opposition to a right of secession. Such a right, Columbia claimed, would be, “tantamount to international anarchy”.

The general provision on equal rights and self-determination was, therefore, balanced by other Charter provisions, most notably, article 2(7), on non-intervention in matters essentially within the domestic jurisdiction of states. The Rapporteur noted that: “It was understood… that the principle in question [self-determination], as a provision of the Charter, should not be considered alone but in connection with other provisions.” And on this basis: “The Article… to the effect that the domestic affairs of each state are its own concern suffices to rule out that possibility of undue intervention.”

**d. The Trust and Non-Self-Governing Systems**

The Charter saw the concept of trusteeship developed into a general principle for colonial territories. The Charter, in fact, contained not one system of trusteeship but two. Chapters XII-XIII (articles 75-91) outlined the Trusteehip system for the international supervision of territories which did not govern themselves. Due British objections, this system was limited to mandate territories, territories detached from enemy states in the Second World War, and those voluntarily placed under the system. Other colonial territories were covered by a Declaration on Non-Self-Governing Territories, in chapter XI (articles 73-4).

Both systems were based on the doctrine of “trusteeship”. This was reflected in the title of the Trusteeship system, and article 73, which referred to obligations for non-self-governing territories as “a sacred trust”. Both were aimed at the protection of the well being of the populations of the territories and their progressive development toward self-government.

Proposals for the goals of the trusteeship system varied considerably. At one end, the Soviet Union proposed that trusteeship should based on “progressive development toward self-government and self-determination with active participation of peoples of these territories having the aim to expedite the achievement of them of the full national independence”. China argued that its goals were, “progressive development toward independence or self-government as may be appropriate to the particular circumstances of each territory and its people”.

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36 Rapporteur, Cmte. I/1, 1 June, p. 17. (See note 16).
37 Columbia, Cmte. I/1, 15 May, p. 20 (see note 16); Nicaragua, Doc. 8, G/5, UNCIO, vol. I, p. 557; China (Republic of): “‘peoples’ can be identified with states. China means the state of China and a logical meaning of that would be the people of the state of China.” WD 435, CO 199, UNCIO, vol. XVII, p. 280.
39 Columbia, Cmte. I/1, 15 May, p. 20. (See note 16).
40 Rapporteur, Cmte. I/1, 1 June, p. 17. (See note 16).
41 Rapporteur, Cmte. I/1, 15 May, p. 11. (See note 16).
45 USSR, Doc. 2, G/26 (f), UNCIO, vol. III at p. 618.
46 China (Republic of), Doc. 2, G/26 (e), UNCIO, vol. III at p. 615.
British proposals were more modest, “progressive development toward self-government” and “the development of self-government in forms appropriate to the varying circumstances of each territory.” French proposals were least substantial: “further the progressive development of their political institutions”.

Although the idea of self-government as a goal for trusteeship was generally accepted, independence proved more controversial. In a compromise, independence was explicitly included as an aim in the Trusteeship system, while the Declaration on Non-Self-Governing territories only referred to self-government. Article 76 also explicitly stated that the basic objectives of the Trusteeship system were in accordance with the purposes of the Charter in article 1, which, of course, would include equal rights and self-determination of peoples.

The Trusteeship system was also in general more stringent than that for non-self-governing territories. In article 85 the terms of the trusteeship agreements and any alterations and amendments to those agreements were to be approved by the UN General Assembly. The only exception were strategic trusts, in which the approval and modification of agreements was to be agreed by the Security Council. The General Assembly not only considered reports by the administering authority: which had an obligation to make an annual report based on a questionnaire drawn up by the Trusteeship Council: it could also examine petitions from the inhabitants of the trust territories themselves. States administering non-self-governing territories, on the other hand, only had the obligation, under article 73(e), to regularly transmit information of a technical nature on the economic, social and educational conditions in the territories.

The obligations towards the inhabitants of the territories under trusteeship were also, at least semantically, more exacting. Under article 73 states with non-self-governing territories had an obligation to “ensure” the political, economic, social, and educational advancement of the peoples concerned, whereas, under article 76, administering states were to “promote” similar goals for the inhabitants of the trust territories. Under article 73 administering states were to “develop” self-government, while, under article 76 the obligation was to “promote” progressive development towards self-government or independence. In both cases the achievement of self-government was seen as a progressive process dependent on the circumstances and level of development of the peoples in question. Nonetheless, these systems, however gradually and in whatever form, were aimed at the ultimate self-government of the peoples in question. For those reasons states with territorial claims over colonial territories, such as Ethiopia over Eritrea, Argentina over the Falkland Islands and Guatemala over Belize, made reservations over those territories. The two systems also provided a framework in which trusteeship could be replaced by self-determination as the decolonisation process developed.

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47 US, Doc. 2, G/26 (c), UNCIIO, vol. III at p. 607.
48 UK, Doc. 2, G/26 (d), UNCIIO, vol. III at p. 609.
49 France, Doc. 2, G/26 (a), UNCIIO, vol. III at p. 605.
52 Article 83(1).
53 Articles 87-8.
2. The Human Rights Covenants

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (EXTRACTS) \(^{55}\)

**Article 1**

1. All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

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

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

**Article 27**

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

**Article 47**

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

a. The Drafting of the Covenants

The twin Human Rights Covenants, \(^{56}\) the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights 1966, both contain in article 1 an identical formulation of the right to self-determination. Both instruments have been widely ratified and article 1 is generally seen as the most important codification of self-determination in a binding legal instrument. Moreover, although opened for signature in 1966, the Covenants were, in fact, the first major instruments to deal with self-determination after the UN Charter. Article 1 was drafted between 1950 and 1955 by the UN Human Rights Commission and General Assembly’s Third Committee, and remains the most important


expression of self-determination in the 1950s.

The Covenants were part of the “International Bill of Human Rights”: an attempt to flesh out the rather general human rights provisions in the UN Charter into a set of rights. The first stage in this process was the adoption of the Universal Declaration of Human Rights, GA Res. 217A(III), in December 1948. Part E of GA Res. 217(III) laid out the next stage of the “Bill”: the drafting of a legally-binding convention on human rights, which eventually became the two Human Rights Covenants.

The Universal Declaration itself contained many of the elements of self-determination. Its preamble reaffirmed the Charter’s vision of a world of peoples and also recognised, “recourse, as a last resort, to rebellion against tyranny and oppression”. A number of writers have also seen a close connection between self-determination and article 21(3) of the Declaration, which provided that:

“The will of the people shall be the basis of the authority of government; this shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.”

This provision encapsulated the principle of popular sovereignty. The formula that the will of the people was the basis of authority reflected a French view that this was a collective people’s right, although other states held different interpretations. The reference to, “or by equivalent free voting procedures”, also revealed another parallel with the principle of self-determination as it was understood in this era: the connection between the exercise of rights by a people and its level of development. The phrase originated with a Swedish proposal that the nature of the democratic process was conditional on the degree of civilisation of a people. Despite these various points

59 France: “…P[roposed an amendment to paragraph 3… because, as it stood, it was not comprehensible to minds trained in the tradition of Roman law. It could not logically be stated, as an individual right, that the government should conform to the will of the people; such a right was a collective right on the part of the people as whole. The French amendment was not designed to change the substance of paragraph 3, but merely to clarify it. The paragraph should first make plain that the will of the people was the source of authority and should then speak of how that will should be expressed.” 3 GAOR (1948) 3rd Cmtn., 132nd mtg., (A/C.3/SR.132) p. 450. The French amendment was subsequently effectively incorporated into a Chinese (ROC) amendment which was adopted by the General Assembly’s Third Committee by 39 votes to 3, with 3 abstentions. Ibid. 134th mtg., (A/C.3/SR.134) pp. 468, 472. See also Belgium, ibid. 132nd mtg., (A/C.3/SR.132) p. 453; Greece: “It was the people and not the individual who freely chose their representatives” Ibid. p. 454. But see New Zealand: “With regard to the French amendment, without wishing to start a philosophical discussion she would say that the statement that the authority of government was founded in the will of the people as expressed by free elections was open to challenge. In some countries that authority was actually based on written constitutions which could not be amended save in certain predetermined conditions.” Ibid. 133rd mtg., (A/C.3/SR.133) p. 460.
60 Sweden: “The phrase, ‘in equivalent, free voting procedures’… [was] included to take into account the fact that some primitive people were not accustomed to elections such as were held by more civilized peoples.” 3 GAOR (1948) 3rd Cmtn., 132nd mtg., (A/C.3/SR.132) p. 449.
of connection, however, the Universal Declaration did not include a specific reference to self-determination. Nonetheless, although decolonisation was still in its early stages, the political pressures which would propel self-determination on to the UN agenda were already evident. The rights of colonial populations were raised by Arab, Asian and Eastern Bloc states,\(^6\) and the Soviet Union pointedly criticised the Declaration for not including the right of self-determination.\(^6\)

The USSR raised this criticism again in October 1950 as work started on what was then intended to be a single draft Covenant.\(^6\) This time the issue was taken up in the General Assembly’s Third Committee by Socialist, Asian and Arab countries.\(^6\) In November Saudi Arabia and Afghanistan successfully introduced an amendment,\(^6\) adopted as GA Res. 421D(V),\(^6\) requesting the Commission on Human Rights to make a study of self-determination and prepare recommendations for the General Assembly. The Commission could not make this study in 1951 and in December of that year Arab and Asian states presented a proposal,\(^6\) GA Res. 545(VI)\(^6\) for a draft article based on the formula: “All peoples shall have the right to self-determination”,\(^6\) and for recommendations on the right’s implementation.

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\(^{61}\) India, 3 GAOR (1948), Plenary Meeting, 182\(^{nd}\) mtg., (A/PV.182) p. 894; Poland ibid. pp. 906-7, 909; Syria, ibid. 183\(^{rd}\) mtg., (A/PV.183) pp. 922-3.

\(^{62}\) Ukrainian SSR: “Neither did the declaration of human rights recognize the right of peoples and nations to self-determination, a right arising from human rights as each citizen was a member of a community and only the community could obtain such a right for the individual.” 3 GAOR (1948), Plenary Meetings, 180\(^{th}\) mtg., (A/PV.180) pp. 871-2; USSR: “The USSR delegation wished to stress that the draft declaration contained no reference to the highly important question of the right of all nations to self-determination.” Ibid. 183\(^{rd}\) mtg., (A/PV.183) p. 926.

\(^{63}\) USSR, 5 GAOR (1950) 3\(^{rd}\) Cmtee., 289\(^{th}\) mtg., (A/C.3/SR.289) para. 34.


\(^{66}\) GA Res. 421(V), 5 GAOR (1950) Supplement no. 20, (A/1775) at p. 42-3. Section D was adopted by 30 votes to 9, with 13 abstentions. The resolution as a whole was adopted by 38 votes to 7, with 12 abstentions. 5 GAOR (1950) Plenary Meetings, 317\(^{th}\) mtg., (A/PV.317) paras. 159, 170.

\(^{67}\) Adopted by the Third Committee by 33 votes to 9, with 10 abstentions. In favour: Uruguay, Venezuela, Yemen, Yugoslavia, Afghanistan, Argentina, Bolivia, Brazil, Burma, Byelorussian SSR, Czechoslovakia, Dominican Republic, Egypt, Ethiopia, Greece, Guatemala, Haiti, India, Indonesia, Iran, Iraq, Lebanon, Liberia, Mexico, Nicaragua, Pakistan, Philippines, Poland, Saudi Arabia, Syria, Thailand, Ukrainian SSR, USSR. Against: Australia, Belgium, Canada, France, Netherlands, New Zealand, Turkey, UK, US. Abstaining: Chile, China, Columbia, Cuba, Denmark, Ecuador, Israel, Norway, Peru, Sweden. 6 GAOR (1951) 3\(^{rd}\) Cmtee., 403\(^{rd}\) mtg., (A/C.3/SR.403) para. 58.

\(^{68}\) “This article shall be drafted in the following terms: ‘All peoples shall have the right of self-determination’, and shall stipulate that all States, including those having responsibilities for the administration of Non-Self-Governing Territories, should promote the realization of that right, in conformity with the Purposes and Principles of the United Nations, and that States having responsibility for the administration of Non-Self-Governing Territories should promote the realization of that right in relation to the peoples of such Territories”. GA Res. 545(VI) 6 GAOR (1951), Supplement No. 20, (A/2119) pp. 36-7. Adopted by 42 votes to 7, with 5 abstentions. 6 GAOR (1951) Plenary Meetings, 375\(^{th}\) mtg., (A/PV.375) para. 83.

\(^{69}\) Afghanistan, Burma, Egypt, India, Indonesia, Iran, Iraq, Lebanon, Pakistan, Philippines, Saudi Arabia, Syria and Yemen, (A/C.3/L.186 and Add.1) 6 GAOR (1951), Annexes, Agenda Item 29, p. 22.
In April 1952 the Commission met for a month and produced a draft, which followed its mandate, although it also contained a major innovation with a provision on permanent sovereignty, or economic self-determination.\textsuperscript{70} Recommendations were also made for the implementation of the right, which were debated in the Third Committee and adopted by the General Assembly in December 1952 as GA Res. 637(VII).\textsuperscript{71} These debates also provide a valuable insight into the position of states in the drafting of the Covenants and indeed influenced that process.

In 1954 the draft Covenant was split in two, although the twin Covenants continued to share a common article on self-determination. In November 1955 the Third Committee finally adopted the draft article 1 by 33 votes to 12, with 13 abstentions.\textsuperscript{72} This perhaps represented the most comprehensive debate on self-determination in any international instrument. In October-November 1966 an additional article on the right of peoples to their natural wealth and resources was added to the Covenants. Both were opened for signature on 19 December 1966.

A major feature of the debate in the Third Committee was that, whatever disagreement there was over self-determination, all sides proclaimed general support for the principle itself. In the words of the Chilean delegate: “Those who supported the amendment [for the study of self-determination], as well as those who rejected it, recognized the merits of the right to self-determination.”\textsuperscript{73} Where there was disagreement, and sharp disagreement, was over whether self-determination should be translated into a legally binding article, and what form it should take.

The article’s supporters were drawn, in particular, from Socialist, and Asian and Arab countries. These countries were acutely aware of the growing movement for independence in colonial territories and aimed to demonstrate support for those aspirations and accelerate decolonisation by proclaiming self-determination as a legally binding right.\textsuperscript{74} These countries further argued that the right of self-determination was essential for maintenance of international peace\textsuperscript{75} and a prerequisite for human rights.\textsuperscript{76}

\textsuperscript{70} “1. All peoples and all nations shall have the right of self-determination, namely, the right freely to determine their political, economic, social, and cultural status. 2. All States, including those having responsibility for the administration of Non-Self-Governing and Trust Territories and those controlling in whatsoever manner the exercise of that right by another people, shall promote the realization of that right in all their territories, and shall respect the maintenance of that right in other States, in conformity with the provisions of the United Nations Charter. 3. The right of peoples to self-determination shall include permanent sovereignty over their natural wealth and resources. In no case may a people be deprived of its own means of subsistence on the grounds of any rights that may be claimed by other States.” Commission on Human Rights, Report of the 8th Session, 1952, 14 ESCOR (1952) Supplement no. 4, (E/CN.4/669) para. 91. Adopted by 10 votes to 6, with 2 abstentions. Ibid. para. 70.

\textsuperscript{71} GA Res. 637(VII) 7 GAOR (1952), Supplement No. 20, (A/2361) p. 26.

\textsuperscript{72} In favour: Columbia, Costa Rica, Czechoslovakia, Ecuador, Egypt, El Salvador, Greece, Guatemala, Haiti, India, Indonesia, Iraq, Lebanon, Liberia, Mexico, Pakistan, Peru, Philippines, Poland, Saudi Arabia, Syria, Thailand, Ukrainian SSR, USSR, Uruguay, Venezuela, Yemen, Yugoslavia, Afghanistan, Argentina, Bolivia, Byelorussian SSR, Chile. Against: France, Luxembourg, Netherlands, New Zealand, Norway, Sweden, Turkey, UK, US, Australia, Belgium, Canada. Abstaining: Cuba, Denmark, Dominican Republic, Ethiopia, Honduras, Iceland, Iran, Israel, Panama, Paraguay, Brazil, Burma, China. 10 GAOR (1955) 3rd Cmtee., 676\textsuperscript{th} mtg., (A/C.3/SR.676) para. 27.

\textsuperscript{73} Chile, 5 GAOR (1950) 3rd Cmtee., 311\textsuperscript{th} mtg., (A/C.3/SR.311) para. 24.

\textsuperscript{74} Ukrainian SSR, 8 Comm.HR (1952) 255\textsuperscript{th} mtg., (E/CN.4/SR.255) p. 3; Saudi Arabia, 6 GAOR (1951) 3rd Cmtee., 367\textsuperscript{th} mtg., (A/C.3/SR.367) para. 45; Iran, ibid. 399\textsuperscript{th} mtg., (A/C.3/SR.399) para. 46; Pakistan, 7 GAOR (1952) 3rd Cmtee., 448\textsuperscript{th} mtg., (A/C.3/SR.448) para. 3; Yugoslavia, 9 GAOR (1954) 3rd Cmtee., 568\textsuperscript{th} mtg., (A/C.3/SR.568) para. 49; Uruguay, ibid. 580\textsuperscript{th} mtg., (A/C.3/SR.580) para. 33; Egypt, 10 GAOR (1955) 3rd Cmtee., 639\textsuperscript{th} mtg., (A/C.3/SR.639) para. 8; Syria, ibid. para. 13; Liberia, ibid. 644\textsuperscript{th} mtg., (A/C.3/SR.644) para. 33; Philippines, ibid. 646\textsuperscript{th} mtg., (A/C.3/SR.646) para. 39.

\textsuperscript{75} Indonesia, 6 GAOR (1951) 3rd Cmtee., 366\textsuperscript{th} mtg., (A/C.3/SR.366) para. 18; Czechoslovakia, ibid. para. 58;
These proposals were, however, met with scepticism and opposition from many other delegates, especially, although by no means exclusively, from Western countries. A number of objections were raised to such an article. First, it was claimed that self-determination was really a principle and not a right, and consequently had no place in the Covenants.\(^7\) Second, it was a group right, whereas all the other rights in the Covenants were individual.\(^8\) Third, self-determination was extremely hard to formulate as a legal obligation because of its ambiguous nature, not least the fact that the “peoples” who exercised it were undefined.\(^9\) Correspondingly, there was a danger that it could be used by minorities to dismember states.\(^\) Fourth, the Third Committee was really trying to amend the Charter, and as such had overstepped its mandate and might disrupt the delicate balance of rights and duties contained in the instrument.\(^\) Fifth, this controversy over self-determination might deter states from ratifying the Covenants.\(^\)

UN membership at the time was only a fraction of what it is today. Between 1950 and 1955 there were 60-76 members. Western, Latin American, and Asian, Arab and African countries formed three roughly numerically equal groups,\(^\) with Communist states forming a somewhat
smaller group. Moreover, these geographical groupings, with the exception of the Soviet Bloc, were quite heterogeneous in their views on self-determination, although Arab and Asian countries were at the time organising themselves into a group.\textsuperscript{84} Thus, support for the self-determination of peoples encompassed a wide range of possible situations and actions. No group was in a position, as would later be the case, to push through its agenda without regard to its opponents.

b. The Two Human Rights Committees

Subsequent practice in the interpretation of the Covenants is also provided by reports to the two human rights committees established to promote the implementation of the Covenants: the Human Rights Committee and the Committee on Economic, Social and Cultural Rights. Article 40 of the International Covenant on Civil and Political Rights provides for states parties to submit reports to the Human Rights Committee (established in 1976) on their implementation of rights in the Covenant.\textsuperscript{85} Article 40(1)(a) requires an initial report to be made within a year of ratification of the Covenant (or the Covenant’s entry into force in March 1976). Thereafter, under Article 40(1)(b), reports must be submitted whenever requested by the Committee, which has been interpreted to mean every five years.\textsuperscript{86} The Committee, under article 40(4) has also produced a general comment on the right of self-determination, General Comment No. 12 (21), and in General Comment Nos. 23 and 25, explored its relationship with minority rights, and the right to vote and take part in public affairs, respectively.

The International Covenant on Economic, Social and Cultural Rights also provides, in article 16(1), for states parties to report on implementation of rights in the Covenant, although it did not spell out when or in what form these reports should be submitted.\textsuperscript{87} In 1976 a three stage reporting system was set up by the Economic and Social Council. States’ reports were examined by a Working Group established in 1979, and replaced in 1986 by the Committee on Economic, Social and Cultural Rights, in a six-year cycle. Every two years states were to report on the rights in articles 6-9, and then 10-12, followed by 13-15.\textsuperscript{88} This system did not specifically cover article 1 and, although states were supposed to pay “full attention”\textsuperscript{89} to it, it was remarked that, “the Committee had never received more than three or four lines on the right to self-determination”.\textsuperscript{90} In 1988 the three stage reporting procedure was replaced by a single report on articles 1-15 to be submitted after two years and thereafter every five years.\textsuperscript{91} The issues in these

\textsuperscript{84} Morphet op. cit. no. 56 at p. 71.
\textsuperscript{86} 11-6 YHRC (1981-2) I, SR.303, para. 2.
c. The Balance in the Covenants

The drafting of article 1 appeared to be based on a contradiction. On one hand, states explicitly framed the right as a universal one: “All peoples have the right to self-determination…” On the other, they clearly intended to limit its application. While it was certainly the case that advocates of an article on self-determination had colonial peoples largely in mind, it was also clear that if they pushed for a narrow interpretation of self-determination, they also risked undermining its legitimacy. Delegates, after all, in the debate had underlined the broad significance of the right by citing historical arguments, or its role in their own existence. To limit the right to one category of people, therefore, would be to undermine its credibility. One of the main criticisms which states levelled at each other’s drafts and proposals, often on a partisan basis, was that they fell short of a universal standard. In fact, the universality of self-determination enjoyed broad support. The general approach of supporters

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95 See e.g. criticisms of Belgium: “The principle of self-determination was universal; to attempt to limit its application to an arbitrary defined category of population would be to distort a great principle and seriously weaken its value.” 7 GAOR (1952) 3rd Cmtee., 446th mtg., (A/C.3/SR.446) para. 31; Yugoslavia: “It was hard to see how ‘all’ peoples could enjoy the right of self-determination if only one class of signatory States was under an obligation to ensure the exercise of the right.” 10 GAOR (1955) 3rd Cmtee., 657th mtg., (A/C.3/SR.657) para. 12; Canada, 7 GAOR (1952) 3rd Cmtee., 457th mtg., (A/C.3/SR.457) para. 1.
of colonial self-determination, reflected in GA Res. 545(VI), the Human Rights Commission’s draft, GA Res. 637(VII), and finally article 1, was that the right was universal but of particular relevance for colonial peoples.  

This has continued in the reports to the Human Rights Committee, which show a general consensus that self-determination is a universal right. A couple of states have dissented from this line. India, Sri Lanka and briefly Azerbaijan have argued that article 1 applied only to peoples under colonial or foreign domination. However, this position has attracted repeated criticism from the Committee and from other states.

For opponents of article 1 universality was tactically useful. If self-determination was a right of all peoples, states with colonies could deflect the attention being deliberately focussed on them by pointing to other situations where it was being denied. The Netherlands, for example, argued that: “There were more peoples and nations outside the colonial orbit which were


Netherlands, (CCPR/C/10/Add.3) 11-16 YHRC (1981-2) II, p. 156; Jordan, (CCPR/C/1/Add.55) ibid. p. 199; German Federal Republic, (CCPR/C/28/Add.6) 23-8 YHRC (1985-6) II, p. 262; Senegal, 29-30 YHRC (1987) I, SR.722, para. 8; Mexico, (CCPR/C/46/Add.3) 34-6 HRCOR (1988-9) II, p. 37; Republic of Korea, CCPR/C/114/Add.1, (1998) p. 7. See comments by Mr. Sadi, 6-10 YHRC (1979-80) I, SR.222, para. 4; Mr. Bouziri, 17-22 YHRC (1983-4) I, SR. 477, para. 67; Mr. Tomuschat, ibid. SR.478, para. 1; Mr. Ermacora, ibid. para. 29; Mr. Ndiaeye, ibid. para. 33; Mr. Aguilar, ibid. para. 38; Sir Vincent Evans, ibid. SR.503, para. 13; Mr. Dimitijevic, ibid. para. 28.


Azerbaijan, CCPR/C/81/Add.2, (1994) p. 4. Mr. Herndel: “[D]id not understand how it could be asserted that the right of self-determination should be reserved exclusively for former colonies, when according to article 1 of the Covenant, all peoples had the right of self-determination.” CCPR/C/1332, (1996) para. 20; Mrs. Chanet, ibid. para. 28; Mrs. Evatt, ibid. para. 47; Mr. Pocar, ibid. para. 62. See also CCPR/C/79/Add.38, (1994) p. 2. Later Azerbaijan took the position that self-determination should be interpreted as strengthening the independence, sovereignty and territorial integrity of states whose governments reflect the interests of all members of their populations without distinction. CCPR/C/AZE/99/2, (2000) p. 10.

Criticism of Sri Lanka: Mr. Ermacora: “[H]e was unable to accept the interpretation of article 1 given by the representative of Sri Lanka”, 17-22 YHRC (1983-4) I, SR.477, para. 66; Mr. Bouziri: “[M]embers of the Committee had expressed the unanimous view that the article was addressed to all States and that sovereign and independent States thus had obligations thereunder. That did not mean that separatism should necessarily be encouraged. The interpretation given by Sri Lanka, which was not in accordance with the Covenant, should be reconsidered.” ibid. para. 67; Sir Vincent Evans, ibid. para. 68; Mr. Tomuschat, ibid. SR.478, para. 1; Mr. Klein: “It was furthermore frankly incorrect to state that the right to self-determination did not apply to sovereign independent States.” CCPR/C/1436, (1995) para. 39; Mr. El Shafei, ibid. para. 50; Mr. Buergenthal, ibid. para. 63. Criticism of India: Mr. Tomuschat: “[A]sked for clarification of the reservation made by India with respect to article 1 and for an assurance that it did not deny the Indian people’s right to self-determination.” 17-22 YHRC (1983-4) I, SR.494, para. 6; Mr. Serrano Caldera, ibid. para. 32; Mr. Bouziri, ibid. para. 54; Mr. El Shafei, 40-2 HRCOR (1990-1) I, SR.1039, para. 30; Mr. Aguilar Urbina, ibid. para. 43; Mr. Wennergren, ibid. para. 44. See also objections to India’s reservation by France, Federal Republic and the Netherlands. E/C.12/1988/1, p. 20.
deprived of all opportunity of determining their political status than there were within it.”

Moreover, if the right was universal there was no reason why minorities might not claim it. Opponents could raise the spectre that a legal right to self-determination would only encourage secession and instability. It was simply too hot to handle.

Opponents of article 1, though, as much as its supporters had no interest in encouraging secession. Consequently, states in the debate balanced the right of all peoples to self-determination with other principles. The two balancing principles which appeared to have most support were the territorial integrity of states, and that a population be sufficiently developed to exercise the right. Other factors were: peace and stability, the circumstances of the population and the territory, human rights, respect for neighbours’ rights, and the existence of a legal dispute over the status of the territory. Within this balance four categories of populations could be identified: colonial peoples, the peoples of states, peoples under foreign or alien domination and minorities.

i. Colonial Peoples

The right of colonial peoples to self-determination was, of course, a principal motivating factor behind article 1. Colonial peoples are the only category of people, which can be implied

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104 Netherlands, 10 GAOR (1955) 3rd Cmte., 671st mtg., (A/C.3/SR.671) para. 3
105 UK: “On the question of minorities, many representatives appeared to have been indulging in wishful thinking, and had not analysed the facts objectively… No one wanted to encourage separatist or irredentist movements. But if it were acknowledged that certain minorities could be regarded, as peoples, article 1 indubitably sanctioned their right to independence, with all the dangers that that involved.” 10 GAOR (1955), 3rd Cmte., 652nd mtg., (A/C.3/SR.652) para. 19.
from a literal reading of the Covenants. Article 1(3) provides that states parties, “including those having responsibility for the administration of Non-Self-Governing or Trust Territories”, shall promote realisation of the right of self-determination. Nonetheless, the debates revealed some ambiguity around the concept of colonial peoples. Different claims were made by Honduras and Saudi Arabia over the status of Belize (British Honduras), and by Indonesia and Syria, and the Netherlands over West Irian (West Papua). Argentinia, presumably in a reference to the Falkland Islands, also argued that territories subject to litigation were not entitled to unilaterally change their status.

ii. The Peoples of States

It is not surprising that one people that states’ representatives in the drafting of the Covenants would accord the right of self-determination were states’ populations. In this case, self-determination involved safeguarding and strengthening the independence of those peoples, especially in the economic field. State independence was, of course, already supported by the principles of sovereign equality and non-intervention in the internal affairs of states. Self-determination was considered to be a corollary of those principles, especially non-intervention.

This connection has been supported in subsequent states’ reports to the Human Rights Committee and by the Committee itself in General Comment No. 12 (21). Not surprisingly the strongest advocates of this connection have been states that have been subject to considerable outside interference. As El Salvador put it: “El Salvador has been one of the keenest defenders of the right of peoples to self-determination... El Salvador has reiterated its attachment to this fundamental principle of international law and has vigorously condemned any outside interference in the internal affairs of countries and, in particular, in the internal affairs of El Salvador.” Similar sentiments were echoed by Lebanon, by Ba’athist Iraq (somewhat hypocritically) about interference resulting from the Iran-Iraq and First Gulf wars, and

120 El Salvador, (CCPR/C/14/Add.5) 17-22 YHRC (1983-4) II, p. 241.
121 Lebanon, (CCPR/C/1/Add.60) 17-22 YHRC (1983-4) II, p. 211.
especially by Central and South American countries. Costa Rica even cited its treason laws as evidence of its respect for self-determination. Committee members have also questioned states about interventions in Afghanistan, Cambodia and Uganda.

However, some practice in the Committee has shown that the line between defending self-determination and violating it may be thin and subjective. Yugoslavia, for example, was asked whether its support for peoples struggling against imperialism was not simply a pretext for interference in the internal affairs of other states. When El Salvador complained to the Committee about destabilisation by Cuba, one member, Mr. Movchan replied that Cuba was simply following the tradition of Simón Bolívar in struggling against foreign domination.

iii. Peoples under Foreign or Alien Domination

A literal reading of article 1(3) suggests that the obligation to promote the realisation of self-determination applied to states with non-self-governing and trust territories, but was not exclusive to them. This interpretation was supported by the Human Rights Committee in General Comment No. 12 (21). It stated that article 1(3) imposed, “specific obligations on States parties, not only in relation to their own peoples but *vis-à-vis* all peoples which have not been able to exercise or have been deprived of the possibility of exercising their right to self-determination.” But, who were these peoples?

Delegates in the Third Committee evidently contemplated the application of self-determination in a wider range of situations than colonial territories or states. Lebanon argued that self-determination imposed three classes of obligations: “States in general, those which administered Non-Self-Governing Territories and those which exercised the right of sovereignty over another people.” This latter category could be called peoples under foreign or alien domination. Delegates raised a number of peoples who might fall into this category. With war on the Korean peninsula, different states argued over Korean self-determination. Pakistan raised the question of Kashmir. Iraq and Syria demanded rights for the Palestinian people.

Some states also raised the plight of peoples in Eastern Europe who had been either annexed by the Soviet Union or who were nominally independent but controlled by the superpower.
Other states, though, appeared to draw a distinction between the political reality of colonial peoples and those behind the Iron Curtain. The Philippines recognised that: “Another important aspect of the problem of self-determination was an increasing consciousness of the plight of formerly sovereign peoples, which had lost everything as a result of the Second World War save the outward trappings of independence. The United Nations could not yet take any effective action on their behalf…” 136 The Indian delegate, believed that: “it was futile to promise the same treatment to Non-Self-Governing and Trust Territories on the one hand and to recently enslaved nations on the other.” 137 For other delegates this area of self-determination seemed only to provoke apathy. 138

Peoples under foreign or alien domination represented an open-ended category. Subsequent practice by the Human Rights Committee has also revealed it to be an extremely political one. In the 1970s and 1980s, in particular, states before the Committee could be expected to be extensively probed by certain committee members on their support for the Palestinian, Namibian and South African peoples. 139 These were, of course, issues, that were especially prominent in the UN General Assembly at the time. Support for the self-determination of East Timor or Western Sahara, on the other hand, was only raised by states themselves, 140 or when Morocco presented its report. 141 Sometimes these questions appeared to go far beyond the Committee’s mandate. For example, Mr. Bouziri asked Iran, then at war with Iraq, on the basis of respect for the right of self-determination: “Why had the Iranian government not accepted the cease-fire proposed by Iraq, so that Iraq could go and fight the Israelis?” 142 A striking criticism of this selective promotion of self-determination came from Lebanon: “Although many members of the Committee had asked what Lebanon was doing to promote the self-determination of the


138 Venezuela: “It was true that certain sovereign States had been annexed by others by force of arms since the beginning of the Second World War; but the majority of the Members of the United Nations regarded those States simply as temporarily suspended from the exercise of their sovereign rights. Their people could not be described as ‘slaves’ under international law, since such a description would be tantamount to recognition of the existence of international slavery as a juridical fact; whereas the de facto subjugation of those peoples gave rise to no rights or obligations for anyone.” 7 GAOR (1952), 3rd Cmtee., 451st mtg., (A/C.3/SR.451) para. 35.
141 Mr. Ermacora, 11-6 YHRC (1981-2) I, SR.327, para. 13; Mr. Tarnopolsky, ibid. para. 35; Morocco, ibid. SR.332, para. 10; Morocco, 40-2 HRCOR (1990-1) I, SR.1033, paras. 3-4; Mr. Ndiaye, ibid. para. 6; Mr. Aguilar Urbina, ibid. paras. 7-9; Mr. Ando, ibid. paras. 11-2; Mrs. Higgins, ibid. paras. 13-4; Morocco, ibid. paras. 15-23; Ms. Chanet, ibid. para. 24; Mr. Fodor and Mr. Myullerson, ibid. para. 25; Ndiaye, ibid. para. 26; Mr. Aguilar Urbina, ibid. para. 27; Morocco, ibid. paras. 28-9; Morocco, CCPR/C/SR.1788, (2000) para. 8; Ms. Evatt, ibid. para. 56; Ms. Medina Quiroga, ibid. para. 37.
142 Mr. Bouziri, 11-6 YHRC (1981-2) I, SR. 365, para. 35 and SR.368, para. 40. See also Mr. Al Douri’s reference to Israel as, “the Zionist entity, which had refused to recognize the Palestinian people’s right to self-determination since its creation in 1948.” Ibid. SR.356, para. 41.
Palestinian people, few of them had expressed any interest in what Lebanon was doing to promote the self-determination of its own people, which was after all the matter of greatest priority.”

iv. Minorities

It was unlikely that states’ representatives in drafting the Covenants would ever show any great enthusiasm for the idea that specific populations within states could claim the right to freely determine their political status. As the Netherlands warned delegates: “States were the principal subject of existing international law; those who undermined the State were at the same time undermining the whole world order.” There was considerable opposition to a right of self-determination which either embraced minorities or extended to secession. The aim of balancing self-determination with the principle of the territorial integrity was to restrict this possibility. The rights of ethnic minorities, or rather persons belonging to such groups, were recognised in a separate provision in the Civil and Political Covenant: article 27. However, the issue was not clear-cut.

In part this can be attributed to the tactics of opponents of article 1 in the debate, who raised the issue of minorities claiming self-determination to highlight the danger in codifying a legal right. However, the debate also revealed how hard it was to restrict the right of all peoples to self-determination without appearing arbitrary and selective. The following exchange is illustrative:

“Mrs. MEHTA (India) pointed out that the question of minorities and of the self-determination of peoples should not be confused.

…

Mr. NISOT (Belgium) asked the Indian representative whether, in her delegation’s opinion, minorities should, in principle, have the right to self-determination denied to them.

Mrs. MEHTA (India) replied that all depended on what was meant by minorities.”

Indeed, some of the distinctions between peoples and minorities were not just arbitrary but clumsy. Syria, for example, after defining a nation as, “comprised of people of the same ethnic group”, dismissed the possibility of secession on the grounds that peoples within states did not want it. Iraq argued that self-determination applied, “not to a secessionist movement”, but, “to

143 Lebanon, 17-22 YHRC (1983-4) I, SR.446, para. 3.
a people under foreign domination”.148 But, presumably a secessionist movement (e.g. the Kurds) might be able to present quite a convincing argument that they were under foreign domination.149

Moreover, states identified self-determination with groups which could easily be considered minorities.150 A draft by the Soviet Union on self-determination encompassed minority rights.151 Denmark argued that border populations had the same right to self-determination as the peoples of non-self-governing territories.152 Mexico described the partition of the Ewe, an ethnic group which straddles the borders of Ghana and Togo, as, “a glaring example of the violation of the right of peoples to self-determination.”153 Consequently, while there was little support for the right of minorities to self-determination, the limitation of the right to such groups was also not completely clear.

This same problem has also been evident in the practice of the Human Rights Committee. The Committee itself has shown little enthusiasm for secession,154 (unless a state explicitly provides for such a right in its constitution).155 However, although in General Comment No. 23 (50) it drew, “a distinction between the right to self-determination and the rights [of persons belonging to minorities] protected under article 27”,156 it has not clarified the distinction between peoples and minorities themselves.157 States have also been unclear on the issue. For example, when

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154 Mr. Graefrath, 17-22 YHRC (1983-4) I, SR.472, para. 38; Mr. Tomuschat, ibid. SR.504, para. 45; Mr. Cooray, ibid. SR.513, para. 42; Mr. Prado Vallejo, ibid. SR.514, para. 23; Mr. Bouziri, ibid. para. 31; Mr. Opsahl, 23-8 YHRC (1985-6) I, SR.590, para. 15; Mr. Prado Vallejo, ibid. para. 18; Mrs. Higgins, 43-5 HRCOR (1991-2) I, SR.1149, para. 42.

155 Mr. Tomuschat (to USSR), 1-5 YHRC (1977-8) I, SR.109, para. 51; Mr. Ermacora (to USSR), 23-8 YHRC (1985-6) I, SR.565, para. 11; Mr. Lallah (to Byelorussian SSR), 1-5 YHRC (1977-8) I, SR.117, para. 27; Mr. Tarnopolsky (to Ukrainian SSR), 6-10 YHRC (1979-80) I, SR.154, para. 38; Mr. Tarnopolsky (to Yugoslavia), 1-5 YHRC (1977-8) I, SR.99, para. 20; Mr. Herndl, Mr. Prado Vallejo and Mr. Sadi (to Yugoslavia), 43-5 HRCOR (1991-2) I, SR.1144, paras. 30, 52 and 56.

156 General Comment No. 23 (50), 49 GAOR (1994) Supplement No. 40, (A/49/40) p. 107, para. 3.1.

157 Mr. Tomuschat, “[T]he concept of the concept of a people... had given rise to differences of opinion, but he felt that it was not the Committee’s role to deal with that problem”. 17-22 YHRC (1983-4) I, SR.478, para. 1; Mr. Opsahl, “...agreed that it would be useful to define the concept of the people, but that it was not the Committee’s role to do so.”, ibid. para. 3; Mr. Dimitrijevic: “In some languages, the word ‘people’ had ethnic and other connotations which he felt the Committee should avoid.”, ibid. SR.514, para. 36; Mr. Serrano Caldera, “[T]he Covenant did not draw a distinction between ‘peoples’ and ‘ethnic, religious and linguistic minorities’, although it was true that under article 1 of the Covenant ‘All peoples have the right to self-determination’ while article 27 granted certain specific rights under certain conditions to ethnic, religious and linguistic minorities. To establish a distinction between ‘peoples’ and ‘ethnic, religious and linguistic minorities’, it would be necessary to define those terms and that was not the central purpose of the Committee’s discussion.” 23-8 YHRC (1985-6) I, SR.608, para. 37; Mr. Dimitrijevic, “[T]he Covenant made an implicit distinction between ‘peoples’ and ‘minorities’ in according them different rights”, ibid. para. 40; Mr. Bouziri: “While the Covenant did not draw a direct distinction between ‘peoples’ and ‘minorities’, it did so indirectly as the existence of articles 1 and 27 showed.”, ibid. para. 45; Mrs. Higgins, “[It was generally agreed that... under the Covenant peoples have the right to self-determination while members of ethnic minorities have other rights.”, ibid. para. 48; Mr. Opsahl: “Minorities coming from peoples which had a national State and which had exercised their right of self-determination in connection with that State could not claim that right in relation to another State under article 1.”, ibid. SR.618, para. 56; Mr. Opsahl,
Senegal was asked whether groups in the province of Casamance, where there had been a long-running secessionist conflict, could be peoples, its representative was unable to answer, although he claimed that most people there felt thoroughly Senegalese.

States have also blurred the line between the self-determination of peoples and the constitutional protection of minorities. Finland, for example, has argued that the autonomy of the Åland Islands represented, “an example of how self-determination of a distinct population group can be realized within a larger community.” Similarly, Belgium has looked at the constitutional relationship between the country’s Flemish, French and German communities under article 1. The United States has also reported on Native Americans under article 1, although it was stressed that “sovereignty” and “self-determination” in this context where different from their meaning in international law. This is not to mention Armenia, which, with irredentist claims against Azerbaijan, has argued that Armenians in Nagorno-Karabakh have a right to self-determination.

d. Self-Determination

i. Immediate or Progressive?

The trust and non-self-governing systems and the concept of “trusteeship” were based on the progressive development of self-government dependent on the capacity of a population for such government. Self-determination, as codified in article 1, posed a challenge to this concept with the argument that the basis for political authority resided with peoples. Peoples had the right to freely determine their political status and pursue their economic, social and cultural development. It was not for other countries to make those decisions for them. However, if self-determination challenged the basic legitimacy of colonial rule, what obligations did it actually entail?

The way in which the self-determination of colonial peoples was interpreted depended on how the general object of that process, statehood was viewed. Was possession of a state simply an inherent right of all peoples, or was statehood an institution which needed to be viable before peoples could obtain it? These two perceptions shaped the process of self-determination. If statehood was simply an inherent right of all peoples, then self-determination was a short process involving the acquisition of independence. If, on the other hand, statehood required a capacity for self-government, then self-determination might be a more progressive right dependent on political development. Eleanor Roosevelt drew the analogy that: “Self-determination was the

“[M]inorities coming from peoples which had a national faith [state] and which had performed an act of self-determination could not claim protection under article 1.” Ibid. SR.590, para. 15; Mrs. Chanet: “[N]o clearly drawn distinction had been made between article 27 and the right to self-determination”, CCPR/C/SR.1294, (1994) para. 6; Mr. Prado Vallejo: “[N]o express distinction was drawn in the text of the Covenant itself between the right to self-determination and the right protected under article 27.” Ibid. para. 35.


161 Finland, (CCPR/C/58/Add.5) 40-2 HRCOR (1990-1) II, pp. 74-5; 23-8 YHRC (1985-6) I, SR.643, para. 32.


building of roads and bridges, not the mere decision to build them, but the process of finding the engineers, the teachers and the money and seeing the job through."\textsuperscript{165}

Supporters of an immediate right attacked the idea that colonial peoples were actually progressively obtaining a capacity for self-government under the trust and non-self-governing territory systems. According to Yugoslavia: “If the colonial Powers had not been able to bring their colonial peoples to an adequate stage of development in two centuries, they would be unlikely to be able to do so in the two ensuing decades.”\textsuperscript{166} It was also argued that peoples were ready for self-determination as soon as they had been “awakened” and demanded it.\textsuperscript{167}

The basic ideas behind trusteeship were also attacked: “good government”, argued India, “was no substitute for self-government; whatever advantages a people enjoyed, freedom was the prime desideratum.”\textsuperscript{168} This was more than simply President Coolidge’s adage, quoted by Brazil that, “it was preferable to have people err by themselves rather than to have others err for them.”\textsuperscript{169} Foreign rule was an intolerable denial of freedom, and if the cost of obtaining freedom was anarchy, in Manuel Quezon’s words to be ruled like hell, it was still preferable. Saudi Arabia put it in particularly stark Quezonesque terms:

“The metropolitan States averred that, if they were to withdraw from the territories under their control, the peoples of those territories would cut one another’s throats, the fallacy of that argument had been proved by experience but even if it were true, that risk was preferable to their position of subjugation.”\textsuperscript{170}

Self-determination therefore encompassed two positions. These were, however, not mutually exclusive and statehood as a right of peoples could be balanced with the requirements for self-government. The staunchest anticolonial states generally considered self-determination to be an immediate right.\textsuperscript{171} However, the progressive approach, which attracted many Western and Latin American states, appeared to command the greatest support in the Committee.\textsuperscript{172} This was also

\textsuperscript{165} US, 7 GAOR (1952) 3\textsuperscript{rd} Cmtee., 447\textsuperscript{th} mtg., (A/C.3/SR.447) para. 28.

\textsuperscript{166} Yugoslavia, 7 GAOR (1952) 3\textsuperscript{rd} Cmtee., 448\textsuperscript{th} mtg., (A/C.3/SR.448) para. 24.

\textsuperscript{167} Afghanistan, 7 GAOR (1952) 3\textsuperscript{rd} Cmtee., 445\textsuperscript{th} mtg., (A/C.3/SR.445) para. 24; see also Indonesia, ibid. 451\textsuperscript{st} mtg., (A/C.3/SR.451) para. 8; Venezuela, ibid. 451\textsuperscript{st} mtg., (A/C.3/SR.451) para. 33.


\textsuperscript{169} Brazil, 9 GAOR (1954) 3\textsuperscript{rd} Cmtee., 565\textsuperscript{th} mtg., (A/C.3/SR.565) para. 41.

\textsuperscript{170} Saudi Arabia, 6 GAOR (1951) 3\textsuperscript{rd} Cmtee., 398\textsuperscript{th} mtg., (A/C.3/SR.398) para. 37. Later qualified in 402\textsuperscript{nd} meeting: “[H]e had said... not that he concdoned threat-cutting, but that even if, as the colonial Powers contended, the peoples of the Non-Self-Governing Territories, on being freed, did cut one another’s throats, that would be preferable to shedding blood in fighting foreign troops sent to stifle their national aspirations.” 6 GAOR (1951) 3\textsuperscript{rd} Cmtee., 402\textsuperscript{nd} mtg., (A/C.3/SR.402) para. 20.

\textsuperscript{171} Ukrainian SSR, 6 GAOR (1951) 3\textsuperscript{rd} Cmtee., 367\textsuperscript{th} mtg., (A/C.3/SR.367) para. 19; Byelorussian SSR, ibid. 368\textsuperscript{th} mtg., (A/C.3/SR.368) para. 15; USSR, ibid. 370\textsuperscript{th} mtg., (A/C.3/SR.370) para. 12; Syria, ibid. 400\textsuperscript{th} mtg., (A/C.3/SR.400) para. 4; Poland, 7 GAOR (1952) 3\textsuperscript{rd} Cmtee., 445\textsuperscript{th} mtg., (A/C.3/SR.445) para. 6.

\textsuperscript{172} Belgium, 8 Comm.HR (1952) 252\textsuperscript{nd} mtg., (E/CN.4/SR.252) p. 7; Greece, 7 GAOR (1952) 3\textsuperscript{rd} Cmtee., 454\textsuperscript{th} mtg., (A/C.3/SR.454) para. 28; Netherlands, 6 GAOR (1951) 3\textsuperscript{rd} Cmtee., 398\textsuperscript{th} mtg., (A/C.3/SR.398) para. 40; Chile, 399\textsuperscript{th} mtg., (A/C.3/SR.399) para. 20; Australia, ibid. 400\textsuperscript{th} mtg., (A/C.3/SR.400) para. 19; France, 7 GAOR (1952) 3\textsuperscript{rd} Cmtee., 445\textsuperscript{th} mtg., (A/C.3/SR.445) para. 32; Mexico, ibid. 447\textsuperscript{th} mtg., (A/C.3/SR.447) paras. 14, 18; Argentina, ibid. 449\textsuperscript{th} mtg., (A/C.3/SR.449) para. 25; New Zealand, ibid. 450\textsuperscript{th} mtg., (A/C.3/SR.450) para. 9; Ecuador, ibid. 454\textsuperscript{th} mtg., (A/C.3/SR.454) para. 6; UK, ibid. 456\textsuperscript{th} mtg., (A/C.3/SR.456) para. 3; Sweden, 10 GAOR (1955) 3\textsuperscript{rd} Cmtee., 641\textsuperscript{st} mtg., (A/C.3/SR.641) para. 16; Denmark, ibid. 644\textsuperscript{th} mtg., (A/C.3/SR.644) para. 1; Brazil, ibid. 650\textsuperscript{th} mtg., (A/C.3/SR.650) para. 6; El Salvador, ibid. 674\textsuperscript{th} mtg., (A/C.3/SR.674) para. 12. Some states argued
consistent with other UN practice regarding colonial territories at the time, such as the UN Commission for Eritrea in 1950, which clearly connected a right to statehood with a capacity for self-government.173

One factor against an immediate right was the practical reality of decolonisation. Lebanon, for example, was faced with the dilemma of whether to:

“[O]pt for… progressive realization, but that would be contrary to justice and the wishes of many delegations. To opt for immediate realization would lead to other difficulties, because it was recognized that there were cases in which it was not possible for the right of peoples to self-determination to be exercised immediately.”174

The danger for anticolonial states was that if they pushed for too radical interpretations of self-determination, their drafts might not pass, or the Covenant might not be ratified. The composition of the Committee made some compromise necessary. These states were also faced with the uncomfortable reality that countries with the greatest influence on the timing and methods of self-determination were those with colonial possessions. Some delegates believed that it was more productive to engage rather than alienate those states.175 As the debate progressed, progressive self-determination seemed to gain the upper hand. Some prominent supporters of an immediate right, such as Saudi Arabia, appeared to soften their position.176

Although article 1 could accommodate different interpretations of self-determination, the phrase “promote the realization” in article 1(3) may be seen to be more orientated towards the progressive implementation of the right.177

This was in the 1950s. However, this division between an immediate and a progressive right that self-determination was best achieved by agreement between the representatives of the dependent peoples and the administering authorities. Norway, 7 GAOR (1952) 3rd Cmtee., 450th mtg., (A/C.3/SR.450) para. 17; Israel, ibid. 459th mtg., (A/C.3/SR.459) para. 12.

173 Report of the United Nations Commission for Eritrea (Majority Report): “A fair and lasting solution for the problem of Eritrea must be realistic and take into account all the salient facts of the case… Attention is, firstly, drawn to the fact that Eritrea is a poor country, without any prospects of progressing as a separate economic entity, and dependent in most vital respects on Ethiopia’s rich farming resources and transit trade. In the view of the delegations of Burma, Norway and the Union of South Africa, these facts preclude a solution which has as its aim the creation of an entirely separate Eritrean State, whether in the immediate future or after an interval of international trusteeship.” 5 GAOR (1950), Supplement No. 8, (A/1285), at p. 24, paras. 155­6.

Memorandum Submitted by the Delegations of Guatemala and Pakistan (Minority Report): “All peoples have the right to be free. The Eritreans have the right to independence, since a majority of the population claims it and there are no jurisdictional reasons justifying any other procedure… We observed that, while Eritrea possesses trained people, it does not have a sufficient number of them to assume the government of the territory immediately. A period of time is necessary for the political, economic, social and educational development of the inhabitants, and to ensure the tranquillity of the territory before they are able to take over the government… we are of the opinion that the most appropriate course would be for the United Nations to take direct charge of the administration.” Ibid. p. 31, paras. 205-8.


176 Saudi Arabia: “Brazil wanted the right of self-determination to be exercised gradually; but that was precisely what was proposed in article 1.” 10 GAOR (1955) 3rd Cmtee., 648th mtg., (A/C.3/SR.648) para. 21.

has continued in the practice of the Human Rights Committee. Some states in their reports have called for the immediate termination of all forms of colonial government.178 On the other hand, some states with dependent territories have connected article 1 with articles 73 and 76 of the Charter.179 Britain and France, in particular, have also made declarations that in any conflict between article 1 and their obligations under the Charter, those obligations would prevail.180

ii. Economic Self-determination

In 1952 Chile introduced a proposal in the Human Rights Commission for the inclusion of a right of “permanent sovereignty”, or economic self-determination into the draft Covenant.181 Somewhat amended, and with the phrase “permanent sovereignty” deleted,182 the provision became article 1(2).

The basic idea of economic self-determination was not new. The right of states to determine their economic systems, to control resources, regulate economic activity and to expropriate foreign companies was an established part of state sovereignty.183 However, in international law these rights were also balanced by obligations. International agreements were binding, and expropriation and nationalisation were to conform to international standards of a public purpose, non-discrimination and compensation. Economic self-determination, or permanent sovereignty, created the possibility, in the name of peoples’ rights, of changing that balance. Opponents argued that this peoples’ right was not a human right at all, only a re-branding of states’ rights.184

The potential implications of this challenge were immense. “If self-determination included inalienable sovereignty by the people over their natural resources,” France warned, “all international agreements would be subject to revocation by either of the parties.”185 Most proponents of the right did not go that far. However, while they agreed that nationalisation

178 Romania, (CCPR/C/1/Add.33) 6-10 YHRC (1979-80) II, p. 53; Algeria, (CCPR/C/62/Add.1) 43-5 HRCOR (1991-2) II, p. 78. See also Mr. Graefrath, 6-10 YHRC (1979-80) I, SR.161, para. 37.
179 New Zealand, (CCPR/C/10/Add.6) 17-22 YHRC (1983-4) II, p. 269; UK, 6-10 YHRC (1979-80) I, SR.161, paras. 5-8; (CCPR/C/1/Add.17), 1-5 YHRC (1977-8) II, p. 97.
184 UK, 8 Comm.HR (1952) 257th mtg., (E/CN.4/SR.257) p. 13; France, ibid. 260th mtg., (E/CN.4/SR.260) p. 9; Australia, ibid. p. 12; Sweden, ibid. 261” mtg., (E/CN.4/SR.261) p. 5. But see Chile: “[I]n countries which were still developing, such as those in Africa and Latin America, human rights were so intermingled with the rights and duties of States that it was almost impossible to distinguish between them.” Ibid. 260th mtg., (E/CN.4/SR.260) p. 11.
The right of peoples rather than states to control resources, though, created problems. The concept of a people was, after all, far from clear. El Salvador referred to a tribe in Tanganyika deprived of its ancestral land, although this was later qualified as an example of “large human groups”, and not necessarily peoples. AUSTRALIA also warned that the right could be used by minorities against states.

If peoples remained ambiguous, article 1(2) did little to clarify economic self-determination. The right was expressed by a delicately worded balance with five elements, each reflecting the different interests of states in the Committee. First, “all peoples”, could, “for their own ends, freely dispose of their natural wealth and resources”. This appeared to have a counterpart in a second phrase, “without prejudice to any obligations arising out of international economic co-operation”. This was followed by a third element, “the principle of mutual benefit”, which appeared to be balanced with a fourth, “international law”. These four were then balanced by a fifth element: “in no case may a people be deprived of its own means of subsistence.” The trouble was, though, that it was unclear exactly how these elements interacted. The terms were undefined and so was the way in which they related to each other.

The right of peoples to freely dispose of natural resources “for their own ends” was controversial and only narrowly adopted. Britain argued that such a provision was selfish and allowed peoples to engage in economic activities contrary to the interests of others. Costa Rica disputed this, pointing out that the phrase was balanced by references to co-operation, mutual benefit and international law. Nonetheless, Indonesia considered that states did have the right to refuse to co-operate with other states.

Peru understood “co-operation” as balancing the right to expropriate with a duty to compensate. Costa Rica, Argentina and Guatemala interpreted “international law” as also protecting investors. However, the United States and Columbia claimed that “co-operation”, “international law” and “mutual benefit” were not clear enough. Britain expressed concern

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that “mutual benefit” might provide an escape clause for treaty commitments.196 And some states did interpret the phrase this way. Syria, which had argued that one-sided investment treaties were invalid, believed that “mutual benefit” and “international law” were essential to prevent exploitation under the guise of “co-operation”.197 Uruguay, on the other hand, interpreted “mutual benefit” as referring to economic co-operation within the tenets of international law.198 The phrase, “based on the principle of mutual benefit”, was adopted by 21 to 14, with 23 abstentions.199

The final sentence on subsistence was very controversial. Britain said that it was puzzling,200 and Guatemala that it was too broad,201 while Egypt and Iraq claimed that it was self-explanatory. The most detailed interpretation was provided by Saudi Arabia: “It was intended to prevent a weak or penniless government from seriously compromising a country’s future by granting concessions in the economic sphere – a frequent occurrence in the nineteenth century.”202 El Salvador cited two examples: Nauru, which lost substantial amounts of its main resource, phosphates, under trusteeship; and the aforementioned tribe in Tanganyika:203 although these were not necessarily examples of “peoples”.204 The United States complained that “in no case” implied an absolute principle,205 while El Salvador considered that it was subject to international law.206 Greece argued that it could not jeopardise investments in under-developed countries,207 but Israel thought that it might throw them into question.208 In Egypt’s opinion the phrase was a matter of judgment: “the term… did not mean totally deprived. It left the door open for commercial concessions, so long as such concessions were reasonable and just.”209 But what was “reasonable and just”? The provision was ultimately adopted by 25 votes to 8, with 25 abstentions.210

199 In favour: Bolivia, Byelorussian SSR, Chile, Costa Rica, Czechoslovakia, Ecuador, Greece, Guatemala, India, Indonesia, Liberia, Peru, Poland, Saudi Arabia, Syria, Ukrainian SSR, USSR, Yemen, Yugoslavia, Afghanistan, Argentina. Against: Australia, Burma, Brazil, Canada, China, France, Luxembourg, Netherlands, New Zealand, Norway, Sweden, Turkey, UK, US. Abstaining: Burma, Columbia, Cuba, Denmark, Dominican Republic, Egypt, El Salvador, Ethiopia, Haiti, Honduras, Iceland, Iran, Iraq, Israel, Lebanon, Mexico, Pakistan, Panama, Paraguay, Philippines, Thailand, Uruguay, Venezuela. 10 GAOR (1955) 3rd Cmtee., 676th mtg., (A/C.3/SR.676) para. 24.
208 Greece, 10 GAOR (1955) 3rd Cmtee., 672th mtg., (A/C.3/SR.672) para. 43.
211 In Favour: Costa Rica, Czechoslovakia, Ecuador, Egypt, El Salvador, Greece, India, Indonesia, Iraq, Libya, Peru, Philippines, Poland, Saudi Arabia, Syria, Ukrainian SSR, USSR, Uruguay, Yemen, Yugoslavia, Afghanistan, Argentina, Bolivia, Byelorussian SSR, Chile. Against: Netherlands, New Zealand, Norway, Sweden, Turkey, UK, US, Australia, Canada. Abstaining: Columbia, Cuba, Denmark, Dominican Republic, Ethiopia, France, Guatemala, Haiti, Honduras, Iceland, Iran, Israel, Lebanon, Luxembourg, Mexico, Pakistan, Panama, Paraguay, Thailand, Turkey, Venezuela, Belgium, Brazil, Burma, China. 10 GAOR (1955) 3rd Cmtee., 676th mtg., (A/C.3/SR.676) para. 25.
Article 1(2) was adopted by 26 votes to 13, with 19 abstentions. 212 However, its ambiguous balance between rights and duties was further complicated in 1966 with the addition of a second article on natural wealth and resources (article 25 in the Economic, Social and Cultural Covenant, and article 47 in the Civil and Political Covenant). There were three striking features of articles 25 and 47. First, they included a right of peoples to enjoy and utilize fully and freely their natural wealth and resources without any explicit qualifications. In other words, their right was framed as an absolute right. Second, they were separate from the other rights of the Covenants, in the section on implementation. Third, they were framed negatively. Nothing the Covenants was to be interpreted as impairing the right of peoples to their resources. This raised the question of which provisions in the Covenants might restrict an absolute right to resources? The obvious answer was article 1(2). Articles 25 and 47 can be seen, therefore, as an attempt to change the interpretation of the balance in article 1(2) without actually being an amendment to the paragraph.

Behind this new article was the radically different composition of the United Nations in 1966. In 1955, when article 1 was completed, Asian and African, Western and Latin American countries formed roughly equal groupings. However, by 1966, when articles 25 and 47 were drafted, Asian and African states formed about fifty percent of member states. 213 This new composition made the General Assembly an ideal platform for developing countries to challenge the old international law.

In 1962 the General Assembly, with the exception of the Eastern Bloc which abstained, reached a consensus on economic self-determination in the Declaration on Permanent Sovereignty over Natural Resources, GA Res. 1803(XVII). 214 This agreement struck a similar balance to article 1(2), with the right of permanent sovereignty balanced by international obligations, but with sufficient ambiguity, for example, the standard of compensation was "appropriate", that almost all states could support it.

However, by 1966 it was clear that this consensus had fallen by the wayside. The new mood was reflected in the debate on article 25 of the Economic, Social and Cultural Covenant, in October of that year. The Third World majority, rather than seeking compromise, simply flexed its voting muscle. Malaysia hoped that a generally acceptable formula could be found, 215 and it appears that such efforts were being made behind the scenes. 216 But, these hopes were in vain. A day after the debate began the representative of Congo (Brazzaville) moved for a motion of closure and this was passed by 48 votes to 21, with 30 abstentions. A vote then followed and the article adopted by 75 votes to 4, with 20 abstentions. 217 In November an identical article (50,


217 In Favour: Hungary, India, Indonesia, Iran, Iraq, Jamaica, Jordan, Kenya, Kuwait, Liberia, Libya, Madagascar, Malaysia, Mali, Mauritania, Mexico, Mongolia, Morocco, Nepal, Nigeria, Pakistan, Panama, Peru, Philippines, Poland, Romania, Rwanda, Saudi Arabia, Senegal, Sierra Leone, Somalia, Spain, Sudan, Syria,
later 47) was added to the Civil and Political Covenant, without debate and by an unrecorded vote of 50 to 2, with 17 abstentions.\(^\text{218}\)

Although brief, the debate supports the literal reading that the articles were intended to endorse an unrestricted right to resources. Sri Lanka argued that because of the change in UN membership it was necessary to take account of a new absolute right to resources.\(^\text{219}\) Articles 25 and 47 were not an amendment to article 1, but delegates hoped that they would qualify it. Iraq considered that, “the right enunciated in article 1 was accompanied by restrictions which limited its scope, whereas the proposed article had the advantage of recognizing that the right was absolute.”\(^\text{220}\) “The right of peoples to the enjoyment of their natural resources was affirmed unambiguously,” in the article, Algeria claimed, “whereas it was enunciated with qualifying restrictions in article 1, paragraph 2.”\(^\text{221}\) Tunisia similarly believed that, “certain obligations were no longer valid”, although it was not specified what they were.\(^\text{222}\) Columbia considered that the article would supplement the sentence on “means of subsistence”,\(^\text{223}\) which had been seen as a possible escape clause for international obligations.

The intent to qualify article 1(2) can be clearly seen in the reaction to a Venezuelan proposal that the phrase, “without prejudice to the provisions of article 1, paragraph 2, of the present Covenant” be inserted in the article.\(^\text{224}\) This was rejected presumably because the idea of the article was precisely to prejudice article 1(2).

Subsequent practice in the Human Rights Committee has done little to clarify the complex balance of rights and obligation in the Covenants. In the 1970s and 1980s a number of states referred to the more absolute right to resources proclaimed as part of the New International Economic Order.\(^\text{225}\) Others, though, argued that the right to resources was subject to international obligations.\(^\text{226}\) General Comment No. 12 (21) seemed to follow Mr. Aguilar’s suggestion that, “a cautious approach was needed”,\(^\text{227}\) to article 1(2). It merely stated that the right entailed corresponding duties for all states and the international community. States were to indicate any factors or difficulties, which prevented the free disposal of their natural wealth and resources

Thailand, Togo, Tunisia, Turkey, Uganda, Ukrainian SSR, USSR, UAR, Tanzania, Uruguay, Venezuela, Yugoslavia, Zambia, Afghanistan, Albania, Algeria, Bolivia, Brazil, Bulgaria, Byelorussian SSR, Cameroon, Central African Republic, Ceylon, Chad, Chile, China (Republic of), Columbia, Congo (Brazzaville), Congo (Democratic Republic of), Costa Rica, Cuba, Cyprus, Czechoslovakia, Dahomey, Ecuador, Ethiopia, Ghana, Guatemala, Guinea, Guyana, Honduras. Against: New Zealand, Norway, UK, US. Abstaining: Iceland, Israel, Italy, Japan, Luxembourg, Netherands, Nige, Portugal, Sweden, Upper Volta, Argentina, Australia, Austria, Belgium, Canada, Denmark, Finland, France, Gabon, Greece. 21 GAOR (1966) 3rd Cmtee., 1405\(^\text{th}\) mtg., (A/C.3/SR.1405) para. 43.

\(^\text{220}\) 21 GAOR (1966) 3rd Cmtee., 1404\(^\text{th}\) mtg., (A/C.3/SR.1404) para. 46; see also India, ibid. para. 42; Hungary, ibid. para. 48; Iraq, ibid. 1405\(^\text{th}\) mtg., (A/C.3/SR.1405) para. 3; Cuba, ibid. para. 4.
\(^\text{225}\) Iraq, 6-10 YHRC (1979-80) I, SR.204, para. 5; Senegal, ibid. SR.219, para. 46; Romania, (CCPR/C/32/Add.10) 29-30 YHRC (1987) II, p. 170; Mexico, (CCPR/C/46/Add.3) 34-6 HRCOR (1988-89) II, p. 38. See also Mr. Hanga, 6-10 YHRC (1979-80) I, SR.199, para. 10; SR.214, para. 14; 11-6 YHRC (1981-2) I, SR.291, para. 12; 17-22 YHRC (1983-4) I, SR.476, para. 17. See also Mr. Graefrath, 6-10 YHRC (1979-80) I, SR.216, para. 54.
\(^\text{226}\) France, (CCPR/C/22/Add.2) 17-22 YHRC (1983-4) II, p. 192.
contrary to article 1(2) and to what extent that affected the enjoyment of other rights.\textsuperscript{228} There was no attempt to clarify the balance of rights and obligations in article 1(2) and the relationship between this paragraph and article 47.

iii. Democratic Government, and Internal and External Self-Determination

In the drafting of the Covenant there was considerable support for the idea that self-determination included a right to democratic or representative government.\textsuperscript{229} A number of states also connected the right to article 21(3) of the Universal Declaration of Human Rights.\textsuperscript{230} In the practice of the Human Rights Committee there has also been widespread support for self-determination as a right to democratic government.\textsuperscript{231} In the case of Hong Kong it appears to be the only interpretation of self-determination.\textsuperscript{232} However, this had not been universal. Some states have argued that self-determination is satisfied in a single party state, although the end of the Cold War has thinned out their numbers.\textsuperscript{233} In general states have taken the view that their


\textsuperscript{229} Pakistan, 8 Comm.HR (1952) 253\textsuperscript{rd} mtg., (E/CN.4/SR.253) p. 13; India, ibid. 256\textsuperscript{th} mtg., (E/CN.4/SR.256) p. 4; Brazil, 7 GAOR (1952) 3\textsuperscript{rd} Cmte., 444\textsuperscript{th} mtg., (A/C.3/SR.444) para. 38; Afghanistan, ibid. 445\textsuperscript{th} mtg., (A/C.3/SR.445) para. 16; US, ibid. 447\textsuperscript{th} mtg., (A/C.3/SR.447) para. 28; Norway, ibid. 450\textsuperscript{th} mtg., (A/C.3/SR.450) para. 17; Israel, ibid. para. 40; Uruguay, ibid. 452\textsuperscript{nd} mtg., (A/C.3/SR.452) para. 8; Lebanon, ibid. 454\textsuperscript{th} mtg., (A/C.3/SR.454) para. 13; Liberia, 9 GAOR (1954) 3\textsuperscript{rd} Cmte., 572\textsuperscript{nd} mtg., (A/C.3/SR.572) para. 50; Belgium, 10 GAOR (1955) 3\textsuperscript{rd} Cmte., 643\textsuperscript{rd} mtg., (A/C.3/SR.643) para. 8; Greece, ibid. 647\textsuperscript{th} mtg., (A/C.3/SR.647) para. 9; Denmark, ibid. 674\textsuperscript{th} mtg., (A/C.3/SR.674) para. 21.

\textsuperscript{230} Costa Rica, 7 GAOR (1952) 3\textsuperscript{rd} Cmte., 452\textsuperscript{nd} mtg., (A/C.3/SR.452) para. 2; Mexico, 9 GAOR (1954) 3\textsuperscript{rd} Cmte., 570\textsuperscript{th} mtg., (A/C.3/SR.570) para. 40; India, 10 GAOR (1955) 3\textsuperscript{rd} Cmte., 651\textsuperscript{rd} mtg., (A/C.3/SR.651) para. 3.

\textsuperscript{231} UK: “The right to self-determination in the United Kingdom itself is exercised primarily through the electoral system.” (CCPR/C/58/add.6) 40-2 HRCOR (1990-1) II, p. 175; Netherlands: “The Netherlands electoral system sufficiently guarantees the Netherlands people’s right to self-determination,” CCPR/C/70/Add.7, (1995) p. 11; Australia: “Australia interpreted self-determination as the matrix of civil, political and other rights required for the meaningful participation of citizens in the kind of decision-making that enabled them to have a say in their future. Self-determination included participation in free, fair and regular elections and the ability to occupy public office and enjoy freedom of speech and association.” 31-3 HRCOR (1987-8) I, SR.807, para. 19; German Federal Republic: “The exercise of self-determination requires a democratic process, and this democratic process is inseparably linked with the unrestricted exercise of human rights.” (CCPR/C/52/Add.3) 37-9 HRCOR (1989-90) II, p. 163; Costa Rica: “Without representative democracy it is impossible for there to be effective and free self-determination of peoples.” (CCPR/C/37/Add.10) 37-9 HRCOR (1989-90) II, p. 149; Canada, 6-10 YHRC (1979-80) I, SR.211, para. 9; Portugal, (CCPR/C/6/Add.6) ibid. p. 97; Morocco, (CCPR/C/10/Add.2) ibid. p. 183; Mexico, (CCPR/C/22/Add.1) 17-22 YHRC (1983-4) II, p. 9; Luxembourg, (CCPR/C/31/Add.2) 23-8 YHRC (1985-6) II, p. 197; Panama, (CCPR/C/42/Add.7) 40-2 HRCOR (1990-1) II, p. 277; Columbia, (CCPR/C/64/Add.3) 43-5 HRCOR (1991-2) II, p. 118; Cyprus, CCPR/C/32/Add.19 (1994) p. 3; Nepal, CCPR/C/74/Add.2 (1994) p. 1; Paraguay, CCPR/C/84/Add.3 (1994) p. 9; US, CCPR/C/81/Add.4, (1994) p. 5; Mauritius, CCPR/C/64/Add.12 (1995) p. 2; Bolivia, CCPR/C/63/Add.4 (1996) p. 3; Equador, CCPR/C/84/Add.6 (1997) p. 5; Cambodia, CCPR/C/81/Add.12 (1998) p. 11; Chile, CCPR/C/95/Add.11 (1998) p. 11; Republic of Korea, CCPR/C/114/Add.1 (1998) p. 7; Venezuela, CCPR/C/VEN/98/3 (1999) p. 3; Czech Republic, CCPR/C/ZE/2000/1 (2000) p. 7. See also Mrs. Higgins: “In her view, however, it was questionable whether any system short of election on the basis of the ‘one person, one vote’ principle could be a satisfactory expression of self-determination”. 23-8 YHRC (1985-6) I, SR.604, para. 44.

\textsuperscript{232} Hong Kong (SAR), CCPR/C/HK/SAR/99/1 (1999) p. 5.

\textsuperscript{233} USSR: “Referring to the internal aspect of the right to self-determination, on of the basic requirements of the first Programme of the Communist Party had concerned the right to self-determination for all peoples of the State. The Soviet State had from the outset granted all peoples of former Tsarist Russia full independence in deciding their
constitutional arrangements reflect the wishes of the people and thus satisfy self-determination. Despite the statement in General Comment No. 12 (21) that states parties should describe how in practice, not just on paper, their constitutional and political process allow for exercise of the right, states have tended to report on the latter.235

The International Covenant on Civil and Political Rights contains in article 25 a right to take part in the conduct of public affairs and to vote and be elected at genuine periodic elections. These rights were recognised in the Human Rights Committee’s General Comment No. 25 (57) as being, “related to, but distinct from the rights covered by article 1”, on account of being rights of individuals. The Comment continued that under article 1 peoples, “enjoy the right to choose the form of their constitution or government.”236

Connected to this, the drafting of the Covenants also saw the coining of a distinction between the “internal” and “external” aspects of self-determination. In January 1952 the Syrian delegate distinguished between what he described as the “domestic” and “international” aspects of self-determination:

“The principle of the right of peoples to self-determination had two aspects, according to whether it was considered from the domestic or the international point of view. From the domestic point of view, it took the form of self-government, that is to say a people’s right to adopt representative institutions and freely choose the form of government, which it wished to adopt. From the international point of view, it led to independence.”237

In November in the debate on GA Res. 627(VII) a similar idea was expressed by Mr. Beaufort of the Netherlands as the “internal” and “external” aspects of self-determination:

“[T]he idea of self-determination was a complex of ideas rather than a single concept. Thus the principle of internal self-determination, or self-determination on the national level, should be distinguished from that of external self-determination, or self-determination on the international level. The former was the right of a nation, already constituted as a State, to choose its form of government and to determine the policy it meant to pursue. The latter was the right of a group which considered itself a nation to form a State of its own.”238

This distinction was subsequently taken up by opponents of article 1. Mr. Beaufort, in particular, used it to demonstrate self-determination’s complexity and thus unsuitability as a legal right, as well as, to highlight that its denial was a far wider phenomenon than colonial

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236 General Comment No. 25 (57), 51 GAOR (1996) Supplement No. 40, (A/51/40) p. 98, para. 2. See Mrs. Higgins: “It was important to differentiate between the right of self-determination, as described in article 1 of the Covenant, and the right of the individual to vote, which was covered by article 25…” CCPR/C/SR.1399 (1995) para. 48; Mr. Kretzmer, ibid. para. 44; Mrs. Evatt, ibid. para. 51. See also Mr. Scheinin, CCPR/C/SR.1672 (1998) para. 3; Mrs. Chanet, ibid. para. 4; Mr. Evatt, ibid. para. 5; Mr. Zahkla, ibid. para. 10.
237 Syria, 6 GAOR (1951) 3rd Cmtee., 397th mtg., (A/C.3/SR.397) para. 5.
situations. Similarly, Denmark and Australia rejected a draft of article 1 because it did not specifically spell out the internal aspects of the right. Such criticisms, on the other hand, were rejected by Greece as “hair-splitting.”

However, the internal and external division of self-determination also pointed to more fundamental issues. It has been argued that the concept of self-determination, as it was promoted by Woodrow Wilson and other western leaders at Versailles grew out of a liberal nationalist tradition. This tradition continued with the UN Charter, which affirmed, however imperfectly, a vision of a world community of peoples in which peace and security was preserved and the rights and freedoms of individuals were respected. However, if liberal nationalism supposed that liberalism and nationalism could work in a partnership, the codification of self-determination in article 1 had actually seen a shift in that relationship. Supporters of the right justified its place in the Covenants on the basis that self-determination was the prerequisite for human rights.

Indonesia called it the, “conditio sine qua non of individual human rights.” Poland claimed that “freedom of the individual was a snare and a delusion as long as the nation of which he was part was not free.” In other words, in the order of human rights self-determination came first. National government and nationalism took priority over liberal government and individual rights.

The division of self-determination into internal and external aspects was arguably an attempt to redress this imbalance. Internal self-determination (respect for individual and democratic rights) corresponded neatly with liberal government, while external self-determination (the right of peoples to choose their state) equated with national government. The identification of two parts in self-determination ensured that attention could be focussed on its liberal as well as its nationalist aspects. As Australia argued:

“Articles 6, 7, 8, 9, 16, 17 and 20 [of the Civil and Political Covenant]… seemed to provide a more logical standard for measuring the extent of ‘internal’ self-determination than the simple claim that the exercise of the right of self-determination was a prerequisite of the enjoyment of other rights.”

However, an internal and external division of self-determination still reveals the same problems experienced by liberal nationalism. Subsequent practice by the Human Rights Committee has revealed some disagreement on the relationship between self-determination and other human rights, including an internal and external division of the right. There is general

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241 Greece: “The Greek delegation would therefore not take part in arguments on technicalities which had aptly been described as ‘hair-splitting.’ For his part, he could not accept subtle distinctions drawn by some representatives between individual and collective human rights and between ‘internal’ and ‘external’ self-determination.” 7 GAOR (1952) 3rd Cmtee., 454th mtg., (A/C.3/SR.454) para. 25.
244 Poland, 8 Comm.HR (1952) 255th mtg., (E/CN.4/SR.255) p. 6.
246 See Mr. Mavrommatis: “He was not certain that everyone meant the same thing by the internal aspect of self-determination.” 43-5 HRCOR (1991-2) I, SR.1092, para. 47; Mr. El Shafei: “In the absence of any problem of
agreement that self-determination is not an individual right. For example, when Barbados claimed that self-determination was a right of individuals to determine their own political status,\textsuperscript{247} Committee members replied that the right was held by peoples not individuals.\textsuperscript{248} States have continued to argue that self-determination is a prerequisite for human rights,\textsuperscript{249} while West Germany claimed that: “Where the political will cannot be expressed freely and in a democratic manner, the right of self-determination is a travesty.”\textsuperscript{250} Moreover, the assumption that self-determination and human rights, like nationalism and liberalism, are essentially complementary has been challenged, in particular, in the report of the disintegrating Socialist Federal Republic of Yugoslavia:

\textsuperscript{247} Barbados, (CCPR/C/1/Add.36) 11-6 YHRC (1981-2) II, p. 65.
\textsuperscript{248} Mr. Bouziri, 11-6 YHRC (1981-2) I, SR.264, para. 28; Mr. Sadi, ibid. para. 43; also Mr. Ermacora, ibid. SR.265, para. 34. See also Costa Rica, CCPR/C/103/Add.6 (1998) p. 3.
\textsuperscript{249} Columbia, (CCPR/C/37/Add.6/Rev.1) 11-3 HRCOR (1987-8) II, p. 274; Chile, (CCPR/C/58/Add.2) 37-9 HRCOR (1989-90) II, p. 103; Dominican Republic, (CCPR/C/32/Add.16) ibid. p. 178; Iraq, (CCPR/C/64/Add.6) 40-2 HRCOR (1990-1) II, p. 326; Ecuador, (CCPR/C/58/Add.9) 43-5 HRCOR (1991-2) II, p. 56; Peru, (CCPR/C/51/Add.4) 43-5 HRCOR (1991-2) II, p. 109; Armenia, CCPR/C/92/Add.2 (1998) p. 5. General Comment No. 12 (21): “The right of self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights.” 39 GAOR (1984) Supplement No. 40, (A/39/40) para. 1. Mr. Movchan, “[W]ithout the exercise of the right to self-determination, the rights of individuals were non-existent or precarious: all members of the Working Group, who were of different beliefs or ideologies, had been in agreement on that point.” 17-22 YHRC (1983-4) I, SR.474, para. 2; Sir Vincent Evans, “[T]he adjective ‘non-existent’ was much too strong... the end of the paragraph could be changed to: ‘the rights of individuals... could not be fully effective and would be much more vulnerable.’” Ibid. SR.476, para. 19; Mr. Opsahl, “[N]on-existent... reflected a historical reality”. Ibid., SR.478, para. 4; Mr. Bouziri: “Several members of the Committee had found the adjective ‘non-existent’... excessive. He found the expression quite correct.” Ibid. para. 10; Mr. Ndiaye, “[S]elf-determination is an essential condition for the effective guarantee and enjoyment of human rights and for the protection and strengthening of those rights.” Ibid. para. 17; Mr. Aguilar: “[T]he realization of the right of peoples to self-determination was a ‘sine qua non’... for the effective guarantee and observance of human rights... was too strong... some peoples might not be in a position to exercise their right to self-determination for economic or cultural reasons or because their numbers or resources were inadequate, and those circumstances need not prevent observance of other rights contained in the Covenant. The right to self-determination was not, like the right to life laid down in article 6 of the Covenant, a sine qua non for the exercise of the other rights provided for in that instrument.” Ibid. SR.504, para. 39; Mr. Ermacora: “The right to self-determination could not be freely exercised unless it was also possible to exercise other rights, such as freedom of expression and of opinion.” Ibid. para. 51.
\textsuperscript{250} German Federal Republic, (CCPR/C/52/Add.3) 37-9 HRCOR (1989-90) II, p. 163.
“If we proceed from the fact that human rights belong primarily to the individual and that tendencies towards national homogenization and identification are realized through giving preference to national rights, we can state that in Yugoslavia the other rights of citizens are restricted and not infrequently suspended in favour of a group called a nation.”

Indeed, one Committee member argued that individual rights should not “straitjacket” self-determination, which was as a “revolutionary reservation” to the other rights in the Covenant.

3. The Colonial Independence Declaration

DECLARATION ON THE GRANTING OF INDEPENDENCE TO COLONIAL COUNTRIES AND PEOPLES, GA RES. 1514(XV), (FULL TEXT)

The General Assembly,

Mindful of the determination proclaimed by the peoples of the world in the Charter of the United Nations to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to promote social progress and better standards of life in larger freedom,

Conscious of the need for the creation of conditions of stability and well-being and peaceful and friendly relations based on respect for the principles of equal rights and self-determination of all peoples, and of universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion,

Recognizing the passionate yearning for freedom in all dependent peoples and the decisive role of such peoples in the attainment of their independence,

Aware of the increasing conflicts resulting from the denial of or impediments in the way of the freedom of such peoples, which constitute a serious threat to world peace,

Considering the important role of the United Nations in assisting the movement for independence in Trust and Non-Self-Governing Territories,

Recognizing that the peoples of the world ardently desire the end of colonialism in all its forms and manifestations,

Convinced that the continued existence of colonialism prevents the development of international economic co-operation, impedes the social, cultural and economic development of dependent peoples and militates against the United Nations ideal of universal peace,

Affirming that peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based on the principle of mutual benefit, and international law,

Believing that the process of liberation is irreversible and that, in order to avoid serious crises, an end must be put to colonialism and all practices of segregation and discrimination associated therewith,

Welcoming the emergence in recent years of a large number of dependent territories into freedom and independence, and recognizing the increasingly powerful trend towards freedom in such territories which have not yet attained independence,

Convinced that all peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory,

Solemnly proclaims the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations;

And to that end

252 Mr. Graefrath: “He personally did not believe that the Covenant was ever intended to put the right of self-determination into a straitjacket of individual rights or that it could ever succeed in doing so. Article 1 might in a sense be understood as a revolutionary reservation.” 11-6 YHRC (1981-2) I, SR.366, para. 26.
Declares that:
1. The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.
2. All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
3. Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.
4. All armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise their right to complete independence, and the integrity of their national territory shall be respected.
5. Immediate steps shall be taken in Trust and Non-Self-Governing or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.
6. Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and the principles of the Charter of the United Nations.
7. All States shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights and the present Declaration on the basis of equality, non-interference in the internal affairs of all States, and respect for the sovereign rights of all peoples and their territorial integrity.

a. Drafting

1960 marked a turning point in the policy of the General Assembly towards colonial self-determination. At this time the decolonisation process had gained momentum, with seventeen new states taking up their seats that year.254 On 23 September 1960 Soviet Chairman Nikita Khrushchev presented the Assembly with a draft declaration on the granting of independence to colonial countries and peoples.255 This was taken up and on 28 November, when debate opened on the issue, twenty-five Asian and African states submitted their own declaration on colonial independence.256 This draft drew on resolutions of the Afro-Asian conference in Bandung in 1955 and the first and second conferences of African states at Accra and Addis Ababa in 1958.257

--End Notes--

255 “1. All colonial countries and Trust and Non-Self-Governing Territories must be granted forthwith complete independence and freedom to build their own national States in accordance with the freely-expressed will and desire of their peoples. The colonial system and colonial administration in all these forms must be completely abolished in order to afford the peoples of the territories concerned an opportunity to determine their own destiny and form of government. 2. Similarly, and strongholds of colonialism in the form of possessions and leased areas in the territory of other States must be eliminated. 3. The Governments of all countries are urged to observe strictly and steadfastly the provisions of the United Nations Charter and of this Declaration concerning the equality and respect for the sovereign rights and territorial integrity of all States without exception, allowing no manifestations of colonialism or any special rights or advantages for some States to the detriment of other States.” USSR, 15 GAOR (1960) Plenary Meetings, 869th mtg., (A/PV.869) para. 183. UN Doc. A/4502, 15 GAOR (1960) Annexes, Agenda Item 87, pp. 2-7.
256 Afghanistan, Burma, Cambodia, Ceylon, Chad, Ethiopia, Ghana, Guinea, India, Indonesia, Iran, Iraq, Jordan, Lebanon, Liberia, Libya, Morocco, Nepal, Nigeria, Pakistan, Saudi Arabia, Sudan, Togo, Tunisia, Turkey plus Cyprus, Mali and the UAR. Cambodia, 15 GAOR (1960) Plenary Meetings, 926th mtg., (A/PV.926) paras. 9-10. At the end of the debate there were forty three sponsors.
and June 1960.\textsuperscript{257} On 14 December it was adopted without changes, by 89 votes to 0, with 9 abstentions,\textsuperscript{258} as the Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res. 1514(XV).\textsuperscript{259} The Colonial Independence Declaration has been called the “Magna Charta” of decolonisation.\textsuperscript{260} And it is a landmark document. If the Declaration of the Rights of Man and the Citizen 1789 signalled the emergence of nationalism as a political force, the Colonial Independence Declaration marked its global conquest. It was also a watershed, which specifically repudiated many of the basic assumptions in earlier instruments, like the UN Charter. In particular, size and development were no longer held to be prerequisites for statehood, at least for trust and non-self-governing territories. As a resolution of the UN General Assembly, the Declaration, unlike the UN Charter or the Covenants, is not formally legally binding. Nonetheless, it has been considered by the International Court of Justice in determining international law in the Namibia\textsuperscript{261} and Western Sahara\textsuperscript{262} advisory opinions.

b. The Balance in the Colonial Independence Declaration

As its title suggests, GA Res. 1514(XV) was essentially concerned with the independence of colonial countries and peoples. The basis for that independence was the right of self-determination. But, the general order of business was nicely summed up by the United Arab Republic (the short-lived union of Egypt and Syria): “the right of peoples and nations to independence – that is to say, the right of self-determination”.\textsuperscript{263}

\textsuperscript{257} The Bandung Communique 1955: “(a) in declaring that colonialism in all its manifestations is an evil which should be speedily brought to an end; (b) in affirming that the subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation”. Quoted by Togo, 15 GAOR (1960) Plenary Meetings, 936\textsuperscript{th} mtg., (A/PV.936) para. 63. See also Ghana, ibid. 927\textsuperscript{th} mtg., (A/PV.927) para. 49-50; Indonesia, ibid. (A/PV.936) para. 52; Cyprus, ibid. 945\textsuperscript{th} mtg., (A/PV.945) para. 106.

\textsuperscript{258} In favour: Haiti, Honduras, Hungary, Iceland, India, Indonesia, Iran, Iraq, Ireland, Israel, Italy, Ivory Coast, Japan, Jordan, Laos, Lebanon, Liberia, Libya, Luxembourg, Madagascar, Mali, Mexico, Morocco, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Romania, Saudi Arabia, Senegal, Somalia, Sudan, Sweden, Thailand, Togo, Tunisia, Turkey, Ukrainian SSR, USSR, UAR, Upper Volta, Uruguay, Venezuela, Yemen, Yugoslavia, Afghanistan, Albania, Argentina, Austria, Bolivia, Brazil, Bulgaria, Burma, Byelorussian SSR, Cambodia, Cameroun, Canada, Central African Republic, Ceylon, Chad, Chile, China, Columbia, Congo (Brazzaville), Congo (Leopoldville), Costa Rica, Cuba, Cyprus, Czechoslovakia, Denmark, Ecuador, El Salvador, Ethiopia, Federation of Malaya, Finland, Gabon, Ghana, Greece, Guatemala, Guinea. Against: None. Abstaining: Portugal, Spain, South Africa, UK, US, Australia, Belgium, Dominican Republic, France. 15 GAOR (1960) Plenary Meetings, 947\textsuperscript{th} mtg., (A/PV.947) para. 34.


\textsuperscript{261} Namibia (Advisory Opinion), ICJ Reports (1971) p. 31, para. 52.

\textsuperscript{262} Western Sahara (Advisory Opinion), ICJ Reports (1975) pp. 31-2, paras. 55-7.

\textsuperscript{263} UAR, 15 GAOR (1960) Plenary Meetings, 929\textsuperscript{th} mtg., (A/PV.929) para. 161; see also Iran, ibid. 926\textsuperscript{th} mtg., (A/PV.926) para. 46; Ethiopia, ibid. 928\textsuperscript{th} mtg., (A/PV.928) para. 31; Libya, ibid. 929\textsuperscript{th} mtg., (A/PV.929) para. 2;
The formula for colonial independence in the Declaration was a general proclamation that, “All peoples have the right to self-determination…”, (grafted in from the draft Covenant) in principle 2. This was balanced with protection for the national unity and territorial integrity of a “country”, in principle 6. Meanwhile, specific provisions in principles 1, 3, 4 and 5, legitimised by the article on self-determination, spelled out the basis for colonial independence.

In simple terms, this balance may be seen to allow the Declaration to appeal to self-determination as the basis for colonial independence, while protecting the integrity of states. However, the result was much more ambiguous. Principle 6 stated that any attempt aimed at the partial or total disruption of the national unity or territorial integrity of a “country” was incompatible with the purposes and principles of the UN Charter. But what was a “country”? Was it a colony, a state or a nation? Principle 6 allowed for all three interpretations and this was unfortunate because not all of them were compatible. Some states interpreted the principle as protecting the integrity of a colony. Arab states cited Palestine as an example of the unjust division of such a territory. Others argued that it upheld the integrity of a state. The disintegrating Congo was used to illustrate the importance of this. Still others argued that it supported the integrity of a nation, which might not correspond to existing frontiers. This was, in fact, a challenge to the integrity of states and colonies. Examples included Somalia, Morocco’s claims over Western Sahara and Mauritania, Indonesia’s over West Irian (West Papua), Ireland’s over Northern Ireland and Guatemala’s over Belize. Guatemala at one point attempted unsuccessfully to insert a paragraph into the Declaration recognising the right of states to recover national territory.

Not surprisingly, states interpreted principle 6 as it suited them best. Morocco, for example, supported all three interpretations depending on the situation: in Palestine, the integrity of a colony, in the Congo, the integrity of a state, and in Mauritania, the integrity of a nation. Consequently, paragraph 6 and its open concept of “country” did not so much establish legal clarity, as simply represent a vehicle for nationalist claims.

Another source of ambiguity was colonialism. Principle 1 condemned the subjection of
peoples to alien subjugation, domination and exploitation as a denial of fundamental rights, contrary to the UN Charter and an impediment to the promotion of world peace and cooperation. But “alien” subjugation, domination and exploitation was again an ambiguous concept. It related most obviously to dependent territories, although states administering non-self-governing territories denied that they were engaged in subjugation, domination and exploitation. The term, though, also had a wider possible use. Many states identified the Soviet Union and the People’s Republic of China, especially in Tibet, as colonial situations.

The charge of colonialism was also made against Israel and Zionism by Arab states.

The response to these charges was similar. In all cases states attempted to rebut the charge of colonialism or alien domination by highlighting their national basis and the idea of a people. Portugal and Spain who denied that they had colonies but overseas provinces constructed national ideas, which eschewed geography and race in favour of ties of politics, language and history. The Spanish delegate called his country “an immense archipelago.” Israel emphasised ties of history, descent and territory. The Soviet Union, on the other hand, was not

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281 Portugal: “Portugal has been for centuries a unitary nation and it has been recognized as such by the international community. We are, like many other nations, multi-racial; our land and our people are dispersed over several continents, as is also the case with other nations. But we form only one unit, completely independent and solid – politically, juridically and socially, one country with the same strong national feeling. Nowhere in my country is there any subjugation of peoples to foreign domination because all our people, wherever they may live, are themselves the body and soul of the nation…When the Portugese nation was set up and extended over other continents, usually on unoccupied or unused land, some very striking factors became apparent: to those peoples which had not yet conceived the idea of a homeland, it offered one; it also offered a common language, the guarantee of peace and an organized economic and community life without disrupting the indigenous way of life.” 15 GAOR (1960) Plenary Meetings, 934th mtg., (A/PV.934) para. 86.
282 Spain: “I shall not dissemble the fact – and I am proud to state it – that Spain is a Euro-African Power and has been such for many centuries; that it has had possessions or, rather, establishments in Africa that are more ancient than any establishments that the Moslem kings can boast of, as I have shown. I have no need to add that this north of Africa was never at any time a hard and fast unity, as invented history asserts. This was quite clearly proved in the discussion about Mauritania. We Spaniards were a colony not of Morocco – although that is partially true – but definitely of Mauritania… between 1094 and 1149. The Mauritans, the Almoravides, or probably people from those tribes, occupied a great part of Spain, built a castle in the Aljafajer and controlled practically the whole of Moslem Spain. We were an Afro-Asian colony – and I say it proudly – there is no need to hide the fact. To that circumstance we owe the Alhambra of Grenada, Cordoba and the immense cultural monuments that have become part of our culture.” 15 GAOR (1960) Plenary Meetings, 945th mtg., (A/PV.945) para. 57.
283 Israel: “[W]e repudiate as morally unworthy and historically stupid the attempt to equate Zionism with colonialism. Zionism is one of the noblest, the most moving, the most constructive national movements in human history. Behind it lies a unique and unbroken connexion, extending over 4,000 years, between the Jewish people and Palestine. No Jew could dwell in Israel as a stranger or an alien, for there is not a foot of its soil unhallowed by the bones of his Biblical ancestors. It was here that the moral and spiritual genius of our people gave birth to Judaism, from which also sprang the Christian religion. It was here that our people enjoyed national independence, which
a national state, but, nonetheless, presented itself as a community of free and equal nations united in their common economic, social and political endeavours. \textsuperscript{284} These ideas did nothing to mollify critics. Portugal’s ideas, for example, were dismissed as fairy tales. \textsuperscript{285} But, they underline a common perception of colonialism. The defining feature of colonial government was that it was non-national. Correspondingly, a crucial defence against the charge of colonialism was to present oneself as a national state.

c. Self-Determination

The Colonial Independence Declaration was the product of political change. The decolonisation process had clearly gathered pace and the composition of the Assembly had changed, with the admission of seventeen new states that year injecting a real sense of momentum. The debate, punctuated by references to “the wind of change” \textsuperscript{286} and “the irreversible course of history”, \textsuperscript{287} showed an intense consciousness that colonialism was being brought to an end. This new composition and perspective resulted in a shift in interpretations of self-determination, with greater emphasis on immediate realisation. This was reflected, in particular, by principle 3, which repudiated the basic logic of trusteeship and the rationale of

they lost and regained and lost again, in the perpetual struggle against the great colonial empires of that time. The vital bond between the Jewish people and the land of Israel is the very essence of our long and often tragic history.....I would refer to the statement by the Israeli Foreign Minister... that Israel Arabs enjoy exactly the same political rights as do Israel Jews; that their economic, social and cultural standards have risen rapidly since the establishment of the State of Israel; and that ‘no Arab State can point to the achievement of a standard of living for the masses of its population that may be compared favourably to the standard of living of the Israel Arabs’.\textsuperscript{15} GAOR (1960) Plenary Meetings, 946\textsuperscript{th} mtg., (A/PV.946) paras. 3, 7.

Byelorussian SSR, 15 GAOR (1960) Plenary Meetings, 934\textsuperscript{th} mtg., (A/PV.934) para. 86.

USSR: “It may be said that it is easy for the Soviet Union to advocate the liquidation of the colonial system, since the Soviet Union has no colonies. Yes, that is so. We have no colonies and no capital in other countries. But there was a time when many of the nationalities inhabiting our country suffered the bitter oppression of Tsarism, of the landlord-bourgeois system. Conditions in remote areas of the Tsarist empire hardly differed from those of colonies because their populations were cruelly exploited by the autocracy, by capitalism. Whereas the autocracy looked upon the peoples of Central Asia and Transcaucasia, and other nationalities inhabiting the Russian Empire as a source of profit, after the October revolution, when these peoples obtained complete freedom, they quickly improved their economic, cultural and social condition. Let us take, for example, the Soviet Republics of Central Asia. Today Kazakhstan, Uzbekistan, Kirghizia, Turkmenistan, Tadzhikistan – all the sister republics of Central Asia – have been transformed from backward colonies of Tsarist Russia into advanced, industrially developed socialist republics... Enormous economic and cultural progress has also been made by other relatively small nationalities of the Soviet Union, united in autonomous republics. Thus, for example, during the period from 1913 to 1959, large-scale industrial production in the Yakut ASSR increased by 53 times, in the Komy ASSR by 109 times, in the Tatar ASSR by 147 times and in Bashkir ASSR by 163 times...The Tsarist Government pursued in the borderlands of Russia an essentially colonialist policy which differed little from what can be observed today in colonial countries. Ukbeks, Kakakhs, Tadziks and other non-Russian nationalities were scornfully called ‘aliens’. They were not considered human beings and were ruthlessly exploited. National differences, hatred and dissension were fermented between these nationalities, and the Tsarist Empire was held together only by bayonets and oppression. When the peoples of Russia, showed their capabilities in the development of their national economy and culture. Did the development of our country suffer by the granting to the peoples of the right of independence and self-determination? Is there strife and enmity between nationalities in our multinational country or a disintegration of the State? No, there is nothing of the sort, nor can there be.” 15 GAOR (1960) Plenary Meetings, 869\textsuperscript{th} mtg., (A/PV.869) paras. 192-3, 197, 207-8.

Iran, 15 GAOR (1960) Plenary Meetings, 926\textsuperscript{th} mtg., (A/PV.926) paras. 34-5.

Malaya, 15 GAOR (1960) Plenary Meetings, 935\textsuperscript{th} mtg., (A/PV.935) para. 119.
articles 73 and 76: “Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.”

This was also the attitude of many states in the Assembly. Sri Lanka (Ceylon), for example, introduced a proposal, which stated that: “The Trusteeship system has not justified itself anywhere and should be buried together with the entire colonial system, which is an anachronism.” Nonetheless, this shift was not total. Two different approaches to statehood could still be seen in the General Assembly. On one hand, Brazil argued that:

“[I]t is necessary that the peoples still under a colonial régime convince themselves that independence is not just a magic word followed by a flag, an anthem and diplomatic representation, but the effective political, economic and cultural mastery of the country’s wealth and heritage, their utilization in the service of the whole population, and the practice of liberty through political institutions based on a representative régime with full freedom of opinion.”

On the other, Argentina claimed that:

“It would not be in keeping with the dignity of the human person to say that a people cannot accede to independence because it does not have the material resources to support itself, or because it does not have enough technicians to establish an industry or because it does not have officials qualified to constitute an organic administration.”

Statehood was not a question of political capacity but dignity. “Independence”, Argentina argued, “is a spiritual value”. Many delegates expressed the conviction that independence would lead to rapid political, social and economic development. However, even if it did not, it was still better than colonial rule. The Ghanaian delegate underlined this with a slogan from his country’s independence struggle, “we prefer complete independence with danger to servitude in tranquillity”.

Nonetheless, a significant number of states saw the process of self-determination as progressive, and their position was to some extent accommodated in the Declaration. Principle
5 called for “immediate steps” to be taken in trust and non-self-governing territories to enable the peoples to enjoy independence and freedom. However, “immediate steps” was not the same as “immediate”. It could be interpreted as, “a call to all those Powers that presently administer dependent territories to take immediate action with a view to enabling the peoples of those territories to achieve independence without delay.” But, it could also mean, “we shall proceed towards to the goal and shall not allow ourselves to be stopped by unnecessary hindrance.”

A Soviet amendment which would have set a deadline (the end of 1961) for the termination of colonialism was defeated by 47 votes to 29, with 22 abstentions.

Another significant aspect of self-determination was its relationship to the use of force. Principle 4 of the Declaration prohibited all armed or repressive measures against dependent peoples in order to enable them to exercise their right to independence. This was subject to a qualification by many states that the prohibition of force should not effect the maintenance of law and order. A number of states expressed the hope that decolonisation could be achieved peacefully, although Sri Lanka (Ceylon) argued that a perpetuation of colonialism could give rise to violence on the principle of, “peacefully if we may, forcibly if we must”. Nonetheless, the general orientation of the Declaration was towards the peaceful transfer of power.

In favour: Iraq, Jordan, Lebanon, Liberia, Libya, Mali, Mexico, Morocco, Poland, Romania, Saudi Arabia, Somalia, Sudan, Togo, Tunisia, Ukrainian SSR, USSR, UAR, Yemen, Yugoslavia, Afghanistan, Albania, Bulgaria, Byelorussian SSR, Cuba, Czechoslovakia, Ethiopia, Guinea, Hungary. Against: Iran, Ireland, Israel, Italy, Ivory Coast, Japan, Laos, Luxembourg, Madagascar, Netherlands, New Zealand, Nicaragua, Niger, Norway, Pakistan, Panama, Peru, Philippines, Portugal, Spain, Sweden, Thailand, Turkey, South Africa, UK, US, Argentina, Australia, Austria, Belgium, Bolivia, Brazil, Canada, Chile, China, Columbia, Congo (Brazzaville), Costa Rica, Denmark, El Salvador, Federation of Malaya, France, Gabon, Greece, Guatemala, Honduras, Iceland. Abstaining: Indonesia, Nepal, Nigeria, Paraguay, Senegal, Upper Volta, Uruguay, Venezuela, Burma, Cambodia, Cameroon, Central African Republic, Ceylon, Chad, Congo (Leopoldville), Cyprus, Dominican Republic, Ecuador, Finland, Ghana, Haiti, India. 15 GAOR (1960) Plenary Meetings, 947th mtg., (A/PV.947) para. 32.


Chadwick op. cit. no. 13 at p. 45.
4. General Assembly Resolution 1541(XV)

PRINCIPLES WHICH SHOULD GUIDE MEMBERS IN DETERMINING WHETHER OR NOT AN OBLIGATION EXISTS TO TRANSMIT THE INFORMATION CALLED FOR UNDER ARTICLE 73e OF THE CHARTER, GA RES. 1541(XV), (EXTRACTS) 305

**Principle I**

The authors of the Charter of the United Nations had in mind that Chapter XI should be applicable to territories which were then known to be of the colonial type. An obligation exists to transmit information under Article 73e of the Charter in respect of such territories whose peoples have not yet attained a full measure of self-government.

**Principle II**

Chapter XI of the Charter embodies the concept of Non-Self-Governing Territories in a dynamic state of evolution and progress towards a “full measure of self-government”. As soon as a territory and its peoples attain a full measure of self-government, the obligation ceases. Until this comes about, the obligation to transmit information under article 73e continues.

**Principle III**

The obligation to transmit information under Article 73e of the Charter constitutes an international obligation and should be carried out with due regard to the fulfilment of international law.

**Principle IV**

*Prima facie* there is an obligation to transmit information in respect to a territory which is geographically separate and distinct ethnically and/or culturally from the country administering it.

**Principle V**

Once it has been established that such a *prima facie* case of geographical and ethnical or cultural distinctness of a territory exists, other elements may then be brought into consideration. These additional elements may be, inter alia, of an administrative, political, juridical, economic or historical nature. If they affect the relationship between the metropolitan State and the territory concerned in a manner which arbitrarily places the latter in a position or status of subordination, they support the presumption that there is an obligation to transmit information under Article 73e of the Charter.

**Principle VI**

A Non-Self-Governing Territory can be said to have reached a full measure of self-government by:
(a) Emergence as a sovereign independent State;
(b) Free association with an independent State; or
(c) Integration with an independent State.

**Principle VII**

(a) Free association should be the result of a free and voluntary choice by the peoples of the territory concerned expressed through informed and democratic processes. It should be one which respects the individuality and the cultural characteristics of the territory and its peoples, and retains for the peoples of the territory which is associated with an independent State the freedom to modify the status of that territory.

through the expression of their will by democratic means and through constitutional processes.

(b) The associated territory should have the right to determine its internal constitution without outside interference, in accordance with due constitutional processes and the freely expressed wishes of the people. This does not preclude consultations as appropriate or necessary under the terms of the free association agreed upon.

Principle VIII

Integration with an independent State should be on the basis of complete equality between the peoples of the erstwhile Non-Self-Governing Territory and those of the independent country with which it is integrated. The peoples of both territories should have equal status and rights of citizenship and equal guarantees of fundamental rights and freedoms without any distinction or discrimination; both should have equal rights and opportunities for representation and effective participation at all levels in the executive, legislative and judicial organs of government.

Principle IX

Integration should come about in the following circumstances:

(a) The integrating territory should have attained an advanced stage of self-government with free political institutions, so that its peoples would have the capacity to make a responsible choice through informed and democratic processes;

(b) The integration should be the result of the freely expressed wishes of the territory’s peoples acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage. The United Nations could, when it deems necessary, supervise those processes.

a. Drafting

Not to be confused with GA Res. 1514(XV), the other major resolution of 1960, GA Res. 1541(XV) was very much a counterpart to the Colonial Independence Declaration. While the declaration proclaimed the right of colonial peoples to independence, GA Res. 1541(XV) defined the basic colonial unit, the non-self-governing territory, and the means by which those territories could attain self-government. As argued earlier, the right to self-government points to a goal, while self-determination emphasises a process. GA Res. 1541(XV) by defining the non-self-governing territory and outlining the methods for achieving the goal of self-government, also effectively defined the process of self-determination in the colonial context. In doing so, it revealed the same problems inherent in definitions of peoples and self-determination: that any criteria will appear either arbitrary or inconsistent, or both. Like the Colonial Independence Declaration, GA Res. 1541(XV) is not legally binding, but has been considered by the ICJ in respect to self-determination in Western Sahara.307

Article 73 of the UN Charter provided in 1945 that members administering non-self-governing territories assumed certain obligations, one of which was to transmit information under article 73(e). By the end of 1946 the UN Secretary-General had received information from Australia, France, New Zealand, Britain, the United States, Belgium, Denmark and the Netherlands on their overseas territories.308 Spain and Portugal, which also had colonial

306 See generally Pomerance op. cit. no. 259 at pp. 10-2; Whelan loc. cit. no. 259 at pp. 30-1; Ofuatey-Kodjoe op. cit. no. 13 at pp. 359-60; T. D. Musgrave, Self-Determination and National Minorities (Clarendon Press, Oxford, 1997) at pp. 71-3.


308 For the list of territories see GA Res. 66(I), 1 GAOR (1946) (A/64/add.1) pp. 124-5.
territories, were not UN members at the time.

There was some disagreement as to what exactly a non-self-governing territory was. This emerged, in particular, in debates over the US territory of Puerto Rico when it adopted an associated status.\textsuperscript{309} In November 1953 the General Assembly adopted a list of factors to be taken into account in deciding whether a territory had achieved full self-government, GA Res. 742(VIII).\textsuperscript{310} However, when Spain and Portugal joined the UN in 1955 the issue became critical. At a time when many UN members were denouncing colonialism as slavery, the two argued that they had no non-self-governing territories at all, but only “overseas provinces”. General Assembly action became inevitable.

In 1959 the General Assembly established a special committee, the Committee of Six, composed of three members which administered non-self-governing territories and three members which did not.\textsuperscript{311} Its task was to enumerate the principles to guide members as to whether there was an obligation to transmit information under article 73(e). On 3 October 1960 the six agreed, with reservations by some, to an Indian draft outlining twelve principles which would effectively serve to define a non-self-governing territory.\textsuperscript{312} The twelve principles were debated in the Fourth Committee between 1-14 November, and adopted by the General Assembly on 15 December, by 69 votes to 2, with 21 abstentions.\textsuperscript{313}

b. The Non-Self-Governing Territory

The twelve principles in the resolution, according to the Indian delegate responsible for the draft, were based on universal principles without reference to particular territories. However, it was obvious that the principles, which were intended to, “remove any uncertainty with regard to the existence of an obligation to transmit information”, were tailored to Western overseas territories.\textsuperscript{314} Delegates also clearly understood that they were focused on Spain and Portugal. Panama, for example, expressed satisfaction that they, “met the situation which has arisen as a result of the establishment of so-called overseas provinces.”\textsuperscript{315}


\textsuperscript{310} GA Res. 742(VIII), 8 GAOR (1953) Supplement No. 17, (A/2630) pp. 21-3.

\textsuperscript{311} GA Res. 1467(XIV) 14 GAOR (1959), Supplement No. 16, (A/4354) p. 36. Composed of India, Mexico, Morocco, Netherlands, UK and US.


\textsuperscript{313} In favour: Chile, Columbia, Congo (Leopoldville), Costa Rica, Cuba, Cyprus, Denmark, Ecuador, El Salvador, Ethiopia, Malaya, Finland, Ghana, Greece, Guatemala, Guinea, Haiti, Honduras, India, Indonesia, Iran, Iraq, Ireland, Israel, Ivory Coast, Japan, Laos, Lebanon, Liberia, Libya, Madagascar, Mali, Mexico, Morocco, Nepal, Nicaragua, Niger, Nigeria, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Senegal, Somalia, Sudan, Sweden, Thailand, Togo, Tunisia, Turkey, UAR, Upper Volta, Venezuela, Yemen, Yugoslavia, Afghanistan, Argentina, Austria, Bolivia, Brazil, Burma, Cambodia, Cameroon, Canada, Central African Republic, Ceylon, Chad. Against: Portugal, South Africa. Abstaining: China, Czechoslovakia, Dominican Republic, France, Hungary, Italy, Luxembourg, Netherlands, New Zealand, Poland, Romania, Spain, Ukrainian SSR, USSR, UK, US, Albania, Australia, Belgium, Bulgaria, Byelorussian SSR. 15 GAOR (1960) Plenary Meetings, 948\textsuperscript{th} mtg., (A/PV.948) para. 88.

\textsuperscript{314} India, 15 GAOR (1960) 4\textsuperscript{th} Cmte., 1031\textsuperscript{a} mtg., (A/C.4/SR.1031) para. 4.

\textsuperscript{315} Panama, 15 GAOR (1960) 4\textsuperscript{th} Cmte., 1039\textsuperscript{b} mtg., (A/C.4/SR.1039) para. 21. See especially Ukrainian SSR, ibid. 1033\textsuperscript{d} Cmte., (A/C.4/SR.1033) para. 21; El Salvador, ibid. para. 35; Nepal, ibid. 1034\textsuperscript{b} mtg., (A/C.4/SR.1034) paras. 25-6; Israel, ibid. 1037\textsuperscript{e} mtg., (A/C.4/SR.1037) para. 13; Senegal, ibid. para. 16; Saudi Arabia, ibid. para. 24; Poland, ibid. 1038\textsuperscript{h} mtg., (A/C.4/SR.1038) para. 3; Guinea, ibid. para. 6; Lebanon, ibid.
The test in GA Res. 1541(XV) for a non-self-governing territory had three elements. The first, in principle IV, was geographical separation, the so-called “salt-water” test. Second, also in principle IV, was “ethnic and/or cultural” distinctiveness from the administering country. Together these criteria established a prima facie case for non-self-government. Third, once this prima facie case had been established, principle V provided for a further set of criteria. These were administrative, political, juridical, economic or historical factors which effected the relationship between the metropolitan state and the territory so as to arbitrarily place the latter in a position or status of subordination.

As a test for territories “of the colonial type” principles IV-V were somewhat curious, at least if colonialism was understood as alien subjugation, domination and exploitation. If these were the characteristics of colonial territories, then the critical tests would be a position of arbitrary subordination and ethnic or cultural distinctiveness to establish the rule as alien. Geographical separation as a general test would seem superfluous. Many of history’s great empires would have been unaffected by it. The Hapsburg, Russian, Chinese, Mongol, Persian, Inca, Aztec, Ghanian, Malian and Mughal empires would have passed it unscathed. In the Roman Empire it would have distinguished island provinces such as Britannia or Cyprus, but not Gaul or Germany and, if the Bosporus Straits counted as insufficient salt-water, Palestine or North Africa. In contemporary cases of the time, South West Africa (Namibia), governed by South Africa in violation of its mandate, would have failed the non-self-governing test. It also gave the successors to the Tsars and Chinese Emperors little to fear.

Moreover, despite talk in the Assembly of the UN Charter as a living document, the concept of a non-self-governing territory in principle I was frozen to territories, “then known to be of the colonial type”, at the time of the Charter. The Philippines, which elsewhere had expressed concern about the rise of “iron and bamboo curtains”, argued this excluded territories which had become non-self-governing since the time of the Charter.137

The argument that colonialism was wider than the overseas territories of Western powers was, of course, not new. Many states, most notably Belgium, argued this. However, it would have distinguished island provinces such as Britannia or Cyprus, but not Gaul or Germany and, if the Bosporus Straits counted as insufficient salt-water, Palestine or North Africa. In contemporary cases of the time, South West Africa (Namibia), governed by South Africa in violation of its mandate, would have failed the non-self-governing test. It also gave the successors to the Tsars and Chinese Emperors little to fear.

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137 “If his delegation voted in favour of principle I, it would be on the express understanding that territories of the colonial type included not only those in existence at the time the United Nations Charter had been drafted but also any territories lacking a full measure of self-government which might have come within the scope of the classification since then.” Philippines, 15 GAOR (1960) 4th Cmtee., 1043rd mtg., (A/C.4/SR.1043) para. 17.

138 The so-called “Belgian thesis” that the “non-self-governing territory” was wider than overseas territories. Belgium: “[A] number of States were administering within their own frontiers territories which were not governed by the ordinary law; territories with well-defined limits, inhabited by homogeneous peoples differing from the rest of the population in race, language and culture. Those populations were disenfranchised; they took no part in the national life; they did not enjoy self-government in any sense of the word.” 9 GAOR (1954) 4th Cmtee., 419th mtg., (A/C.4/SR.419) para. 20. See also Josef L. Kunz, “Chapter XI of the United Nations Charter in Action” 48 American Journal of International Law (1954) pp. 103-10 at pp. 108-9.
have been evidently self-defeating for a resolution intended to focus pressure on Spain and Portugal to have proclaimed an open-ended and ambiguous definition of a non-self-governing territory. Indeed, Nepal stated that it, “would have been happier if there had been no need to enunciate principles and if information had been transmitted on all Non-Self-Governing Territories.”

The essentially makeshift nature of the principles can be seen in the fact that, although a number of states had ethnically distinct island provinces which might appear prima facie non-self-governing, only the Philippines was sufficiently concerned to expressly qualify them. Other such states, which one might expect to have been worried, were not. Pakistan, which at the time was divided into two “wings”, separated by a large tract of the Indian Ocean, even argued that geographical separation and ethnic distinctiveness created a presumption of non-self-governance that was for a state to disprove. This was retrospectively unwise because when East Pakistan seceded in 1971 as Bangladesh, it was precisely argued that its geographical separation and ethnic distinctiveness marked it out as a West Pakistani colony.

On the other hand, states were also making qualifications to those territories that the test was actually intended to identify as prima facie non-self-governing: namely the Portuguese colonies, like Goa, Macau and East Timor. The most far-reaching qualification came from Somalia, which, “reserved the right to advocate a more general application of the principles.” This was, in fact, a rejection of the salt-water test altogether, as Somalia argued that Somali inhabited territories in Kenya, Ethiopia and Djibouti were overland colonies.

As a definition for a non-self-governing territory, GA Res. 1541(XV), therefore, showed the same problems inherent in the definition of a people. On one hand, the test for non-self-government fell notably short of all peoples under alien subjugation or denied self-government. The requirement of geographical separation in principle IV, and the time limit imposed on the loss of self-government in principle I added quite arbitrary limitations on the scope of the non-self-governing territory. On the other hand, the principles that were proclaimed were not consistently applied. In the drafting of the resolution states were making exceptions to territories which fulfilled the criteria for a non-self-governing territory and this continued throughout the decolonisation process.

c. Self-Government

Another crucial feature of a non-self-governing territory was that by definition it had not yet obtained self-government. Principle VI outlined three ways in which a territory could do this: emergence as a sovereign independent state, free association with an independent state or integration with an independent state. No conditions were set for self-government by

320 Philippines: “With regard to principle IV, his delegation’s approval would be subject to the express understanding that its provisions did not apply to a country – such as the Philippines – which consisted of an archipelago inhabited by peoples of different ethnic origin yet enjoying equal rights.” 15 GAOR (1960) 4th Cmtee., 1043th mtg., (A/C.4/SR.1043) para. 18.
independence, but conditions were attached to integration and free association. Free association, in principle VII, was to be established by the free and voluntary choice of the people concerned expressed by informed and democratic means. The individuality and culture of the territory had to be respected and its people had the right to determine their internal constitution without outside interference. This status, moreover, was not necessarily permanent and could later be changed by democratic means. Integration, in principles VIII and IX, was to take place on the basis of equality: people were to have equal status, citizenship, fundamental rights, representation and participation. The prerequisite for integration was an advanced stage of self-government with free political institutions to enable people to make a free and informed choice with full knowledge of their change of status. This was to be done with democratic processes based on universal adult suffrage, which could, if deemed necessary, be supervised by the United Nations.

The conditions set for free association and integration reflected the suspicion of many states that colonial powers would use them to prolong colonialism. On the other hand, though, these states also proceeded on the assumption that any claim by an independence movement to represent a people was automatically valid and did not need to be objectively tested.

GA Res. 1541(XV) was essentially a practical political document. The principles proclaimed were intended to, “provide a legal and constitutional basis for any action which the General Assembly might take in the matter”. Above all, against the two recalcitrant Iberian states. However, this made the General Assembly the arbiter of what was or was not a non-self-governing territory. No such authority was vested in the Assembly by the Charter, and a number of states argued that it had overstepped its authority. On the other hand, other states argued that the Charter was a living document which had to evolve with events.

Using its new self-appointed authority, the majority in the Assembly passed GA Res. 1542(XV) classifying Portuguese territories as the non-self-governing. Spain had earlier backed down and agreed to transmit information on its territories. As a result, territories which had been called “overseas provinces” by Portugal to avoid its Charter obligations, were re-

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325 Indonesia: “[H]is delegation was afraid that in a few years the administering Powers would report that all the Non-Self-Governing Territories under their administration had become associated or integrated with the metropolitan States in accordance with ‘the voluntary choice of the territory concerned’”. 15 GAOR (1960) 4th Cmtee., 1043th mtg., (A/C.4/SR.1043) para. 31; Togo, ibid. para. 22; Guinea: “No doubt the administering Powers would be willing to organize plebiscites on the question of integration, but they would ensure that the results were in accordance with their plans by installing puppet governments in the Territories concerned which would agree to integration regardless of the wishes of the people. Thus little by little all the colonial possessions would be swallowed up.” Ibid. para. 36; Mali: “There must be no possibility of the Organization’s being told that 99 per cent of the population had voted for integration with the metropolitan country by means of a referendum, as had actually happened in 1958.” 15 GAOR (1960) 4th Cmtee., 1044th mtg., (A/C.4/SR.1044) para. 18. See also Togo and Tunisia ammendment, (A/C.4/L.650), 15 GAOR (1960) Annexes, Agenda Item 38, pp. 6-7.


327 Canada, 15 GAOR (1960) 4th Cmtee., 1046th mtg., (A/C.4/SR.1046) para. 2; Belgium, ibid. para. 5; Brazil, ibid. 1049th mtg., (A/C.4/SR.1049) para. 4; France, ibid. para. 5; Australia, ibid. para. 6; UK, ibid. para. 10; US, ibid. para. 12; Belgium, ibid. para. 22; Canada, ibid. para. 25.


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branded by the General Assembly as “non-self-governing territories” in order to enforce those commitments.

5. The Friendly Relations Declaration

DECLARATION ON PRINCIPLES OF INTERNATIONAL LAW CONCERNING FRIENDLY RELATIONS AND CO-OPERATION AMONG STATES IN ACCORDANCE WITH THE CHARTER OF THE UNITED NATIONS, GA RES. 2625(XXV), (EXTRACTS)³³¹


[1] By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.

[2] Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle, in order:
   (a) To promote friendly relations and co-operation among States; and
   (b) To bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned;

and bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental rights, and is contrary to the Charter.

[3] Every State has the duty to promote through joint and separate action universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter.

[4] The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by the people constitute modes of implementing the right of self-determination of that people.

[5] 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 pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and receive support in accordance with the purposes and principles of the Charter.

[6] The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and principles.

[7] 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.

[8] Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country.

a. Drafting

In 1963 the General Assembly set up a Special Committee to work on the formulation of seven legal principles for friendly relations and co-operation among states in accordance with the UN Charter. Among them was the principle of equal rights and self-determination, and with the right’s established status as basis for friendly relations, it featured prominently in the debate in the Special Assembly and the General Assembly’s Sixth Committee. The Special Committee, in fact, began work on the principle quite late, not until 1966, after which it became one of the main sticking points until a consensus was finally reached in 1970. The Friendly Relations Declaration, GA Res. 2625(XXV) was adopted by a consensus on 24 October 1970. Like GA Res. 1514(XV) and GA 1541(XV), the Declaration is not formally binding, but has been widely used by the ICJ and national courts in considering the state of international relations.


333 These were outlined in GA Res. 1815(XVII), 17 GAOR (1962) Supplement No. 17, (A/5217) pp. 66-7.


law.

As a consensus agreement, the provisions of the Declaration were a compromise and in the words of Britain: “Like most compromises, it was less than satisfactory to all.” Differences over self-determination evident in the debates on the Covenants and the Colonial Independence Declaration remained. However, the political context behind the self-determination had moved on. The decolonisation process had progressed and the General Assembly was now increasingly focussed on the territories held by a recalcitrant Portugal, the white minority regimes in South Africa and Southern Rhodesia, and Namibia, then occupied by South Africa. In reaction many states in the General Assembly increasingly interpreted self-determination as encompassing a right to armed struggle. However, this interpretation was not shared by others and the issue profoundly split the Assembly. The result was a declaration, which in some areas consolidated on earlier instruments, like GA Res. 1514(XV) and GA Res. 1541(XV), but in others barely papered over fundamental disagreement.

b. The Balance in the Friendly Relations Declaration

i. An Improved Balance?

In debates in the Special Committee a few states did explicitly argue that self-determination applied only in particular circumstances. According to India, “the principle of self-determination was applicable to peoples under alien domination or colonial rule but not to parts of existing states.” Similarly, Burma argued that: “To understand it [self-determination] as covering peoples who constituted a sovereign State would have the effect of re-writing history to suit a political concept.” Nigeria stated quite bluntly that, “the principle was applicable only to people under foreign or colonial domination.” Ghana set limits on the exercise of the right: “self-determination could be exercised only once.” However, these states represented a small minority. Nigeria also later recognised the principle as universal. The majority of states, although they may have had their own ideas as to how self-determination should be applied, nonetheless, argued that it applied to all peoples. This consensus encompassed states from all the different factions in the Assembly. Socialist and Non-aligned drafts referred to the right of “all peoples” to self-determination, while US and UK drafts simply referred generally to

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342 Nigeria, A/AC.125/SR.91 (1968) p. 111
“peoples”.

Correspondingly, the Declaration followed a familiar formula. Self-determination was a right of “all peoples”, but was balanced with other principles, notably the territorial integrity of states, while, at the same time, its application was promoted in certain areas: developing friendly relations between states and bringing a speedy end to colonialism. The Declaration, in fact, contained two provisions on territorial integrity. Paragraph 8 was a relatively straightforward provision: states should refrain from any action aimed at the partial or total disruption of the national unity or territorial integrity of another state or country. However, paragraph 7 is perhaps more interesting. Arguably it represented an attempt to deal with some of the problems of legitimacy in balancing by creating a more sophisticated balance. Not only that, it also appeared to do so by balancing nationalism with liberalism. It is notable that the draft for paragraph 7 originated with three Western states whose drafts effectively set up representative government as the standard for self-determination. However, at the same time, it also revealed the shortcomings in balancing nationalism with liberalism and with liberal nationalism in general.

Paragraph seven was framed as an exception to the previous provisions on self-determination. Nothing in the previous paragraphs was to be construed as authorising 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 and thus possessed of a government representing the whole people of the territory without distinction as to race, creed or colour. The provision caused considerable interest because of its apparent connection between the protection of the territorial integrity of a state and the enjoyment of representative government. However, this formula


can also be seen as an attempt to resolve one of the essential problems in balancing: how to limit the right of self-determination without being seen to arbitrarily deny it.

The story of paragraph seven started in 1966 with an American draft on self-determination, which provided that:

“The existence of a sovereign and independent State possessing representative Government, effectively functioning as such to all distinct peoples within its territory is presumed to satisfy the principle of equal rights and self-determination as regards those peoples.”

This formula was essentially repeated in a British draft the following year. Both delegations denied that drafts were intended to encourage secession. The British delegate, Mr. Sinclair, stated quite bluntly that, “the United Kingdom proposal was not intended to encourage or condone secessionist movements.” Mr. Reis, of the United States, believed that the value of his country’s draft was that in certain cases it might be legitimately open to doubt whether ethnic groups occupying contiguous geographical territories could claim the right to self-determination. In those cases a sovereign independent state with representative government functioning as such to all distinct peoples within its territory, was presumed to satisfy the equal rights and self-determination of those peoples. Both drafts, therefore, represented refinement on the balancing of self-determination with territorial integrity. By equating self-determination with representative government, they sought to limit it on its own terms: by satisfaction rather than arbitrary restriction. Also by concentrating on self-determination as a process focussed on the state, they avoided the problem of defining peoples.

The drafts received a mixed reception in the Special Committee. Syria and Czechoslovakia were sceptical as to their value. Burma called the UK draft, with its emphasis on representative government, “a mild attempt to impose certain of its own political persuasions on the constitutional law and practice of other States.” Kenya was concerned about its impact in


349 UK: “States enjoying full sovereignty and independence, and possessed of a representative government, effectively functioning as such with respect to all distinct peoples within their territory, shall be considered to be conducting themselves in conformity with this principle as regards those peoples,” (A/AC.125/L.44, part VI), 22 GAOR (1967) Annexes III, Agenda Item 87, (A/6799) para. 176.
350 On Anglo-American conduct more generally in this area see Horowitz op. cit. no. 347 at pp. 61-2.
354 UK: “Paragraph 2(c) aimed at establishing the duty of every State to refrain from acts which might disrupt the national unity of another State, but within the framework of that principle it was necessary to provide that fully sovereign and independent States were conducting themselves in conformity with the principle as regards peoples subject to their jurisdiction, if they had representative and effective internal machinery of government.” A/AC.125/SR.69 (1967) p. 19.
multinational states.\textsuperscript{357} However, Australia welcomed the drafts as a realistic attempt to ensure that the principle of equal rights and self-determination did not disrupt the unity of existing states. The text, its delegate believed, did not encourage secession, but implied that respect for self-determination, at a minimum, required effective representative institutions through which the legitimate aspirations of minorities might find expression.\textsuperscript{358} The Netherlands, though, did not exclude the possibility of secession if it were the case that a people was, “being fundamentally discriminated against”, within a state.\textsuperscript{359}

In 1970 the ideas in the American and British drafts were developed in an informal draft presented by Italy:

“States enjoying full sovereignty and independence, and possessed of a government representing the whole of their population, shall be considered to be conducting themselves in conformity with the principle of equal rights and self-determination of peoples as regards that population. Nothing in the foregoing paragraphs shall be construed as authorizing any action which would impair, totally or in part, the territorial integrity, or political unity, of such States.”\textsuperscript{360}

This followed the US and UK drafts in providing that representative government was an expression of self-determination,\textsuperscript{361} limiting the right again by satisfaction rather than arbitrary exclusion.

The Italian text was welcomed by Canada which expressed satisfaction that it effectively safeguarded territorial integrity: “there would thus be no danger that some might be misled in attempting to invoke the principle to justify the dislocation of a State within which various communities had been co-habiting successfully and peacefully for a considerable time.”\textsuperscript{362} Poland also endorsed the inclusion of the phrase, “the whole population belonging to the territory”, into the draft, which, “could in no circumstances be interpreted or invoked as providing legal justification for any State to make territorial claims against other States”\textsuperscript{363}

However, the development of the draft did not end there. The Italian text was given a new

\textsuperscript{357} Kenya: “Kenya was a country of many different tribal, racial, ethnic and religious groups, all of which were treated as equals, and to enunciate the principle that each group was entitled to self-determination would be carrying that principle to an absurd extreme. Although paragraph 4 of the United Kingdom proposal attempted to exclude such a possibility, the inevitability of complaints of unequal treatment wherever ethnically different people coexisted in one nation made the attempt impractical. Of course, if there were genuine discrimination against any ethnic group in an independent State, that group would have to rebel against the central Government and exercise its right of self-determination, but that would be a domestic matter outside the jurisdiction of the United Nations.” A/AC.125/SR.107 (1969) p. 88.

\textsuperscript{358} Australia, A/AC.125/SR.107 (1969) p. 75.

\textsuperscript{359} Netherlands: “[S]o long as adequate provision was made against abuse, the Committee would not serve the cause of justice by excluding the possibility that a people within an existing or future State would possess sufficient individual identity to exercise the right of self-determination. If, for example – in the opinion of the world community – basic human rights and fundamental freedoms which imposed obligations on all States, irrespective of their sovereign will, were not being respected by a certain State vis-à-vis one of the peoples living within its territory, would one in such an instance – whatever the human implications – wish to prevent the people that was being fundamentally discriminated against from invoking its right to self-determination?” A/AC.125/SR.107 (1969) p. 85.


\textsuperscript{361} Italy, A/AC.125/SR.114 (1970) p. 45.


\textsuperscript{363} Poland, A/AC.125/SR.114 (1970) p. 58.
twist, courtesy of an amendment by Lebanon, which proposed that after “population” should be added the words: “including the indigenous population and without distinction as to race, creed or colour.”\(^{364}\) The words “indigenous population” were not added to the final draft, but “without distinction as to race, creed or colour” was. This phrase had been previously used the Colonial Independence Declaration, and, as has been noted, was more a slogan than a description: \(^{365}\) “race” presumably rendering “colour” superfluous.

Nonetheless, with the addition of this phrase, governments that made a distinction as to race (i.e. *apartheid* South Africa and Southern Rhodesia) might not be considered to be in conformity with the principle of self-determination and their territorial integrity, correspondingly, not respected. Thus amended, the paragraph became consistent with the argument that states who assisted national liberation movements fighting against racist regimes were not violating the UN Charter. It was perhaps no coincidence that the only delegation to comment on paragraph seven in debate in the Sixth Committee was South Africa, which argued that its language, “could only encourage subversive activities”. \(^{366}\) However, presumably for many states that was precisely the intention.

Thus, to some extent, the innovative provisions of paragraph seven became like so many other provisions in the consensus-based declaration: meaning some things to some states other things to others. From a Western perspective it appeared to equate respect for self-determination with representative government. \(^{367}\) For the Third World it appeared to support the fight against white minority rule in Africa. \(^{368}\) Significantly, subsequent interpretations of the paragraph in the Vienna Declaration 1993 and the UN Fiftieth Anniversary Declaration 1995 have been closer to the original Western formula: “a Government representing the whole people belonging to the territory without distinction of any kind.” \(^{369}\) Nevertheless, the paragraph did arguably represent an attempt to resolve some of the problems associated with balancing self-determination with territorial integrity.

This, of course, raises the question of how correct the assumptions behind the paragraph were.


\(^{366}\) “[South Africa] wished to express its reservation regarding the seventh paragraph of the same principle, which implied that the rule that a State might not violate the territorial integrity of other States would not apply where that State maintained that the other States did not possess Governments representing the whole people. His delegation was unable to accept such qualifications of the rule of the inviolability of territorial integrity. In fact they asserted that principle nugatory giving every State discriminatory powers to take action against another State to which it was hostile on the pretext that the peoples of the latter State were entitled to its support or that the Government of that State was not representative of the whole people.” South Africa, 25 GAOR (1970) 6\(^{th}\) Cmtee., 1184\(^{th}\) mtg., (A/C.6/SR.1184) para. 15.

\(^{367}\) Rosenstock loc. cit. no. 336 at p. 732.


Representative government may satisfy self-determination from a liberal perspective, but from the nationalist perspective the only question is whether a people exists. The paragraph cleverly side-stepped this issue, but it also notably did not exclude the possibility that peoples might exist within states. If such peoples did exist then the problem from a nationalist perspective is why those peoples’ rights should be limited. It may be all very well saying that the territorial integrity of states enjoying representative government should be protected, but still, a nationalist could argue, why should some peoples have fewer rights than others?

ii. Peoples

The balance of principles for the restriction and promotion of self-determination in the Declaration had significance for four different categories of population: colonial peoples, the peoples of states, peoples under alien or foreign domination and minorities. The right of colonial peoples to self-determination was a clear objective in the Declaration. Paragraph 2 stated a duty of states to promote the realisation of equal rights and self-determination to bring “a speedy end to colonialism”. Paragraph 6 specified that the territory of a colony or other non-self-governing territory had a separate and distinct status from the territory administering it and this status continued until the people had exercised their right to self-determination in accordance with the Charter. This reflected the drafts of Socialist and Non-Aligned states, which asserted that colonies could not constitute integral parts of the colonising state. These states also argued that this separate status followed from the basic illegality of colonialism, and that non-intervention should not be invoked to prevent support for a people struggling for their right to self-determination.

The concept of the non-self-governing territory was, however, not without dispute. A number of states invoked territorial ties over colonies. Spain, with an eye to Gibraltar, argued that decolonisation, “could not be made to cover artificial groups, which historically were not nations or provide a way of concealing the dismemberment of a country’s territory”. Argentina, with a claim on the Falkland Islands, “attached particular importance to the territorial aspects of the principle of self-determination, which safeguarded the rights of peoples whose territorial integrity had been violated by the activities of colonial Powers”. Somalia, with irridentist ambitions against its neighbours believed that: “The term ‘territorial integrity’ had to be interpreted in light of the circumstances”. Guatemala, which claimed Belize protested that, “the automatic and indiscriminate application of the principle of equal rights and self-determination… would be incompatible with the sovereignty and territorial integrity of States.”

Paragraph 2 also expressly linked the principle of equal rights and self-determination to the promotion of friendly relations and co-operation among states. There was wide support among delegates that the peoples of states had the right to freely choose their political and economic development. This mirrored non-intervention and sovereign equality, and the right was
explicitly connected to these principles by many states.\textsuperscript{377} This was expressed by some states as the “internal” and “external”, or “domestic” and “international”, aspects of self-determination.\textsuperscript{378} Some delegations equated self-determination with the right of a people to representative government.\textsuperscript{379} although for others it simply meant that their choice of political or social system was not subject to outside interference.\textsuperscript{380}

Like the Colonial Independence Declaration, the Declaration referred in principle 2 to peoples under alien subjugation, domination and exploitation. Alien domination was a potentially wider concept than the overseas colonialism of Western states, and a number of possible situations might have fallen into this category. Many states drew attention to the racist regimes of South Africa and Southern Rhodesia\textsuperscript{381} and the “foreign minorities”\textsuperscript{382} they represented. Arab states highlighted the Palestinians.\textsuperscript{383} Pakistan, presumably with Kashmir in mind, argued that subjugation should be, “purged of any racial or continental connotation”, and, “a people was dependent when its territory was occupied by another State in contravention of international agreements or Security Council resolutions”.\textsuperscript{384} With war in Vietnam, states from different perspectives argued for Vietnamese self-determination.\textsuperscript{385} The United States referred to the recent Soviet invasion of Czechoslovakia as a clear violation of self-determination.\textsuperscript{386} The US draft also referred to, “the restoration of self-government”, as a means of satisfying self-determination, which was seen as a reference to the Baltic States.\textsuperscript{387}
There appeared to be little general enthusiasm for the idea that self-determination extended to minorities. Secession was referred to by delegates as the “misuse” or “abuse” of self-determination. The Philippines considered: “The word ‘peoples’ should be construed broadly, although not so widely as to include tribal, racial, ethnic, and religious groups.” Even so, some states referred to groups within states, while others contemplated that self-determination could encompass a right of secession even if they did not approve of it.

c. Self-Determination

i. Immediate or Progressive

One area of self-determination where there appeared to be a growing consensus among states was that it was part of positive international law, although opinions varied as to its precise legal position. A number of states placed particular emphasis on the role of the Colonial Independence Declaration in the development of this law, and many expressed regret that no reference had been made to it. Other states, though, were more cautious as to its role.

In other areas differences remained. There was still division over whether self-determination was realised immediately or progressively. This was reflected in the various drafts. Socialist and Non-Aligned drafts took the position that the self-determination of colonial peoples was an immediate right. In the Czechoslovak draft, for example, colonialism was to be, “liquidated

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395 See e.g. India: “India stood fully committed behind that resolution, which should remain the guiding star in the fight for the liquidation of the remaining relics of colonialism.” A/AC.125/SR.114 (1970) p. 69.
397 See Canada: “While his delegation would not wish to ignore the General Assembly’s declaration on colonialism (resolution 1514 (XV), which was an important political document, it did not regard that declaration as a mandatory source.” A/AC.125/SR.69 (1967) p. 10.
completely and without delay”. On the other hand, US and UK drafts took a more progressive approach, with emphasis on the development of the institutions of free self-government. It was sufficient that the administering authority, “maintain a readiness to accord self-government, through free choice”, and in “good faith” develop self-governing institutions.

The Declaration to some extent accommodated both positions. It followed the formula in the Colonial Independence Declaration that alien subjugation, domination and exploitation was a denial of fundamental rights and contrary to the Charter. It also called for, “a speedy end to colonialism”. However, “speedy” was not the same as “immediate” and as the US delegate noted, “reasonable men could differ as to the meaning of ‘speedy’.” The US also considered that: “Nor were Articles 73 and 76 of the Charter in any way altered.”

As to the ways in which self-determination could be implemented, the Declaration built on the options contained in GA Res. 1541(XV). Although, like GA Res. 1514(XV), it equated “self-determination and freedom and independence”, the Declaration stated that either a sovereign and independent state, integration or free association could be modes for implementing self-determination. This was considered by some states to be sensible and realistic considering that many of the remaining colonies were small islands with few resources. Moreover, in addition, the Declaration stated that an act of self-determination could involve, “any other political status freely determined by a people”. The United States, in particular, considered that this reference to the free expression of the will of the people constituted the essence of self-determination.

ii. The Use of Force

However, there were deeper divisions opening up over the implementation of self-determination. A major area of contention in the drafting was over the use of force in self-determination. The issue fundamentally split the Assembly. On one hand, with attention increasingly focussed on Portugal and the white minority regimes in South Africa and Southern Rhodesia, there was strong support for the use of force in self-determination. This was a predominant position among African, Asian and Socialist states. Typically, it was argued that peoples engaged in an armed struggle for self-determination were acting in self-defence.

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was also claimed that those peoples could receive assistance, and that such assistance was not a violation of the UN Charter or the territorial integrity of states.

What this right of self-defence entailed varied. Hard-liners argued that the mere existence of colonialism was inherent aggression to which people were entitled to self-defence by whatever means necessary. A more moderate view was that peoples who had been denied the opportunity to exercise self-determination peacefully then had a right to self-defence. Support for self-defence, therefore, encompassed a range of positions, and states sometimes shifted their stance according to the circumstances.

Although self-defence was proclaimed as a general right of colonial peoples, it appeared to be primarily directed at Portuguese colonies, and the regimes of South Africa and Southern Rhodesia. Some Arab states also raised Palestine. Some states differentiated between colonial situations. Cameroon offered what it called the “‘progressive’ colonial Powers” a compromise in which force was a last resort, but would be “unreasonable” if a procedure was available for self-determination to be implemented “within a reasonable period.”

On the other hand, there were other states, prominently Western, who staunchly opposed such ideas. They argued that self-defence, under article 51 applied only to states, and the extension of the concept was incompatible with the Charter, detrimental to peace, and a licence for terrorism. The US called the right to assistance, “an open invitation for the illegal use of force and for intervention in the internal affairs of other States.”

The resulting compromise, contained in paragraph 5, constituted a delicately worded balance, which really paved over rather than resolved the differences between states. First, every State had the duty to refrain from any forcible action, which deprived peoples referred to in the
Declaration of their right to self-determination and freedom and independence. Second, such peoples forcibly deprived of self-determination were entitled to take action against and resist such forcible action in pursuit of the exercise of their right to self-determination. Third, those peoples were entitled to seek and receive support in accordance with the purposes and principles of the Charter.

States, therefore, were prohibited from forcible action, which deprived peoples of their right to self-determination. This, however, was arguably no more than the duty on states in paragraph 2 to promote the realisation of the principle of equal rights and self-determination. Some states, particularly those with dependent territories, argued that this did not prejudice the maintenance of law and order, which was considered to be an obligation under the Charter and international law, and necessary for the people’s advancement. The text itself only referred to forcible action which deprived peoples of their right to self-determination, which might not necessarily preclude the use of force for other purposes. Indonesia, though, pointed out that phrases like “police action” and “law and order” could be euphemisms, which from its own experience evoked bitter memories.

Peoples who had been forcibly deprived of self-determination were entitled, “in pursuit of their right to self-determination”, to take “actions against” and “resistance to” such “forcible action”. This was a more moderate version of the self-defence argument than the Non-Aligned drafts, which referred to peoples who had merely been “deprived” of the right, and fell well short of the inalienable right to struggle in Socialist drafts. Precisely what form this action or resistance could take was not elaborated. The obvious inference was that resistance to forcible action would likewise involve force, but the issue was left open.

Such peoples in their resistance were entitled to seek and receive support from states. This support was, however, to be in accordance with the purposes and principles of the Charter. Consequently, its nature depended on how states read the Charter. If the Charter’s purposes and principles were to prohibit the threat or use of force and to promote the peaceful settlement of disputes, then support might only be limited to humanitarian or other non-military assistance.

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420 Cassese op. cit. no. 11 at p. 152; Pomerance op. cit. no. 259 at pp. 50-1.
422 Arangio-Ruiz loc. cit. no. 1 at pp. 567-8.
425 Czechoslovakia: “Peoples have an inalienable right to eliminate colonial domination and to carry on the struggle, by whatever means, for their liberation, independence and free development. Nothing in this Declaration shall be construed as affecting the exercise of that right.” (A/AC.125/L.16, part VI) 24 GAOR (1969) Supplement No. 19, (A/7619) para. 138; Czechoslovakia, Poland, Romania and USSR: “Peoples who are under colonial domination have the right to carry on the struggle, by whatever means, including armed struggle, for their liberation from colonialism and may receive in their struggle assistance from other States.” (A/AC.125/L.74) ibid. para. 145.
426 US, “The text recognized that, in those cases where the right to self-determination was being forcibly denied, the peoples entitled to that right might seek and receive support which was in accordance with the Charter. In the view of the United States, that language did not enlarge rights contained in the Charter and did not constitute a
However, if they were to promote respect for the right to self-determination and to end colonialism, then the scope for support could be wider and perhaps encompass forcible action.  

In short, paragraph 5 represented a consensus but not an agreement. By some careful linguistic juggling and intentional ambiguity, it was able to offer something, though not everything, to all sides. Sharp disagreement between states was cushioned by vague formulations. One such ambiguity was the purposes and principles of the Charter, which was especially ironic as the Declaration was intended as a codification of those principles.

This concept of self-determination and forcible action in the Declaration was further developed in the General Assembly’s Definition of Aggression, GA Res. 3314(XXIX), of 1974. Like the Declaration, this was a consensus instrument, which, in article 3, outlined acts which “regardless of a declaration of war, shall… qualify as an act of aggression”. In article 7, however, nothing in the Definition, in particular article 3, was in any way to prejudice the right to self-determination, freedom and independence, derived from the UN Charter, of peoples who were forcibly deprived of the right and who had been referred to in the Friendly Relations Declaration. These peoples were, in particular, those under colonial and racist regimes or other forms of alien domination. The Definition did not prejudice the right of such peoples to struggle to that end, and to seek and receive support, in accordance with the principles of the UN Charter and in conformity with the Declaration on Friendly Relations.

This article was, therefore, an exception to a definition of aggression, and comments by states suggest that it was intended, in particular, to apply to article 3(g), which defined as aggression: “The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State”. This would appear to place the article in the context of guerrilla warfare by national liberation movements.

The article was explicitly based on the Declaration, which it referred to twice, and like the Declaration it represented a delicately worded balance. The peoples in the article were explicitly those, which had been referred to in the Declaration. They were peoples that had been “forcibly

Cameron: “Violation of the principle of self-determination by colonial Powers, in particular by the threat or use of force, was contrary to the Charter of the United Nations and to international law; hence the colonial peoples concerned were entitled to liberate their territory from foreign occupation, and it was the duty of the community of nations to give them every kind of assistance in doing so.” A/AC.125/SR.70 (1967) p. 14.

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427 Cameron: “Violation of the principle of self-determination by colonial Powers, in particular by the threat or use of force, was contrary to the Charter of the United Nations and to international law; hence the colonial peoples concerned were entitled to liberate their territory from foreign occupation, and it was the duty of the community of nations to give them every kind of assistance in doing so.” A/AC.125/SR.70 (1967) p. 14.


429 Article 7: “Nothing in this Definition, and in particular article 3, could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist régimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.”


431 Egypt: “[T]he fact that the definition included the acts enumerated in article 3(g) could in no way prejudice the right of peoples to fight for their right of self-determination, freedom and independence or the right of other States to assist those peoples in their just struggle.” A/AC.134/SR.113 (1974) p. 52; Kenya: “It should be noted that subparagraph (g) had no relevance whatsoever to the right of a State to give support to peoples struggling against colonialism, foreign domination or racist oppression. That right was recognized in the Declaration on Friendly Relations and was explicitly safeguarded in article 7 of the draft definition.” 29 GAOR (1974) 6th Cmtee., 1474th mtg., (A/C.6/SR.1474) para. 24; Algeria, ibid. 1479th mtg., (A/C.6/SR.1479) para. 33; Ghana, 28 GAOR (1973) 6th Cmtee., 1442nd mtg., (A/C.6/SR.1442) para. 66; Democratic Republic of the Congo, A/AC.134/SR.45 (1969) pp. 178-9.
deprived” of the right of self-determination and were, in particular, “peoples under colonial and racist régimes or other forms of alien domination”.

This specification of “peoples under colonial and racist régimes” was a development on the Declaration, where such groups were only implied. The common denominator between these peoples was alien domination. However, alien domination was also recognised as not being exclusive to these situations and was left open-ended: “other forms…” States were unclear as to what these other forms might be, although a number referred to Palestine. Some states expressed concern about this ambiguity. Australia, for example, raised the spectre that: “A dissident group – and what State could claim that there was no such group within its borders – need only invoke the right to self-determination to gain entitlement to use force and to call on and receive assistance from outside sources.”

The right of these peoples forcibly deprived of self-determination to struggle again represented a softer version of the self-defence argument, although some states made their own interpretations of, “forcibly deprived”. Tunisia, for example, qualified its understanding of “forcibly” with “or by other more indirect means”. Yugoslavia also argued that, “peoples deprived of their rights by subtle rather than forcible means were equally entitled to fight for them.”

The concept of “struggle” also varied considerably among states. Canada considered that “struggle” meant, “struggle by peaceful means, and not as a condonation of the use of force contrary to the provisions of the Charter.” Yugoslavia, on the other hand, believed peoples could use, “all means at their disposal” and Democratic Yemen specified that it encompassed “armed force.”

The support which these peoples could seek and receive was in accordance with the principles of the Charter and conformity with the Declaration. The Declaration had, of course, been notably ambiguous about the principles of the Charter and a familiar division was again expressed about the nature of support they entitled states to give. Belgium, for example, believed that the Charter did not sanction the use of force in self-determination. Australia claimed it could not be used to, “condone the use of armed force in the name of self-determination.” The United States considered that, “the article did not legitimize acts of armed force by a State, which would otherwise constitute aggression.” On the other hand, Zambia argued that material support for liberation struggles did not constitute aggression under the Charter, and for Uganda such

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433 Australia, A/AC.134/SR.95 (1972) p. 33.
support could include arms and personnel.443

6. The Helsinki Final Act and Paris Charter

CONFERENCE ON SECURITY AND CO-OPERATION IN EUROPE: FINAL ACT (EXTRACTS)444

VIII. Equal Rights and Self-determination of Peoples

The participating States will respect the equal rights of peoples and their right to self-determination, acting at all times in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to the territorial integrity of States. By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development. The participating States reaffirm the universal significance of respect for and effective exercise of equal rights and self-determination of peoples for the development of friendly relations among themselves as among States: they also recall the importance of the elimination of any form of violation of this principle.

CHARTER OF PARIS FOR A NEW EUROPE (EXTRACTS)445

We reaffirm the equal rights of peoples and their right to self-determination in conformity with the Charter of the United Nations and with relevant norms of international law, including those relating to territorial integrity of States.

a. Background

The Conference on Security and Co-operation in Europe was an important symbol of détente, a certain thawing in Cold War relations between the countries of NATO and the regimes of the Warsaw Pact. 35 countries were involved (all 33 European states, except Albania, plus the United States and Canada), and the conference took place in three stages: Helsinki in 1973, Geneva in 1974 and then Helsinki again in 1975. The resultant Helsinki Final Act 1975 included a declaration of ten principles to guide relations between states.446

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The basis for these principles was the UN Charter, and for many states the Friendly Relations Declaration. Although the Final Act itself was not formally legally binding: “a solemn political and moral obligation”; according to Norway; “a moral commitment to be ignored at our mutual peril”, for Britain, but, “not a treaty”; its principles were treated as significant elaborations of those of the Charter. As the host nation Finland argued, “the principles... are not merely repeating what has been said before but, proceeding from an established basis, recognizing its value, they mean developing a new set of standards to open up new dimensions in the mutual relations of States.” The Final Act has been considered by the ICJ (though not in relation to self-determination) and the Canadian and Russian courts in determining the state of international law.

b. The Balance in the Final Act

Draft proposals on self-determination were submitted to the conference by the Soviet Union, Yugoslavia, the Netherlands, and France, and the right also featured in a West German proposal on frontiers. The result was principle VIII, which drew, in particular, on the French and Yugoslav drafts, and represented an accommodation of various interpretations of

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447 GDR, (CSCE/I/PV.3) pp. 8-10; Yugoslavia, (CSCE/I/PV.5) p. 33.
448 Spain, (CSCE/I/PV.3) p. 87; Austria, (CSCE/I/PV.5) p. 39; Italy, (CSCE/I/PV.6) p. 7; Turkey, (CSCE/I/PV.6) pp. 23-5.
449 Norway, (CSCE/III/PV.5) p. 76.
450 UK, (CSCE/III/PV.2) pp. 12, 16.
451 Finland, (CSCE/III/PV.4) p. 72.
452 Nicaragua (Nicaragua v. United States of America), (Merits), ICJ Reports (1986) p. 100, para. 189.
454 Constitutional Court of the Russian Federation, Tatarsk Case, 30:3 Statutes and Decisions of the USSR and Its Successor States (1994) p. 41.
455 USSR: “equal rights and self-determination of peoples, in accordance with which all peoples possess the right to establish a social regime and choose a form of government which they consider expedient and necessary to secure economic, social and cultural development of their country”, (CSCE/I/3) p. 3.
456 Yugoslavia: “The participating States reaffirm the universal significance of the principle of equal rights and self-determination of peoples for the promotion of friendly relations and co-operation between States in Europe and the world as a whole and the for the eradication of any form of subjugation or of subordination contrary to the will of the peoples concerned.They will observe the right of every people freely to determine its political status and to pursue, independently and without external interference, its political, economic, social and cultural development. They will refrain from any forcible or other action denying the equal rights or right of self-determination of any people.” (CSCE/I/28) p. 4.
457 Netherlands: “Every participating State shall conduct its relations with every other participating State on the basis of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations. The participating States recognize the inalienable right of every people, freely and with all due respect for human rights and fundamental freedoms, to choose, develop, adapt or change its political, economic, social or cultural system, without interference of any kind on the part of any State or group of States.” (CSCE/II/A/8) p. 1.
458 France: “The participating States recall that, according to the Charter of the United Nations, the development of friendly relations among nations is based on respect for the principle of equal rights and self-determination of peoples. By virtue of this principle, all peoples have the right to determine their internal and external political status in full freedom and without external interference and to pursue their economic, social and cultural development; and all States have the duty to respect this right. The participating States consider that respect for these principles must guide their mutual relations just as it must characterize relations among all States.” (CSCE/II/A/12) p. 4.
self-determination.

The universal nature of self-determination was affirmed in all three paragraphs of the final act: “the equal rights of peoples and their right to self-determination”; “all peoples always have the right, in full freedom to determine, when and as they wish, their internal and external political status...”; “participating States reaffirm the universal significance of respect for and effective exercise of equal rights and self-determination of peoples for the development of friendly relations among themselves as among States”. However, respect for self-determination was to be “at all times” in conformity with “the purposes and principles of the Charter” and “the relevant norms of international law”, the most explicit of which was, “the territorial integrity of States.” The relationship between self-determination and other principles can be divided in two along the lines of the “internal” and “external” political status of people provided in paragraph two.

As a right of peoples to determine their external political status, self-determination was balanced, in particular, by principle IV, the territorial integrity of states, and principle III, the inviolability of frontiers. The obvious intent in the reference to territorial integrity was to prevent self-determination being used to legitimise secession. This was apparently especially a concern for Canada and Yugoslavia. The territorial integrity was also appealed to by Spain to override the principle of self-determination in Gibraltar.

The relationship between self-determination and the principle of the inviolability of frontiers appeared to have more fluidity. All the Eastern Bloc regimes stressed the inviolability of frontiers. For the Soviet Union, which had divided Germany, moved Poland, and annexed the Baltic States and parts of Finland, Romania, Poland, Germany and Czechoslovakia, recognition of existing frontiers was an especially important goal. Poland, with a sensitive border with Germany, objected to any connection between frontiers and self-determination, and made a corresponding reservation to the right in its “external” application.

Western countries, though, appeared to take the view that inviolability of frontiers did not mean “immutability”. The idea that the principle allowed the possibility of peaceful change was championed, in particular, by West Germany, which submitted a proposal connecting it with self-determination.

The explicit aim was to create, “a state of peace in Europe in which the German nation will regain its unity through free self-determination.” Similarly, the Irish

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459 Russell loc. cit. no. 4461 at pp. 269-70.
460 Spain, (CSCE/I/PV.3) p. 87. See also Interpretative Statement by the Spanish Delegation, 8 June 1973, (CSCD/HC/51).
461 USSR, (CSCE/I/PV.2) p. 13; Poland, (CSCE/I/PV.2) p. 30; GDR, (CSCE/I/PV.3) p. 11; Romania, (CSCE/I/PV.4) p. 38-40; Bulgaria, (CSCE/I/PV.4) p. 62; Czechoslovakia, (CSCE/I/PV.4) p. 87; Hungary, (CSCE/III/PV.3) p. 73.
463 Ireland, (CSCE/I/PV.6) p. 86; Denmark, (CSCE/I/PV.2) p. 22; Canada, (CSCE/I/PV.4) p. 26; FRG, (CSCE/I/PV.3) p. 26; US, (CSCE/I/PV.5) p. 72; Belgium, (CSCE/I/PV.6) p. 73; Netherlands, (CSCE/I/PV.7) p. 19; UK, (CSCE/III/PV.2) p. 11; Greece, (CSCE/III/PV.2) p. 26; Sweden, (CSCE/III/PV.4) pp. 52, 53-5; Spain, (CSCE/III/PV.4) p. 82.
464 Federal Republic of Germany: “The participating States have the duty to refrain from the threat or use of force against the existing international frontiers of another participating State or for the settlement of territorial disputes and questions relating to State frontiers. The participating States regard one another’s frontiers, in their existing form and irrespective of the legal status which in their opinion they possess, as inviolable. The participating States are of the opinion that their frontiers can be changed only in accordance with international law, through peaceful means and by agreement with due regard for the right of the peoples to self-determination.” FRG, (CSCE/II/A/3) p. 4. See also US, (CSCE/I/PV.5) p. 72.
465 FRG, (CSCE/III/PV.2) p. 92.
Republic, with an eye to Northern Ireland, stressed the possibility that frontiers could evolve, “by peaceful means and by agreement.” It was added that a union with the North, “could and should only happen if and when a majority of the people in Northern Ireland declare their willingness to join with us in a future united Ireland.”

Self-determination, however, even in the West German proposal, was not the only principle to be taken into account in the modification of boundaries. Any changes were to take place peacefully, referring to the principles of the prohibition of the threat or use of force, non-intervention and the peaceful settlement of disputes; and with the agreement of the states concerned, referring to the principle of sovereign equality.

The internal aspects of self-determination appeared to be connected to its relationship with the principles of sovereign equality and non-intervention, in principles I and VI, respectively. In fact paragraph 2, on the right of all peoples to determine their internal political status and to pursue as they wish their political, economic, social and cultural development, bore a striking similarity to principle I on sovereign equality: “participating States will respect… each other’s right freely to choose and develop its political, social, economic and cultural systems…” A number of states implicitly connected the three principles, and the three were explicitly connected by the Netherlands:

“...be important that in the final document on principles, adequate mention be made of the inalienable right of the people of every State freely to choose, to develop and, if desired, to change its political, economic, social and cultural systems without interference in any form by any other State or group of States and with due respect to human rights and fundamental freedoms.

In the… [Friendly Relations Declaration] this element is mentioned three times, that is, in the Chapter on sovereign equality, in that on equal rights and self-determination of peoples and in that on non-intervention.”

Eastern European states also connected self-determination to sovereignty and non-intervention as they had done at the United Nations to support the principle that their social and political order was not subject to outside interference. However, the hope in the West was that respect for the three principles would create an opportunity for peoples in Eastern Europe to develop their own political systems without the Soviet interference that had taken place in Hungary and Czechoslovakia in 1956 and 1968. This would correspond to the earlier uses of “internal” and “external” self-determination as an attempt to promote liberal government. The Netherlands, referring to “internal self-determination”, stated that:

“It can happen that a nation, which at some moment in its history had adopted a certain political or social-economic system, may want to adjust this system to changed

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466 Ireland, (CSCE/III/PV.3) p. 52.
467 Denmark, (CSCE/I/PV.2) p. 22; Belgium, (CSCE/I/PV.6) p. 73; Greece, (CSCE/III/PV.2) p. 26.
472 Netherlands, (CSCE/I/PV.7) p. 19.
473 USSR, (CSCE/I/PV.2) p. 13, (CSCE/III/PV.3) pp. 42-5; Yugoslavia, (CSCE/III/PV.4) p. 21; Czechoslovakia, (CSCE/I/PV.4) p. 87; Romania, (CSCE/III/PV.5) p. 82.
circumstances. If in such a situation the peoples’ democratic rights to adapt its structures were interfered with, either from within or especially from outside, tensions could build up which might endanger peace and security.”

c. The Paris Charter 1990

Many of these relationships between self-determination and other principles, which were mostly theoretical in the Final Act, were being tested at the time of the debate on the Paris Charter 1990. When delegates met in Paris in November of that year, they did so in a very different Europe from that of Helsinki in 1975. The previous year had seen Communist regimes fall in rapid succession in Eastern Europe from the Elbe River to the Black Sea. The Soviet and Yugoslav regimes were liberalising, but also noticeably fraying. Germany had been reunified. Aspirations, expressed as self-determination, which only a few years ago were just dreams, could now be realised. However, the dilemma at Paris was that, while self-determination could be liberating, it could also be highly destabilising. The liberal government, long hoped for in Eastern Europe seemed inseparable from nationalism. As French President François Mitterrand asked the conference in his opening address, “have we overcome the division of Europe into two blocs only to see it disintegrate as a result of aspirations which had been too long stifled by force?”

This new political situation also appeared to be reflected in the balance between self-determination and other principles. The Charter’s provision on self-determination seemed to be a trimmed down version of principle VIII of the Final Act. The universal significance of the right, its basis for friendly relations and its internal and external aspects were all cut. The Charter only reaffirmed the equal rights of peoples and their right to self-determination in conformity with the UN Charter and the relevant norms of international law, which included the territorial integrity of states.

This formula of less emphasis on self-determination but consistent support for territorial integrity reflected the mood in Paris. Self-determination was seen to encapsulate legitimate aspirations. A newly liberated Hungary highlighted the plight of Eastern Europe: “Nations lost their independence, others waited hopelessly for the enjoyment of their right to self-determination. Now the world echoes to the watchword of freedom and this demand must be met to everyone’s satisfaction.” However, there was widespread concern over the rise of destabilising nationalism. Poland warned of, “sinister clouds of resurging conflicts of bygone

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474 Netherlands, (CSCE/I/PV.7) p. 18.
475 France, (CSCE/SP/VR.1) p. 3.
476 See generally Cassese op. cit. no. 11 at pp. 292-6; Salo loc. cit. no. 446 at p. 320.
477 Hungary, (CSCE/SP/VR.3) p. 8. See also Iceland: “[T]here are conflicts these very days between minorities and majorities and between nations where people are struggling to regain independence lost through a forceful and unwarranted division of Europe after the Second World War. The rights of self-determination of all people must be honoured.” (CSCE/SP/VR.3) pp. 34-5. The Holy See: “I will confine myself to referring to just some of these conditions which the Holy See regards as being particularly important... respect for the right of peoples to self-determination in conformity with the rules of law and of peaceful international coexistence, particularly where historic considerations of justice justify their aspirations to recover their national and State individuality.” (CSCE/SP/VR.2) p. 84.
478 US, (CSCE/SP/VR.2) p. 25; Czechoslovakia, (CSCE/SP/VR.2) p. 43; Switzerland, CSCE/SP/VR.2) p. 51; UK, (CSCE/SP/VR.2) pp. 61-2; Turkey, (CSCE/SP/VR.2) p. 89; Yugoslavia, (CSCE/SP/VR.3) p. 14; Spain, (CSCE/SP/VR.3) p. 23; Austria, (CSCE/SP/VR.3) p. 40; Cyprus, (CSCE/SP/VR.3) pp. 45-6; Germany,
days”. Cyprus recalled from its own experience, “what extreme nationalism can bring in terms of suffering, destruction and destitution”. Soviet leader Mikhail Gorbachev raised the spectre of, “the ‘Balkanization’ or, even worse, the ‘Lebanization’ of entire regions”.

To counter these disruptive effects, self-determination was to be contained by territorial integrity and the inviolability of frontiers. According to France: “Europe has paid a high price to learn that you cannot play with frontiers with impunity. But too many communities have experienced frontiers as the blade of a guillotine.” Greece argued that, “national frontiers are inviolable boundaries and not lines of confrontation.” The Soviet Union raised the spectre that territorial changes might have, “a destructive snowball effect that would throw Europe back into the kind of situation, which it knows only too well from its own history.”

Nonetheless, there were situations in which states were not prepared to see frontiers as absolutely inviolable. Many states congratulated Germany on its reunification, which had been achieved, according to German Chancellor Helmut Kohl, “in conformity with the right of nations to self-determination.” Similarly, with regard to the Baltic States, Sweden put it on record that it, “supports their right to self-determination, in accordance with the letter and spirit of the Helsinki Final Act.” Other states argued that Lithuania, Latvia and Estonia should be involved in the CSCE process, perhaps as observers. Britain also repeated the Western position at Helsinki that territorial changes might be permissible under certain circumstances. Prime Minister Margaret Thatcher argued that: “The Helsinki Accords made clear that borders can only be changed peacefully by agreement and never by force.”

Consequently, the balance in the Charter appeared to reflect the view that self-determination might express legitimate aspirations, but it needed to be considered with other principles and wider interests of peace and stability. This limited concept of self-determination was perhaps best summed up by Finnish President Mauno Koivisto: “All peoples have the right to self-determination and political sovereignty. These aims should be sought through negotiations.”

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(CSCE/SP/VR.3) p. 58; Norway, (CSCE/SP/VR.3) p. 64; Bulgaria, (CSCE/SP/VR.4) pp. 30-1.

479 Poland, (CSCE/SP/VR.3) p. 10.
480 Cyprus, (CSCE/SP/VR.3) p. 46.
481 USSR, (CSCE/SP/VR.2) p. 37.
482 France, (CSCE/SP/VR.5) p. 2.
483 Greece, (CSCE/SP/VR.3) p. 28.
484 USSR, (CSCE/SP/VR.2) p. 37.
485 Italy, (CSCE/SP/VR.2) p. 10; US, (CSCE/SP/VR.2) p. 25; Sweden, (CSCE/SP/VR.2) p. 65; Turkey, (CSCE/SP/VR.2) p. 87; Ireland, (CSCE/SP/VR.3) p. 2; Hungary, (CSCE/SP/VR.3) p. 5; Cyprus, (CSCE/SP/VR.3) p. 45; Belgium, (CSCE/SP/VR.3) p. 53.
486 Germany, (CSCE/SP/VR.3) p. 55.
487 Sweden, (CSCE/SP/VR.2) p. 65.
488 Poland, (CSCE/SP/VR.3) p. 11; Norway, (CSCE/SP/VR.3) p. 64.
489 Czechoslovakia, (CSCE/SP/VR.2) p. 44.
490 UK, (CSCE/SP/VR.2) p. 62.
491 Finland, (CSCE/SP/VR.4) p. 14.
7. The Draft Declaration on the Rights of Indigenous Peoples (1982-)

THE DRAFT DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (EXTRACTS)\textsuperscript{492}

Preamble

[para. 1] Affirming that indigenous peoples are equal in dignity and rights to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,

[para. 14] Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights affirm the fundamental importance of the right of self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

[para. 15] Bearing in mind that nothing in this Declaration may be used to deny any peoples their right of self-determination,

Article 3

Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 8

Indigenous peoples have the collective and individual right to maintain and develop their distinct identities and characteristics, including the right to identify themselves as indigenous and be identified as such.

Article 31

Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal or local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.

Article 45

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations.

a. Drafting

It is argued in this chapter that states are effected by nationalist considerations of legitimacy in the drafting of instruments. In the final instrument of this chapter, the draft Declaration on the Rights of Indigenous Peoples these considerations have actually been directly articulated. This declaration is unique among the instruments covered in that its drafting includes representatives of indigenous groups and these delegates have challenged the position of states with nationalist

arguments. The draft UN Declaration on the Rights of Indigenous Peoples does currently remain a draft. Nonetheless, if it is eventually completed it is likely to be one of the most important instruments on the issue of self-determination for indigenous and non-state populations.

The drafting of the Declaration has been a long and still ongoing process. Work began in 1982 with the establishment of the Working Group on Indigenous Populations under the Commission on Human Rights’ Sub-Commission on the Prevention of Discrimination and Protection of Minorities (now the Sub-Commission on the Promotion and Protection of Human Rights). This was a group of five experts, originally chaired by Asbjørn Eide and then by Erica-Irene A. Daes. By 1993 this group had reached agreement on a draft declaration, endorsed by the Sub-Commission in 1994. The matter then moved up the UN chain to the Commission on Human Rights. In 1995 the Commission established another Working Group under Resolution 1995/32, after which it is named, to further elaborate the draft Declaration. This group, chaired by José Urrutia until 1999 and then by Luis-Enrique Chávez, both from Peru, includes representatives from the 53 states on the Human Rights Commission, who vote on the proposals, as well as other interested states, international organisations and accredited NGOs. This work continues to this day.

The drafting brings in representatives from both states and indigenous organisations, and both are actively involved in the preparation of drafts and in stating their positions. In the first Working Group on Indigenous Populations the actual draft was prepared by the five experts, with input from state and indigenous representatives. In the second Working Group under Resolution 1995/32 the draft is prepared by representatives of the 53 members of the Human Rights Commission, although again based on proposals by states and indigenous NGOs. In terms of international law, the two sides do not start from equal positions. States will provide the opinio juris in what is intended to ultimately be a non-binding General Assembly resolution, but indigenous organisations undoubtedly provide legitimacy for the whole enterprise. The result has been a mix of nationalist and legal arguments from both the state and non-state perspective, in a process which has so far rumbled on for over twenty-two years.

b. The Balance in the Draft Declaration

The were two fundamental issues in indigenous self-determination. First, were indigenous groups “peoples”? Second, what did a right of self-determination involve for such peoples? The first question ran to the very identity of the declaration itself. Was it a declaration on the rights of


497 Lâm op. cit. no. 493 at pp. 70-1, 80-1.
indigenous populations, indigenous peoples or the generic indigenous people? Each title reflected a different approach to indigenous rights and generally the issue revealed markedly different responses from states’ and indigenous representatives.

States were concerned with the use of “peoples” as a legal term of art, specifically connected with rights under international law. A “people” basically equated with a “self-determination unit”. The concern of states was to define who was and was not entitled to the right and there were three particular aspects to their approach.

First, there was considerable attention paid to the question of whether indigenous groups should be classified as “peoples” or “populations”. The former entailed a right to self-determination, the latter did not. Many states reluctant to accord this right preferred the use of “indigenous populations”. Alternatively, America argued that indigenous groups should be interpreted, like minorities, in a non-collective way: “persons belonging to indigenous groups…”.

Second, to the extent that “indigenous peoples” was accepted by states, it was often in a qualified way. Canada argued that it should be specified that the use of “peoples” had no consequences for international law, in particular, regarding secession. Other states sought to follow the precedent of ILO Convention No. 169, which specifically distinguished “peoples” from rights normally attached to the term in international law. This effectively set up “indigenous peoples” as a third category of group in international law, alongside “peoples” and “persons belonging to… minorities”, with its own particular rights.

Third, states pressed for objective definitions of peoples to establish, “identifiable and practicable rights and obligations”. States were concerned about the lack of objective criteria to identify “indigenous peoples”, as well as, a variety of other undefined terms in the draft including “nation”. Japan warned that, “having the term ‘indigenous peoples’ unqualified… could eventually open the way to subjective definitions and, as a consequence, to confusion.” China argued that drafting the Declaration without a definition was, “like building a house without knowing who was going to live in it.” This was not simply to delimit the category of indigenous peoples but also to exclude other populations. Thus, China, which was one of the

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most insistent states on a definition, actually argued that it didn’t have any indigenous peoples.\textsuperscript{507}

Its aim was to prevent its own minorities from claiming indigenous rights.

States, therefore, took a legal approach, concerned with defining specific terms with a view to the content and scope of the right. This, though, was challenged by indigenous representatives with an essentially nationalist approach to the question of peoples. These representatives, first, claimed that indigenous peoples should be recognised as “peoples” in international law with rights equal to others. Second, they sought the widest, most subjective definition of indigenous peoples. An objective definition with specific criteria was condemned as exclusionary.\textsuperscript{508}

Indigenous peoples had a right to define themselves,\textsuperscript{509} and this was considered to be an integral part of their right to self-determination.\textsuperscript{510} Third, they understood the concept of indigenous people in the most colloquial way, basing their claims on popular perceptions of nationality. If indigenous populations looked like the sort of groups that were normally called peoples, then they were peoples.\textsuperscript{511}

“There can be no doubt that we are peoples with distinct historical, political and cultural identities and will remain so. We are united by our histories as distinct societies, as well as by our languages, laws and traditions… Indigenous peoples are unquestionably peoples in every legal, political, social, cultural and ethnological meaning of the term. It would be discriminatory, illogical and unscientific to identify us in the United Nations Declaration… as anything less than peoples.”\textsuperscript{512}

Many states too doubted whether it was possible or desirable to establish any objective definition of indigenous peoples.\textsuperscript{513} It was well-known that international law had failed to produce a generally-accepted definition of a “people”. However, there were also advantages for states in leaving indigenous peoples undefined. Without any identifiable international standards, the implementation of indigenous rights would then have to fall back on national legislation. Thus, Australia emphasising, “the futility of… an all-embracing definition of indigenous peoples”, believed that the matter was best left to national legislation.\textsuperscript{514} Russia too was prepared to accept the ambiguities of indigenous self-identification as long as it did not impede its own national legislation.\textsuperscript{515}

However, this approach was criticised by the Maori Legal Service and the Ka Lahui Hawai‘i as


\textsuperscript{509} E/CN.4/Sub.2/1984/20, p. 18, para. 102. The Aboriginal and Torres Strait Islander Social Justice Commissioner: “Self-identification as laid down in article 8 was widely recognized in international human rights law and he referred in that regard to article 1(2) of ILO Convention No. 169.” E/CN.4/1997/102, p. 46, para. 237.


\textsuperscript{511} “The Chief of the Grand Council of the Cree… pointed out that they had defined themselves as peoples since time immemorial.” Grand Council of the Cree, E/CN.4/Sub.2/1993/29, p. 20, para. 66.


\textsuperscript{513} Switzerland, E/CN.4/1997/102, p. 11, para. 46; Denmark, ibid. p. 23, para. 110; Fiji, ibid. p. 26, para. 130.

\textsuperscript{514} Australia, E/CN.4/1997/102, p. 47, para. 240.

\textsuperscript{515} Russia, E/CN.4/1997/102, p. 46, para. 238.}
leaving the Declaration as only an exercise in, “cosmetic window-dressing”. 516

States’ and indigenous representatives also had different views on the scope of the right to self-determination. The draft Declaration contains in article 3 a general proclamation of the right, specifically modelled on article 1(1) of the Covenants, 517 and in article 31 a more specific provision, which expands on the right as one of autonomy and internal self-government.

States tended focus on the status of positive international law and there was a lot of talk about whether practice had moved self-determination from a colonial to some sort of post-colonial right. 518 However, to the extent that they accepted self-determination for indigenous groups, article 31 was seen to reflect the maximum content of the right: that is one of autonomy or internal self-government and not of secession. 519 Some states argued that articles 3 and 31 should be combined so that self-determination was spelled out as autonomy or internal self-government. 520 However, many states were concerned about even going that far. Brazil has considered that article 31 should not prejudice the internal organisation of the state. 521 Canada and New Zealand have similarly argued that self-determination must be exercised within the constitutional framework of states. 522 The Nordic countries also tried unsuccessfully to trim the article down, cutting it after “local affairs…” . 523 Nonetheless, despite this connection to article 31, neither the language of article 3, nor previous practice, suggested that self-determination was naturally restricted to autonomy or internal self-government. Argentina pointed out that article 3 used the same formula as the Colonial Independence Declaration (again taken from the Covenants) and this had been used to promote independence. 524

Indigenous representatives, on the other hand, tended to see article 31 as a minimum content of self-determination along the lines of, “including but not limited to”. 525 They pressed for an

518 New Zealand: “…[A] distinction could be made between the right of self-determination as it currently existed in international law, a right which developed essentially in the post-Second World War era and which carried with it a right of secession, and a proposed modern interpretation of self-determination within the bounds of a nation-State, covering a wide range of situations but relating essentially to the right of a people to participate in the political, economic and cultural affairs of a State on terms which meet their aspirations and which enable them to take control of their own lives.” E/CN.4/Sub.2/1993/29, p. 17, para. 52; Australia: “[S]elf-determination is not a static concept, but rather an evolving right which includes equal rights, the continuing right of peoples to decide how they should be governed, the right of peoples as individuals to participate fully in the political process (particularly by way of periodic free and fair elections) and the right of distinct peoples within a state to make decisions on and administer their own affairs (relevant both to indigenous peoples and to national minorities).” E/CN.4/1995/WG.15/2/Add.2, p. 4, para. 8; Canada: “[I]nternational law did not clearly define ‘self-determination’ or ‘peoples’; it was traditionally understood as the right of colonized peoples to statehood. However, a survey of State practice and academic literature suggested it was an ongoing right which was expanding to include the concept of an internal right for groups living within existing States, and which respected the territorial and political integrity of the State.” E/CN.4/1997/102, p. 63, para. 332; E/CN.4/Sub.2/1983/22, p. 19, para. 99; E/CN.4/Sub.2/1987/22, p. 15, para. 56; Argentina, E/CN.4/1995/WG.15/2, p. 3, para. 6; Mexico, E/CN.4/1995/WG.15/2/Add.1, p. 6, para. 3; Morocco, ibid. p. 6, para. 3; Japan, E/CN.4/1997/102, p. 64, para. 338; Pakistan, E/CN.4/2001/85, p. 13, para. 77; Guatemala, ibid. p. 15, para. 88.
521 Brazil, E/CN.4/1997/102, p. 64, para. 334.
unlimited right of self-determination and did so with primarily nationalist arguments. Self-determination was an “inherent” and “primordial” right, which every people had, regardless of state practice. It was also universal and any restrictions on it were a “double standard”, racist and discriminatory. These were also backed up with positive legal arguments. The self-determination had already been recognised as a right of all peoples in instruments, such as the UN Charter, the Covenants, the Vienna Declaration and Banjul Charter, as well as the practice of various human rights bodies. It would, therefore, be unlawful for the Working Group to limit it. It would also violate the norms of non-discrimination and the prohibition of racial discrimination. It was even argued that the right of all peoples was *jus cogens* so that if self-determination was narrowed in scope the resultant Declaration would become void.

The NGOs made a familiar set of claim about self-determination, almost identical to ones made in the drafting of the Covenants. Self-determination was not only a right, but a prerequisite for human rights. Moreover, this “cornerstone” of the Declaration was also essential for all the other rights in the draft, as well as peace and development, and the very survival of...
indigenous peoples. It was also argued that, as collective rights were the combined rights of individuals in a group, they could not lead to the denial of individual rights. States, on the other hand, warned that collective rights like self-determination could infringe on individual human rights.

Indigenous organisations also claimed that there was no need for states to be concerned about an unlimited right of self-determination: 1) Secession was generally not a practical option for indigenous peoples. 2) Indigenous peoples had a different, “non-statist” view of self-determination, not tied to territorial sovereignty. 3) The right of self-determination actually strengthened states and was thus the best way to avoid their break up. 4) Self-determination should be thought of more in terms of a process, rather than a particular outcome. Nonetheless, these NGOs also often kept a margin of ambiguity over whether self-determination actually included secession. The right did “not necessarily”, “not always” or “not automatically” lead to separate statehood, but it still was a “possibility”.

The fact was, of course, that the circumstances of indigenous groups varied. The Cree, for example, pointed out that the crucial factor in their status was the possibility of secession: not by themselves but by a non-indigenous minority, the Québécois, which would then effect their political position.

This argument that self-determination was a right of “all peoples” was also one that governments were sensitive to. Many indigenous representatives also recognised a need to
Therefore, attention has turned to the balance between self-determination and other principles. Various possible balances have been identified for the draft Declaration. The first would be one based on the present article 45, which provides that nothing in the Declaration was to be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations.\textsuperscript{555} A second possibility might be to include a balance with territorial integrity or just “principles of international law” in the preamble.\textsuperscript{556} A third and less subtle option would be to add a reference to territorial integrity to article 3,\textsuperscript{557} although this is one that NGOs have been quite unhappy with.\textsuperscript{558}

Nonetheless, as a Hawaiian representative pointed out, “the concept of territorial integrity imposed a requirement of legitimacy on the State.”\textsuperscript{559} Thus, the drafting has often turned towards the possibility of a more sensitive balance like the one in the Friendly Relations Declaration. The principle of territorial integrity did appear more acceptable to indigenous NGOs, or at least harder to argue against, if it was qualified with conditions of representative government.\textsuperscript{560} The drafting also seems to confirm the recent trend in the balance of dropping “race, creed and colour” as a requirement in representation. Paragraph 7 was generally interpreted as meaning the whole people,\textsuperscript{561} and one organisation specifically required that the balance should be formulated in this way.\textsuperscript{562}

The use of this balance by states again seemed to be with the intent of supporting territorial integrity rather than allowing for secession. The balance was raised, in particular, by Western states, who set the standard for representative government as democracy, which they knew they could easily fulfil.\textsuperscript{563} Only one state, Australia, actually attempted to explore how this balance


\textsuperscript{557} New Zealand, E/CN.4/2003/92, p. 17; Canada, ibid. p. 18.

\textsuperscript{558} E/CN.4/2001/85, p. 16, para. 94.

\textsuperscript{559} E/CN.4/2001/85, p. 15, para. 87.


\textsuperscript{562} Indian Law Resource Center, E/CN.4/2003/92, p. 6, para. 20.

\textsuperscript{563} Australia: “[I]t would be difficult to say that a government elected by free and universal suffrage could be described as unrepresentative of its people or peoples.” E/CN.4/1995/WG.15/2/Add.2, pp. 3-4, para. 7; New Zealand, E/CN.4/2000/84, pp. 13-4, para. 78; Norway, ibid. p. 14, para. 81; Spain, E/CN.4/2001/85, p. 14, para. 83; Canada, ibid. p. 15, para. 85;
might lead to a right of secession and even this was extremely cautious. Australia began with the
view that the break up of a state was essentially a domestic matter outside the scope of self-
determination in international law. It also noted that the issue of the representativeness was one
on which states had been reluctant to pass judgment. Nonetheless, to the extent that a right of
secession might exist, the bar for the right was very high: “gross and systematic abuses of the
human rights of a group which could be characterised as a people”. 564

Nonetheless, the balance did leave open the possibility of remedial secession and indigenous
NGOs could widen this possibility by lowering the bar. The World Council of Indigenous
Peoples, for example, argued that a right of secession emerged if a government was, “so abusive
and unrepresentative... that the situation is tantamount to classic colonialism”. 565 The concept of
“colonialism” is, of course, open to various interpretations. The International Alliance of
Indigenous and Tribal Peoples of the Tropical Forest argued that a refusal to recognise a right of
self-determination and autonomy constituted, “domination and exploitation.” 566 Indigenous
NGOs also inverted the equation of self-determination with democracy, which underpinned the
balance, arguing that democracy required the realisation of self-determination for all peoples. 567

This balance has also been fleshed out, most notably by the Canadian Supreme Court in Re.
Secession of Quebec, with the internal and external aspects of self-determination. There was also
a great deal of discussion about this division in the drafting of the Declaration. Self-
determination in the draft has been interpreted by Erica-Irene A. Daes, the chair of the first
Working Group (1984-93), and a number of states as an internal right. 568

However, the drafting has also shown that it is possible to punch holes in the distinction from
a number of directions. Legally, it has been considered that there is no agreement on the status or
content of internal and external self-determination. 569 Indigenous NGOs have also been able to
raise the nationalist criticism that the distinction is “artificial” and “unhelpful”. 570 The limiting of
indigenous rights to just internal self-determination, in particular, has been called
“discriminatory”. 571 They have also been able to breakdown the distinction by opening up the
concept of external self-determination. It was argued that this did not simply mean secession,
and that indigenous peoples were, in fact, exercising self-determination on an external level at by
their participation in the UN Working Group. 572 This does raise questions about how convincing
the division is as a way of dealing with the rights of groups within states.

564 Australia, E/CN.4/1995/WG.15/2/Add.2, pp. 3-4, paras. 6-7.
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567 Indian Law Resource Centre, Assembly of First Nations, International Treaty Four Secretariat and Grand
568 E-I A. Daes, E/CN.4/Sub.2/1992/33, p. 17, para. 67; Chile, E/CN.4/1997/102, p. 61, para. 320; Finland,
E/CN.4/2001/85, p. 13, para. 76; Russia, ibid. pp. 15-6, para. 90; New Zealand, ibid. p. 18, para. 109; US,
E/CN.4/2003/92, p. 6, para. 22.
Concluding Remarks

The normal technique in the drafting of instruments on self-determination has been to balance it with other principles, notably territorial integrity, which limit its application. Nonetheless, the examples have shown two particular problems with this approach. The first is the perception of the arbitrary restriction of self-determination. As has been seen, an attempt was made in the Friendly Relations Declaration to soften this perception by connecting self-determination with representative government and limiting it by satisfaction rather than restriction. The second is that the balancing principles themselves may encapsulate national ideas. In the Colonial Independence Declaration the territorial integrity of a “country” proved as much a vehicle for nationalist claims as the self-determination of a “people”.

The coalition-building role of self-determination could also be seen in the drafting of instruments. Self-determination represented a principle which states could support in general while retaining their own interpretations of what it meant. This was also accommodated in instruments with ambiguous formulas to encompass these differences. Thus, the division between self-determination as immediate or progressive, which continued throughout the decolonisation process, was covered by terms such as “immediate steps” and “speedy”. Likewise, the split over the use of force in self-determination was reconciled by the intentionally ambiguous phrase, “purposes and principles of the Charter”.

Self-Determination and Courts: Tipping the Balance

Outline

This chapter will look at the approaches taken by courts and other international bodies when making decisions about self-determination. The first thing to note about approaches to self-determination is that the right seems to put these bodies in a difficult position. Cases on self-determination usually involve delicate political situations, which may call into question the very existence of certain states, while instruments leave courts with only an ambiguous set of provisions to work with.

There is no better illustration of these problems than the implementation of article 1 of the International Covenant on Civil and Political Rights by the Human Rights Committee. It may be recalled that in the drafting of the Covenants that a number of objections were raised to the inclusion of an article on self-determination. Sceptics argued that, unlike other rights, self-determination was not held by individuals, but an undefined collective body, the people, and pointed to the danger that it could be used by minorities to challenge the integrity of states. Nonetheless, supporters of the article, keen to show their sympathy for colonial peoples, successfully pressed for its adoption. However, in effect, these problems were not resolved, but merely transferred. They ended up with the Human Rights Committee, which under the Optional Protocol to the Civil and Political Covenant, could consider communications from individuals over the violation of rights under the Covenant.

Sure enough the committee began to receive petitions from individuals claiming to represent groups within states who were peoples with a right to self-determination. In 1980 it received a communication from the Grand Captain of the Mikmaq Tribal Society alleging that the “Mikmaq people” had been denied self-determination by Canada and that, “the Mikmaq nation be recognised as a State.”\(^1\) This complaint was dismissed in 1984 on the grounds that the author had not shown himself to be the authorised representative of the society,\(^2\) a decision which avoided the key question of whether the Mikmaqs were actually a people.\(^3\)

Nonetheless, petitions continued and in 1990 the Committee made decisions on Lubicon Lake Band, E. P et al. v. Columbia, South Tirol and Whispering Pines Indian Band, in which it laid out its approach to self-determination. This was to reject a right of petition over violations of article 1, and limit communications only to individual rights.\(^4\) This approach was somewhat at

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\(^2\) Ibid. p. 203, para. 8.2.
\(^3\) This was criticised by Committee member Roger Errera, who raised three questions which he considered were not addressed by the decision: “(1) Does the right of ‘all peoples’ to ‘self-determination’, as enunciated in article 1, paragraph 1, of the Covenant, constitute one ‘of the rights set forth in the Covenant’ in accordance with the terms of article 1 of the Optional Protocol? (2) If it does, may its violation by a State party which has acceded to the Optional Protocol be the subject of a communication from individuals? (3) Do the Mikmaq constitute a ‘people’ within the meaning of the above-mentioned provisions of article 1, paragraph 1, of the Covenant?” Ibid. p. 204.
\(^4\) The Optional Protocol provides a procedure under which individuals can claim that their individual rights
odds with the actual wording of the Optional Protocol, which referred to the Committee’s competence to receive communications on, “any of the rights set forth in the Covenant.” It also squared badly with the committee’s own finding that self-determination was, “an essential condition for the effective guarantee of observance of individual rights and for promotion and strengthening of those rights.” Nonetheless, as the committee recognised in Lubicon Lake and South Tirol, the approach did avoid the difficult question of whether those groups were actually peoples.

The International Court of Justice has also shown a notable caution when dealing with self-determination. Despite the right’s prominent position in the UN Charter and instruments like GA Res. 1514(XV), the Court made no reference to it until the Namibia Advisory Opinion of 1971. This was not for a lack of opportunity. In the Right of Passage (Portugal v. India) case and the South West Africa cases 1962 and 1966 both sides in the disputes submitted arguments involving self-determination. The principle also seemed particularly relevant to the Northern Cameroons (Cameroon v. United Kingdom) case 1963, which involved a disagreement over a plebiscite in a trust territory. Still, aside from the individual opinions of several judges, it was the Namibia Opinion which marked the Court’s first explicit recognition of the principle.


8 Case Concerning Right of Passage over Indian Territory (Portugal v. India) (Merits), ICJ Reports (1960) pp. 16, 25 and 31.


10 Case Concerning the Northern Cameroons (Cameroon v. United Kingdom) (Preliminary Objections), ICJ Reports (1963) pp. 15-39.


However, while the Court in Namibia did recognise the general applicability of self-determination to non-self-governing territories, it did not take the next step of applying it directly to the situation in Namibia. The Western Sahara Opinion of 1975 was also notably ambiguous. The Court did not find anything to prevent the application of self-determination to the territory, but was unclear as to what this entailed, speaking ambiguously about the “will of the peoples of the Territory”, without ever defining who they were.

Questions about the Court’s approach were also fuelled by the East Timor (Portugal v. Australia) Case of 1995. This concerned the Timor Gap Treaty 1989 between Australia and Indonesia, which provided for the exploitation of the offshore oil resources of the Portuguese colony of East Timor, which Indonesia had forcibly annexed in 1975. Portugal brought the case against Australia for, among other things, infringing East Timorese self-determination and permanent sovereignty by concluding this treaty. Portugal could bring an action against Australia because it had accepted the compulsory jurisdiction of the Court, but not against Indonesia which had not, and did not participate in the proceedings. This proved to be the critical flaw in the Portuguese case. The Court found, by fourteen votes to two, that to decide the Portuguese claims it would first have to rule on the lawfulness of Indonesia’s conduct without its consent and declined to exercise jurisdiction. The basis for this was the so-called Monetary Gold Rule that the Court could not exercise jurisdiction if the legal interests of an unrepresented third party formed, “the very subject-matter of the decision.” However, in previous cases, including Certain Phosphate Lands in Nauru, which dealt with the exploitation of the resources of a trust territory, the Court had taken a restrictive view of this rule. East Timor was the first time in

Indian Journal of International Law (1971) pp. 467-80 at pp. 473-4

13 Western Sahara (Advisory Opinion), ICJ Reports (1975) p. 68, para. 162.


16 Case of the Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America (Preliminary Objections) (Judgment), ICJ Reports (1954) p. 32.


18 Certain Phosphate Lands in Nauru concerned a claim against Australia by the Pacific island of Nauru for the rehabilitation of land that had been mined for phosphates, its principal resource, while under Australian trusteeship. The Government of Nauru claimed that Australia bore responsibility for the breach of its legal obligations, including: “First: the obligations set forth in Article 76 of the United Nations Charter and Articles 3 and 5 of the Trusteeship Agreement for Nauru of 1 November 1947. Second: the international standards generally recognized as applicable in the implementation of the principle of self-determination. Third: the obligation to respect the right of the Nauruan people to permanent sovereignty over their natural wealth and resources…” (ICJ Reports (1992), p. 243, para. 5.) Australia, though, had not been alone in its responsibilities for the island. In 1920 when the island was put under mandate, responsibility was shared by Australia, Britain and New Zealand. In 1947 when this was succeeded by trusteeship all three states were jointly designated as “the Administering Authority”. In practice, however, Nauru was the responsibility of an Australian administrator, who acted subject to his government’s instructions. Britain and New Zealand received reports on the island, but these were treated as being for information
seventeen years that it had refused to exercise its own jurisdiction.\textsuperscript{19} Moreover, aside from this, while recognising that self-determination was, “one of the essential principles of contemporary international law”\textsuperscript{20}, the Court was also delicately non-committal on whether the East Timorese themselves had such a right: “The Court… has taken note… that, for the two Parties, the territory of East Timor remains a non-self-governing territory and its people has the right to self-determination.”\textsuperscript{21} The Court noted agreement between the two sides that the people of East Timor had a right to self-determination without actually explicitly supporting it itself.

However, on the other hand, the \textit{Construction of a Wall in the Occupied Palestinian Territory} Opinion of 2004 did seem to mark a bolder approach from the ICJ, with a remarkably straightforward decision on Palestinian self-determination. The Court identified the Palestinians as a people with a right of self-determination\textsuperscript{22} which Israel had an obligation to respect.\textsuperscript{23} It found that Israel, by constructing a wall on occupied Palestinian territory, which gave expression \textit{in loco} to illegal settlements and changes to the status of Jerusalem, and altered the demographic composition of the region, had breached that obligation.\textsuperscript{24} This entailed specific consequences for Israel and for other states. Israel was to halt construction of the wall in the occupied territory, dismantle those sections of the wall, end its associated legal régime and make reparations to those persons effected.\textsuperscript{25} States were to not to recognise, nor to aid or assist this illegal situation, and were also see to it, while respecting the UN Charter and international law, that this impediment to self-determination was brought to an end.\textsuperscript{26} (These different aspects of the \textit{Wall} opinion will be examined in more detail in the next chapter).

If the behaviour of courts and other bodies may be effected by various factors surrounding only. Australia argued that as Nauru’s administration had been shared with Britain and New Zealand, any determination of its legal position would necessarily prejudice that of its former partners. However, in a controversial nine to four decision, the Court pierced the veil of “the Administering Authority”, finding that it, “did not have an international legal personality distinct from those of the States”. In practice, Australia had, “played a very special role”, in the administration of the island. (ICJ Reports (1995), p. 258, para. 47.) Highlighting the fact that Australia had a greater responsibility than its nominal partners, the Court found that the position of Britain and New Zealand did not form “the very subject matter” of the dispute. Nor was it not a “prerequisite” for Australian responsibility. (ICJ Reports (1995), p. 261, para. 55.) The case was ultimately settled out of court. (Agreement between Australia and the Republic of Nauru for the Settlement of the Case in the International Court of Justice Concerning Certain Phosphate Lands in Nauru, 31 ILM (1993) pp. 1474-9).

\textsuperscript{19} Bekker \textit{loc. cit. no.} 14 at p. 98; Antonopoulos \textit{loc. cit. no.} 14 at p. 83; Chinkin \textit{loc. cit. no.} 14 at p. 719.

An interesting commentary on this is provided by James Crawford, who represented Australia in the case: “…[T]he Court was not assisted by the approach of Portugal, which relied exclusively on the right of self-determination as the basis for an obligation of non-recognition, thereby necessarily calling on the Court to find, as against Indonesia, that the right was being violated. The position might, perhaps, have been different had Portugal relied instead on the obligation of states not to recognize a change of territorial sovereignty procured by the use of force. It seems to be settled that the obligation of non-recognition arises irrespective of the legality of the underlying use of force. For example, it does not matter whether Israel was acting in self-defence in occupying the West Bank and the Gaza Strip during the Six Day War, in the sense that, whether or not it was then acting lawfully, third states are obliged not to recognize its sovereignty over those territories pending a final settlement. But if that is so, it could have been argued that all the Court needed to find in relation to East Timor was that Indonesia’s occupation resulted \textit{in fact} from a use of force, whether or not that force was unlawful.” Crawford \textit{op. cit. no.} 5 at p. 35.

\textsuperscript{20} \textit{Case Concerning East Timor (Portugal v. Australia)} (Judgment), ICJ Reports (1995) p. 102, para. 29.

\textsuperscript{21} ICJ Reports (1995) pp. 105-6, para. 37.

\textsuperscript{22} \textit{Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory} (Advisory Opinion), (2004), www.icj-cij.org (12/07/04) para. 118.

\textsuperscript{23} Ibid. paras. 122, 149.

\textsuperscript{24} Ibid. para. 122.

\textsuperscript{25} Ibid. paras. 151-3.

\textsuperscript{26} Ibid. para. 159.
self-determination, and if they also often display a marked caution when dealing with it, what impact does the interaction between nationalism and international law have on their decisions? Nationalism and international law are two very different doctrines and they have two very different approaches to the concept of justice. From a legal perspective, courts resolve cases by applying the relevant law to the facts of the case, based on evidence before the court that conforms to certain accepted standards. On the other hand, the nationalist perspective is very different. In its view, the legitimacy of a law or an institution depends on its representation of nations and peoples. Thus, a common feature in nationalism is the use of facts in a selective and subjective way to support particular national theories.

How do these two approaches effect the decisions of courts and tribunals? An obvious approach already seen from the previous chapter is to balance self-determination with other principles, which allow some degree of certainty in its application, while allowing it to be proclaimed in a universal form. This balancing has two particular problems. First, these balances, however they are expressed, are intended to restrict self-determination and may appear arbitrary and restrictive. Second, as legal principles can be closely associated with national ties, any balance between them may depend on the interpretation of nationalist concepts, like “people” and “country”. What superficially seems to be a balance of legal principles becomes inseparable from the politics of an underlying nationalism.

These are problems with balancing in the abstract, when applied to peoples in general. They become much clearer when balancing is applied to particular peoples. The legitimacy of peoples’ rights generally derives from the fact that those peoples are seen as “natural” or “authentic”. As the Permanent Court of International Justice recognised in the Greco-Bulgarian Communities Opinion, the existence of national communities, “is a question of fact; it is not a question of law”. It is very difficult to deal with peoples’ rights simply with abstract legal principles. In fact, in these circumstances it may be hard to demonstrate that a particular balance of principles is not simply a fiat imposed by international lawyers to deny a people its right to self-determination. It will be shown with the Badinter Opinions, in particular, that limiting self-determination with principles, while basically sitting on the fence as to whether those groups are peoples or not, is an extremely insecure and unstable position.

A better approach may be to address these nationalist concerns head on and support a legal balance with a legitimising nationalist rhetoric. Nationalism, after all, supports legal positions if they are seen as representative of nations and peoples. A balance of principles could be legitimate as long as it was presented as an expression of particular national groups. The effect of this would be that, where self-determination was to be promoted, courts would identify peoples, and where it was to be restrained the identity of groups would be diminished. However, if courts use peoples in this way to support their legal balances, then they may also do so in an essentially nationalist way. Descriptions of peoples may not simply represent stating the facts of the case or filling in the background. They may be highly selective and subjective interpretations of the populations in question specifically shaped to legitimise a particular position.

This chapter will compare balancing with and without nationalism. It will first look at two cases where a legal balance has been struck without any explicit supporting nationalism: Katangese Peoples Congress v Zaïre and the Badinter Opinions Nos. 1, 2 and 3. It will then examine cases where legal principles are supplemented with a nationalist rhetoric: the Burkina

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27 Interpretation of the Convention between Greece and Bulgaria Respecting Reciprocal Emigration, Signed at Neuilly-sur-Seine on November 27th, 1919 (Question of the “Communities”) (Advisory Opinion), PCIJ (1930) Series B, No. 17, p. 22.
Faso/Mali Frontier Dispute case, the two Åland Islands decisions, Re. Secession of Quebec, Tatarstan and Chechnya, and Western Sahara. The chapter will conclude with Judge Ammoun’s Separate Opinion in Namibia, which may be the most overtly nationalist decision ever to have come out of the International Court of Justice.

1. Katangese Peoples’ Congress v. Zaire: Balancing as States’ Rights

An interesting contrast to the Human Rights Committee’s blanket refusal to consider self-determination is provided by the decision of the African Commission on Human and Peoples’ Rights in Katangese Peoples’ Congress v Zaïre.28 This related to a regional instrument, the African or Banjul Charter on Human and Peoples’ Rights 1981. Article 20 of the Charter proclaimed that:

“1. All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.
2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.
3. All peoples shall have the right to the assistance of the States parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.”29

However, in what has been called an, “obvious abdication of responsibility”,30 the Committee responsible for drafting the Charter left the concept of “people” undefined on the grounds that they didn’t want to, “indulge in concepts that would end up in difficult discussions.”31 Again, like the Third Committee in the Covenants, the problem of the people was passed along, and with Katangese Peoples’ Congress v Zaïre it landed in the hands of the African Commission on Human and Peoples’ Rights. The case concerned a complaint brought under article 20(1) of the Charter in 1992 by an organisation claiming to represent the population of Katanga, a mineral rich region of Zaïre, now Democratic Republic of Congo, which had previously attempted to secede from that country in 1960. Its aim was to obtain recognition for the organisation as a liberation movement entitled to support to achieve independence, to gain recognition for an independent Katanga and to secure the evacuation of Zaïre from the region. Unlike the Human Rights Committee, the African Commission did examine the merits of the complaint, and

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dismissed it on the grounds that no rights in the Charter had been violated.

The Commission responded to the Katangese claim by establishing a balance between self-determination and the principles of state sovereignty and territorial integrity. It found, on the one hand, that self-determination could be exercised in a variety of ways: “independence, self-government, local government, federalism, confederalism, unitarism or any other form of relations that accords with the wishes of the people”. However, at the same time, its exercise was to be, “fully cognisant of other recognised principles such as sovereignty and territorial integrity.” The Commission specifically recognised that it had an obligation, “to uphold the sovereignty and territorial integrity of Zaïre, a member of the OAU and a party to the African Charter on Human and Peoples’ Rights.”

The Commission did try to soften its balance and make it appear less arbitrary by considering two factors that might effect it. The first was, “concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called into question”. The second was, “evidence that the people of Katanga are denied the right to participate in Government as guaranteed by Article 13(1) of the African Charter”. However, no such evidence had been presented in this case. Katanga was, therefore, “obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire.” The Katangese claim was consequently rejected. There had been no violation of the rights under the Charter.

As to the underlying issues of peoples behind the balance, the Commission offered little but ambiguity. It took no position on whether the Katangese were a people or not. Indeed, it considered that whether, “the Katangese consist[ed] of one or more ethnic groups”, to be, “immaterial”. Instead it left a series of unanswered questions. If self-determination was a right of peoples, did the fact that Katanga was entitled to a “variant of self-determination” mean that it was a people? How did the balancing of self-determination with territorial integrity and sovereignty relate to article 19 of the Charter, which stated that all peoples shall be equal and that nothing shall justify the domination of one people by another? The impression left is that the Commission was more concerned with the protection of OAU states, than the rights of peoples. This would only seem to confirm previous criticisms levelled at the Committee that it was, “downplaying of any meaningful conception of peoples’ rights”, and had “a strong statist orientation”. 32 Certainly such a neglect of the concept of peoples would seem hard to square with the work of a commission on peoples’ rights.

2. The Badinter Opinions Nos. 1, 2 and 3: The Limits of Balancing

The problems of balancing are even more explicit in the first three opinions of the Badinter Commission, 33 in particular, Opinion No. 2. The Arbitration Commission of the Conference on

Yugoslavia, or “Badinter Commission”, after its chairman Robert Badinter, was established by an EC Declaration on 27 August 1991. It consisted of the presidents of the French, German, Spanish and Italian Constitutional Courts and the Belgian Court of Arbitration, and its role was to deliver non-binding opinions on various aspects of the disintegration of Yugoslavia. The title of an arbitration commission was, in fact, somewhat misleading. Badinter was a consultative body, intended to develop policy towards Yugoslavia in a legal framework. The EC (now EU) was free to ignore its opinions and did so on more than one occasion. The Commission delivered ten opinions between January and July 1992, and then reformulated, another five in 1993, although it is only the first three, all given on 11 January 1992, which concern us here.

EC policy itself was outlined in a Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union, on 16 December 1991. This Declaration was explicitly based on the principles of the Helsinki Final Act and the Paris Charter. It emphasised self-determination, but also based recognition policy on “respect for the inviolability of all frontiers, which could only be changed by peaceful means and by common agreement”. The Badinter Commission appeared to recognise the general applicability of self-determination in the dissolution of Yugoslavia. However, the principle was not really used to determine the political entities emerging from the break up. Instead, self-determination was balanced and contained with the principle of uti possidetis, which upheld the existing borders of the Yugoslav republics. This was done by first highlighting the ambiguity in self-determination: “international law as it currently stands does not spell out all the implications of the right to self-determination.” Uti possidetis was then used to establish clarity: “However, it is well established that, whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (uti possidetis juris) except where the States concerned agree otherwise.”

Uti possidetis had previously been invoked in decolonisation in Latin America, Africa and Asia, but its application in the context of the dissolution of a state was somewhat novel. The Commission, though, cited the International Court’s finding in the Burkina Faso/Mali Frontier Dispute case that uti possidetis was, “a general principle, which is logically connected with the phenomenon of obtaining independence, wherever it occurs.” In further support, it noted that article 5 of the Yugoslav Constitution stipulated that the territories and boundaries of the republics could only be altered with their consent. The Commission also found, from the Friendly Relations Declaration, the Helsinki Final Act and the draft Convention of the Conference on Yugoslavia, a well-established principle that the alteration of existing frontiers by
force was incapable of producing a legal effect. This principle was then reinforced with general political considerations of stability and peace. The Commission, again citing the Frontier Dispute case, considered that: “Its [uti possidetis] obvious purpose is prevent the independence and stability of new States being endangered by fratricidal struggles…”

However, there were two problems with this balance. The first was that the Commission also found “the rights of peoples and minorities” to be “peremptory norms of general international law”. In other words, peoples’ rights were of such fundamental importance that they might override other rules and principles unless they were also peremptory. This finding was convenient for the Commission as it ensured that peoples’ and minority rights applied to all the Yugoslav successor states regardless of their prior obligations. But, it stood somewhat at odds with its finding that self-determination in international law was ambiguous. More seriously, though, it threw into question the whole balance between self-determination and uti possidetis. If peoples’ rights, which presumably included self-determination, were peremptory, then uti possidetis would have to be too, simply to maintain the balance. This would mean that frontiers were not only inviolable, but could not be changed even by mutual agreement between states. This, though, would appear to contradict the Commission’s own finding that uti possidetis meant no changes to existing frontiers, “except where the States concerned agree otherwise.”

A second more serious problem concerned the legitimacy of the balance. This had been established in Opinion No. 2 in response to a question from Serbia: “Does the Serbian population in Croatia and Bosnia-Herzegovina, as one of the constituent peoples of Yugoslavia, have the right to self-determination?” This question was evidently loaded, asserting that Serb populations were a people and then asking rhetorically whether as a people they had a right to self-determination. The Commission’s response was that uti possidetis prevented changes to existing frontiers under self-determination unless where the states agreed otherwise.

However, this balance suffered from problems of legitimacy. The essential question in restriction of self-determination is whether or not the population is a people. The population may be called a “minority”, in which case it might not have a legal right to self-determination, but this could be seen as arbitrary. Alternatively, it might be called a “people”, but if that were the case it would be harder to legitimately argue that it did not have the right to freely determine its external political status. The position the Commission took, in fact, was to sit on the fence. In an opinion, which one commentator said could, “charitably be described as unclear”, it found that Serbs had both minority rights, which implied that they weren’t peoples, and a right of self-determination, which implied that they were.

The Commission found that, “ethnic, religious or language communities… have the right to recognition of their identity under international law.” This right to identity was supported by: “the – now peremptory – norms of international law [which] require States to ensure respect for the rights of minorities… The Serbian population in Bosnia-Herzegovina and Croatia must therefore be afforded every right accorded to minorities under international conventions as well

39 Ibid.
40 Ibid.
41 Opinion No. 1, p. 1496.
42 Opinion No. 2, p. 1498.
43 Ibid.
44 Ibid.
as national and international guarantees consistent with the principles of international law”.  

Self-determination was also found to apply to these populations, even though the Commission ruled out changes to borders without agreement. It has been argued that under these circumstances self-determination meant the “internal” aspect of the right. In fact, what was being proposed was not the self-determination of peoples at all, but its reformulation along individual lines. The basis for this was apparently the Covenants: “Article 1 of the two 1966 International Covenants on human rights establishes that the principle of the right to self-determination serves to safeguard human rights. By virtue of that right every individual may choose to belong to whatever ethnic, religious or linguistic community he wishes.” Stripped of its collective dimension, self-determination became a possibility for the Serbian population, not as a people, but as individuals to freely determine their political status: “one possible consequence of this principle might be for the members of the Serbian population in Bosnia-Herzegovina and Croatia to be recognized under agreements between the Republics as having the nationality of their choice, with all the rights and obligations which that entails with respect to the States concerned.”

Exactly where this individually framed right of self-determination came from is something of a mystery. The text of article 1 of the Covenants proclaims self-determination as a right of peoples. The drafting of the Covenant makes it clear that states contemplated self-determination as a right of peoples. Subsequent practice in the Human Rights Committee has confirmed self-determination to be a right of peoples. It may be recalled that when Barbados suggested that self-determination could be an individual right it was readily criticised. The idea that self-determination was a prerequisite for individual rights was certainly expressed, but not that it was an individual right itself. By limiting self-determination with uti possidetis but still according Serb populations both minority rights and some form of self-determination, the opinion strove to maintain its nationalist legitimacy at the cost of its legal coherence. Nor was it very successful in protecting that legitimacy. The opinion has been widely perceived as having arbitrarily restricted the right of peoples to self-determination. Balancing self-determination with other legal principles, therefore, evidently needs to be supported with more than mere ambiguity.

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46 Opinion No. 2, p. 1498.  
47 Craven loc. cit. no. 33 at pp. 383-5.  
48 Rady loc. cit. no. 33 at p. 384.  
49 Opinion No. 2, p. 1498, para. 3.  
51 Marc Weller: “[I]n this episode the right to secede, although based on the right to self-determination, was not applied generally to reorganize peoples (i.e., individuals sharing common and distinctive ethnic, linguistic and cultural characteristics) into political units matching their geographical distribution. It was applied only to those inhabiting a region whose territorial limits had previously been defined by an autonomous government and administration (e.g., federal states).” Weller loc. cit. no. 33 at p. 606. Matthew Craven: “The Arbitration Commission did not directly consider the applicability of the principle of self-determination in relation to the acts of independence of the various Republics. Indeed, it appears to have implicitly rejected the relevance of self-determination as a determining factor in the acquisition of statehood.” Craven loc. cit. no. 33 at p. 381. Hurst Hannum: “If former Yugoslav republics were exercising their right of self-determination, that right does not appear to have belonged to any objectively identifiable ‘people’, unless ‘people’ is defined simply as those who inhabit a particular administrative territory.” Hannum loc. cit. no. 45 at p. 37.
3. The Burkina Faso/Mali Frontier Dispute: Adding a Little Nationalism to the Balance

Balancing, then, suffers from serious limitations when applied to cases. A balance of legal principles may lack nationalist legitimacy and trying to resolve it with a non-committal line may only lead to legal incoherence, as in the case of the Badinter Opinions. However, the best way to counter problems of nationalist legitimacy may be to meet them head on. If a balance of legal principles can be reduced to different national ideas, then the most fruitful strategy might be to use these ideas to support those principles. This has arguably been the approach of courts and other similar bodies in the remaining cases in this chapter.

A good place to start is with the International Court’s decision in the Burkina Faso/Mali Frontier Dispute case. This is almost a reprise of the Badinter example, as the Commission explicitly used the case as the basis for its own balance. However, the difference is that, although the relationship between self-determination and *uti possidetis* was similar, the Court arguably rationalised this balance by appealing to the logic of African nationalism.

Self-determination, in fact, only played a small role in the Frontier Dispute judgment, appearing only in one paragraph, which examined its relationship with *uti possidetis*:

“At first sight this principle [*uti possidetis*] conflicts outright with another one, the right of peoples to self-determination. In fact, however, the maintenance of the territorial status quo in Africa is often seen as the wisest course, to preserve what has been achieved by peoples who have struggled for their independence, and to avoid a disruption which would deprive the continent of the gains achieved by much sacrifice. The essential requirement of stability in order to survive, to develop and gradually consolidate their independence in all fields, has induced African States judiciously to consent to the respecting of colonial frontiers, and to take account of it in the interpretation of the principle of self-determination of peoples.”

The Court had earlier underlined the significance of *uti possidetis*:

“[T]he ‘principle of the intangibility of frontiers inherited from colonization’… is not a special rule which pertains solely to one specific system of international law. It is a general principle, which is logically connected with the phenomenon of obtaining independence, wherever it occurs. Its obvious purpose is to prevent fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power.”

This again was a legal defence of an existing policy. In this case it was the decision by the Organisation of African Unity to uphold the borders which African states inherited on

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53 *Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali)* (Judgment) ICJ Reports (1986) p. 567, para. 25.

independence, as provided for in article III(3) of the OAU Charter of 1963 and the Cairo Declaration of 1964. The Court did this by striking a balance between self-determination and uti possidetis in which the latter prevailed. The pre-eminent position of uti possidetis in this balance was then reinforced by general political considerations of peace, stability and development. The obvious purpose of the principle, it was considered, was to “prevent fratricidal struggles” and to give states the “essential requirement of stability” to survive and develop.

However, unlike Badinter, these considerations of peace, stability and development were not only used to support uti possidetis, but also to give it a nationalist logic. In this case to connect it to African nation-building. “At first sight”, the Court noted, uti possidetis, “conflicts outright with… the right of peoples to self-determination.” The evident assumption here was that peoples were identifiable entities, which could be seen not to conform with colonial frontiers. But, the Court only considered this impression superficial and took a closer look. Uti possidetis created conditions essential for, “peoples who have struggled for their independence”, to, “gradually consolidate their independence in all fields”. This consolidation by peoples of their independence may be seen as a reference to nation-building, building nations within states: a familiar concept for African nationalism.55

These considerations, the Court argued, have, “induced African States judiciously to consent to the respecting of colonial frontiers, and to take account of it in the interpretation of the principle of self-determination of peoples.” The interpretation of peoples was connected with the consolidation of independence. The concept of “people” was, therefore, implicitly shifted away from certain identifiable groups to nations which were built within political structures supported by uti possidetis. They were, to use Robert Rotberg’s phrase, “nations of intent”.56

Thus, the Court did not simply treat the relationship between uti possidetis and self-determination as one between legal principles, or even between political considerations, but it connected all these elements to the dynamics of African nationalism. This represents nationalist construction at its most basic.


The Åland Islands57 (pronounced O-land = “river land” in Swedish) are an archipelago lying

in the gulf of Bothnia between Finland and Sweden, which on Finnish independence in 1917 became the source of a dispute between them. The islands themselves were neither rich nor populous. 25,000 people lived in the archipelago, mostly engaged in farming, fishing and shipbuilding. The main settlement, Mariehamn, with a population of 1,600, was little more than a quaint seaside village. The islands, however, had considerable strategic importance. Napoleon once remarked that the group which lay on the approach to the Swedish capital was, “the key to Stockholm”. However, if the sea froze over in winter, they also provided a land route for an invasion of Finland. Crucially for the dispute, although part of the Grand Duchy of Finland since its creation in 1809, the islanders were overwhelmingly Swedish in language and culture.

On 4 December 1917 Finland declared its independence from Russia. Shortly afterwards it descended into civil war between pro- and anti-Communist camps, which also drew in Russian and German forces. Finland’s bid for separation, however, was pre-empted by the Ålanders. On 20 August delegates from the islands’ communes met and communicated a desire to be reunited with Sweden: to which the whole of Finland had originally been attached before its annexation by Russia in 1809. A plebiscite followed in June 1919 producing a 96.4% vote in favour of union with Sweden.59

Matters came to a head in June 1920 when Finnish troops were dispatched to the islands and two leaders of the Åland movement were arrested for treason. The same month the dispute was referred to the Council of the League of Nations by Britain and ultimately examined by two international commissions. The first commission, the Commission of Jurists, was established the following month in July and composed of three law professors: F. Larnaude, A. Struycken and Max Huber. The Jurists’ mandate was quite limited. Principally, it was whether under international law the Åland question should be left entirely within the domestic jurisdiction of Finland. There was also the question of international obligations concerning the demilitarisation of the islands. The significance of the first question was whether, under article 15(8) of the Covenant of the League of Nations, the League Council was competent to exercise jurisdiction over a dispute.

Although the Jurists’ mandate did not directly address whether or not the Åland Islanders had a right to self-determination, it evidently lay at the centre of the dispute. The Jurists approached the question of domestic jurisdiction by striking two separate balances between self-determination and other principles.

The first was between self-determination and state sovereignty. In this legal balance self-determination was clearly the weaker of the two, contained by state sovereignty. The Jurists considered that:

“Although the principle of self-determination of peoples plays an important part in modern political thought, especially since the Great War, it must be pointed out that there is no mention of it in the Covenant of the League of Nations. The recognition of this principle in a certain number of international treaties cannot be considered as sufficient to put it upon the same footing as a positive rule of the Law of Nations.

On the contrary, in the absence of express provisions in international treaties, the right of disposing of national territory is essentially an attribute of the sovereignty of every State. Positive International Law does not recognise the right of national groups, as such, to separate themselves from the State of which they form part of by simple expression of a

58 Barros op. cit. no. 57 at p. 2.
59 Wambaugh op. cit. no. 57 vol. I at p. 516.
wish, any more than it recognises the right of other States to claim such a separation.”

According to the Jurists, “under normal conditions” the separation of groups within a state fell under its domestic jurisdiction. Any other conclusion was to undermine not only “the very idea embodied in the term ‘State’”, but also stability and the interests of the international community. This balance, in which self-determination was contained by state sovereignty, however, only applied to a state which was, “definitely constituted”. In cases where states were, “not yet fully formed or… undergoing transformation or dissolution” and the situation was “obscure and uncertain from a legal point of view”, then, “the principle of self-determination of peoples may be called into play.”

There was also another factor which might shift the balance, although the Jurists did not explore it: “The Commission… does not give an opinion concerning the question as to whether a manifest and continued abuse of sovereign power, to the detriment of a section of the population of a State, would… be considered as one which is not confined to the domestic jurisdiction of the State concerned, but comes within the action of the League of Nations”. In any case, it was argued, this, “certainly does not apply to the case under consideration”.64

Allowing the possibility that self-determination might be called into play, the Jurists struck another balance: between self-determination and minority rights. The two were found to have a common goal: “to assure to some national Group the maintenance and free development of its social, ethnical or religious characteristics.”65 Self-determination and minority rights were, therefore, not ends in themselves but merely different methods of achieving this particular goal. Whether self-determination was the appropriate method depended on a number of factors: “geographical, economic and other similar considerations may put obstacles in the way of its complete recognition.”66 If self-determination were limited by this open-ended and evidently political list of “considerations”, then an, “an extensive grant of liberty to minorities”, might prove more appropriate, “according to international legal conception”, and, “the interests of peace”.67

Having established two balances: self-determination and state sovereignty, and self-determination and minority rights: the Jurists then applied the first to Finland. In this case, the containment of self-determination by state sovereignty depended on whether the Finnish state had, “a definite and normal character”, or whether it was a, “transitory or not fully developed situation.”68 The Jurists concluded that when the Åland dispute arose Finland, “had not yet acquired the character of a definitely constituted State.”69 As a result, the Åland question did not just involve Finland and the League of Nations Council was competent to make recommendations for a settlement under article 15 of the Covenant. The reasoning behind the Jurists’ conclusions and their ideas of “Finland” and the “Åland Islands” are interesting because

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61 Ibid. p. 5
62 Ibid. p. 6.
63 Ibid. p. 5.
64 Ibid. p. 5.
65 Ibid. p. 6.
66 Ibid. p. 6.
67 Ibid. p. 6.
68 Ibid. p. 7.
they are almost diametrically opposed to those later expounded by the Commission of Rapporteurs.

Essential to the Jurists’ reasoning was the question of whether Finland was a historic political entity. In 1809, when it was annexed by the Czar from Sweden, Finland had been established as a Grand Duchy within the Russian Empire, with its own diet and a broad measure of autonomy except in foreign policy. Could this Grand Duchy be considered a state? The Jurists noted that most legal commentators on the subject believed that it could. However, they played down the Grand Duchy’s political significance, highlighting that after the Russification programme of 1899 Finland had been treated as an ordinary province. Moreover, they stressed the limits of Finland’s former autonomy: that it had never controlled its external affairs and was indissolubly bound to Russia.70

The Jurists also downplayed the legal significance of international recognition of Finland: “The experience of the last war shows that the same legal value cannot be attached to recognition of new States in war-time, especially to that accorded by belligerent powers, as in normal times… In many cases they were only recognitions of peoples or nations, sometimes, even, mere recognitions of Governments.”71 Moreover, they noted that Sweden, despite its recognition, had always shown an interest in the Åland Islands, and “acted” as if its recognition was subject to reservations.

There was also the, “very abnormal character of… [Finland’s] internal situation”, which, of course, was a reference to the civil war:

“In the midst of revolution and anarchy, certain elements essential to the existence of a State, even some elements of fact, were lacking for a fairly considerable period. Political and social life was disorganised; the authorities were not strong enough to assert themselves; civil war was rife… It is, therefore, difficult to say at what exact date the Finnish Republic, in the legal sense of the term, actually became a definitely constituted sovereign State… It would appear that it was in May, 1918, that the civil war ended and that foreign troops began to leave the country, so that from that time onwards it was possible to re-establish order and normal political and social life, little by little.”72

Finland was, therefore, not a historic political entity, but, “a new political phenomenon… not… a mere continuation of a previously existing political entity,”73 which apparently only dated from May 1918. The Jurists, thus, broke “Finland” as a legal entity and a historical political idea.74 The republic could not, “claim that the future of the Åland Islands should be the...
same as hers simply because of the one fact that the Islands formerly formed part of the Finnish political organisation in the Russian Empire.”

Nor could Finnish sovereignty be retroactively applied. This left an extremely fluid situation:

“The extent and nature of the political changes, which take place as facts and outside the domain of law, are necessarily limited by the results actually produced. These results alone form the basis of the new legal entity which is about to be formed, and it is they which will determine its essential characteristics. If one part of a State actually separates itself from that State, the separation is necessarily limited in its effect to the population of the territory which has taken part in the act of separation.”

By marginalising Finnish sovereignty and thus domestic jurisdiction, the Jurists had cleared the way for an international settlement. However, they had taken some bold steps, such as denying Finnish sovereignty even though the state was internationally recognised. What implications did this have for other states? The Jurists may have balked at undermining the idea of the state, but they had taken a major step in that direction to solve the Åland question. This, then, required that this question deserved serious attention. Thus, the Jurists’ balance between sovereignty and self-determination not only involved the deconstruction of “Finland” as a historical political entity, but also the building of an “Åland” idea.

Therefore, after demolishing Finnish statehood, the Jurists turned to the Åland claims, drawing particular attention to the, “political expressions of the wishes of the people”, especially the plebiscite of June 1919. The fact that the Jurists highlighted the plebiscite was, however, perhaps not as significant as how they interpreted it:

 “[T]he populations of the Aaland Islands and from the mainland of Finland, though they acted together in order to separate themselves from Russia, have, from the outset, expressed quite different hopes for their ultimate political future. The population of the mainland wished to form an independent State, the inhabitants of the Aaland Islands wished to reunite with Sweden, and they expressed this wish in such a way that, even if the disturbed condition of Russia and Finland at first had a considerable influence upon the aspirations of the Islanders, nevertheless, this wish can be looked upon as a unanimous, sincere and continued expression of feeling.”

The key word here is “continued”. The plebiscite was interpreted as the expression of long-held differences in the identities and aspirations of the islanders and the Finnish mainland. This echoed the claims of Åland leaders themselves, who argued that their aspirations were the result of historic differences between the islands’ “ancient Swedish nationality” and the “Finnish-Ugric

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75 Jurists p. 10.
76 Ibid. pp. 9-10.
77 Ibid. p. 10.
78 Ibid. p. 11.
79 Ibid. p. 12.
nationality” of the mainland (referring to Finns by their common ancestry with Hungarians):

“[E]ver since their country was violently torn from their motherland in 1809 and united with Finland under the Russian yoke, they have never been able to forget the land of their origin. Deep within the national consciousness has the feeling of community with Sweden and the longing to be received once more into the mother’s arms existed, even if while under the Russian yoke it was impossible that this could be expressed in public.”

This was an interpretation apparently endorsed by the Jurists:

“[T]he population of the Islands, which is very homogeneous, inhabits a territory which is more or less geographically distinct; further, the population is united by ties of race, language and traditions to the Swedish race, from which it was only separated by force… It must be added that the population of the islands had no means of asserting its nationalist aspirations during the period of Russian rule.”

In their report the Jurists introduced two balances: one between self-determination and state sovereignty, the other between self-determination and minority rights. The balance between state sovereignty and self-determination was weighed to open the Åland question to international jurisdiction and subsequent examination by a Commission of Rapporteurs. However, the legitimacy of this balance required the Jurists to make their own interpretations of historical ties: removing them from Finland, while adding them to the Åland Islands. The Commission of Rapporteurs resolved the dispute with a different balance for self-determination and correspondingly their interpretation of “Finland” and “Åland” was also very different.

5. The Åland Islands, Part 2: The Commission of Rapporteurs

After the Jurists’ report, the League Council, in September 1920, created the Commission of Rapporteurs to examine the Åland question and recommend a solution. The Commission was composed of former Swiss president Felix Calonder, former Belgian foreign minister Eugène Beyens and Emil Nielsen, a former US ambassador to the Ottoman Empire and a member of the New York Court of Appeals. Their report in April 1921 was drafted by Beyens from an agreed outline drawn up over several days of discussion. The report of the Commission of Rapporteurs was again based on two balances: self-determination and state sovereignty, and self-determination and minority rights. However, with a broader mandate than the Jurists, they were able to fully explore both.

The balance between state sovereignty and self-determination lay at the heart of the Rapporteurs’ deliberations: “the primary question at issue, and which no ethnical or political considerations allow to be brushed aside, is a legal one – that of Finland’s right of sovereignty with regard to the Aaland Islands.” This question of sovereignty broke in two: was Finland a

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81 Jurists p. 12.
82 Barros op. cit. no. 57 at pp. 302-11.
83 The Aaland Islands Question: Report Submitted to the Council of the League of Nations by the Commission
sovereign state after the dissolution of its ties to Russia, and did Finnish sovereignty extend to the Åland Islands? Although this sovereignty was the primary issue, the Rapporteurs kept “sight” of ethnic and political considerations. The result of this was that the Rapporteurs interpreted the concepts of “Finland” and “Åland” in a radically different way from the Jurists. As the Jurists had knocked Finland down as a historical political entity, so the Rapporteurs built it up.

Both Finland and Sweden produced various historical documents and maps to support their claims. These were broadly dismissed by the Rapporteurs, who only attributed, “a relative importance to this historical problem, however absorbing it may be for both parties.”

History, though, was far from unimportant, and in the face of the “contradictions and uncertainties” of Finnish and Swedish historical evidence, the Rapporteurs focussed on a single fact: “the historical fact that Aaland, from the year 1634, has always been united to the Abo [Finland’s historic capital] Administration.” This historical fact was pivotal: “Even whilst admitting that the term Finland was nothing but a purely geographical signification, it is none the less true that Aaland in 1634 was definitely joined to the provinces of Abo and Björneborg”. Therefore, despite criticising historical arguments, raised, “by reason of preconceived ideas”, the Rapporteurs followed those same preconceptions, picking out a single fact which supported the historical unity of Finland and the Åland Islands.

History, then, revealed a “geographical signification” called Finland. The Rapporteurs developed this geographical unity between the Åland Islands and the mainland. The Skiftet, a stretch of water dotted with islets and rocks which separated the islands from Finland, was found to be, “not a boundary traced by nature”, “a bad frontier between two States, extremely arbitrary from a geographical point of view.” The Åland Sea, between the islands and Sweden, on the other hand, was a “natural dividing line… a branch of the sea containing only a few islets.”

With history and geography now behind Finland, the Rapporteurs turned to its existence as a political entity. In this they examined the same facts as the Jurists: the establishment of an autonomous Grand Duchy in 1809 and then the stripping of that autonomy in 1899 under Russification. However, the difference was that, while it might be said that the Jurists saw the cup of Finnish sovereignty as half empty, the Rapporteurs saw it as half full. The Jurists concentrated on what Finland lacked: power over external relations. The Rapporteurs looked at what it had: “an autonomous State… granted its own constitution, and enjoying the attributes of sovereignty, with the exception of the direction of foreign policy and national defence”.

The Jurists, somewhat incredibly considering their proclaimed support for minority rights, attached legal significance to the stripping of autonomy under Russification in 1899. The Rapporteurs, however, played it down. The Czar’s policy was an illegal action pursued by stealth.

The result was that the Grand Duchy was found to be an autonomous and constitutional state, which had existed for 108 years within the same geographical limits under the sovereignty of the

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84 Ibid. p. 7.
85 Ibid. p. 10.
86 Ibid. p. 9.
87 Ibid. p. 8.
88 Ibid. p. 3.
89 Ibid. p. 29.
90 Ibid. p. 22.
91 “Nicholas II did not dare to pronounce the abrogation of the Finnish Constitution; rather, he sought to sap its foundations and reduce it to nothing. Little by little, after some years of sterile effort, he decided on wiser courses and recalled the illegal measures which he had taken.” Ibid. p. 22.
Czar. Finland may have been dependent, but it was a state nonetheless, and on independence, “became thereafter… a sovereign State instead of a dependent State.” In December 1917, therefore, “a new regime was created in Finland, but not a new State, without the loss of a yard of the national territory to another Power.” The historic political entity of Finland, “attained independence en bloc… and in this ‘bloc’ since 1809 the Aaland Islands were indubitably included.”

As to the Åland Islands, while the Jurists saw gaps in Finnish sovereignty, the Rapporteurs saw acts of its sovereignty. The Jurists pointed to the lack of Finnish governmental authority over the country during the civil war, whereas the Rapporteurs highlighted that the legal government always exercised authority over part of the country and, “reconquered the provinces one by one”. The presence of foreign troops similarly, for the Rapporteurs, did not detract from Finnish sovereignty. As to Sweden’s reservations in its recognition of Finland, the Rapporteurs found that, as they were implied rather than explicit, acceptance of such reservations would, “lend itself to varying interpretations leading to controversy.” Finally, the fact that Åland delegates had expressed a desire for union with Sweden meant only that: the Ålanders wished for union with Sweden. The Rapporteurs concluded that: “the right of sovereignty of the Finnish State over the Aaland is, in our view, incontestable and their present legal status is that they form part of Finland.”

This might have been the end of the matter. State sovereignty prevailed in its balance with self-determination. The Jurists had found that international jurisdiction could be exercised because Finland had not been definitely constituted as a state, but for the Rapporteurs it was unquestionably sovereign. Nonetheless, they agreed that the Åland question extended beyond Finnish domestic jurisdiction. On this basis, they examined whether there were “adequate reasons” and “sufficiently weighty considerations” to grant the Ålanders a plebiscite and modify their situation. With this they turned to the second balance between self-determination and minority rights.

The Rapporteurs concurred with the Jurists that self-determination was, “not, properly speaking a rule of international law” and described it as a principle of “justice and liberty, expressed by a vague and general formula which has given rise to the most varied interpretations and differences of opinion.” Justice and liberty were not only embodied in self-determination, but also in minority rights and were not just a common denominator, but a common goal. The difference between self-determination and minority rights was not one of ends, but of means. It was essentially practical. Two factors apparently determined whether justice and liberty were to be obtained through self-determination or minority rights: stability and oppression. In a widely

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92 Ibid. p. 13.
93 Ibid. p. 22.
94 Ibid. p. 23.
95 Ibid. p. 23.
96 Jurists p. 13.
97 Rapporteurs p. 25.
98 Ibid. p. 23.
99 Ibid. p. 25.
100 Ibid. p. 24.
101 Ibid. p. 25.
102 Ibid. p. 25.
103 Ibid. p. 25.
104 Ibid. p. 25.
105 Ibid. p. 27.
quoted statement, the Rapporteurs considered that:

“To concede to minorities, either of language or religion, or to any fractions of a population the right of withdrawing from the community to which they belong, because it is their wish or good pleasure, would be to destroy order and stability within States and to inaugurate anarchy in international life; it would be to uphold a theory incompatible with the very idea of the State as a territorial and political unity.”106

Against the factor of stability was the question, raised by the Jurists but not explored, of a state consistently oppressing a group. In this case justice and liberty may not be served by continued association with the state:

“The separation of a minority from the State of which it forms a part and its incorporation in another State can only be considered an exceptional solution, a last resort when the State lacks either the will or the power to enact and apply just and effective guarantees.”107

How did this apply to Finland and the Åland Islands? The Rapporteurs rejected the analogy that because Finland had determined its own status, the same right applied to Ålanders. Finns had an indisputable, “natural right… born of inherent justice, to proclaim their independence”. However, Ålanders as, “only a small part of the Finnish territory, and… a small fraction of the Finnish nation”, did not have the same right. The Rapporteurs considered it self-evident that: “one cannot treat a small minority, a small fraction of a people, in the same manner and on the same footing as a nation taken as a whole.”108

Self-determination, therefore, only appeared to be a right of established national political entities. The Rapporteurs pointed out that Finland had been an autonomous state since 1809 and had a “clearly defined territory” and a “well-developed national life”.109 Ties of, “history, geography and politics”, which the Rapporteurs drew special significance to, and which supported Finnish self-determination, nonetheless, worked for the Ålanders, “in favour of the status quo.”110

In a balance between self-determination and minority rights the legitimacy of Åland self-determination rested primarily on two facts. The first was the clear will of the population for union with Sweden. The second was that the islanders were almost exclusively Swedish speaking. These were, however, just facts, and the question was how they were interpreted. Åland leaders and the Jurists interpreted them in a way that supported Åland rights. The Rapporteurs, on the other hand, attacked the significance of both in turn.

It was clear that the Ålanders had voted overwhelmingly for union with Sweden, and the Rapporteurs were in no doubt that that they would do so again: “a new plebiscite, were such authorised, would confirm by a swelling majority, almost unanimously, the wish for reunion with Sweden.”111 However, what interested the Rapporteurs was not the vote, but what motivated it. They dismissed Finnish arguments that the people were simply being manipulated by the Åland leaders. One motive might have been the concern of this, “peaceable and

106 Ibid. p. 28.
107 Ibid. p. 28.
108 Ibid. p. 27.
109 Ibid. p. 27.
110 Ibid. p. 29.
111 Ibid. p. 27.
conservative population” over the spread of bolshevism on the Finnish mainland and the subsequent civil war, but the principal one was nationality.\(^{112}\)

The Rapporteurs never questioned the Swedish character of the Ålanders: “They are altogether Swedish in origin, in habits, in language and in culture; 96.2% of the inhabitants are Swedes. The men are tall, strong and squarely built, and bear clearly the marks of their race.”\(^{113}\) It was natural that they would feel certain ties to Sweden:

> “In Sweden they see their natural guardian of their language, their customs, their immemorial traditions, of which they are so proud and to which they are attached above everything else. Even more than Russian domination they fear Finnish domination, which would lead to their gradual denationalisation, the absorption of their population, which has remained free from all ethnical mixture, by a race of whose language they are ignorant and whose invasion they abhor.”\(^{114}\)

This interpretation of nationality, though, was different from the Åland leaders and the Jurists. The desire for union was motivated by, “the instinct of self-preservation”,\(^{115}\) not long-standing aspirations. The Rapporteurs questioned the historical depth of Åland claims. They noted that a French writer visiting the islands during the Crimean War in 1856 recorded the islanders’ desire to join Sweden: “But after that, no trace of these distant and persistent aspirations recurred.”\(^{116}\) In fact, in their opinion, the peasants and sailors of the islands confined at the extremity of Finnish territory in isolation developed “a pronouncedly insular mentality” and “an essentially local patriotism”.\(^{117}\) They were, in other words, not an integral part of the Swedish nation, torn from their homeland by force, but an isolated and insular people looking for security in a threatening and uncertain time. This was less a question of correcting historic wrongs than protecting the character of a population threatened by political change. It was a question for minority rights.

There were, however, two factors that could shift the balance between minority rights and self-determination: oppression and stability. The first of these, oppression, though, was found by the Rapporteurs to work in favour of Finland. Under the Czar, “Finland [had]… been oppressed and persecuted” and “her tenderest feelings [had]… been wounded by the disloyal and brutal conduct of Russia.” The Ålanders had not been oppressed in this way. The arrest of two leaders of the Åland movement did not amount to general persecution. The population was, “threatened in its language and its culture”, but this was not from oppression and the Rapporteurs believed it possible to appeal to the “good will” of the Finnish government to reach a settlement which guaranteed their cultural identity.\(^{118}\)

The second factor, stability generally worked against Åland self-determination and the Rapporteurs used it to attack the other fact in favour of an Åland people: their Swedish ethnicity. In addition to the Ålanders, Finland had a substantial Swedish-speaking minority of around 350,000. The Rapporteurs considered that the Ålanders were, “in certain respects… not one with those which are Swedish-speaking… above all in their separatist spirit, which carries them towards Sweden, alienating them from their brothers in race who have remained Finnish at

\(^{112}\) Ibid. p. 25.
\(^{113}\) Ibid. p. 4.
\(^{114}\) Ibid. p. 26.
\(^{115}\) Ibid. p. 26.
\(^{116}\) Ibid. p. 25.
\(^{117}\) Ibid. p. 26.
\(^{118}\) Ibid. p. 28.
However, aside from this difference in aspirations, which had already been explained in terms of their local peculiarities, the Ålanders did, “not form a different ethnical group”. On the contrary, “they constitute[d] the fifth part of the Swedes of Finland, from whom they are not isolated geographically.” It was pointed out that the islands off Turku/Åbo, the Ålanders’ most immediate neighbours, were also, “almost exclusively Swedish”. The Skiftet separating Åland from Finland was, therefore, “no more an ethnographical than a natural frontier.”

This, though, raised the question of selectivity. If the Skiftet was not an ethnographical barrier and the Ålanders were only part of the Swedish ethnicity in Finland, then what about the Åland Sea between the islands and Sweden? It was scarcely plausible that this short stretch of water between the ethnically Swedish Åland Islands and ethnically Swedish Sweden was an ethnographic barrier. If Ålanders were but a fraction of the ethnic Swedes in Finland, what of those in Sweden?

Nonetheless, with the Ålanders established as a fifth of the Swedish ethnicity in Finland, the Rapporteurs could flesh out the issue of stability. Finnish Swedes, it was noted, were, “strongly pronounced against the separation of the Islands”, and there were good reasons why their views should be taken into account. The new Finnish Constitution established an equality between the Finnish and Swedish languages. However, the Rapporteurs found, “a certain tension – even a certain distrust – between the two linguistic groups”. They cited concerns by Finland’s Swedish party that if Åland were ceded to Sweden, “the agreement between the two unequal fractions of the nation would be irretrievably compromised”. The Rapporteurs raised the spectre that bitter resentment among Finns caused by the loss of the islands “would be swift to change to hatred… against their fellow-citizens of Swedish stock”. The Finns, were apparently, “vindictive”, by nature and, “their vengeance would turn first of all on their unfortunate associates.” Any solution, which ignored the wishes of Finland’s Swedes (for the islands to remain with Finland), therefore, would have “disastrous consequences”.

Finland’s stability had far wider implications: “sooner or later Russia will rise from this chaos to become once again one of the important factors in the future of Europe. Shall we then see a restoration of Pan-Slavist imperialism, as in the time of the Romanoffs? Whatever happens, it is in the general interest to hasten the consolidation of the States which have freed themselves from the Empire of the Czars to live an independent existence, and to help them to live and to prosper.” Finland had been a bulwark against Russian expansion: “The services which Finland rendered to others as well as to herself, in repelling the attacks of Bolshevist Communism, should not be forgotten.” The Swedes, on the other hand, the Rapporteurs pointedly noted, had not intervened in this war: “A large part of the population considered the Finnish Civil war if anything as a class struggle rather than a battle to the death between legal order and communist anarchy.” “It would be”, the Rapporteurs considered, in view of Finland’s services, “an extraordinary form of gratitude… to wish to despoil her of territory to which she attaches the greatest value.”

In conclusion, Sweden was recommended to, “bow with good grace” and follow the example

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119 Ibid. p. 29.
120 Ibid. p. 29.
121 Ibid. p. 29.
122 Ibid. p. 30.
123 Ibid. p. 31.
124 Ibid. p. 30.
125 Ibid. p. 17.
126 Ibid. p. 30.
it set with the peaceful separation of Norway.\textsuperscript{127} Åland independence was also dismissed: “the Archipelago has not the certain resources, which would enable it to bear all the expenses both in internal administration and communications with abroad.”\textsuperscript{128} The problem of Åland self-preservation was to be solved by autonomy. This involved the expansion of the Law of Autonomy passed by the Finnish Diet on 7 May 1920 with various measures on education, property rights and migration. Autonomy, the Rapporteurs argued, was the most realistic solution. The idea of Åland self-determination was nothing more than that: “if they leave the heights of their dreams for the \textit{terra firma} of reality, the privileges which have been offered to them will no longer seem so worthless.”\textsuperscript{129}

However, the balance established by the Rapporteurs between minority rights and self-determination was still subject to considerations of oppression. A warning was attached to the autonomy proposal: “in the event that Finland, contrary to our expectations and to what we have been given to understand, refused to grant the Aaland population the guarantees which we have just detailed, there would be another possible solution, and it is exactly the one which we wish to eliminate. The interest of the Aalanders, the interests of a durable peace in the Baltic, would then force us to advise the separation of the islands from Finland, based on the wishes of the inhabitants which would be freely expressed by means of a plebiscite.”\textsuperscript{130}

6. Re. Secession of Quebec: Burke Revisited

The Commission of Rapporteurs built a counter-argument against the use of self-determination to disrupt a state’s territorial integrity by focussing on the right as one of historically constituted political units. Emphasis was placed on stability and the historical development of political life. Conversely, the significance of the will of the people at any particular time was played down. This represented a conservative counter-argument similar to the one originally invoked by Edmund Burke against French Revolution. And this conservative tradition can be seen even more clearly in the Canadian Supreme Court’s decision in \textit{Re. Secession of Quebec}.\textsuperscript{131}

In September 1996 the Governor in Council, under section 53 of the Supreme Court Act, referred three questions to the Supreme Court concerning the legal situation in the event of a

\begin{footnotes}
\item [127] Ibid. p. 31.
\item [128] Ibid. p. 32.
\item [129] Ibid. p. 33.
\item [130] Ibid. p. 34.
\end{footnotes}
secession attempt by Quebec. The questions, although hypothetical, were far from theoretical. The background was Canada’s near miss with secession on 30 October 1995, when the population of Quebec rejected a declaration of sovereignty in a controversial referendum by a razor thin 50.58%. The first question asked was whether under the Canadian constitution the National Assembly, legislature or government of Quebec could unilaterally effect the secession of Quebec from Canada? Second, whether international law gave those bodies the right to effect a unilateral secession and whether there was a right of self-determination in international law, which would entail such a right? Third, in the event of a conflict between domestic and international law over the secession of Quebec, which would take precedence? As the perspective here is international law, question two will be examined before question one. The answer to question three was that there was no conflict between domestic and international law.

The Supreme Court’s approach to the second question was based on two balances. The first balance was between self-determination and territorial integrity, in which self-determination was not only limited, but effectively contained: “international law expects that the right to self-determination will be exercised by peoples within the framework of existing sovereign states and constantly with the maintenance of the territorial integrity of those states.”

This was, however, subject to a second balance. The Rapporteurs had struck a balance between self-determination and minority rights, which tilted one way, or the other according to considerations of stability or oppression. In Re. Quebec this balance was expressed through “internal” and “external” aspects of self-determination, which could similarly be effected by considerations of stability and oppression. Internal self-determination was defined by the Court as, “a people’s pursuit of its political, economic, social and cultural development within the framework of an existing state.” External self-determination was defined, quoting the Friendly Relations Declaration, as: “The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people…”

Citing, “recognized sources of international law”, the Court considered that self-determination was, “normally fulfilled through internal self-determination”. In support of this it invoked considerations of stability: “such a right must be sufficiently limited to prevent threats to an existing state’s territorial integrity or the stability of relations between sovereign states.” In a limited number of circumstances, though, it might be expressed externally. The first category were colonial peoples. Second were peoples subject to alien subjugation, domination and exploitation outside a colonial context. Third, the Court claimed that a “number of commentators”, who it did not name, asserted that, “when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession.” The Vienna Declaration 1993, in its opinion, added credence to this claim, although it considered that, “it remains unclear whether this third proposition actually

135 Ibid. p. 438, para. 126.
137 Ibid. p. 438, para. 127.
139 Ibid. p. 440, para. 133.
reflects an established international law standard”. Thus, “at best” external self-determination could be exercised in only three situations: all of which were characterised by subjugation and domination.

Quebec, evidently, did not fall into any of these three situations: “The population of Quebec cannot plausibly be said to be denied access to government.” Failure to reach agreement on amendments to the Constitution, the Court noted, while a matter of concern, did not amount to a denial of self-determination. Consequently, “even if characterized in terms of ‘people’ or ‘peoples’”, Quebec did not have a right to unilateral secession.

This ambivalence towards the question of whether or not Quebec was a people was typical of the Court’s attitude in Re. Secession of Quebec. This was curious considering that the Court acknowledged that characterisation as a “people” was the “threshold step” for access to the right of self-determination. Moreover, it notably considered that, “‘a people’ may include only a portion of the population of an existing state.” Did this mean that the population of Quebec could be a people? Again the Court was ambivalent: “While much of the Quebec population certainly shares many of the characteristics (such as a common language and culture) that would be considered in determining whether a specific group is a ‘people’, as do other groups within Quebec and/or Canada, it is not necessary to explore this legal characterization to resolve Question 2 appropriately.”

Two factors lay behind this apparent ambivalence. First, in the same manner as the Friendly Relations Declaration, the Court had shifted the emphasis in self-determination from the existence of peoples as such to the enjoyment of representative government or in this case “internal” self-determination. It also shifted the burden of legitimacy on to the secessionists. Remidual secession might not, in the Court’s own opinion, be established in international law, but by raising it, like the Rapporteurs, it could show that the population in question was not oppressed.

“[T]o reflect the phraseology of the international documents that address the right to self-determination of peoples, Canada is a ‘sovereign and independent 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’”. Second, the Court’s ambivalence over whether Quebec was a people in question two was, in fact, only apparent. It was able to be nonchalant because in answering question one it had already carefully constructed an idea of Canadian nationality, which diminished the significance of Quebec’s claim to be a people. This was an idea of Canada as a political nation founded in shared values and institutions. Canada was not a country founded along narrow ethnic lines, but

\[141\] Ibid. p. 441, para. 135.
\[142\] Ibid. p. 442, para. 138.
\[143\] Ibid. p. 441, para. 136.
\[144\] Ibid. p. 442, para. 137.
\[145\] Ibid. p. 442, para. 138.
\[146\] Ibid. p. 437, para. 123.
\[147\] Ibid. p. 437, para. 124.
\[148\] Ibid. p. 437, para. 125.
\[149\] See Oliver loc. cit. no. 131 at p. 92.
a people of peoples in which, “diversity could be reconciled with unity”. 151 Quebec might have its own language and culture, but that did not undermine its position in the wider Canadian nation. The Court quoted George-Etienne Cartier:

“When we are united, he said, we shall form a political nationality independent of the national origin or the religion of any individual... In our own federation, we will have Catholics and Protestants, English, French, Irish and Scots and everyone, through his efforts and successes, will add to the prosperity and glory of the new confederation. We are of different races, not so that we can wage war on another, but in order to work together for our well-being.” 152

This political nation, it was stressed, had contractual origins, which were themselves the expression of a longer democratic tradition. The Canadian Confederation was not created by an “Imperial fiat”, but by an, “initiative of the elected representatives of the people”, 153 in which, the Court stressed, the people of Quebec had played a central role. In particular, the Constitution Act 1867, which the Court described as, “an act of nation-building”, 154 was based on the “Quebec Resolutions”, adopted at a conference in the province in 1864. 155 Moreover, these events were the culmination of a longer process. “[T]he Canadian tradition”, the Court recalled, was “one of evolutionary democracy”:

“The evolution of our democratic tradition can be traced back to the Magna Charta (1215) and before, through the long struggle for Parliamentary supremacy which culminated in the English Bill of Rights in 1688-89, the emergence of representative political institutions in the colonial era, the development of responsible government in the 19th century, and eventually the achievement of the Confederation itself in 1867.” 156

This emphasis on the evolution of political structures out of a long historical tradition seemed to closely follow Edmund Burke’s original attack on the political foundations of self-determination. Indeed, the Court’s description of, “the ongoing process of constitutional development and evolution of our Constitution as a ‘living tree’” 157 invoked an organic analogy of historical national growth similar to Burke’s Reflections on the French Revolution.

This emphasis on the contractual nature of the Canadian nation based on the desire to live under common institutions, however, raised a question: what was to prevent Quebec, if it so wished, from repudiating that contract and withdrawing from those institutions? Burke in his original conservative counter-argument had a two-fold response to the arbitrary dismantling of a state. First, he emphasised the length of the state-building process. The state was not a short term contract, “a partnership agreement in the trade of pepper and coffee... to be taken up for a little temporary interest, and to be dissolved by the fancy of the parties.” 158 It was a series of

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151 Ibid. p. 407, para. 43. See Howse and Malkin loc. cit no. 131 at p. 200; Haljan loc. cit. no. 131 at p. 450.
153 Ibid. p. 404, para. 35.
154 Ibid. p. 407, para. 43.
156 Ibid. p. 415, para. 63.
157 Ibid. p. 410, para. 52.
agreements forged over a considerable period of time: “The idea of a people is the idea of a corporation… many a weary step is to be taken before they can form themselves into a mass, which has a true, politic personality.”

This building of a nation through many a weary step was echoed by the Court with a quote from the Attorney General of Saskatchewan:

“A nation is built when the communities that comprise it make commitments to it, when they forego choices and opportunities on behalf of a nation… when the communities that comprise it make compromises, when they offer each other guarantees, when they make transfers and perhaps most pointedly, when they receive from others the benefits of national solidarity. The threads of a thousand acts of accommodation are the fabric of a nation.”

A particular feature of the compromises needed to create Canada was the reconciliation of unity and diversity through federalism. The function of federalism was, “to enable citizens to participate concurrently in different collectivities and to pursue goals at both a provincial and a federal level.” These were the compromises that allowed Canadian democracy to function, and while the system needed democratic legitimacy, the will of the people could not be arbitrarily invoked to change it:

“[D]emocracy in any real sense of the word cannot exist without the rule of law. It is the rule of law that creates the framework within which the ‘sovereign will’ is to ascertained and implemented… Equally, however, a system of government cannot survive through adherence to the law alone. A political system must also possess legitimacy… that requires an interaction between the rule of law and the democratic principle”.

The “sovereign will” noticeably appeared in quotation marks. The will of the people was not so much sovereign as a factor in political legitimacy: “It would be a grave mistake to equate legitimacy with the ‘sovereign will’”. Like the Rapporteurs, the Court downplayed the significance of a vote in favour of secession: it expressed a popular will, but did not in itself have a binding legal effect.

Burke’s second response was that in the long period of state-building other values necessary for a nation become intertwined with the institutions of the state: “where… [institutions] have cast their roots wide and deep, and where, by long habit, things more valuable than themselves are so adapted to them, and in a manner interwoven with them… one cannot be destroyed without notably impairing the other”. The Court also developed the idea of four unwritten principles interwoven with the constitution: democracy, the protection of minorities, constitutionalism and the rule of law, and federalism. These principles provided a standard

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277-518 at p. 368.  
160 Ibid. p. 416, para. 66.  
162 Ibid. p. 417, para. 67.  
163 Burke op. cit. no. 158 at p. 427.  
164 Ibid. p. 424, para. 87.  
165 Ibid. p. 450.  
166 161 DLR (1998) 4th Series, p. 416, para. 67, p. 419, paras. 73-4; Oliver loc. cit. no. 131 at pp. 84-6; Haljan loc. cit. no. 131 at p. 450.
against which the legitimacy of a secession would be measured: “Refusal of a party to conduct negotiations in a manner consistent with constitutional principles and values would seriously put at risk the legitimacy of that party’s assertion of its rights”. 167 The popular will could not be the single decisive factor. “[L]inguistic and cultural minorities, including aboriginal peoples”, the Court noted, and Quebec contained both, “look to the Constitution of Canada for the protection of their rights.” 168 As the Court later pointed out, groups which could be characterised as “peoples” existed not only in Canada but also in Quebec. 169 Moreover, in the federal system, “there may be different and equally legitimate majorities in different provinces and territories and at the federal level. No one majority is more or less ‘legitimate’ than the others”. 170 Indeed, federalism, “would be defeated if one of those democratically elected levels of government could usurp the powers of the other simply by exercising its legislative power to allocate additional power to itself unilaterally.” 171

The Constitution, the Court found, neither expressly authorised nor prohibited secession, 172 but a referendum could be no more than a bargaining chip. It considered that: “the clear repudiation of the existing constitutional order and the clear expression of the desire to pursue secession by the population of a province would give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire.” 173 The result of those negotiations, though, would not be predetermined:

“The Constitution is the expression of the sovereignty of the people of Canada. It lies within the power of the people of Canada, acting through their various governments duly elected and recognized under the Constitution, to effect whatever constitutional arrangements are desired within Canadian territory, including, should it so be desired, the secession of Quebec from Canada.” 174

However:

“We hold that Quebec could not purport to invoke a right of self-determination such as to dictate the terms of a proposed secession to the other parties: that would not be a negotiation at all… The democracy principle, as we have emphasized, cannot be invoked to trump the principles of federalism and the rule of law, the rights of individuals and minorities, or the operation of democracy in the other provinces or in Canada as a whole.” 175

Thus, Re. Secession of Quebec, like the Rapporteurs’ decision in the Åland Islands, fits into a conservative nationalist tradition stretching back to Edmund Burke’s original repudiation of the French Revolution. This conservative counter-argument emphasises historical political development within established entities and limits the significance of any particular expression.

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168 Ibid. p. 427, para. 96.
169 Ibid. p. 437, para. 125.
170 Ibid. p. 416, para. 66.
171 Ibid. p. 419, para. 74.
172 Ibid. p. 423, para. 84.
173 Ibid. p. 425, para. 88.
174 Ibid. p. 423, para. 85.
175 Ibid. p. 425-6, para. 91.
of the will of the people. The judgment’s use of history has been criticised as a means to, “obscure or presumptively legitimate what judges are doing when they dip outside the text of the constitution for legal and binding rules.”¹⁷⁶ But, that is precisely the point. Re. Secession of Quebec, like the Åland Islands decisions, underlines that legal principles are far from monolithic, rather they are closely connected with political considerations and legitimising national ideas.

7. The Tatarstan and Chechnya Cases: The Basic Counter-Argument

If the Rapporteurs and Re. Secession of Quebec represent the conservative counter-argument, the decisions by the First and Second Russian Constitutional Courts in the Tatarstan and Chechnya cases,¹⁷⁷ represent a more conventional nationalist counter-argument. Both cases involved a balance between the principles of self-determination and territorial integrity in which the latter prevailed. In both the court also supported this balance by using the basic nationalist counter-argument of drawing a distinction between a nation and its aspirations as such, and political and legal demands made in its name.

The decision of the (First) Russian Constitutional Court in the Tatarstan case on the 13 March 1992 concerned the constitutionality of a Declaration of State Sovereignty by the Republic of Tatarstan’s Supreme Soviet on 31 August 1990; amendments to the Tatar Constitution; and, in particular, a referendum on the status of the republic, which was held a week later on 21 March 1992. This asked the question:

“Do you agree that the Republic of Tatarstan is a sovereign state, a subject of international law that constructs its relations with the Russian Federation and other republics and states on the basis of treaties between equal parties? ‘Yes’ or ‘No’.”¹⁷⁸

The referendum was intended to lend popular legitimacy to the earlier Declaration of State Sovereignty: “to attribute to it the quality of a norm of the highest level – confirmed by the People.”¹⁷⁹ Sovereignty declarations had been made by other republics in the Russian Soviet Federal Socialist Republic (RSFSR), and concept of “sovereignty” in the Soviet Union had been somewhat open. However, what distinguished the Tatar declaration, and concerned the Court, was that it made “no mention whatsoever” of Tatarstan being part of Russia.¹⁸⁰ Was the

¹⁷⁶ Haljan loc. cit. no. 131 at p. 450.
¹⁷⁹ Ibid. p. 39.
¹⁸⁰ Ibid. p. 35.
referendum, then, a vote on secession?

Tatarstan’s right to raise the issue of its legal status, the Court held, was “derivative from the right of the People to self-determination.”181 This right, it noted, could be found in both Russian and international law. Article 3 of the Decree of the Congress of People’s Deputies, “On the Fundamental Principles of the National-State Structure of the RSFSR”, established that the right of self-determination was to be guaranteed in the Russian Federation. This, however, could be “exercised in various national-state and national-cultural forms.”182 On the international level the Court cited article 1 of the Covenants (ratified by the USSR in 1973) and the Friendly Relations Declaration. The right of self-determination was, “one of the basic principles of international law”.183

However, the Court balanced this right with the principles of respect for territorial integrity and human rights. Citing article 29 of the Universal Declaration of Human Rights and GA Res. 41/117, it argued that the exercise of rights required respect for the rights and freedoms of others. “Otherwise”, it considered, “the exercise of any right, including that to self-determination… would be the abuse of the right and not the exercise of the right.”184

Additionally, international documents emphasised, “the impermissibility of making reference to the principle of self-determination in order to jeopardize state and national unity.”185 These documents included, in particular, paragraph 7 of the Friendly Relations Declaration. “Analogous principles” could also be found in CSCE instruments. “Thus”, the Court concluded, “without negating the right of a People to self-determination exercised by means of the lawful expression of will, it is appropriate to proceed from the premise that international law restricts it by the observance of the requirements of the principle of territorial integrity and the principle of the observance of human rights.”186

A similar balance was applied on the level of Russian constitutional law. The Russian Constitution did not envisage the right of its constituent republics to secede. On the contrary, under the Constitution, any changes to the Russian national-state structure fell under the jurisdiction of the RSFSR. The unilateral secession of Tatarstan would not only be a violation of the territorial integrity of a sovereign state and the national unity of its peoples, it would harm the constitutional order to the detriment of human rights and the rights of peoples. The “only lawful and equitable” solution to the question of the status of the republics was a “negotiation process based on the law”, involving, “all of the interested subjects of the RSFSR”.187

However, this balance was not to negate, “the right of a People to self-determination exercised by means of the lawful expression of will [emphasis added]”. The Court, therefore, supported its balance containing self-determination by arguing that the case did not involve a lawful expression of will, distinguishing the referendum conducted by Tatar authorities from the Tatarstan people themselves and their rights. On the one hand, the Court claimed that it viewed, “with understanding the aspirations of the multinational People (narod) of Tatarstan to develop and reinforce the statehood of the republic”.188 On the other, it argued that the forthcoming referendum could not express those aspirations.

181 Ibid. p. 39.
182 Ibid. p. 39.
183 Ibid. p. 40.
184 Ibid. p. 40.
185 Ibid. p. 40.
186 Ibid. p. 41.
188 Ibid. pp. 34-5.
The referendum question, the Court argued, was confusing: a violation of, “the requirement of clarity and unambiguousness”. Its precise purpose was undefined, and in substance it amounted to several questions to which only one answer could be given. It, therefore, deprived citizens of not only “the right to the free expression of their will”, but also the, “right to participate in the discussion and adoption of laws and decisions of national importance” contained in the Tatar and RSFSR constitutions. Judge Ametistov, in a separate opinion, went even further and argued that it violated article 25 of the Civil and Political Covenant.

Nonetheless, the Court did find that most of the question was clear enough in its intent to violate the constitution. The part which stated that, “Tatarstan is a subject of international law and constructs its relations with the Russian Federation and other republics and states on the basis of treaties between equal parties”, the Court found, “shall be recognized as not in accord with the Constitution”. This was because the formulation was, “associated with a unilateral change of the national-state structure of the RSFSR and signifies that the republic of Tatarstan is not part of the RSFSR.” This, of course, aside from the reference to Tatarstan as sovereign, which in Soviet usage had always been ambiguous, was basically the question.

A similar formula was followed by the (Second) Russian Constitutional Court in the 1995 Chechnya case. This case concerned the constitutionality of four presidential edicts issued during the First Chechen War. These edicts provided for the use of force in order to protect the security and territorial integrity of the Russian Federation. As a result, the relationship between territorial integrity and self-determination became an issue in the case.

The balance between self-determination and territorial integrity was again based on paragraph seven of the Friendly Relations Declaration. Self-determination was recognised as an accepted international norm. However, in accordance with the paragraph, exercise of the right: “must not be interpreted as sanctioning or encouraging any actions that would lead to the division or complete violation of the territorial integrity or political unity of sovereign and independent states acting in observance of the principle of the equal rights and self-determination of nations.”

The principle of territorial integrity was again supported by human rights: “The integrity of the state is an important condition of the equal legal status of all citizens, irrespective of the place of their residence, and one of the guarantees of their constitutional rights and freedoms.” Thus, the 1993 Russian Constitution, which did not recognise a right of secession and provided in article 66(5) that a subject of the Federation could only change its status by mutual agreement, was, “in accord with generally accepted international norms on the right of a

189 Ibid. p. 42.
190 Judge Ametistov, Separate Opinion, ibid. p. 47.
191 Ibid. p. 44.
Paragraph seven again was raised on the assumption that the Russian government was, in fact, representative and acting in conformity with the principles of equal rights and self-determination. The Court cited in consideration of this that “the federal powers (the President, the Government, and the Federal Assembly) repeatedly undertook attempts to overcome the crisis that had arisen in the Chechen Republic.” “However”, it continued, “they did not lead to a peaceful political resolution.” The Court did not examine whether the presidential edicts restricting constitutional rights and freedoms, affected the representiveness of Russia’s government.

This balance was supported again by separating the Chechen nation (narod) and their legitimate aspirations from the nationalist politicians who claimed to represent them. On one hand, the situation in Chechnya was considered to be the product of historic injustices: the nation’s mass deportation under Stalin and the “insufficiently effective” rectification of the consequences of this. “The state power, first of the USSR and then of Russia, was not able to assess correctly the justified resentment of the Chechens”, and the Russian Federation, “exhibited passivity in the resolution of the problems of mutual relations with this republic”.

Nonetheless, it was emphasised that in autumn 1991 the lawfully elected Supreme Soviet of the republic had been dispersed and free elections had not taken place since then. The Court cited statements by the Congress of People’s Deputies, the Duma and the European Parliament that, “free elections or a referendum had not been held and lawful bodies of power had not been formed”.

The Court characterised the Chechen rebels simply as “illegal armed formations”, and described the secessionist conflict as nothing more than “a civil war” between “mutually hostile groupings”. Thus, the Court separated the Chechen nation and its possible grievances from the secessionists themselves. The Chechen movements, as presented, were neither united nor represented the people. This again supported the containment of self-determination within the territorial integrity of the Russian Federation.

8. Western Sahara: Painting in a Colour between Blue and Green

a. Introduction

Nations and peoples are usually defined as groups sharing certain common characteristics, such as language, culture and a sense of identity. But, they are not the only groups with such features. Similar ties may be found in a tribe, even though tribes are not generally considered to be nations. How, then, is a nation distinguished from a tribe? Generally tribes are smaller than nations, but there are large tribes and small nations, so where does one begin and the other end? Hugh Seton-Watson put the dilemma rather well:

“The word ‘tribe’ has usually been applied to comparatively small groups of people, with a rather low level of culture… Most of these communities, scattered across the globe and the centuries, shared a fierce loyalty both to their chiefs and to fellow-members of the

194 Ibid. p. 52.
195 Ibid. p. 52.
196 Ibid. p. 51.
197 Ibid. p. 51.
198 Ibid. pp. 50-1.
community. The difficulty is to decide at what point ‘tribal consciousness’ becomes ‘national consciousness’... one has to be very cautious in the use of the words ‘nation’ and ‘tribe’; yet the difference exists, just as the difference in the spectrum between blue and green exists, though the colours merge in the human eye which beholds the rainbow.”

If tribal and national identities can merge into one another like blue into green, how should one consider a country made up of tribes? Does one see one people, a people with a tribal structure, a group of tribes, a group of peoples or a group of peoples who have become a single people? There are a number of possibilities, and the Western Sahara Advisory Opinion of 1975 presented not one, but three such countries: Western Sahara, Morocco and Mauritania. The opinion was in many ways a display of legal gymnastics. The Court managed to contort itself into finding both that there were ties between Western Sahara and Morocco and Mauritania, and that they were not the sort of ties that effected the application of self-determination. In each of its twists it found support in the very particular nature of the peoples of the region, which were painted in ambiguous shades of turquoise.

The opinion concerned the legal position of Western (or Spanish) Sahara, which at the time was a Spanish colony on the north-west African coast claimed by two of its neighbours, Morocco and Mauritania. Morocco’s claim dated from 1956 and was part of originally far greater ambitions which extended down the west African coastline past Western Sahara and into Mauritania. Mauritanian claims were much more recent, dating only from 1970. Interest in the territory was also spurred with the discovery of substantial phosphate deposits there.

The General Assembly had also taken an interest in Western Sahara and in 1966 called on Spain in consultation with Morocco and Mauritania and other interested parties to devise procedures for a referendum there. Spain, which earlier claimed that Western Sahara was an overseas province, accepted the principle of self-determination, but in practice dragged its feet over implementation emphasising difficulties created by the nature of the territory and its population. However, in 1973 this policy changed and the next year a referendum was scheduled for the first half of 1975.

Morocco and Mauritania’s ambitions now took on a sense of urgency. In September 1974 King Hassan of Morocco challenged Spain to submit Western Sahara to arbitration by the International Court of Justice. If Spain refused, he argued, the United Nations could ask for an

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202 “You, the Spanish Government, claim that the Sahara was res nullius. You claim that it was a territory or property left uninherited, you claim that no power and no administration had been established over the Sahara: Morocco claims the contrary. Let us request the arbitration of the International Court of Justice at the Hague... It will state the law on the basis of the titles submitted...” Quoted in Western Sahara (Advisory Opinion), ICJ Reports
advisory opinion. And this was what happened. Morocco and Mauritania were able to gather enough support in the General Assembly to pass a resolution in December 1974, GA Res. 3292(XXIX) requesting an advisory opinion on Western Sahara. The resolution also urged Spain to postpone its referendum until after the opinion, which Spain duly did. This bought time for Morocco and Mauritania whose attitude to the proceedings could not ultimately be said to be that of good faith.

In GA Res. 3292(XXIX), the General Assembly requested the Court’s opinion on two questions:

“I. Was Western Sahara (Río de Oro and Sakiet El Hamra) at the time of colonization by Spain a territory belonging to no one (terra nullius)?
If the answer to the first question is in the negative,
II. What were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity?”

As noted by several judges, these questions were loaded. If the Court answered Question I by finding that Western Sahara was not terra nullius (land belonging to no one), which it did, then it must belong to someone, and Question II was orientated to finding that someone to be Morocco and Mauritania. The Court, therefore, essentially reframed the questions. They were to be, “considered in the whole context of the decolonization process”, in which the, “applicable principles of decolonization”, would form, “an essential part of the framework”. Thus, Question II was reinterpreted as one of the existence of, “such ‘legal ties’ as may affect the policy to be followed in the decolonization of Western Sahara.” The relevant date for the existence of such ties was set at 1884, when a Spanish protectorate was proclaimed over Río de Oro. In broad terms, the issue was one of the balance between the principles of territorial integrity and self-determination. In order to consider the question in this way, the Court argued that “legal ties” could not only be understood as ties to territory, since legal ties were normally established in relation to people.

b. The Moroccan, Mauritanian and Spanish Claims

At the centre of Morocco’s claim was a balance between the principles of self-determination and territorial integrity, as set out in principles 2 and 6 of GA Res. 1514(XV). Morocco considered that the principles and techniques of decolonisation were not yet settled and there

208 Ibid. p. 36, para. 71.
209 Ibid. p. 30, para. 52.
210 Ibid. p. 41, para. 85.
211 Ibid. p. 38, para. 77.
212 Ibid. p. 41, para. 85.
remained a wide range of possible solutions in light of these two principles. One method of
decolonisation was the reintegration of a province with the “mother country” from which it had
been detached by colonialism. As the only historical state in the region, Morocco claimed
Western Sahara on the basis of ties of state sovereignty supported by common political,
geographical, religious, ethnic, cultural and historical ties.

Mauritanian claims were also based on the balance between self-determination and territorial
integrity. The balance between the two, it was argued, varied and in some cases territorial
integrity might predominate, especially where a territory had been created by colonialism to the
detriment of the “State or country” to which it belonged. The word “country” was significant,
because at the time of Spanish colonisation, Mauritania was not yet a state. This was a claim
made solely on behalf of a nation. Mauritania claimed to have been united as a national “entity”
known as the Bilad Shinguitti, which would later form the basis of the Islamic Republic of
Mauritania. The Bilad Shinguitti was vast: ranging from the Senegal River in the south to Wad
Sakiet El Hamra in northern Western Sahara. Its people were united by language, culture,
religion, history, habits, social structure and law. Moreover, they saw themselves, and were
known in the Arab world, as a distinct community famous for its scholarship, literature and
poetry. Although not a state, the emirates and tribes of the Shinguitti nation exercised co-
sovereignty as equals, and, while they sometimes fought each other, they united against
foreigners.

A third view on the Western Saharan population was offered by Spain. Spain argued that at
the time of colonisation the territory was inhabited by a distinct people, the Sahrawis, whose
common organisation and way of life created a sense of collective self-awareness and mutual
solidarity. These people, organised as autonomous tribes independent of outside authority, made
a clear distinction in their literature between themselves, “the country of the nomads” and the
settled peoples to the north and south, in Morocco and Mauritania.

Obviously not all three of these claims could be correct. The Moroccan idea was attacked by
Spain and to a lesser extent by Mauritania. Spain noted, “a striking absence of any documentary
evidence or other traces of a display of political authority by Morocco with respect to Western
Sahara.” Allegiance to the Sultan was limited to settled populations in southern Morocco, not
to the independent nomads of Western Sahara, and even in settled areas this authority was weak.
Those populations paid no taxes and were never completely subjugated. Mauritania, for its
part, did not dispute the Sultan’s authority over the tribes of northern Western Sahara, but the
other tribes were part of the Bilad Shinguitti.

Spain also attacked the Mauritanian national idea. The Bilad Shinguitti, it argued, was only a
zone of Islamic culture around the town of Shinguit, whose influence, in any case, had declined
by the sixteenth century. Adrar, one of Mauritania’s emirates, which included the town within its
borders, emerged only in the eighteenth century and could not be considered to be its successor.
The emirates and tribes of the region, far from acting as co-sovereigns, fought each other and

\[\text{\textsuperscript{213}}\text{Ibid. p. 29, para. 49.}\]
\[\text{\textsuperscript{214}}\text{Ibid. pp. 42-5, paras. 90-2, 94-6, 99}\]
\[\text{\textsuperscript{215}}\text{Ibid. pp. 29-30, para. 50.}\]
\[\text{\textsuperscript{216}}\text{Ibid. pp. 57-60, paras. 131-39.}\]
\[\text{\textsuperscript{217}}\text{Ibid. p. 62, para. 145.}\]
\[\text{\textsuperscript{218}}\text{Ibid. p. 46, para. 100.}\]
\[\text{\textsuperscript{219}}\text{Ibid. p. 46, paras. 100-1.}\]
\[\text{\textsuperscript{220}}\text{Ibid. p. 47, para. 102.}\]
signed separate treaties with France.  

Indeed, not only were the emirates and tribes of Mauritania divided, but there was also no evidence for ties of allegiance to the independent tribes of Western Sahara. Moreover, the alleged historical Mauritanian nation was not the basis of the present state. “Mauritania” as an idea dated only to 1904, by which time the Spanish colony in Western Sahara was well established in fact and law.

The rejection of the Spanish idea of a Sahrawi people was implicit in both the Moroccan and Mauritanian claims. Both states argued that Western Sahara was an artificial creation of Spanish colonialism which separated its inhabitants from their homeland.

c. A Tribal Solution to Western Sahara

Incredibly enough, the Court managed, to some extent, to accommodate all three of these positions. Its conclusion was that there were legal ties between Western Sahara and Morocco and Mauritania. But, these ties did not amount to “territorial sovereignty”. Thus, they might not, “affect the application of resolution 1514(XV) in the decolonization of Western Sahara and, in particular, the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory”. Commentators noted that the opinion felt like a diplomatic compromise. Morocco and Mauritania could save face but the referendum would go ahead.

However, notably each stage of the compromise was supported by the tribal nature of the countries involved. The tribal structure of Western Sahara allowed the Court to find legal ties to Morocco, but not ties that effected the general population. The tribal nature of Mauritania created the opportunity to find ties to Western Sahara, but not ties that limited the application of self-determination. Finally, the tribes of Western Sahara left the maximum room for negotiation in a future settlement based on a referendum.

Integral to all these findings was the principle of self-determination and the Court approached it in a way that left all the options open. It refrained from identifying a Western Saharan people, instead referring to an undisclosed number of unidentified “peoples” in the territory. Its definition of the principle, “the need to pay regard to the freely expressed will of peoples”, emphasised the process of self-determination, rather than its direction towards any particular end. Moreover, even this process was loose. As was pointed out in the introduction, the definition fell short of an “obligation” to “respect” the freely expressed will of peoples, and left substantial room for future, “consultations between the interested States” which the Court specifically envisaged. On top of this, the Court emphasised its disclaimer on the legal consequences of an opinion: “the right of the population of Western Sahara to self-determination is not prejudiced or affected by the present request for an advisory opinion”. The Court, thus, fashioned self-determination in Western Sahara into an empty concept, leaving its subject, procedure and ends open for other parties to fill in later. Nonetheless, whatever form it took, the
Court did orientate future policy towards, “a free and genuine expression of the will of the people.”

This basic orientation was reflected in its approach to the principles of decolonisation. The basic balance of principles behind the Western Sahara dispute was between self-determination and territorial integrity. However, despite finding that territorial sovereignty might affect its application, the Court’s examination of self-determination’s relationship with other principles was, in fact, quite muted. Surveying the international instruments on decolonisation, the Court cherry-picked the provisions that supported its own particular interpretation of self-determination. In GA Res. 1514(XV) it cited principles 2, 5 and 6, finding that, “in particular paragraph 2” confirmed and emphasised, “that the application of the right of self-determination requires a free and genuine expression of the will of the peoples concerned.” In GA Res. 1541(XV) it found that “certain of its provisions” (those on free association and integration) provided that they should be the result of, “a free and voluntary choice by the peoples”, and, “the freely expressed wishes of the territory’s peoples”, respectively. The requirements for independence in the resolution, or the lack of them, were passed over. In GA Res. 2625(XXV), the Court focussed on the part of the resolution that provided that a political status was to be, “freely determined by a people [the Court’s own emphasis].”

The General Assembly, however, had not itself always followed this policy in decolonisation. The Court concluded with the observation that the validity of self-determination was not affected by the fact that in certain cases the General Assembly had dispensed with the requirement of consulting the inhabitants of a territory. Those instances were based either on the consideration that a certain population did not constitute a “people” entitled to self-determination or on the conviction that a consultation was totally unnecessary, in view of special circumstances. This finding was question-begging. Was a people only a people when the General Assembly considered it to be one? Where did it acquire such sweeping powers, and what were the “special circumstances” that made consultation unnecessary? The Court did not address these questions. Its statement was basically a defence of its own interpretation of self-determination: the General Assembly’s practice did not affect the validity of the principle as the need to pay regard to the freely expressed will of peoples.

Integral to this process based approach to self-determination was the ambiguity surrounding the peoples of Western Sahara, which itself was based on the tribal composition of the territory. The Court emphasised this tribal structure. Western Sahara had, “very special characteristics which, at the time of colonization by Spain, largely determined the way of life and social organization of the peoples inhabiting it.” Low and spasmodic rainfall created an environment inhabited mostly by nomadic tribes. These tribes, the Court noted, had a number of common features: their Islamic faith, their general political structure of a sheikh and a Juma’a (tribal assembly), rights and customs relating to pasture and water, and the role of burial grounds. “Not infrequently”, these tribes had ties of dependence or alliance, “which were essentially tribal” in nature. However, despite these common features, it was also noted that, “inter-tribal conflict was not infrequent.” It was in this context of an undisclosed number of tribal peoples that the Court

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230 Ibid. p. 37, para. 72.
231 Ibid. pp. 31-2, para. 55.
232 Ibid. pp. 32-3, para. 57.
233 Ibid. p. 33, para. 58.
235 Ibid. p. 41-2, paras. 87-8.
considered the ties to Morocco and Mauritania and the application of self-determination to Western Sahara.

d. The Court’s Examination of Morocco’s Claims

Morocco’s claim was based on the balance of self-determination and territorial integrity in GA Res. 1514(XV), and this, in turn, depended on the concepts of “country” and “people”. Morocco had established its legal ties by building up its “country” with national ties: history, geography, religion, culture and politics. The Court examined all of them in turn and found none to be ties of territorial sovereignty.

The first of these were historical ties. The Court, however, dismissed Morocco’s claim for a long-standing historical relationship with Western Sahara dating back to the Arab conquest of the seventh century. The historical events referred to by Morocco were found to be of a “far flung, spasmodic and often transitory character”, and, “somewhat equivocal as evidence of possession of the territory now in question.”

Morocco also claimed a common geography with Western Sahara. Indeed there is no natural boundary between the two. However, the Court dismissed this geographical unity or contiguity as “somewhat debatable”. This might have been a reference to the Atlas mountain range of southern Morocco (which itself does not delimit the border with Western Sahara), although this was never spelled out. Instead, the Court turned the geographical argument against Morocco. Geographical contiguity, in its opinion, only made the lack of authority shown by Morocco over Western Sahara harder to reconcile with immemorial possession.

Political ties lay at the centre of the Moroccan claims: expressed either as displays of Moroccan authority or ties of allegiance between the tribes and the Sultan. The Court first examined political ties based on a continuous display of authority in the territory. It recalled the test in the Permanent Court’s judgment in the Legal Status of Eastern Greenland. The Eastern Greenland test had two elements: “the intention and will to act as sovereign, and some actual exercise or display of such authority”. The Court considered that it might be true that in, “thinly populated or unsettled countries, very little in the way of actual exercise of sovereign rights” might be sufficient in the absence of a competing claim.” Western Sahara, though, “if somewhat sparsely populated, was a territory across which socially and politically organized tribes were in constant movement and where armed incidents between these tribes were frequent.” Therefore, “the paucity of evidence of actual display of authority unambiguously relating to Morocco renders it difficult to consider the Moroccan claim as on all fours with that of Denmark [which was found to exercise sovereignty] in the Eastern Greenland case.”

Having rejected political ties based on a display of Moroccan authority, the Court turned to ties of political and religious allegiance to the Sultan. It was noted that the Moroccan Sherifian State of the time was based on a common bond of Islam, as well as the allegiance of tribes.

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236 ICJ Reports (1975) p.42, para. 91.
238 ICJ Reports (1975) p. 43, para. 92.
240 ICJ Reports (1975) p. 43, para. 92.
241 Ibid. p. 43, para. 92.
through their caids or sheikhs to the Sultan. The first of these ties, religious ties, were readily dismissed: “Common religious links have, of course, existed in many parts of the world without signifying a legal tie of sovereignty or subordination to a ruler. Even the Dar al-Islam… knows and knew separate States within the common religious bond of Islam.”

This easy rejection of religion was, however, criticised by Judge Ammoun: “Religious feeling does not preclude ethnic or national solidarity between Sahrawi and Moroccans. It tends rather to consolidate it… there is no doubt that the religious tie is one of the constituent elements in legal ties and in those of nationality, being additional to ethnic, social, cultural and economic ties and national aspirations, and making them more binding: the more so in that the Sultan possessed both temporal and spiritual powers, and appointed the caids who applied Muslim law. Modern examples of the strength of religious ties abound: Ireland, Pakistan, Bangladesh…”

The Court then turned to Morocco’s claim of ties of political allegiance supported by common bonds of religion and culture. It noted that the Moroccan state was divided into two areas: Bled Makhzen, areas actually subject to the Sultan; and Bled Siba, areas where tribes were de facto not submissive to the Sultan. Morocco claimed that this political disunity was counteracted by common cultural and religious ties.

However, the Court saw the tribes of the Bled Siba as evidence of the limits of Moroccan authority, calling them “de facto independent powers”. These tribes, it was noted, paid no taxes, did not contribute to the army, did not govern themselves under the Sultan’s authority and were “in a state of permanent insubordination”. Moreover, it was pointed out that the Bled Siba, which seemed to mark the limits of the Sultan’s authority, inhabited the areas, “immediately to the north of Western Sahara”. These tribal areas appeared to form a political buffer between Morocco and Western Sahara.

Nonetheless, despite concluding that each one of Morocco’s ties to Western Sahara did not amount to “territorial sovereignty”, the Court still found other ties of allegiance: “between the Sultan and some, but only some, of the nomadic peoples of the territory.” The Court drew attention to the Tekna, a tribe in the north of Western Sahara whose migration route extended into Morocco. It controversially and ambiguously found that “some authority” was exercised by the Sultan through settled Tekna over the Tekna nomads of Western Sahara.

This finding was met with bemusement by several judges who pointed out that the tribes in question were never identified and evidence for these ties was, to say the least, questionable. Judge de Castro claimed that he had, “not found any firm evidence for the existence of such ties” between “certain unclearly defined tribes” and the Sultan. Judge Dillard questioned whether this connection was, “sufficiently supported by the evidence”. Judge Petrén supported by Judge Ignacio-Pinto argued that the finding depended, “on an analysis of the real significance of the allegiance mentioned, and on an exact identification of the tribes acknowledging it and of the parts of Western Sahara inhabited by them. No such analysis or identification… [were] to be

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242 Ibid. p. 44, para. 95.
244 Ibid. pp. 44-5, para. 96.
245 Ibid. p. 45, para. 97.
246 Ibid. p. 48, para. 105
247 Ibid. p. 49, para. 107; also p. 57, para. 129.
248 Ibid. p. 49, para. 106.
found in the Advisory Opinion.” Judge Gros called the Court’s observations “injudicious”, and the tribes, “mere a posteriori constructions of a little known epoch.” Nonetheless, the tribal structure of Western Sahara allowed the Court to find ties to Morocco, but limit their effect to “some, but only some” of its peoples, leaving no implications for rest of the population. Moreover, as these ties were not of territorial sovereignty, they did not even effect the application of self-determination to the Tekna either, assuming that the Court had a clear idea of who those tribes really were.

e. The Mauritanian “Entity”

In the claims brought by Morocco, national ideas were used to support a claim that centred on state sovereignty. As such, they could be examined by the Court using traditional tests for sovereignty. Mauritania’s claims, though, were more of a problem because, as Mauritania accepted itself, there was no Mauritanian state at the time of Spanish colonisation. It was also clear that Mauritanian statehood was not retroactive. Thus, at the beginning of its examination of Mauritanian claims the Court could confidently state that, “no legal ties of State sovereignty” were involved. Considering that its own standard for legal ties was “territorial sovereignty”, and that it was questionable whether any bodies other than states could be sovereign in international law circa 1884, the Court could have dismissed Mauritania’s claim right there and then.

However, it did not. Instead, the Court investigated whether “other legal ties” existed between the Mauritanian “entity” and Western Sahara. The basis for this was a legal test outlined in the Reparation for Injuries Suffered in the Service of the United Nations Advisory Opinion. The Reparation test posed the question of whether an entity was in: “such a position that it possesses, in regard to its Members, rights which it is entitled to ask them to respect.” This test, the Court conceded, “was applied in a somewhat special context”. The Reparation opinion concerned the question of whether the United Nations had a capacity to bring legal claims. Nonetheless, it was, “the essential test where a group, whether composed of States, of tribes or of individuals, is claimed to be a legal entity distinct from its members.” On the basis of this test the Court found that:

“[T]he information before the Court discloses that, at the time of Spanish colonisation, there existed many ties of a racial, linguistic, religious, cultural and economic nature between various tribes and emirates whose peoples dwelt in the Saharan region which today is comprised of the Territory of Western Sahara and the Islamic Republic of Mauritania. It also discloses, however, the independence of the emirates and many of the tribes in relation to one another and, despite some forms of common activity, the absence

251 Judge Petén, Separate Opinion, ibid. p. 114; see also Judge Ignacio-Pinto, Declaration, ibid. p. 78.
252 Judge Gros, Separate Opinion, ibid. p. 76.
253 Ibid. p. 57, para. 130.
among them of any common institutions or organs of even a quite minimal character. Accordingly, the Court is unable to find that the information before it provides any basis for considering the emirates and tribes, which existed in the region to have constituted… ‘an entity capable of availing itself of obligations incumbent upon its Members’.

Whether the Mauritanian entity is described as the Bilad Shinguitti, or as the Shinguitti ‘nation’ as Mauritania suggests, or as some form of league or association, the difficulty remains that it did not have the character of a personality or corporate entity distinct from the several emirates and tribes which composed it. The proposition, therefore, that the Bilad Shinguitti should be considered as having been a Mauritanian ‘entity’ enjoying some form of sovereignty in Western Sahara is not one that can be sustained.”

To sum up, there were racial, linguistic, religious, cultural and economic ties between the emirates and tribes, which today form Western Sahara and Mauritania. However, these emirates and tribes were independent of each other, and despite some common activity, lacked even minimal institutions or organs between them. Therefore, they did not form an entity, which imposed obligations on its members. Consequently, Mauritania did not form a corporate entity distinct from its emirates and tribes, which could enjoy some form of sovereignty over Western Sahara.

However, the use of this test raised some questions. The Reparation test may have been an “essential test”, but it was also a general test. If the test was that an entity possessed rights, which entailed obligations, then the next logical step would be to ask which rights, which obligations? What were they in theory and in practice? In the Reparation Opinion the Court applied its general test by examining the organs and the functions of the UN, both as outlined in the Charter and in practice. This application was not laid out in great detail, but it was there. From that investigation it found that, “the Organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality”. However, in Western Sahara this necessary step seemed to be missing. The Court applied a general test and obtained a specific result, but provided little to connect the two. The possible rights and obligations of the Mauritanian entity were never specified let alone examined.

What were the possible rights of the Mauritanian entity? They were unlikely to be state’s rights because it was already acknowledged that Mauritania was not a state. They might be the rights of an international organisation, like the UN, and the Court’s reference to, “some form of league or association” suggests that this possibility was considered. However, this was not the Mauritanian claim. As the Court itself stated, “the Shinguitti ‘nation’ as Mauritania suggests”. Mauritania claimed that the Bilad Shinguitti was a nation.

To properly apply the Reparation test the Court needed to ask what rights a nation could possess? This in turn required investigating whether the Mauritanian entity was a nation. If the Reparation test is looked at from this perspective, the Court seems to address these rights only by implication. It found, “many ties of a racial, linguistic, religious, cultural and economic nature between various tribes and emirates”. This was a fairly clear reference to national ties. However, it also noted, “the independence of the emirates and many of the tribes in relation to one another and, despite some forms of common activity, the absence among them of any common institutions or organs of even a quite minimal character.” The obvious implication was that if the

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258 Ibid. p. 63, para. 149.
259 Reparation for Injuries (Advisory Opinion) ICJ Reports (1949) p. 179.
**Bilad Shinguitti** was supposed to be a nation in 1884, it did not act much like one. And that was it. On the basis of these two sentences the Court determined that the Mauritanian entity failed the Reparation test and was not a corporate personality.

This did not mean that the Court had determined that Mauritania was not a nation. To do so would have been both unnecessary and unwise, and it listed of a number of national ties which could point to the contrary. But what it did manage to do was to put the Shinguitti “nation” figuratively as well as literally into quotation marks. By highlighting its fragmented tribal nature, the Court was able to redefine the country from a corporate into a non-corporate entity. The Mauritanian “nation” was no more than the sum of its clannish parts: “the various tribes living in the territories of the Bilad Shinguitti, which are now comprised within the Islamic Republic of Mauritania.”

Once Mauritania had been redefined on these terms, the Court seemed to turn quite easily to the question of its ties to Western Sahara. It found that the migration routes of almost all Western Saharan tribes passed through what was now Mauritania. Rights over grazing pasture, cultivated lands, and wells and water-holes along those routes, as well as the settlement of disputes, were subject to inter-tribal custom derived from Koranic law or tribal usage. The Court again found, to the criticism of many judges, that these ties, including rights over land, constituted legal ties between Western Sahara and the “Mauritanian entity”, as defined by the Court.

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**f. Self-Determination of… The Regheibat?**

The tribes of north-west Africa proved very useful to the Court. The tribal nature of Western Sahara allowed the Court to find ties to Morocco, but not ones that effected the general Western Saharan population. The tribal composition of Mauritania meant that it could have ties to Western Sahara without them being ties of sovereignty. The “peoples” of Western Sahara allowed a broad range of options for a political settlement based on the application of self-determination.

However, this emphasis on tribes did create a bit of a vacuum. Self-determination is a right of peoples and if it is to be applied to a territory, it ultimately looks a bit empty if there is no people there to exercise it. The principle of territorial integrity as presented by Morocco and Mauritania was supported with various national ties. The principle of self-determination applied to a territory of an undisclosed number of unidentified peoples looked rather hollow in comparison. What Western Sahara really needed was a people and it was precisely in the context of the territory being seen as a void that one was produced.

Just before the Court made its final legal conclusions it turned to the issue of whether Moroccan and Mauritanian claims overlapped leaving nothing in between. The Court noted that both Morocco and Mauritania had asserted that there was “no geographical void” or “no-man’s land” between their respective claims. Bits of Western Sahara were either Moroccan or Mauritanian. The Court, though, dismissed these claims: “overlapping arose simply from… the migration routes of the nomadic tribes… To speak of a ‘north’ and a ‘south’ and an overlapping with no void in between does not, therefore, reflect the true complexity of that situation.”

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260 ICJ Reports (1975) p. 65, para. 152.
261 Ibid. pp. 64-5, para. 152.
262 Ibid. p. 66, para. 157.
263 Ibid. p. 67, para. 159.
Finding a possible void between Morocco and Mauritania, the Court then appeared to find a people to fill it. Judge Gros noted that there was undisputed evidence before the Court that at the time of the opinion there were one hundred and seventy-three tribes in the territory. As to the situation in 1884, he considered that there was not enough information to make an accurate determination of the tribes and their ties. Nonetheless, prior to its conclusions, the Court noted, “the independence of some of the nomads”, and highlighted a single tribe, the Regheibat, which it described as, “a tribe prominent in Western Sahara”. It continued: “The Regheibat, although they may have had links with the tribes of the Bilad Shinguitti, were essentially an autonomous and independent people in the region with which these proceedings are concerned.”

One would assume that reference to “the region with which these proceedings are concerned” was a reference to Western Sahara. However, what the Court did not mention was that the Regheibat were also prominent over large areas of Mauritania. Mauritania had not claimed that the Regheibat had links with the tribes of the Bilad Shinguitti, but that they were part of it. Moreover, the description the Regheibat as “an autonomous and independent people” also overlooked important divisions within the population, such as the distinction between the Coastal (Sahel) Regheibat and the Eastern (Sharg) Regheibat. The impression left, though, was that the Regheibat, a “prominent” and “independent people” in between Morocco and Mauritania, was essentially the Western Saharan people or at least the nucleus for one.

In conclusion, Western Sahara can be seen to be based on a legal balance between the principles of self-determination and territorial integrity, or, at least, self-determination and territorial sovereignty. These principles, however, were also based on the fundamentally political concepts of “people” and “country”, and each part of the balance was supported by highlighting certain characteristics of the peoples of the region. The region’s tribal nature and the ambiguous line between tribe and nation allowed plenty of room for the interpretation of peoples. This can be seen in the issue of ties between Morocco and Western Sahara, the Court’s handling of the Mauritanian “entity” and its alternate emphasis on the “peoples” of Western Sahara and the prominence of the Regheibat.

9. Judge Ammoun’s Separate Opinion in Namibia: An African Nationalist History

This chapter has been concerned with the coupling of nationalist rhetoric and legal principles. But, how far can this rhetoric go? The final example, Judge Ammoun’s separate opinion in Namibia provides some indication. Not only does it involve an elaborate nationalist argument, but its basic reasoning ultimately only makes sense within the context of a particular nationalism: Pan-Africanism.

Lebanese Judge Faoud Ammoun was perhaps self-determination’s most enthusiastic supporter at the International Court of Justice. In 1970 he found the right to be an imperative rule of law,
and that was in a case about a Canadian-based light and power company. The next year, though, gave the Vice President of the Court the chance to grapple with one of the most notorious cases of colonial domination, as once again the Court turned to the question of Namibia (South West Africa).

However, for Ammoun, the Namibia opinion appeared to be something of a missed opportunity. While the Court recognised the general applicability of self-determination to colonial territories, the next logical step of applying it to Namibia was much more obscure. The Court did find that South Africa, “remains accountable for any violations of its international obligations, or of the rights of the people of Namibia.” It also reminded all states to, “bear in mind that the injured entity is a people which must look to the international community for assistance in its progress towards the goals for which the sacred trust was instituted.” These are presumably references to self-determination. But, that is the point. It has to be assumed. The Court seemed to apply self-determination to Namibia in winks and hints.

The Court was, in fairness, not specifically mandated to deal with Namibian self-determination. The opinion followed a request by the Security Council on the legal consequences for states of South Africa’s continued presence in Namibia despite SC Res. 276 of 1970, which declared this presence illegal. However, SC Res. 276 was only an enforcement measure for a previous decision by the General Assembly, GA Res. 2145 (XXI) of 1966, which terminated South Africa’s mandate over the territory. The legality of this termination was, therefore, an important element in assessing the legality of the South African presence in Namibia. The Court found that the General Assembly had, within its competence, determined a material breach of the mandate based on South Africa’s obligations under the Mandate Agreement and the UN Charter. It also described the South African administration as, “a flagrant violation of the purposes and principles of the Charter.” However, this was on the basis of, “distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights,” presumably contrary to article 1(3), and not self-determination. Despite finding that self-determination was the ultimate objective of the sacred trust, the principle was not specifically cited as an obligation that South Africa had breached leading to the termination of its mandate.

This recognition of the principle of self-determination, but a failure to explicitly apply it was criticised by Ammoun:

“[T]he Court has been called upon to pronounce, for the first time in regard to certain fundamental principles of international law… These are, in particular… the right of peoples to self-determination and decolonization… The Court, in its Advisory Opinion, has not overlooked them. In my view, however, it has not always gone far enough to spell

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270 See Judge Ammoun, Separate Opinion: “[T]he Court has been called to pronounce, for the first time in regard to certain fundamental principles of international law… The Court, in its Advisory Opinion, has not overlooked them. In my view, however, it has not always gone far enough in spelling out the legal conclusions to which they point.” ICJ Reports (1971) p. 67.
271 ICJ Reports (1971) p. 54, para. 118.
272 Ibid. p. 56, para. 127.
274 Ibid. pp. 46-7, paras. 91-5.
275 Ibid. p. 57, para. 131.
out the legal conclusions to which they point.”

Clearly dissatisfied with this state of affairs, the judge set about making the case for Namibian self-determination.

South Africa had justified its policy of apartheid in Namibia on the basis that the natives had never formed a people and thus their ethnic and social differences were best served by a policy of separate development. Judge Ammoun countered this argument by presenting Namibia as a single national entity. Moreover, he argued that Namibia was not simply a product of European colonialism. It had a character that had both preceded and survived German and South African domination:

“Namibia, even at the periods when it had been reduced to the status of a German colony or was the subject to the South African Mandate, possessed a legal personality which was denied to it only by the law now obsolete. It was considered by the Powers of the day as merely a geographical concept taking its name from its location in the South West of the African Continent. It nevertheless constituted a subject of law that was distinct from the German State, possessing national sovereignty but lacking the exercise thereof.”

Judge Ammoun thus met South African claims head on with his own assertion that there was indeed a historical Namibian personality. However, as an objective interpretation of history, this was open to question. Although the labelling of Namibians as South West Africans by ignorant European colonisers might sound all too likely, in fact the reverse was true. “South West Africa” was coined in the 1840s by the Swedish explorer C. J. Andersson. However, “Namibia”, was derived in the 1950s from the Namib Desert, in the same way that Zambia is named after the Zambezi River, and part of a movement to give African colonies suitably indigenous names. The fact that these names were “African”, though, did not mean that they had been traditionally used. Ghana and Benin, as we saw in Chapter 1, were named after medieval empires that were not actually found within their borders.

Judge Ammoun was not analysing historical facts, but rearranging them to fit a nationalist theory of Namibian history. As has been seen earlier, history is used by nationalists to add depth to national claims. “Nationalist historiography”, wrote Hans Kohn, “desires not only to describe a people’s life but to help form it and to make its history appear as the fulfilment of a supposed national destiny. Such a historiography is less important for the knowledge of history itself than for the understanding of the image which a nation forms of itself and of its own nationalism.”

Nationalist histories often follow a formula with three elements: a national golden age; a period of decline and humiliation, usually at the hands of foreigners; and a period of national regeneration. The basic idea is to support a nationalist programme by presenting it as merely the restoration of a natural state of affairs. As Greek nationalist Adamantios Koraes argued in his Report on the Present State of Civilization in Greece, which is something of a classic among such works: “If the state of a nation is to be fruitfully observed, it is mainly in the period when

277 Ibid. p. 85, para. 10.
278 Ibid. p. 68, para. 2.
this nation degenerates from the virtues of its ancestors, as well as in the period when it is in the process of regeneration." Judge Ammoun’s opinion closely followed this three-fold structure. Perhaps the defining statement of his argument was that: “the Namibian people, ultimate heir of an ancient civilization which in its heyday rivalled anything in Europe, had, before the days of the colonial régime, taken part in the making of great empires”.

However, before he could turn to his nationalist history, Judge Ammoun had first to demolish the foundations for South Africa’s claim that the Namibians were not a people. South Africa supported its assertion that the natives of Namibia had never formed a people by highlighting their ethnic and sociological differences, but Judge Ammoun repudiated this emphasis on ethnicity in nationality. “How many of the peoples”, he asked, “that have come into being, throughout history and in our times, have not in fact been made up of a variety of human elements?” Citing the states of Ghana, Mali, Bornu, Axum, Kivu, Benin, the Bantus and the Congo State, he continued that: “Multiplicity of ethnic entities has been no obstacle to the formation of peoples and States in Africa.” Not only in Africa: in Asia there was India, China and Pakistan; in Europe, Switzerland, Czechoslovakia, Yugoslavia and the United Kingdom. Some of these examples were in retrospect unwise, but the point is clear enough, and Ammoun rather elegantly drove into the heart of the South African argument: “is not even the South Africa of today governed by a White minority formed by the union of immigrants of different national origins – Germans, English, Dutch and several others?”

South African pretensions thus countered, Judge Ammoun could turn to his nationalist history. In its first phase, the golden age, Africa, “had seen the rise and development of flourishing States and empires.” Ghana, he recalled was an empire, “the power and wealth of which was unequalled in Western Europe after the fall of the Roman Empire.” The Empire of Mali, “covered territories more vast than Europe at a time when a considerable part of the latter was a feudal and often feuding patchwork”. At its centre, “shone a university more ancient than any of Europe, the University of Timbuktu, of which it is said, in illustration of its splendour, that the profit there obtained from the sale of manuscripts exceeded that derived from any economic activity.” The state of Bornu was so prosperous that a nineteenth century English traveller claimed that, “even the most humble citizen appeared… happy and comfortable.” The remains of the Great Lake civilisations revealed traces of roads, irrigation canals, dykes and aqueducts which were constructed with “a remarkable level of technical skill.”

Turning to southern Africa, he recalled that the Portuguese had found on the banks of the Zambezi, “richer trade than in any other part of the world”. This was, he considered, “a flattering comparison, for it was made when the Italian republics were at their splendid apogee.” In Zimbabwe there were, “gigantic ruins, which call to mind the bastions of Nuragus or Mycenae”. This empire extended over large areas, including what is now Pretoria and Johannesburg.

Africans had not only flourished politically and economically. Ammoun recalled Father Placide Tempels, (a popular figure for African nationalists) whose study of the Bantus revealed: “the ontological nature of their thinking, based upon awareness of self – on the ‘know thyself’… of Thales, the Phoenician philosopher who was adopted by the Greeks and ranked

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284 Judge Ammoun, Separate Opinion, ibid. pp. 85-6, para. 10.
285 Ibid. p. 86, para. 10.
among the Seven Sages of their land. ‘To the intense spiritual doctrine which quickens and nourishes souls within the Catholic Church,’ writes Placide Tempels, ‘a striking analogy may be found in the ontological thinking of the Bantus.’”

To sum up Ammoun quoted Raimondo Luraghi: “Thus, at the time of the arrival of the Portuguese, a chequered history had unrolled for centuries and millennia between the Sahara desert and South Africa – a history of civilized peoples, comparable to that of the great empires of Latin America or of Europe in the most brilliant days of Antiquity and the Middle Ages.”

This golden age of African civilisation ended with the arrival of foreigners: Europeans. At the 1885 Conference of Berlin, European powers, in “a monstrous blunder and a flagrant injustice” and “one of fate’s ironies” declared Africa south of the Sahara terrae nullius and divided it amongst themselves. With them they brought, “the two greatest plagues in the recorded history of mankind: the slave-trade, which ravaged Africa for centuries on an unprecedented scale; and colonialism, which exploited humanity and natural wealth to a relentless extreme… Only Abyssinia [Ethiopia], by its savage resistance, escaped the slave-trade and repelled colonialism”.

This dark age of foreign exploitation had now been succeeded by a period of national awakening and the struggle for independence: “the people of Namibia, which always used to be the master of the country, is nowadays united by common aspirations, the legal foundation of nationhood, towards a life of independence and freedom, whatever may be the political régime which it will select after obtaining independence.”

While Ammoun’s interpretation of Africa’s past and future may have its attractions, it is, however, open to question as an objective reading of history. The simple denunciation of European colonialism as a great plague obscures the profound changes that it brought to African society. The modern states of Zimbabwe and Ghana are very much the political successors to the colonies of Southern Rhodesia and the Gold Coast, rather than their ancient namesakes. There is also a certain inconsistency in the denunciation of European empire-building as a plague, while glorifying “great” African empires and celebrating the Namibian role in creating them. One might seriously doubt whether the Empire of Ghana, which literally means “war-leader”, had its foundations in “common aspirations”. Nor does Ammoun mention that the state of Bornu, whose wealth he pointedly celebrated, grew rich along a trade route where one of the principal commodities exchanged were human beings. However, there is an even greater problem with Ammoun’s history. Although he produced evidence for great African civilisations, he showed nothing to substantiate his claim that the Namibians played any role in making them.

What “great empires” could the Namibians have been involved with? The state of Zimbabwe, which emerged after 1100, certainly covered a significant area of southern Africa in the fourteenth and fifteenth centuries before its fall around 1500. It is not clear to what extent Zimbabwe was a political unit rather than a zone of cultural and economic influence. Nonetheless, it grew along an eastward trade route between the goldfields of the Zimbabwean

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288 Judge Ammoun, Separate Opinion, ibid. p. 86, para. 10.
289 Ibid. p. 86, para. 10.
290 Berman loc. cit. no. 57 at p. 436.
plateau and the Indian Ocean, not west over the Kalahari Desert into Namibia. Similarly, the vibrant trade on the Zambezi River found by the Portuguese may point to the industriousness of the ancestors of Mozambiquans, but it says nothing about commerce in Namibia. Judge Ammoun, on the face of it, seems to have produced no evidence at all that the Namibians themselves had participated in the making of great empires or were heirs to a civilisation which rivalled anything in Europe. So what was he saying?

To understand Judge Ammoun’s opinion one has to look at African nationalism. Nationalism in Africa emerged on a number of levels. On one hand, there were the nationalist movements, which developed within individual colonies and sought to gain control of the colonial state in the name of a people: Nigeria, Angola, Namibia etc. On the other hand, there was also Pan-African nationalism. Pan-Africanism\(^{294}\) is a nationalism (another notable example is Pan-Europeanism)\(^{295}\) whose national idea embraces the population of an entire continent. The doctrine itself is a mix of ideas ranging from Black pride to the political unification of Africa in a single state. The Constitutive Act of the African Union 1999 specifically claims inspiration from Pan-Africanism in its preamble, although in its objectives and principles it refers several times to the “peoples” of Africa.\(^{296}\) The African people has also been ambiguous, being alternatively defined by geography (the people of the African continent) and race (the Black people). Nevertheless, at least, two levels of people have been available for African nationalists.\(^{297}\)

Pan-Africanism has a particular significance in African nationalism. The movement did not, in fact, first develop in Africa, but among members of a Black diaspora in Europe and the Americas. However, what these individuals shared was a common experience of racial discrimination and an African identity allowed them to turn this shared exclusion on its head. As Colin Legum noted: “Deep at its quivering sensitive centre, Pan-Africanism rests on colour consciousness. Recognition of the unique historical position of black peoples as universal bottom-dog led to a revolt against passive submission to this situation… Pan-Africanism became a vehicle for the struggle of black people to regain their pride, their strength and their independence.”\(^{298}\)

History was an integral part of this process. As Basil Davidson argued: “African self-assertion could never hold its own, intellectually, unless it could stand on its own history.”\(^{299}\) And history in this period was a political battlefield. European colonists who first saw the Zimbabwe ruins in the late nineteenth century could not believe that Africans were capable of such a civilisation. At


\(^{296}\) Article 3(a) and (k) and article 4(c), African Union, Constitutive Act 1999, www.africa-union.org (visited 28/08/03).


\(^{298}\) Legum op. cit. no. 294 at p. 33.

the time of the opinion, the white minority regimes of Southern Rhodesia and South Africa were still denying that they were. Against this, Judge Ammoun armed with Pan-Africanism could draw on the greatness of Ghana, the learning of Timbuktu and the prosperity of Bornu to provide Namibians, as Africans, with a glorious heritage. They may not have literally taken part in the making of those empires, but they could still draw on their legacy as their own. “[I]t is these very populations,” Ammoun reflected, “which the South African Government claims are... incapable of uniting, and which do not deserve the title of a people which the United Nations has attributed to them.” The key word here is “deserve” and it is central to the politics of self-determination. It may be one thing to talk in the abstract about the equal rights and self-determination of peoples, as the UN Charter does. It is another to show it: to demonstrate that Africans who were claimed to be incapable of self-government had actually built states that equalled or surpassed those of the Europeans who ruled them. It can be noted that a very similar fleshing out of African history was seen in the debate on the Colonial Independence Declaration. Ammoun’s message was clear. Africans had prospered in the past and left to their own devices would do so again. Thus, his opinion fulfilled the standard function of a nationalist history: to support a political and in this case also a legal claim by making it appear the logical fulfilment of a historical process.

Concluding Remarks

In 1920, in the heady early days of the doctrine of self-determination, Sarah Wambaugh concluded her A Monograph on Plebiscites with the proposal that: “No group, however small, should be without its day in Court.” Today that suggestion would seem over-optimistic. Courts and tribunals have accepted the applicability of self-determination as a legal principle. Indeed, the International Court of Justice has recognised a line of jurisprudence, albeit a short one, around the principle. However, application remains far from easy.

The standard legal approach of courts and other bodies to self-determination has been to balance the right with principles, such as territorial integrity, state sovereignty and uti possidetis. This has been used in Katangese Peoples’ Congress v. Zaire, the Badinter Opinions, the Åland Islands decisions, the Burkina Faso/Mali Frontier Dispute, Re. Secession of Quebec, Tatarstan and Chechnya. These balances have also been supported by general political considerations, such as peace, stability and development. However, as the Badinter Opinion No. 2 demonstrates, this approach by itself does not deal with problems of nationalist legitimacy. Courts and tribunals, therefore, have typically used nationalist practices of constructing and shaping ideas of peoples to support their legal balances.

This represents a departure from the idea of justice as the impartial examination of factual evidence. These ideas involve subjective interpretations based on a selective examination of the

301 Judge Ammoun, Separate Opinion, ICJ Reports (1971) p. 87, para. 10.
facts. Thus, in the Åland Islands, the Jurists and the Rapporteurs alternatively interpreted the islanders’ desire for union with Sweden as a deeply felt historical wrong or the reaction of isolated yokels to political change. In both cases, neither commission produced much supporting evidence. In Western Sahara the Court with evidence for 173 tribes in the territory, nonetheless, highlighted a single “autonomous and independent people”. Judge Ammoun produced a historical argument for Namibian self-determination, which said virtually nothing about Namibian history, instead concentrating on idealised descriptions of the empires of Ghana, Mali and other great African civilisations. All these cases point to the pervasive influence of nationalism in the law of self-determination.
The Law of Self-Determination: A Contradiction in Terms?

Outline

The last two chapters examined the effect of legitimacy on the drafting of international instruments and the decisions of courts and tribunals. This final chapter will extend this to international legal obligations. The theme throughout this work is that the law of self-determination is defined by the relationship, and indeed the tension between the doctrines of nationalism and international law. In this “law”, self-determination is appealed to as an alternative source of legitimacy to international law and it can be appealed to for two reasons: either to support legal principles and obligations or to challenge them. The various aspects and categories of the law of self-determination can, therefore, either be seen as a support or a challenge to existing legal principles and rules. Does this mean, then, that the law of self-determination is a contradiction in terms?

If self-determination is a doctrine about the legitimacy of legal rules, this also raises the question of to what extent the law of self-determination is actually concerned with creating legal obligations? Does the law of self-determination, at the end of the day, basically amount to a critique of international law, or does it actually establish rules of its own? Is it about legal status or political legitimacy, or are the two inseparably interconnected? Ten aspects of self-determination will be looked at: (1) colonial peoples, (2) the peoples of states, (3) minorities, (4) peoples under foreign or alien domination, (5) economic self-determination or permanent sovereignty, (6) democratic government, (7) the use of force, (8) the issue of principle and right, (9) jus cogens or peremptory norms and (10) erga omnes obligations.

1. Colonial Self-Determination

By all accounts the self-determination of the peoples of trust, non-self-governing and mandate territories appears to be the doctrine’s most successful legal application. There seems to be a general consensus that colonial self-determination is now part of international law.1 This

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consensus perhaps found its notable expression by the ICJ in Namibia:

“[T]he subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them. The concept of the sacred trust was confirmed and expanded to all territories whose peoples have not yet attained a full measure of self-government’ (Art. 73). Thus it clearly embraced territories under a colonial régime…
…the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned.”

Colonial self-determination was undoubtedly a challenge to the legitimacy of both colonial government and the concept of trusteeship in the Trust and Non-Self-Governing systems, and as such it has been very successful. States with non-self-governing territories have all accepted the applicability of the principle of self-determination. An indication of its success also is the fact that one colonial category, the trust territory, no longer exists. The last territory of this type, Palau exercised self-determination by free association with the United States in 1994 and the UN Trusteeship Council now only exists as a “virtual’ body”. The ranks of non-self-governing territories have also been dramatically slashed, with only a handful remaining. However, beyond the fact that self-determination applies to non-self-governing territories, and that states with such territories must justify their governance by reference to the principle, what specific obligations does it impose? On this point, the consensus appears less substantial. General agreement on the self-determination of colonial peoples was achieved by allowing disagreement on two key variables: namely self-determination and peoples.

The obligations imposed by self-determination, as opposed to those under articles 73 and 76 of the Charter, vary considerably depending on whether implementation of the right is seen as immediate or progressive. Immediate self-determination was undoubtedly a radical break from the commitments of the Charter, which envisioned the progressive achievement of self-government under the doctrine of trusteeship. Progressive self-determination, on the other hand, was more a reframing than a repudiation of Charter obligations. Peoples under this right obtained self-government by self-determination rather than the paternalistic concept of trusteeship. Nonetheless, like trusteeship, it was to be achieved according to the circumstances of the territory and the people, and their capacity for self-government. This was not really a substantial change in obligations, only in how they were seen. Indeed, it was even argued that articles 73 and 76 provided a standard by which this exercise of self-determination could be measured.
This division in the implementation of self-determination can be seen throughout the drafting of the major instruments on the right, and neither of the two approaches entirely prevailed. The Colonial Independence and Friendly Relations declarations, although more oriented towards the immediate exercise of the right, nonetheless, accommodated a progressive interpretation through the phrases “immediate steps” and “speedy”. The Covenants, in article 1, which had been drafted earlier, appear to support a more progressive interpretation of self-determination, and this approach was still maintained by some states later before the Human Rights Committee. If neither prevailed, then, at a minimum, obligations would appear to be those of progressive self-determination, if only by default. If self-determination has not been established to be exercised immediately, then it must be to some extent progressive.

The other variable is the “people”. Here the International Court’s claim in Namibia that self-determination was applicable to all non-self-governing territories appears misleading. Not all such territories have been considered to be entitled to exercise or have been able to exercise the right. Indeed, the Court in Western Sahara later qualified this statement with the defensive view that the validity of the principle of self-determination was not affected by the General Assembly dispensing with the requirement of consulting the inhabitants of given territories.

In fact, in the drafting of all the major international instruments on decolonisation, states have sought to limit the application of self-determination in certain situations. This limitation is usually expressed as a balance of legal principles, and in Western Sahara the Court found that the principle of territorial sovereignty might affect the application of self-determination. The most common principle, though, has been territorial integrity, which, it has been argued, prevails over self-determination in certain colonial situations. The most frequently cited authority for this has been principle 6 of the Colonial Independence Declaration which upholds the national unity and territorial integrity of a “country”. However, a “country” can be as ambiguous as a “people”, and just as nationally loaded. What is presented as a balance of principles often boils down to competing national ideas. Which principle ultimately prevails depends on how “people” and “country” are interpreted.

The concept of a “non-self-governing territory” itself has also proved subjective. Despite a supposedly objective test in GA Res. 1541(XV), and the fact that UN keeps a list of such territories (currently 16), practice has also shown that the title can be assigned or withdrawn on an apparently arbitrary basis. For example, Hong Kong and Macau, at the request of the People’s Republic of China, were removed from the list in 1972, on the grounds that they were not non-self-governing territories after all, but “Chinese territory occupied by British and Portuguese authorities.”

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8; Canada, A/AC.125/SR.93 (1968) p. 145; New Zealand, (CCPR/C/10/Add.6) 17-22 YHRC (1983-4) II, pp. 269-70.
7 Western Sahara (Advisory Opinion), ICJ Reports (1975) p. 33, para. 59.
8 ICJ Reports (1975) p. 68, para. 162.
10 Western Sahara, Anguilla (UK), Bermuda (UK), British Virgin Islands (UK), Cayman Islands (UK), Falkland Islands (Malvinas) (UK), Montserrat (UK), St. Helena (UK), Turks and Caicos Islands (UK), United States Virgin Islands (US), Gibraltar (UK), American Samoa (US), Guam (US), New Caledonia (France), Pitcairn (UK), Tokelau (New Zealand). www.un.org/Depts/dpi/decolonization/ trust3.htm (visited 07/10/04).
11 Letter Dated 8 March 1972 from the Permanent Representative of China to the United Nations Addressed to
Practice by the General Assembly on designated non-self-governing territories has been mixed. On one hand, there is Belize, a former British colony in Central America claimed by Guatemala. General Assembly resolutions from 1975 supported Belize’s right to self-determination, despite Guatemala’s claims, and Belize acceded to independence on 21 September 1981.

On the other hand, there is the Falkland Islands (Islas Malvinas), a British non-self-governing territory in the South Atlantic 350 miles off the coast of Argentina, which claims it. In this case General Assembly resolution not only did not accord the inhabitants a right of self-determination, but pointedly called them a “population” rather than a “people” on 2 April 1982 the islands were invaded by Argentina, an intervention which was determined by the Security Council as a breach of the peace, and defeated militarily by Britain. Nonetheless, the General Assembly’s line remained unchanged, calling for negotiations on the islands without reference to self-determination and taking only, “due account of the interests of the population”.

There is also Gibraltar, a British non-self-governing territory off the southern tip of Spain, which was originally ceded by Spain in the Treaty of Utrecht 1713, although article X gave it a right of pre-emption if Britain relinquished sovereignty. The General Assembly again did not support Gibraltar’s self-determination. A referendum on 10 September 1967, in which the


See M. A. Sánchez, “Self-Determination and the Falkland Islands Dispute” 21 Columbia Journal of Transnational Law (1982-3) pp. 557-584; Musgrave op. cit. no. 1 at p. 250; Franck and Hoffman loc. cit. no. 12 at pp. 381-2; Blum op. cit. no. 12 at pp. 109-10.


“Determining” that there exists a breach of the peace in the region of the Falkland Islands (Islas Malvinas), 1. Demands an immediate cessation of hostilities; 2. Demands an immediate withdrawal of all Argentine forces from the Falkland Islands (Islas Malvinas) 3. Calls on the Governments of Argentina and the United Kingdom of Great Britain and Northern Ireland to seek a diplomatic solution to their differences and to respect fully the purposes and principles of the Charter of the United Nations.” SC Res. 502 (1982).


population voted for British sovereignty 99.6% on a 95.9% turnout,²¹ was condemned,²² and the next year the Assembly called on Britain to terminate the colony by 1 October 1969 without reference to the wishes of its inhabitants.²³ A second referendum was held on 7 November 2002, following attempts by the British and Spanish governments to negotiate an agreement on joint sovereignty. This vote, in which 98.97% opted for sole British sovereignty on an 88% turnout,²⁴ was recognised by neither government and ignored by the General Assembly, which called for a continuation of the negotiations which lead to the poll in the first place.²⁵

In support of this limitation it has been argued that the Falkland Islanders and the Gibraltarians are settler populations without a connection to their territories and, in any case, are too small to exercise self-determination. However, these arguments also reveal inconsistencies in practice. Aside from the question of how long a population must inhabit a territory to have a connection to it: the Falkland Islanders and Gibraltarians have lived in their respective territories for 170 and 290 years: the General Assembly has accorded self-determination to settler populations, for example, Indians in Fiji.²⁶ It has also granted the right to extremely small populations. Even Pitcairn Island, with less than a hundred inhabitants, has been considered to have a right not only to self-determination but also to independence.²⁷ Some commentators have suggested that the crucial difference between these cases is the attitude of the Non-Aligned group which dominates the General Assembly. The Falkland Islanders and Gibraltarians, white populations wanting to keep their ties to the colonial country, unlike Belize, may have simply not fitted into this group’s idea of self-determination.²⁸

There is also Hong Kong and Macau. Hong Kong was a British enclave in southern China composed of Hong Kong Island and the Kowloon Peninsular, ceded by China to Britain in 1842 and 1860, and the New Territories, leased from China for 99 years in 1898.²⁹ Macau was another enclave in which Portugal had been conceded the right to perpetual occupation on condition that it would not alienate the territory to another state without China’s consent.³⁰ In 1946 in GA Res. 66(I) Britain put Hong Kong on the list of non-self-governing territories,³¹ which the Republic of China did not dispute. In 1960 in GA Res. 1542(XV) Macau was designated by the General Assembly as a non-self-governing territory, with reservations by the Republic of China. However, when the People’s Republic took the Chinese seat in 1971, Hong Kong and Macau were both removed from the non-self-governing territories list.³² In 1984, with the impending

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²¹ Levie op. cit. no. 19 at p. 112.
²³ GA Res. 2429(XXIII), 23 GAOR (1968) Supplement No. 18, (A/7218) p. 64.
²⁷ See e.g. GA Res. 2430(XXIII), 23 GAOR (1968) Supplement No. 18, (A/7218) pp. 64-5.
³¹ GA Res. 66(I), 1 GAOR (1946) (A/64/Add.1) p. 125.
expiry of the lease on the New Territories, Britain and China concluded the Sino-British Joint
Declaration on Hong Kong, which provided for the whole territory to be transferred to China as a
Special Autonomous Region.\textsuperscript{33} No reference was made to the wishes of the population and the
transfer took place on 1 July 1997.\textsuperscript{34} In 1979 Portugal and China agreed a secret treaty, which
paved the way for the Sino-Portuguese Joint Declaration 1987. On 19 December 1999 the
Portuguese administration was terminated and Macau was also established as a Special
Administrative Region of China, again without any consultation of the local population.\textsuperscript{35}

The use of force has also been a common method for settling the relationship between the self-
determination and territorial integrity and this again shows different practice. The majority in the
General Assembly was broadly sympathetic to the Indian invasion of the Portuguese enclaves of
Goa, Daman and Diu in western India, while the Security Council was blocked by the Soviet
veto.\textsuperscript{36} Indian sovereignty over the territories was acknowledged by Portugal in 1974.\textsuperscript{37}

The Security Council and General Assembly, on the other hand, did condemn the 1975
Indonesian invasion of the Portuguese non-self-governing territory of East Timor.\textsuperscript{38} SC Res. 384
and 389 recognised the right of the East Timorese to self-determination and called upon states to
respect their territorial integrity. However, they did not invoke chapter VII of the Charter and did
not specify measures to compel Indonesian compliance.\textsuperscript{39} General Assembly resolutions on East
Timorese self-determination were also passed, but with declining majorities and after 1982 failed
to gain sufficient support.\textsuperscript{40} East Timor was, though, still recognised as a non-self-governing

Gathering Storm” 22 Bulletin of Peace Proposals (1991) pp. 157-74 at pp. 164-5; R. McCorquodale,
“Negotiating Sovereignty: The Practice of the United Kingdom in Regard to the Right of Self-Determination” 66
British Yearbook of International Law (1995) pp. 283-331 at pp. 290-4; E. Chadwick, Self-Determination, Terrorism

\textsuperscript{33} Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the

\textsuperscript{34} Keesing’s (July 1997) at p. 41732.

\textsuperscript{35} Keesing’s (December 1999) at p. 43314.

\textsuperscript{36} Q. Wright, “The Goa Incident” 56 American Journal of International Law (1962) pp. 617-32; F. de Quadros,
“Decolonization: Portuguese Territories” in R. Bernhardt ed., Encyclopedia of Public International Law (Elsevier,
Amsterdam, 1992) vol. I, pp. 990-3 at pp. 991-2; Shukri op. cit. no. 1 at pp. 214-9.

\textsuperscript{37} Treaty between India and Portugal on Recognition of India’s Sovereignty over Goa, Daman, Diu, Dadra and
Nagar Haveli and Related Matters, 982 UNTS, pp. 159-61

R. S. Clark, ‘The ‘Decolonization’ of East Timor and the United Nations Norms on Self-Determination and
Aggression” 7 Yale Journal of World Public Order (1980-1) pp. 2-44 at pp. 5-9; Franck and Hoffman loc. cit. no. 12
at pp. 342-50.

349.

\textsuperscript{40} GA Res. 3485(XXX), 30 GAOR (1975) Supplement No. 34, (A/10034) pp. 118-9 (adopted by 72 votes to 10,
with 43 abstentions); GA Res. 31/53, 31 GAOR (1976) Supplement No. 39, (A/31/39) p. 125 (adopted by 68 to 20,
with 49 abstentions); GA Res. 32/34, 32 GAOR (1977) Supplement No. 45, (A/32/45) pp. 169-70 (adopted by 67 to
to 31, with 44 abstentions); GA Res. 34/40, 34 GAOR (1979) Supplement No. 46, (A/34/46) p. 206 (adopted by 62
to 31, with 45 abstentions); GA Res. 35/27, 35 GAOR (1980) Supplement No. 48, (A/35/48) pp. 219-20 (adopted by
58 to 35, with 46 abstentions); GA Res. 36/50, 36 GAOR (1981) Supplement No. 51, (A/36/51) p. 200 (adopted by
by 50 votes to 46, with 50 abstentions).
Political changes in Indonesia in 1998, however, lead the government to propose a referendum on autonomy in East Timor with the possibility that it might secede if this was rejected. In May 1999 an agreement was reached for the UN to organise a referendum in the territory,\textsuperscript{42} and in this poll in August the East Timorese rejected autonomy by 78.5\% on a 98.6\% turnout.\textsuperscript{43} This vote lead to devastating retribution by pro-Jakarta militias, with the result of the dispatch of an international force to the territory to restore security,\textsuperscript{44} and the establishment of the United Nations Transitional Authority in East Timor.\textsuperscript{45} UNTAET administered the territory until East Timor acceded to independence on 20 May 2002.\textsuperscript{46}

The Moroccan invasion of the non-self-governing territory of Western Sahara in November 1975, following the \textit{Western Sahara} Opinion, was also met with a weak response from the Security Council. SC Res. 380 of 6 November 1975 called on Morocco to immediately to withdraw from the territory, but made no mention of enforcement measures or self-determination.\textsuperscript{47} Nonetheless, subsequent Security Council resolutions have upheld a right of self-determination\textsuperscript{48} and Western Sahara remains a designated non-self-governing territory. General Assembly resolutions were initially non-committal\textsuperscript{49} or divided (with two parts and parts A and B taking different positions).\textsuperscript{50} However, since 1979 they have consistently recognised Western Sahara’s right to self-determination.\textsuperscript{51} On 14 November 1975 Morocco, Mauritania and Spain reached an agreement to partition the territory between Morocco and Mauritania with Spain receiving fishing rights and mining interests.\textsuperscript{52} This occupation was resisted by the Sahrawi liberation movement, POLISARIO, which declared the Saharan Arab Democratic Republic (SADR) on 27 February 1976. In 1980 a slim majority of states in the OAU (26 out of 50) recognised the SADR as the government of Western Sahara and in 1983 it took its seat as the OAU’s 51\textsuperscript{st} member, prompting a walk out by Morocco and eighteen other states. In 1979 Mauritania pulled its troops out, leaving Morocco to fight on alone.\textsuperscript{53} The continuing conflict drew in the UN and in August 1988 Morocco and POLISARIO, through the good offices of the OAU and UN Secretary-General, reached an agreement in principle for a referendum in Western Sahara.\textsuperscript{54} In April 1991 the Security Council created MINURSO, the United Nations Mission for the Referendum in Western Sahara, to organise and oversee a vote in the territory.\textsuperscript{55} However, this referendum has so far been hampered by fundamental disagreement between the parties over

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\begin{itemize}
  \item \textsuperscript{41} \textit{East Timor (Portugal v. Australia)} (Judgment), ICJ Reports (1995) p. 103, para. 31.
  \item \textsuperscript{43} Ibid. pp. 38-40.
  \item \textsuperscript{44} SC Res. 1264 (1999).
  \item \textsuperscript{45} SC Res. 1272 (1999).
  \item \textsuperscript{46} \textit{Keesing’s} (May 2002) p. 44781.
  \item \textsuperscript{47} SC Res. 380 (1975).
  \item \textsuperscript{48} E.g. SC Res. 621 (1988).
  \item \textsuperscript{50} GA Res. 3458(XXX) A and B, 30 GAOR (1975) Supplement No. 34, (A/10034) pp. 116-7.
  \item \textsuperscript{51} GA Res. 34/37, 34 GAOR (1979) Supplement No. 46 (A/34/46) at pp. 203-4.
  \item \textsuperscript{53} T. Hodges, \textit{The Western Saharans} (Minority Rights Group Report No. 40, London, 1984) at pp. 11-5.
  \item \textsuperscript{54} SC Res. 621 (1988).
  \item \textsuperscript{55} SC Res. 690 (1991).
\end{itemize}
the identification of voters and the basic goals of the vote.\textsuperscript{56}

These disputes over non-self-governing territories may, of course, be expressed legally by principles such as self-determination and territorial integrity. However, these principles, in turn, hinge on the fundamentally political concepts of “people” and “country”. State practice in the UN has shown notable inconsistencies and tends to demonstrate that whether the inhabitants of a non-self-governing territory are a “people” or merely a “population” depends on a variety of political considerations.

To sum up, a consensus has emerged around colonial self-determination, but this was only achieved by allowing ambiguity in two key areas. The first variable was the process of self-determination and whether the right was immediate or progressive. Progressive self-determination did not really differ from existing obligations under the Charter, merely how they were seen. The second variable was the “people”, a designation which has not been extended to all inhabitants of non-self-governing territories. The differential treatment of colonial populations may be explained in terms of a balance of legal principles, like self-determination and territorial integrity, but these balances themselves only seem to reflect political considerations.

Self-determination has certainly posed a successful challenge to the legitimacy of colonial rule and there is little dispute today that broadly speaking it applies to colonial territories. However, once this general principle is looked at in terms of specific obligations, it fragments and appears rather less substantial. The acknowledgement that self-determination is legally applicable to colonial territories is a powerful statement on the legitimacy of that form of government, but the specific legal consequences that flow from it are much more ambiguous. Only a few non-self-governing territories now remain, and, although these include a significant number of disputed cases, there appear to be limited prospects for the further development of this area of self-determination.

\section*{2. The Peoples of States}

In this area self-determination generally plays a supporting role, lending legitimacy to the principles of the sovereign equality of states and non-intervention in the internal affairs of states. Those two principles, the International Court noted in \textit{Nicaragua}, are fundamentally connected and part of international law.\textsuperscript{57} Nonetheless, self-determination gives them an extra dimension, putting the perspective of peoples into two fundamentally state-orientated principles. As Liberia argued in the debate on the Declaration on the Inadmissibility of Intervention: “Intervention was… more than a violation of the rules governing the relations of States; what it amounted to was the domination of one people by another”.\textsuperscript{58}

There is considerable evidence for a connection between the two principles and self-determination. In the Covenants, states linked the three, both in the drafting and before the


\textsuperscript{57} “The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference; though examples of trespass against this principle are not infrequent, the Court considers that it is part and parcel of customary international law. As the Court has observed: ‘Between independent States, respect for territorial sovereignty is an essential foundation of international relations’”. \textit{Nicaragua (Nicaragua v. United States of America)} (Judgment), ICJ Reports (1986) p. 106, para. 202. See also paras. 203-9.

\textsuperscript{58} Liberia, 20 GAOR (1965) 1\textsuperscript{st} Cmttee., 1401\textsuperscript{st} mtg., (A/C.1/SR.1401) para. 42.
Human Rights Committee. The Committee itself in General Comment No. 12 (21) called on states to refrain from interfering in the internal affairs of other states and thereby adversely affecting the exercise of the right to self-determination.\textsuperscript{59}

In the Friendly Relations Declaration self-determination, in principle 5, sits alongside non-intervention and sovereign equality, in principles 3 and 6, respectively. Not only does the text of the Declaration assume that the three principles are complementary, but states in the drafting also explicitly connected them. The same is also true for the Helsinki Final Act, which, in principle VIII, proclaimed respect for self-determination, and in principles VI and I, respect for non-intervention and sovereign equality. States again linked the three in the drafting. Moreover, principle 5 of the Friendly Relations Declaration connected realisation of self-determination with the promotion of friendly relations between states. This followed the UN Charter, which in articles 1(2) and 55 based friendly relations between nations on respect for self-determination.

Finally, a connection between self-determination and non-intervention can be seen in the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, GA Res. 2131(XX) of 1965. This resolution was passed almost unanimously, by 109 votes to 0, with 1 abstention (United Kingdom), and has been considered by the International Court in assessing \textit{opinio juris} regarding non-intervention.\textsuperscript{60} In addition to respect for non-intervention, the Declaration provides that: “All States shall 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.”\textsuperscript{61} A connection between the two principles was also clearly evident in the drafting.\textsuperscript{62} In the words of the United Arab Republic: “The principle of equal rights and self-determination and the principle of non-intervention were inseparable.”\textsuperscript{63}

There is, therefore, considerable evidence for an interpretation of self-determination, which encompasses the principles of non-intervention and the sovereign equality of states. In treaty law

\textsuperscript{60} Nicaragua, ICJ Reports (1986) p. 107, para. 203.
\textsuperscript{62} Honduras: “[F]or Latin America, non-intervention represented not merely a principle but also an indispensable basis for ensuring independence and territorial integrity and for guaranteeing the legitimate and permanent self-determination of peoples.” 20 GAOR (1965) 1\textsuperscript{st} Cmte., 1400\textsuperscript{th} mtg., (A/C.1/SR.1400) para. 27; Sweden: “[T]he principle of non-intervention was supplemented and supported by other principles of the Charter which gave it meaning and substance – for example, those relating to the prohibition of the threat or use of force, the right to self-determination, and the obligation to abide by international treaties.” Ibid., 1401\textsuperscript{st} mtg., (A/C.1/SR.1401), para. 25;
Chile: “[I]ntervention destroyed the very foundations of international coexistence, such as the principles of sovereign equality of States and the right of peoples to self-determination”. Ibid. 1402\textsuperscript{nd} mtg., (A/C.1/SR.1402) para. 44;
Cyprus: “[T]he United Nations Charter was based fundamentally on the principle of equal rights and self-determination of peoples, which included the principle of the sovereign equality of States, and on the principle that States should refrain from the threat or use of force against the territorial integrity or political independence of any State.” Ibid. 1404\textsuperscript{th} mtg., (A/C.1/SR.1404) para. 28; Columbia, ibid. 1\textsuperscript{st} Cmte., 1395\textsuperscript{th} mtg., (A/C.1/SR.1395) para. 36; Cuba, ibid. 1396\textsuperscript{th} mtg., (A/C.1/SR.1396) para. 25; Mexico, ibid. 1397\textsuperscript{th} mtg., (A/C.1/SR.1397) para. 24; Argentina, ibid. 1398\textsuperscript{th} mtg., (A/C.1/SR.1398) para. 43; Ukrainian SSR, ibid. 1399\textsuperscript{th} mtg., (A/C.1/SR.1399) para. 23; Dominican Republic, ibid. para. 44; Uruguay, ibid. 1401\textsuperscript{st} mtg., (A/C.1/SR.1401) para. 25; Liberia, ibid. para. 42; Tunisia, ibid. 1402\textsuperscript{nd} mtg., (A/C.1/SR.1402) para. 1; Poland, ibid, paras. 6-7; El Salvador, ibid. 1403\textsuperscript{rd} mtg., (A/C.1/SR.1403) para. 19; Burma, ibid. para. 29; Philippines, ibid. para. 40; Iraq, ibid. 1404\textsuperscript{th} mtg., (A/C.1/SR.1404) paras. 51-3; Jordan, ibid. 1405\textsuperscript{th} mtg., (A/C.1/SR.1405) paras. 2-3; Mongolia, ibid. para. 26; Jamaica, ibid. 1406\textsuperscript{th} mtg., (A/C.1/SR.1406) para. 31; Pakistan, 20 GAOR (1965) Plenary Meetings, 1408\textsuperscript{th} mtg., (A/PV.1408) para. 63; USSR, ibid. paras. 106 and 110; Brazil, ibid. para. 120; Guatemala, ibid. para. 128; Cameroon, ibid. paras. 136 and 138.
\textsuperscript{63} UAR, 20 GAOR (1965) 1\textsuperscript{st} Cmte., 1403\textsuperscript{rd} mtg., (A/C.1/SR.1403) para. 3.
this may be reasonably inferred from the drafting and implementation of article 1 of the Covenants. In customary law, the comments of states in the drafting of, in particular, the Friendly Relations Declaration, the Helsinki Final Act and the Declaration on the Inadmissibility of Intervention provide a great deal of evidence for *opinio juris*.

However, the relationship between self-determination and the two principles may not always be complementary. Self-determination is based on peoples, while sovereign equality and non-intervention are based on states, and a basic principle of nationalism is that the two do not necessarily correspond. In cases where a state is seen not to represent a people, such as *apartheid* South Africa, self-determination may actually be used as a challenge to non-intervention. This is evident in the Declaration on the Inadmissibility of Intervention, which, on the basis of self-determination, also called on states to, “contribute to the complete elimination of racial discrimination and colonialism in all its forms and manifestations.” Comments by states in the drafting suggest that in such situations self-determination may be an exception to non-intervention. Similar interpretations were also made in drafting of the Friendly Relations Declaration and the Definition of Aggression. This aspect of self-determination will be examined in more detail in the sections on peoples under foreign and alien domination and the use of force, but it highlights that the principles may not always be compatible.

### 3. Minorities and Other Non-State Populations

#### a. Minority Self-Determination

The question of whether minorities within states have a right to self-determination should be relatively straightforward, and yet it is not. What has been fairly clear is the general lack of a positive intention in the drafting of international instruments to extend self-determination, at least in a form that includes secession, to minorities. But, what also stands out is how hard it can be...

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64 Afghanistan, 20 GAOR (1965) 1st Cmte., 1396th mtg., (A/C.1/1396) para. 16; Ukrainian SSR, ibid. 1399th mtg., (A/C.1/1399) para. 16; Democratic Republic of Congo, ibid. 1400th mtg., (A/C.1/1400), para. 40; Tanzania, ibid. 1401st mtg., (A/C.1/1401) para. 5; Byelorussian SSR, ibid. para. 12; Algeria, ibid. para. 19; Yugoslavia, ibid. para. 37; Tunisia, ibid. 1402nd mtg., (A/C.1/1402) para. 3; Kenya, ibid. para. 20; Jordan, ibid. 1405th mtg., (A/C.1/1405) para. 4; Nigeria, ibid. para. 48; USSR, 20 GAOR (1965) Plenary Meetings, 1408th mtg., (A/PV.1408) para. 107. But see France: “Europeans would remember only too well how the pretext of ‘assistance to oppressed minorities’ had been used between 1933 and 1940; and representatives of countries in other continents would no doubt have more recent experiences to remind them of the dangers of that particular argument.”

to draw a line between the self-determination of peoples and the rights of minorities. Can it definitely be said that the “peoples” referred to in the Covenants, or the Friendly Relations Declaration always exclude minorities?

State practice tends to confirm both a lack of support for, but also considerable ambiguity over, the self-determination of minorities. The international community has been notably hostile to secession. This was underlined in the 1960s with the failure of two African secessions. Katanga, which declared independence from Congo (Zaïre) in 1960-63, was not recognised by single state, and Biafra, which seceded from Nigeria in 1967-70, was only recognised by five countries: Tanzania, Gabon, Ivory Coast, Zambia and Haiti. These secessions were defeated militarily. But, a number of secessionist movements which do effectively control all or part of their territory, including Southern Sudan, Northern Cyprus, Somaliland, Abkhazia, Trans-Dniestr, Nagomo-Karabakh, Chechnya and Anjouan in the Comoros archipelago, have also


69 See SC Res. 1547 (2004); SC Res. 1556 (2004).

70 “Considering, therefore, that the attempt to create a ‘Turkish Republic of Northern Cyprus’ is invalid, and will contribute to a worsening of the situation in Cyprus… 1. Deplores the declaration of the purported secession of part of the Republic of Cyprus; 2. Considers the declaration referred to above as legally invalid and calls for its withdrawal… 6. Calls upon all States to respect the sovereignty, independence, territorial integrity and non-alignment of the Republic of Cyprus; 7. Calls upon all States not to recognize any Cypriot State other than the Republic of Cyprus.” SC Res. 541 (1983).


74 See 6 US Department of State Dispatch (1995) at pp. 120-1; 66 British Yearbook of International Law (1995) at p. 621.

not received international recognition.

However, other state practice has blurred the distinction. States before the Human Rights Committee have reported on constitutional arrangements involving minorities under self-determination. The line between peoples and minorities has also been eroded with the development of the rights of indigenous peoples. A number of constitutions also recognise either peoples or a right of self-determination within the respective states. The Russian Constitution 1993 in its preamble and article 5(3) recognises peoples with a right to self-determination within the federation, although this is balanced with territorial integrity in article 4(3). Article 39 of the Ethiopian Constitution 1995 recognises not only the self-determination of nations, nationalities and peoples within the country, but also their right to secession. The Constitution of Bosnia and Herzegovina 1995 recognises at least three constituent peoples. Article 235 of the South African Constitution 1996, although recognising the, “right of the South African people as a whole to self-determination”, does not preclude, “the notion of self-determination”, for communities within the country. Moreover, in the Soviet Union, Yugoslavia and Czechoslovakia this constitutional right to self-determination was invoked to support the dissolution of those states.

In addition, while secessionist movements have not generally received international recognition, there have been exceptions. The first was the secession of Bangladesh in 1971.

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77 Article 39: “Rights of Nations, Nationalities, and Peoples 1. Every nation, nationality and people in Ethiopia has an unconditional right to self-determination, including the right to secession. 2. Every nation, nationality and people in Ethiopia has the right to its own language; to express and to promote its culture; and to preserve its history. 3. Every nation, nationality and people in Ethiopia has the right to a full measure of self-government which includes the right to establish institutions of government in the territory that it inhabits and to equitable representation in regional and national governments. 4. The exercise of self-determination, including secession of every nation, nationality and people in Ethiopia is governed by the following procedures: (a) When a demand for secession has been approved by a two-thirds majority of the members of legislative council of any nation, nationality or people; (b) When the Federal Government has organised a referendum which must take place within three years from the time it received the concerned Council’s decision for secession; (c) When the demand for secession is supported by a majority vote in the referendum; (d) When the Federal Government will have transferred to the people or to their Council its powers; and (e) When the division of assets is effected on the basis of a law enacted for that purpose. 5. A nation, nationality or people for the purpose of this Constitution, is a group of people who have or share a large measure of common culture, or similar customs, mutual intelligibility of language, belief in a common or related identities, and who predominantly inhabit an identifiable, contiguous territory.” G. H. Flanz, “Ethiopia” in G. H. Flanz ed., Constitutions of the Countries of the World (Oceana Publications, New York, 1995) at pp. 18-9.

78 Preamble: “Bosniacs, Croats, and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina hereby determine that the Constitution of Bosnia and Herzegovina is as follows…” 35 ILM (1996) pp. 118-27 at p. 118.

79 Article 235: “The right of the South African people as a whole to self-determination, as manifested in this Constitution, does not preclude, within the framework of this right, recognition of the notion of self-determination of any community sharing a common cultural and language heritage, within a territorial entity in the Republic or in any other way, determined by national legislation.” M. Rwelamira, “South Africa” in G. H. Flanz ed., Constitutions of the Countries of the World (Oceana, New York, 1997) at p. 118.
Bangladesh was originally East Pakistan, carved out of the eastern, mostly Muslim part of Bengal province in the 1947 partition of India, and one of the two “wings” of Pakistan that straddled either side of the subcontinent. East and West Pakistan were not only geographically separate, but also culturally distinct and never acted as a single political unit, with different parties dominating in each “wing” in elections. Moreover, despite the fact that East Pakistan contained the majority of the Pakistani population, it found itself subordinated to the West. Pakistan’s national institutions were located in the West and controlled by Westerners, who also filled administrative positions in the East. The East also suffered economically in the union. On partition per capita income in East Pakistan was 10% less than the West, but by the end of the 1960s it was 60% less.

The political crisis that lead to the 1971 secession began in December 1970 with the success of the autonomist Awami League in national elections. The League stood on a platform of restructuring Pakistan as a loose federation and its victory was so comprehensive in the East that it held a majority in the Pakistani parliament. West Pakistani politicians, in turn, rejected domination by the East and argued that federal structure would leave Pakistan fatally weakened against India. Political gridlock ensued, which was broken by the Pakistani army on 25 March 1971 with a massive attack on the East, causing enormous civilian casualties. On the 26 March Bangladeshi independence was declared over the radio and reaffirmed on 10 April as, “due fulfilment of the legitimate right of self-determination of the people of Bangla Desh.”

The critical factor in the fate of the secession was the role of India. Pakistani military action in the East created an immense refugee crisis for the country, with 9.7 million refugees on Indian territory by November. This humanitarian crisis, as well as the opportunity to dismember Pakistan and discredit the idea of a Muslim nation, lead India to intervene in the East. An ill-fated Pakistani air strike on 3 December provided the cue for the invasion and on the 6 December India recognised Bangladesh. India’s intervention was raised in the Security Council, which found itself blocked by disagreement between the Soviet Union, America and China. The matter was, therefore, taken up by the General Assembly, which by a large majority passed GA Res. 2793(XXVI), calling for a cease-fire and a withdrawal. If implemented this would have left Pakistan in control of the East. Nevertheless, Indian action was swift and decisive and on 16 December, twelve days after the war began, Pakistani forces surrendered. After the war Bangladesh quickly gained recognition, although it was not admitted to the United Nations until 1974 due to the Chinese veto.

Other states established by outside intervention have not been recognised, but there may be a number of features that set Bangladesh apart from other secessions. First, with its geographical separation, Bangladesh was effectively much closer politically to the decolonisation of an overseas territory than a standard secession. With an ocean and a hostile India between the two,

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81 International Commission of Jurists, The Events in East Pakistan: A Legal Study by the Secretariat of the International Commission of Jurists (Geneva, 1972) at pp. 11-45; Buccheit op. cit. no. 66 at pp. 202-7; Heraclides op. cit. no. 66 at pp. 147-52.
83 Heraclides op. cit. no. 66 at pp. 159-62; Buccheit op. cit. no. 66 at pp. 207-11; V. P. Nanda, “Self-Determination in International Law: The Tragic Tale of Two Cities - Islamabad (West Pakistan) and Dacca (East Pakistan)” 66 American Journal of International Law (1972) pp. 321-36 at p. 325.
84 Ibid. p. 336; Buchheit op. cit. no. 66 at pp. 211-2.
it was clear that once Pakistan had been defeated it would be unable to reassert its control. Second, Bangladesh was not a corner of an island or a dot on a map, that could be ignored on a point of principle, but a substantial entity with 73 million people. Commentators have pointed out that the secession did not involve the self-determination of a minority, but the majority of the Pakistani population. Third, Pakistan had tarnished its authority by the brutality of its crackdown in Bengal, although, as will be seen shortly, this should certainly not be overplayed.

The second example was Eritrea in 1993. Eritrea was a former Italian colony on the north-east African coast, which in 1950 was recommended by the UN to be federated with Ethiopia under the Ethiopian crown. However, Eritrea’s autonomy within this union was steadily eroded by Ethiopia until on 14 November 1962 the Eritrean Assembly under duress voted to abolish the federation. This attack on Eritrean autonomy was resisted, first by the Eritrean Liberation Front (ELF) in 1961, which drew from traditionally pro-independence coastal Muslims, and later by the Eritrean People’s Liberation Front (EPLF), which, including Christians from the interior, was more representative of the population. A crucial factor in Eritrean independence was the alliance in the 1990s between the EPLF and the Ethiopian People’s Revolutionary Democratic Front (EPRDF) in Ethiopia, itself an alliance of Tigray, Amhara and Oromo liberation movements. In May 1991 the EPLF captured the Eritrean capital Asmara, while its Ethiopian allies overthrew the Mengistu regime in Ethiopia. One of the first acts of the new EPRDF government was to recognise Eritrea’s right to self-determination and the organisation of a referendum in the territory. In June 1992 the EPLF set up an interim administration in Eritrea followed by a transitional government. A referendum in April 1993 produced a 99.8% vote for independence on a 98.2% turnout, and independence was declared on 24 May 1993. The recognition of the Ethiopian government meant that, despite decades of secessionist struggle, Eritrean independence was ultimately achieved by mutual agreement. Eritrea was also fortunate that as a former colony the principle of *uti possidetis*, which had been endorsed by most OAU members to frustrate African secessionist movements, actually supported its separation from Ethiopia.

Self-determination has also been involved in the dissolution of states, in particular, the Soviet Union, Yugoslavia and Czechoslovakia. Czechoslovakia is closest to the model of the dissolution of a multinational federation. Leaders of the Czech and Slovak republics agreed their separation

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85 Nanda loc. cit. no. 83 at p. 336.
86 Heraclides op. cit. no. 66 at p. 156; Crawford op. cit. no. 65 at p. 45.
93 *Keesing’s* (May 1993) p. 39450.
94 See Alfredsson op. cit. no. 1 at p. 62.
within their existing frontiers on 1 January 1993 and Czechoslovak representatives argued that 
this was an exercise of the right to self-determination.

The Soviet Union was a union of fifteen sovereign Union Republics and with its dissolution 
those political units became independent states. In the Minsk Declaration of 8 December 1991, 
the leaders of Russia, Byelorussia and Ukraine, which were the original signatories to the Union 
Treaty of 1922 establishing the USSR, dissolved the union.\(^{96}\) In its place they established 
the Commonwealth of Independent States and in the Alma Alta Declaration of 21 December 1991 
CIS membership was extended to other Union Republics of the former Soviet Union: Armenia, 
Azerbaijan, Kazakhstan, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan and Uzbekistan.\(^{97}\) 
Georgia also later joined in October 1993 under some coercion.\(^{98}\)

A distinction, however, can be made over the position of the Baltic Republics of Lithuania, 
Latvia and Estonia. These Union Republics had originally been independent states and members 
of the League of Nations, which were occupied by the Soviet Union in 1940. On 11 and 30 
March and 5 May, Lithuania, Estonia and Latvia, respectively, reaffirmed that they were \textit{de jure} 
independent states, based on the illegality of their original annexation as well as the right to self-
determination. Lithuania went further and also declared its \textit{de facto} independence, although this 
lead to a Soviet blockade, and a moratorium on the implementation of this independence in 
June.\(^{99}\) After the coup of 19 August 1991, Estonia and Latvia also declared their \textit{de facto} 
independence on 20 and 21 August and were quickly recognised internationally and by Soviet 
authorities on 6 September.\(^{100}\) Thus, the Baltic States effectively seceded from the Soviet Union 
before its final dissolution, although their position was that they were merely restoring their 
existing independence.\(^{101}\)

The break up of Yugoslavia was also treated as following the dissolution model, in particular, 
by the Badinter Commission and the UN Security Council,\(^{102}\) even though there was no 
agreement to dissolve the federation and Slovene and Croatian independence was resisted by 
federal authorities. This meant that recognition was only potentially extended to the six sovereign 
Yugoslav republics. The basic principles of recognition, as set out in the EC Declaration on 
Guidelines on the Recognition of New States of 16 December 1991 and applied by the Badinter 
Commission, were self-determination and the inviolability of frontiers,\(^{103}\) which was interpreted 
to mean the boundaries of the republics.

On this basis recognition was extended to Slovenia by the EC on 15 January 1992, following 
the advice of Badinter,\(^{104}\) and to Croatia, against the advice of the Commission,\(^{105}\) which had

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\(^{96}\) The Minsk Declaration, 8 December 1991, 31 ILM (1992) pp. 142-6. See A. Wilson, “Post-Soviet States and 
the Nationalities Question” in G. Smith ed., \textit{The Nationalities Question in the Post-Soviet States} (Longman, London, 


\(^{98}\) S. Jones and R. Parsons, “Georgia and the Georgians” in G. Smith ed., \textit{The Nationalities Question in the Post-

\(^{99}\) A. Lieven, \textit{The Baltic Revolution: Estonia, Latvia, Lithuania and the Path to Independence} (Yale University 


\(^{101}\) R. Mullerson, “The Continuity and Succession of States, by Reference to the Former USSR and Yugoslavia” 

\(^{102}\) Conference on Yugoslavia, Arbitration Commission, Opinion No. 1, 31 ILM (1992) at p. 1497. SC Res. 757 

\(^{103}\) EC Declaration on the “Guidelines on the Recognition of New States in Eastern Europe and in the Soviet 

required constitutional provisions on autonomy. Macedonia was more difficult because of a dispute with Greece. Despite Badinter’s finding that Macedonia’s title did not imply a claim on the Greek region of the same name, EC recognition was not forthcoming, and the republic did not take a seat at the UN until 8 April 1993, and only then under the mouthful of, “the Former Yugoslav Republic of Macedonia”, with controversy still over its name. Bosnia-Herzegovina was not recommended by Badinter for recognition because it was considered that the will of its peoples to form an independent state had not been established. Bosnian authorities subsequently held a referendum on 29 February-1 March 1992, which endorsed independence by 99.4% on a 63% turnout, and Bosnia was recognised by the EC on 6 April despite continued fighting in the territory.

Nonetheless, although recognition was only extended to the former republics, the international community also recognised ethnic partition, as long as it was done within the formalities of statehood. Thus, the Dayton Agreement of 19 November 1994 recognised the division of Bosnia-Herzegovina into two ethnically based “entities”, the Muslim (Bosniac)-Croat Federation of Bosnia and Herzegovina and the Serb Republika Srpska. Bosnia was left as a shell of a state with only, “those functions which enable it to function as the government of the internationally recognized state of Bosnia and Herzegovina.”

However, there remains an outstanding issue from the collapse of Yugoslavia, in the shape of Kosovo. Kosovo, with a current population of 1.8 million, 90% of which is ethnic Albanian, was not a republic but an autonomous province of Serbia. It was never upgraded to a full republic for the theoretical reason that Albanians were not a “nation” but a “nationality” and the practical reason that Serbs would not tolerate a further carve up of their territory. Kosovo’s autonomy was abolished in March 1989 by the Serbian government and its Albanian leaders responded by declaring it a republic, and in a referendum in September 1990 independence was endorsed by 99% on an 87% turnout. The current situation in Kosovo stems from the failure of the Milošović regime in March 1999 to sign the Rambouillet peace accords with the Albanian guerrilla movement, the Kosovo Liberation Army. This led to NATO air strikes and an agreement to establish a UN administration in Kosovo. The UN Mission in Kosovo, UNMIK was created by SC Res. 1244 of 10 June 1999 with the mandate to administer the province and to promote substantial autonomy and self-government pending a final settlement. This was to be conducted within the nominal framework of the sovereignty and territorial integrity of

108 GA Res. 47/225, 47 GAOR (1992) Supplement No. 49, (A/47/49) at p. 6
110 Keesing’s (March 1992) p. 38832.
115 Malcolm op. cit. no. 113 at pp. 344-7.
Yugoslavia (now Serbia and Montenegro), although the exercise of this sovereignty was suspended.

The UN administration in Kosovo has inevitably drawn analogies to trusteeship. The UN administration has inevitably drawn analogies to trusteeship. Kosovo is not literally a trust territory, but SC Res. 1244 certainly follows trusteeship’s basic rationale of setting aside questions of self-determination to focus on building the institutions of self-government. While there have been successes in this field, with elections of moderate Albanian nationalists to the province’s assembly in November 2001 and its presidency in March 2002, there has also been serious violence between ethnic Albanians and the Serb minority. The province’s economy also remains stagnant, which has been blamed on its current political limbo. Like trusteeship before it, it is questioned how long UNMIK can exclude questions of national government, and attention has turned to talks on the province’s final status.

There are three possibilities for this final status, all of which may be objectionable to one of the various parties. The first is that Kosovo would remain part of Serbia and Montenegro in accordance with the principles of sovereignty and territorial integrity. However, a return to Serb rule would be likely to be resisted by the province’s ethnic Albanian population. The second might be some sort of partition. The creation of Serb cantons in Kosovo has been proposed by the Serbian government, but rejected by Albanian leaders. The international community might be expected to object to an outright partition of Kosovo, but might accept some form of devolved government for the Serb minority. The third is an independent Kosovo in accordance with the principle of self-determination. International law does not seem to grant Kosovo a right of self-determination, but neither does it comprehensively exclude it. This would appear to satisfy the wishes of the most of Kosovo’s population, but could be expected to be resisted by Serbia, and would also challenge the basis for the territorial settlement in Yugoslavia, which limited independence to the republics.

State practice, then, seems to suggest that while there is little positive support for a right of self-determination for groups within states, especially one that includes secession, neither is this comprehensively repudiated. Peoples within states have been recognised in certain states’ constitutions and in some state practice. Self-determination has also successfully been used to support secession from or the dissolution of a number of states. This does not negate a general antipathy to secession, but it does show how hard it is to draw a line between peoples and minorities both in terms of legitimacy and practice.

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117 Keesing’s (November 2001) p. 44463.

118 Keesing’s (March 2002) p. 44684.

119 “Another Eruption” The Economist (20 March 2004); “Field of Sorrows” The Economist (27 March 2004).


121 “Thick Skin Required” The Economist (22 May 2004).

b. Remedial Secession

Another possibility worth investigating is that, even if minorities do not have a right to self-determination and secession in international law, they may acquire such a right if states exclude or persecute them. This idea of remedial secession harks back to the enlightenment and the liberal notion of the state as a rational institution constructed to serve the governed. The American Declaration of Independence of 1776 is perhaps the best single expression of the doctrine. These ideas have, of course, been extremely important for the modern concept of the state, and this is a source of legitimacy which has arguably been appealed to in international law. Paragraph 7 of the Friendly Relations Declaration supported its balance of principles by allowing or at least not excluding this possibility. The Rapporteurs in the Åland Islands, the Canadian Supreme Court in Re. Secession of Quebec and the African Commission on Human and Peoples’ Rights in Katangese Peoples’ Congress v. Zaire also raised it to strengthen their balances. Nonetheless, the Court in Re. Secession of Quebec noted that, “it remains unclear whether this… actually reflects an established international law standard”.

This is the question. Is remedial secession actually an international legal standard, or does it only relate to the legitimacy of statehood, and by extension international law? It is notable that in the drafting of paragraph 7 of the Friendly Relations Declaration states showed little support for secession. The provision appeared to be more intended to improve the limitation of self-determination by making the balance with territorial integrity seem less arbitrary and limiting the right by satisfaction. This is supported by the fact that in the cases where the balance has been applied, Re. Secession of Quebec, Tatarstan and Chechnya, the Courts have proceeded on the assumption that the governments in question were representative.

The use of the balance in paragraph 7 to aid territorial integrity rather than support secession can also be seen in the Committee on the Elimination of Racial Discrimination’s General Recommendation XXI (48) of 1996. This recommendation struck a familiar balance. On one hand, in accordance with the Friendly Relations Declaration, states had a duty to promote the right of peoples to self-determination. On the other, none of the Committee’s actions were to 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 and possessing a Government representing the whole people belonging to the territory, without distinction as to race, creed or colour.”

The Committee fleshed out this balance with the internal and external aspects of self-determination. Internal self-determination appeared to encompass the content of representative government and consist of a variety of rights: the right of every citizen to take part in the conduct of public affairs, as per article 5(c) of the Convention; the protection of individual rights without discrimination, according to article 2; and rights contained in the Declaration on Minority Rights,

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128 Mr. Rechetov, however, questioned whether such a distinction could be made. CERD/C/SR.1147, (1996) para. 24.
GA Res. 47/135. On the other hand, the Committee also supported territorial integrity with considerations of stability: “a fragmentation of States may be detrimental to the protection of human rights, as well as to the preservation of peace and security.”

However, despite the intricacy of this balance, comments by Committee members suggest that the intention of the recommendation was simply to prevent appeals for secession. “It should be made quite clear”, Mr. Valencia Rodriguez stated, “that the Committee was not in the business of encouraging secession”. Indeed, Mr. Wolfrum introduced the draft recommendation to the Committee with the comment that, “the Committee should make plain its opposition to secession”. This again supports the idea that paragraph 7 was a provision for legitimising territorial integrity rather than supporting remedial secession.

Remedial secession also suffers from a notable lack of state practice. Superficially, the most promising candidate is Bangladesh. Two elements are certainly there. The secession was successful and it was achieved in the face of exceptional brutality by the Pakistani army. It is estimated that the actions of Pakistani forces in East Bengal (Bangladesh) between March and December 1971 lead to three million deaths and created almost ten million refugees. The crucial factor, however, was the international response and here the theory runs into problems.

Indian intervention was critical to the success of the secession. India sheltered and trained East Bengalis in their guerrilla campaign against Pakistan. But, the guerrillas themselves lacked the capacity to prevail militarily and it was Indian intervention on 4 December which secured independence. However, the United Nations’ response to India’s intervention, aside from a divided Security Council, was GA Res. 2793(XXVI), passed on 7 December 1971 by 104 votes to 10, with 11 abstentions. This called on India and Pakistan to declare a cease-fire and withdraw to their own sides of the India-Pakistan border, while vaguely recognising the need “to deal appropriately at a subsequent stage” with the issues behind the hostilities. In other words, if it had been implemented, it would have left Pakistan in effective control of the East.

Strictly speaking, GA Res. 2793(XXVI) concerned hostilities between India and Pakistan rather than the secession as such, and its call for a cease-fire and withdrawal was based on solid Charter principles. However, it was also more than just a resolution on India’s intervention.

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130 Mr. Rechetov, CERD/C/SR.1147, (1996) para. 24; Mr. van Boven, ibid. para. 27; Mr. Garvalov, ibid. para. 29; Mr. Ferrero Costa, ibid. para. 31.
133 Kuper op. cit. no. 80 at p. 48.
134 Heraclides op. cit. no. 66 at pp. 156-7.
136 In favour: Tanzania, US, Upper Volta, Uruguay, Venezuela, Yemen, Yugoslavia, Zaire, Zambia, Albania, Algeria, Argentina, Australia, Austria, Bahrain, Barbados, Belgium, Bolivia, Botswana, Brazil, Burundi, Cameroon, Canada, Central African Republic, Ceylon, Chad, China (PRC), Columbia, Congo, Costa Rica, Cyprus, Dahomey, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, Fiji, Finland, Gabon, Gambia, Ghana, Greece, Guatemala, Guyana, Haiti, Honduras, Iceland, Indonesia, Iran, Iraq, Ireland, Israel, Italy, Ivory Coast, Jamaica, Japan, Jordan, Kenya, Khmer Republic, Kuwait, Laos, Lebanon, Liberia, Libya, Luxembourg, Madagascar, Malaysia, Mali, Malta, Mauritania, Mexico, Morocco, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Pakistan, Panama, Paraguay, People’s Republic of Yemen, Peru, Philippines, Portugal, Qatar, Romania, Rwanda, Saudi Arabia, Sierra Leone, Somalia, South Africa, Spain, Sudan, Swaziland, Sweden, Syria, Thailand, Togo, Trinidad and Tobago, Tunisia, Turkey, Uganda. Against: Bhutan, Bulgaria, Byelorussian SSR, Cuba, Czechoslovakia, Hungary, India, Mongolia, Poland, Ukrainian SSR, USSR. Abstaining: UK, Afghanistan, Chile, Denmark, France, Malawi, Nepal, Oman, Senegal, Singapore. 26 GAOR (1971) Plenary Meetings, 2003rd mtg., (A/PV.2003) para. 490.
States were clearly aware of the implications of their vote for the secession, and a considerable number took the opportunity to express their hostility to Bangladeshi independence. “If we are to speak of self-determination in our respective States, we might not be surprised to see some States multiplied by 4 or by 10 because of their varied internal problems, and our Organization, which has 131 members today, might have more than 600 members tomorrow as a result of this splitting up of States”, warned the Togolese delegate. “Togo, which bravely said ‘No’ to the secession of Katanga and ‘No’ to the secession of Biafra, reaffirms that position today.”

Sri Lanka (Ceylon) raised the danger of setting a “deadly precedent”: “Most countries in this Assembly have substantial minorities – my country has – and must bear in mind the implications of treating the East Pakistan Awami League as a liberation movement.”

The Bangladeshi movement was variously denounced as “a puppet government” and a “fifth column.” Bangladeshi self-determination found support from India and the Soviet Bloc. However, this was a clear minority. Moreover, aside from India, Bangladesh did not receive international recognition until Pakistan had been defeated and it was clear that it was incapable of reasserting control. Bangladesh does not, in fact, appear to be a particularly good example of remedial secession.

With such a lack of positive evidence, it is not surprising that lawyers have often fallen back on the opinions of other lawyers, such as, the Canadian Supreme Court’s “[a] number of commentators…” or Judge Wildhaber’s, “a consensus has seemed to emerge…” However, this literature is also often highly equivocal. James Crawford introduced remedial secession with, “(Possibly)…”. Lauri Hannikainen similarly called it, “not a rule or right but only a possibility”. Heather A. Wilson described it as “possible” but also “highly controversial”. Erica-Irene A. Daes considered that there “may perhaps” be such a right for excluded minorities, with the disclaimer that, “in such a state of affairs legal arguments cease to have any real significance.”

Antonio Cassese also added a disclaimer. On one hand, he suggested that: “the contention could be made that the Declaration on Friendly Relations links external self-determination to internal self-determination in exceptional circumstances. A racial or religious

138 Togo, 26 GAOR (1971) Plenary Meetings, 2003 mtg., (A/PV.2003) paras. 202-3. This was repeated by Chad: “Knowing the consequences of a blind and unreasonable application of the principle of self-determination may be, my Government, which has said ‘No’ to Katanga and ‘No’ to Biafra, cannot say ‘Yes’ to what is now being asked of Pakistan, namely the disintegration of the territorial and national unity of that country.” Ibid. para. 295. See also Indonesia, ibid. 2002 mtg., (A/PV.2002), para. 78; Kuwait, ibid. para. 100; Sudan, ibid. 2003 mtg., (A/PV.2003) para. 87; Jordan, ibid. para. 142; Mauritania, ibid. para. 308; Pakistan, ibid. paras. 445-7.
145 Crawford op. cit. no. 1 at p. 101.
146 Hannikainen op. cit. no. 65 at p. 83.
group may attempt secession, a form of external self-determination, when it is apparent that internal self-determination is absolutely beyond reach.”\textsuperscript{149} On the other, he added a qualifier, “the possibility of racial groups to secede under the extreme circumstances set out above has not become customary law.”\textsuperscript{150} But, if it is not part of international law, why raise it in the first place?

Why is it that international lawyers, time after time, seem go out on a limb for remedial secession? Why should writers prefix this right with “possibly” or “perhaps”, or even make plaintive appeals to morality, “[t]here must, at least, be…”\textsuperscript{151} rather than exclude it from international law altogether? The answer, it may be argued, lies in the liberal idea of statehood, a notion which fundamentally informs how states are seen today. As Judge Luchin observed in the Chechnya case: “A constitutional order mixed in blood and human grief and misfortune, like the road not leading to the temple, loses its principal purpose – to serve Man.”\textsuperscript{152} Or as Christian Tomuschat put it: “States… have a specific raison d’être. If they fundamentally fail to live up to their essential commitments they begin to lose their legitimacy.”\textsuperscript{153} Remedial secession, thus, occupies an interesting position in international law, and one very much in keeping with self-determination. There is very little evidence, both in the drafting of instruments and in practice to support such a principle. But, at the same time, it is so central to the idea of statehood that to exclude it from international law would seem fundamentally unjust. It seems better to leave open such a possibility than to dismiss it completely. Nonetheless, the position of remedial secession is arguably more related to the legitimacy than the substance of positive international law.

4. Peoples under Foreign or Alien Domination

Peoples under foreign or alien domination\textsuperscript{154} goes to the heart of the conflict between nationalism and international law in the law of self-determination. The category is problematic as a legal concept, and it is a problem precisely because the idea that peoples under foreign domination have a right to self-determination is so central to nationalism. As a result the concept is both extremely broad, arguably encompassing all other categories of self-determination (except perhaps democratic government), and apparently open-ended. If a people doesn’t fall into a particular category, such as a non-self-governing territory or a state, then it can be a people under foreign or alien domination, although the term could encompass those categories as well. This

\textsuperscript{149} Cassese op. cit. no. 1 at p. 120.
\textsuperscript{150} Ibid. p. 121.
\textsuperscript{151} Murswieck op. cit. no. 65 at p. 27.
tension is also underlined by attempts to define the category. UN Special Rapporteur Héctor Gros Espiell stated in his report that: “‘colonial and alien domination’ means any kind of domination, whatever form it may take, which the people concerned freely regards as such.” This may satisfy the nationalist perspective, but it renders the concept as a legal category entirely dependent on subjective criteria. Peoples under foreign or alien domination, thus, remains ambiguous both in terms of its scope and obligations.

Peoples under foreign or alien domination has never been particularly well defined in international instruments. Both the Friendly Relations and Colonial Independence declarations reject the subjection of peoples to “alien subjugation, domination and exploitation”. This phrase was a careful formula which implicitly condemned colonialism, without explicitly criticising states with non-self-governing or trust territories, and also allowing that alien domination could apply to other situations.

Article 1(1) of the Covenants referred to “all peoples”, and article 1(3) created an obligation for states to promote the realisation of self-determination. This applied in particular to states with non-self-governing and trust territories, but was not exclusive to those situations. General Comment No. 12 (21) reflected this, considering that article 1(3) imposed specific obligations on states parties not only to their own peoples but, “vis-à-vis all peoples which have not been able to exercise or have been deprived of the possibility of exercising their right to self-determination.”

Perhaps the clearest reference was in the Definition of Aggression, which referred to, “peoples under colonial and racist régimes or other forms of alien domination”. The concepts of “colonial and racist régimes” and “alien domination” were not defined, but the phrase, “or other forms of alien domination”, suggests that alien domination might include colonial and racist regimes but not be limited to them. The drafting of the Definition, together with the Friendly Relations Declaration on which it was based, indicates that those peoples were, in particular, the populations of South Africa, South African occupied Namibia, Southern Rhodesia, Portuguese colonies and Palestine.

A similar formula, “peoples under colonial or other forms of alien domination or foreign occupation”, was used in the Vienna Declaration of 1993 and the UN Fiftieth Anniversary Declaration of 1995. Although states in the drafting of those instruments did not specify who those peoples were, it is suggestive that the issue of peoples under “foreign occupation” was raised by Arab states and Pakistan.

Finally, article 1(4) of the Additional Protocol I of 1977 to the 1949 Geneva Conventions referred to: “armed conflicts in which peoples are fighting against colonial domination and alien

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occupation and racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on... [Friendly Relations].” 159 The concepts of “colonial domination”, “alien occupation” and “racist régimes” were not defined, 160 although some states drew a distinction between peoples under “alien” rule and the position of minorities. 161 However, these concepts, which seemed to be quite fluid, again appeared to be primarily focussed on South Africa, Southern Rhodesia, Namibia, Portuguese colonies and Palestine. 162 There may be five categories that might be peoples under foreign domination: colonial peoples, peoples under racist regimes, states’ peoples, Palestine and minorities.

The first category may be the peoples colonial territories. This could include peoples in non-self-governing and trust territories (though this was denied by states administering such territories) 163 and Namibia when it was governed by South Africa in violation of its mandate. It might also logically apply to non-self-governing territories whose right of self-determination was frustrated by the intervention of a third state, such as East Timor 164 or Western Sahara. 165

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160 Federal Republic of Germany: “The terms ‘colonial domination’, ‘alien occupation’, ‘racist régimes’ are not objective criteria but lend themselves to arbitrary, subjective and politically motivated interpretation and application.” CDDH/SR.36, p. 61; New Zealand: “a great deal is left to subjective appreciation, in deciding whether or not a situation falls within the ambit of Article 1, paragraph 4.” CDDH/SR.36, p. 63; US: “Concepts such as ‘alien domination’ and ‘racist régimes’ had yet to be defined.” CDDH/III/SR.2, p. 14; Australia, CDDH/III/SR.3, p. 12; Brazil, CDDH/III/SR.34.
161 Nigeria: “He understood the right to self-determination not as encouraging secessional and divisive subversion in multi-ethnic nations, but as applying to a struggle against colonial and alien domination, foreign occupation and racist régimes.” CDDH/III/SR.2, p. 13; Pakistan: “There was a clear distinction between freedom fighters struggling in the exercise of their right to self-determination against alien occupation and racist régimes, and minority movements rebelling against a lawful authority and threatening the territorial integrity of a State.” CDDH/III/SR.33, p. 226.
164 Mozambique: “The right of peoples to self-determination was also being denied in East Timor. He demanded the withdrawal of the Jakarta clique, so that the people of East Timor could decide its own future.” 37 GAOR (1982) 3rd Cmtee., 9th mtg., (A/C.3/37/SR.9) para. 67; Zimbabwe: “The United Nations had refused to accept the fait accompli in East Timor and demanded that Indonesia should withdraw its forces and desist from further violation of the territorial integrity of East Timor... His delegation urged Indonesia to respect the rights of the East Timorese people and to initiate a process of dialogue aimed at allowing them self-determination.” Ibid. 13th mtg., (A/C.3/37/SR.13) para. 2.
165 Algeria: “The people of Western Sahara had been suffering since 1975 the tragic consequences of a new foreign domination.” 37 GAOR (1982), 3rd Cmtee., 6th mtg., (A/C.3/37/SR.5), para. 46; Zimbabwe: “Morocco had attempted to justify its illegal occupation of Western Sahara by citing unsubstantiated ties of allegiance between the two States. The advisory opinion of the International Court of Justice on the matter had stated that historic links between the two territories did not support claims of territorial sovereignty or preclude the application of the principle of self-determination for inhabitants in the area. Thus, illegal invasion could never be legitimized by subsequent developments.” Ibid. 13th mtg., (A/C.3/37/SR.13) para. 1; Afghanistan: “The people of Western Sahara was also seeking to exercise its right of self-determination, and his delegation once again expressed its firm support for the struggle of the Democratic Arab Republic of Sahara for independence.” Ibid. para. 47; East Timor: “Timor-Leste shares with our Sahrawi brothers a remarkable amount of history. The inalienable right of the Sahrawi people to self-determination was recognized by the United Nations eight years before that of Timor-Leste. Yet, while the case of Timor-Leste is now seen as a United Nations success story, that of Western Sahara continues to be stalled by successive obstacles.” 57 GAOR (2002) Plenary Meetings, 20th mtg., (A/57/PV.20) p. 10.
The second category may be peoples under racist regimes.\(^{166}\) The concept of a “racist regime” has never been defined, although it was applied, above all, to the white minority regimes of South Africa and Southern Rhodesia, and in this sense can be seen as essentially an overspill from colonial self-determination. The designation has also been extended to Israel, especially in GA Res. 3379(XXX), which equated Zionism with racism,\(^{167}\) although this resolution was notably repealed in 1991.\(^{168}\) In recent written submissions to the ICJ in the Wall Opinion, for example, Arab, African and Asian states complained of the Israeli occupation of Palestinian territory in racist terms. Israel’s security barrier, which formed the focus of the opinion, was frequently described with words like “apartheid” and “bantustanisation”, after the policies the South African white minority regime.\(^{169}\)

In general the category of peoples under racist regimes can probably be best understood, not with legal principles, but in the context of the Afro-Asian anticolonial nationalism behind colonial self-determination. Anticolonial nationalism developed, it can be recalled, in reaction against the monopolisation of power and social status by a white elite. In most cases these elites could be removed by independence. Hence the equation of self-determination with independence in instruments like the Colonial Independence and Friendly Relations declarations. Various discriminatory measures also entrenched the positions of these elites, and in reaction to this, anticolonial nationalism was closely associated with the elimination of racial discrimination. This connection can again be seen in the two declarations.

However, in two cases, South Africa and Southern Rhodesia, the formula of self-determination and independence did not work. Power was held by sizeable population of white settlers and respect for independence only cemented their rule. Nonetheless, following the basic logic of anticolonial nationalism there was no reason not to extend self-determination to those regimes. This was despite the fact that South Africa was an independent state and Southern Rhodesia claimed to be one. Southern Rhodesia, in fact, stands out as the only colony where a

\(^{166}\) Syria: “[M]illions of human beings in South Africa, Palestine, Angola, Zimbabwe and Namibia remained under alien subjugation”. 30 GAOR (1975) 3\(^{rd}\) Cmte., 2126\(^{th}\) mtg., (A/C.3/SR.2126) para. 20-1; Senegal: “The racist theories advanced by the minority régimes in southern Africa as a pretext for colonial rule and foreign domination…” 31 GAOR (1976) 3\(^{rd}\) Cmte., 14\(^{th}\) mtg., (A/C.3/31/SR.14) para. 7; Peru: “Peru, faithful to its humanitarian principles and its independent foreign policy, reaffirmed its recognition of the right of all peoples to freedom, equality and self-determination and the legitimacy of the struggle to attain those rights. His delegation, for its part, would support any measure designed to eradicate colonialism, racism, apartheid and other forms of foreign domination.” Ibid. 15\(^{th}\) mtg., (A/C.3/31/SR.15) para. 57; Nigeria: “Instances of aggression, occupation by foreign forces, colonial domination and mercenary subversion and intervention were some of the most serious factors impeding the exercise of the right of self-determination. South Africa and Palestine, among others, were areas where the international community must act resolutely to permit the exercise of the right to self-determination.” 45 GAOR (1990) 3\(^{rd}\) Cmte., 3\(^{rd}\) mtg., (A/C.3/45/SR.3) para. 59.


The balance of principles in the Colonial Independence Declaration, it can be recalled, limited self-determination with territorial integrity. The two could, of course, be compatible if self-determination was understood as a right to democratic or representative government for the peoples of states. However, the racist regimes category does not seem to be part of a general movement for representative, non-discriminatory government. Many of its most forceful proponents were often dictatorships with dubious records in human rights and ethnic relations, and this has led to the charge of double standards. The category is, in truth, better understood as a tidying up of some loose ends in colonial self-determination and its underlying nationalism, rather than any systematic attempt to end discriminatory government. The continued application of the designation against Israel reflects the perception that the occupied Palestinian territories constitute a European-style colonial situation.

A third category may be the peoples of states. Self-determination has been considered a corollary of the principles of sovereign equality and non-intervention. A logical extension of this would be that intervention, or acts of aggression contrary to article 2(4) of the UN Charter would also constitute foreign domination. States’ peoples considered to have been denied self-determination or to be peoples under occupation or domination have included Lithuania, Latvia and Estonia, Korea, Vietnam, Hungary, Czechoslovakia, Cambodia (Kampuchea),

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172 US: “The United States did not recognize the forcible incorporation by the Soviet Union of the three Baltic States of Estonia, Latvia and Lithuania into its territory in 1940. His government supported the efforts of those three states to attain self-determination peacefully.” 45 GAOR (1990) 3rd Cmtee., 7th mtg., (A/C.3/45/SR.7) para. 40; Lithuania (for Estonia and Latvia): “[T]he peaceful struggle of the Baltic States for independence was proof positive of their commitment to... the right of peoples to self-determination. Even though they had been denied the right to self-determination for fifty years and the issue had been largely ignored by the United Nations, it was to be hoped that the world would learn from that experience and change for the better.” 47 GAOR (1992) 3rd Cmtee., 6th mtg., (A/C.3/47/SR.6) para. 29.
173 Byelorussian SSR: “The provisions of the Charter were being flagrantly violated by the colonial Powers, and especially the United States of America, which was trying to stifle movements for national independence by all possible methods, including the use of armed force. The world was witnessing a striking example of that policy in Korea, where American aggressors were trying to prevent a peaceful people from enjoying the fundamental right of all peoples and nations.” 7 GAOR (1952) 3rd Cmtee., 444th mtg., (A/C.3/SR.444) para. 4; Venezuela: “One of the objects of affirming the right of self-determination of peoples and establishing safeguards for the exercise of that right, was to prevent such changes of sovereignty from being effected by force or corruption... One great problem facing the United Nations, the problem of Korea, had sprung from an act of secession made possible by the influence of a great Power, working through a political party which was ostensibly Korean. The United Nations had taken a stand in opposition to that movement of secession, and its efforts had been directed towards restoring to the Koreans the natural unity of their country.” Ibid. 451st mtg., (A/C.3/SR.451) para. 31.
174 USSR: “It was clear that the right of self-determination of peoples was the right of peoples to determine their political and economic systems freely, and not under the threat of foreign bayonets. It was in the name of those principles that the peoples of the whole world condemned the United States, and that the United States would yet have to end its bombings, withdraw its troops and permit the Viet-Namese people to determine their own future.” 21 GAOR (1966) 6th Cmtee., 931st mtg., (A/C.6/SR.931) para. 20. US: “[I]t was important to secure for the people of Viet-Nam their right to self-determination. It was precisely because the people in Viet-Nam were being denied that right that the tragic situation in Viet-Nam now existed. Aggression in Viet-Nam was from the North, and the purpose of all United States assistance to the Republic of Viet-Nam was to enable its people to resist that aggression so that they could live in peace and freedom.” A/AC.125/SR.64 (1967) p. 16.
175 GA Res. 1131(XI): “Considering that recent events have clearly demonstrated the will of the Hungarian people to recover their liberty and independence,
Afghanistan, Cyprus, Lebanon, Syria (over the Golan Heights), Nicaragua

Noting the overwhelming demand of the Hungarian people for the cessation of intervention of foreign armed forces and the withdrawal of foreign troops…


176 US: “[T]he principle of self-determination had been flagrantly disregarded by the invasion, continued occupation and attempted political control of Czechoslovakia… it was the clearest case of violation of the principle of equal rights and self-determination of peoples in a non-colonial context.” A/AC.125/SR.92 (1968) p. 129.


Cyprus: “The present forced separation of our people carried out by Turkish bayonets is not a reality; it is artificial. But even if one assumes that the Turkish Cypriot community of 120,000 persons, which was forced by the occupier to reside in the north, is a separate people and that it can exercise separately that right to self-determination – which is not the case – this community is as much under occupation and foreign domination as the rest of our people.” 38 SCOR (1983), Plenary Meetings, 2503rd mtg., (S/PV.2504), para. 29.

freely to determine their own political future and to exercise full authority and control over their financial and natural resources... 2.

Reaffirming also that, also by 30 June 2004, the occupation will end and the Coalition Provisional Authority will cease to exist, and that Iraq will reassert its full sovereignty; 3.

Reaffirming also the right of the Iraqi people freely to determine their own political future and control their own natural resources... 2. Welcome, that also by 30 June 2004, the occupation will end and the Coalition Provisional Authority will cease to exist, and that Iraq will reassert its full sovereignty; 3. 187

Reaffirming also the right of the Iraqi people freely to determine their own political future and control over their financial and natural
A fourth possible category, Palestine, does not really fit into either the category of the people of a state, nor, despite being a former mandate territory, the people of a colonial territory. Nonetheless, there appears to be a general consensus that the Palestinian people have a right of self-determination. Like colonial self-determination, this consensus has been summed up by the International Court of Justice. In the Wall Opinion the Court considered that, “the existence of the ‘Palestinian people’ is no longer in issue”, and further that, “the Palestinian people and its ‘legitimate rights’… include the right to self-determination”. Moreover, this was a right that not only Israel, but all states had an obligation to respect. Even the one dissenting justice, Judge Buergenthal did not dispute the existence of such a right. Support for Palestinian self-determination was also evident in written statements submitted to the Court by a number of interested states.

There are a number of possible sources for a Palestinian right to self-determination. The Palestinians have been contemplated, mainly by Arab states, in the drafting of the main instruments on self-determination, such as the Colonial Independence and Friendly Relations declarations, the Definition of Aggression and the Human Rights Covenants. With regard to the last if these, statements and reports to the Human Rights Committee also show broad recognition of a Palestinian right of self-determination. The ICJ also emphasised the role of General
Assembly resolutions and the body’s recognition of the right “on a number of occasions”.196 In fact, the General Assembly has since 1970 issued a string of resolutions proclaiming a right of Palestinian self-determination. Initially controversial, these resolutions have since become routine and have been supported by the overwhelming majority of states, with consistent opposition only from Israel and the United States. Nonetheless, some Western states, like Germany and Britain, have abstained and it may be questioned whether these resolutions reflect legal intent or simply political concern.197


196 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion), (2004), www.icj-cij.org (12/07/04) para. 118.

Another source apparently used by the Court was the principle of the “sacred trust”. In individual opinions there seemed to be differences as to which type of self-determination the Palestinian case fell into. Judge Higgins considered that the opinion represented a case of “self-determination beyond colonialism”. However, Judges Koroma, Al-Khasawneh and Elaraby all referred to the continuing role of the sacred trust in defining the rights of the Palestinian people. The opinion itself seemed to suggest that, like the colonial variant, Palestinian self-determination evolved from the principle of the sacred trust. The Court recalled that Palestine was established as a class A mandate under article 22 of the League of Nations Covenant. It also recalled that in its International Status of South West Africa opinion it identified two principles “of paramount importance” in the mandate: non-annexation and the sacred trust. Citing the Namibia opinion the Court considered that, “...the ultimate objective of the sacred trust’ referred to in Article 22, paragraph 1, of the Covenant of the League of Nations ‘was the self-determination… of the peoples concerned’”. The Court seems to suggest that, although Britain abandoned its mandate over Palestine in 1948 and the General Assembly provided for its termination in GA Res. 181(III) of 1947, Palestinian self-determination developed along the same trajectory as the colonial right.

The Court also referred to an exchange of letters on 9 September 1993 between Israeli Prime Minister Yitzhak Rabin and PLO President Yasser Arafat in which Israel recognised the PLO as, “...the representative of the Palestinian people” It also cited the Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip of 28 September 1995 which referred, “a number of times to the Palestinian people and its ‘legitimate rights’”. The Court inferred that these rights included self-determination.

Israel itself has considered that Palestinian rights may include self-determination in statements to the Human Rights Committee in 1998. The Israeli representative recognised that: “One of the main aims of the Middle East peace process was the achievement of self-determination for all the peoples of the region, including the Palestinians.” Emphasis was placed on self-determination as a process, rather than any specific end, which was interconnected with the peace process as a whole. The representative divided Palestinian self-determination into internal and external aspects. Internally, he argued, self-determination was already being exercised by the Palestinians in the West Bank, Gaza and Jerusalem by democratic elections under international supervision and a freely elected administration governing all spheres of civil life. Externally, “self-determination was taking place through a political process”, based on the “mutual consent of both parties”.

The Palestinian view has been more directed to the ends of self-determination, in particular,
statehood. In pleadings in the Wall opinion, Palestinian representatives argued that the exercise of the right of self-determination required the establishment of an Arab state in Palestine. Written statements and pleadings by Palestine have also connected this right with the territorial integrity of the occupied territories of the West Bank, Gaza Strip and East Jerusalem, the demographic composition and economic viability of the Palestinian people, and permanent sovereignty over resources, including land, work and water.

Internationally Palestinian self-determination has been able to gain broad support through a notable ambiguity in its means and ends. As to the means, some states have explicitly balanced the exercise of Palestinian self-determination with the security of Israel, while others have simply focussed on a right to struggle against that country. The Court seemed to reflect this ambiguity. It called on all states, while respecting the UN Charter and international law, “to see to it” that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination be brought to an end. As has been seen earlier (and will be explored more fully in section 7) states have different interpretations on what assistance to a people, while respecting the UN Charter and international law, entails. One possible interpretation might be military support for the Palestinian intifadah.

204 Mr. Al-Kidwa: “[T]he General Assembly… in accordance with the Charter of the United Nations, dealt with mandated Palestine, deciding on 29 November 1947, in resolution 181(II), to partition Palestine into two States, one Jewish and one Arab. The Arab State has, of course, not yet been realized; and thus the Palestinian people have been unable to exercise their right to self-determination.” Legal consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion), Verbatim Record, 23 February 2004, p. 19, para. 6 at www.icj-cij.org (visited 07/04/04).


207 Laos: “The people of Palestine, under the leadership of the Palestine Liberation Organization, had been waging its struggle against foreign occupation for a number of decades. The intifadah, which was a clear expression of the courage of the Palestinian people, would achieve its objectives – the full exercise of the right to self-determination and national independence.” 44 GAOR (1989) 3rd Cmte., 8th mtg., (A/C.3/44/SR.8) para. 20; Zambia: “Zambia believed that, through their heroic intifadah, the Palestinian people had demonstrated to the world their determination to attain freedom, dignity and their right to a homeland. Peace would not come to the Middle East until the legitimate rights of the Palestinian people were seriously addressed.” Ibid. 9th mtg., (A/C.3/44/SR.9) para. 74; Cyprus, ibid. 10th mtg., (A/C.3/44/SR.10) para. 31; Jordan, ibid. para. 25; Somalia, ibid. para. 35; Libya, ibid. para. 14; Yugoslavia, ibid. 11th mtg., (A/C.3/44/SR.11) para. 19; Bahrain, ibid. para. 32; Yemen, 45 GAOR (1990) 3rd Cmte., 7th mtg., (A/C.3/45/SR.7) para. 50; Syria, ibid. 8th mtg., (A/C.3/45/SR.8) para. 24.

208 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion), (2004), www.icj-cij.org (12/07/04) para. 159.

209 See submissions to the Court by the Organisation of the Islamic Conference: “Reduced by their sufferings to a state of despair, the Palestinian people have twice risen up against the occupier in a struggle known as the Intifada. That action simply represented enforcement of a right recognized by contemporary international law. Thus General Assembly resolution 2625 of 24 October 1970 recommends that States should: ‘(B)ring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned; and bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial
interpretation might be respect for self-determination balanced with concern for the security of Israel. But, this too was ambiguous. The Court did conclude by emphasising that, “both Israel and Palestine are under an obligation scrupulously to observe the rules of international humanitarian law, one of the paramount purposes of which is to protect civilian life” and the need for negotiations to ensure, “peace and security for all in the region.” Nonetheless, some judges argued that the opinion did not sufficiently stress the protection of civilians.

As to the ends of self-determination, it can be noted first of all that the main instruments on the Israeli-Palestinian dispute make no reference to the right. SC Res. 242 (1967) and 338 (1973), which are considered to form the basis for a peaceful solution to the conflict, make no mention of it. Moreover, although the call in SC Res. 242 for the withdrawal of Israeli forces from occupied territories as a basis for a peace settlement, might seem consistent with self-determination, it has been noted that the resolution left open what those “territories” would be. Similarly, SC Res. 1397 (2002) and SC Res. 1515 (2003), which affirm, a “vision of a region where two States, Israel and Palestine, live side by side within secure and recognized borders”, do not specify what those borders would be. The Oslo Accords of 1993 also did not specifically mention self-determination, only, “the legitimate rights of the Palestinian people”, which were intended to be fulfilled through elections and negotiations. The “Roadmap” Plan of 30 April 2003 outlined many of the goals of Middle East self-determination, “an independent, democratic, and viable Palestinian state living side by side in peace and security with Israel and its other neighbours.” Nonetheless, the process it proposed to achieve those goals made no reference to the right.

The International Court also maintained some ambiguity in the ends of Palestinian self-of fundamental human rights, and is contrary to the Charter… In their actions against, and resistance to, such forcible actions in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.” Written Statement of the Organisation of the Islamic Conference, January 2004, ibid. p. 7, para. 25.
determination. Although it concluded with an appeal for negotiations based on the provisions of the Roadmap and SC Res. 1515 for a Palestinian state, the Court did not specifically connect self-determination with a right to independence.\footnote{220} Indeed, when it quoted a provision from GA Res. 2625(XXV) that every state had the duty to refrain from forcible action to deprive peoples of self-determination, it cut the Declaration’s original formula of “self-determination and freedom and independence” to just “self-determination”\footnote{221}. Moreover, while proceeding from the principle of the non-annexation of occupied territory, the Court did not explicitly connect self-determination to the principle of territorial integrity as Palestine and the Arab League had done in their submissions.\footnote{222}

A final point to note about the Wall Opinion was its context, and this may say a great deal about position of Palestinian self-determination. Part of the background to the opinion were statements submitted by a large number of states, including the US, Russia and the countries of the EU, which together with the UN form the “Quartet” sponsoring the Roadmap. These states wrote to inform the Court that they believed that the opinion was inappropriate and unhelpful in resolving the dispute.\footnote{223} These countries did not object because they believed that Israeli actions were lawful, they often stressed the contrary. Nonetheless, they argued that a legal opinion would hinder a political solution. It may be argued that the rights of the Palestinian people are sui generis, an area of law still in development.\footnote{224} But, perhaps the defining statement on Palestinian self-determination does not come from the ICJ, but the UN Committee responsible for the original partition plan for Palestine in 1947: “The basic conflict in Palestine is a clash of two

\footnote{220}{Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion), (2004), www.icj-cij.org (12/07/04) para. 162}  
\footnote{221}{Ibid. para. 88.}  
\footnote{222}{“…[T]he Occupied Palestinian Territory, including East Jerusalem has been recognized by the United Nations and the international community as a territory with an international status – a self-determination unit – with borders based on the Armistice Line of 1949… The wall is… in direct violation of the territorial integrity of the self-determination unit which it amputates and of the legal right to self-determination and statehood of the Palestinian people.” Written Statement of the League of Arab States, January 2004, pp. 62, paras. 8.1 and 8.4.}  
\footnote{223}{Italy (for the EU), 58 GAOR (2003), Plenary Meetings, 23\textsuperscript{rd} mtg., (A/ES-10/PV.23) at pp. 14-5; Uganda, ibid. p. 18; US, ibid. p. 19; UK, ibid. p. 21; Canada, ibid. p. 22; Switzerland, ibid.; Singapore, ibid.}  
\footnote{224}{Written Statement of the United States of America, 30 January 2004, p. 2, para. 1.4, 16, para. 3.1, pp. 24-5, para. 4.6; Written Statement of the Russian Federation, 29 January 2004, p. 5; Ireland (for the EU), p. 1; Italy (for the EU), Illegal Israeli Action in Occupied East Jerusalem and the Rest of the Occupied Palestinian Territory, at p. 2; Written Statement of the United Kingdom of Great Britain and Northern Ireland, January 2004, p. 2, para. 1.6, pp. 18-9, para. 3.23; Written Statement of the French Republic, 30 January 2004, pp. 1-2, paras. 3-5; Statement of the Government of the Federal Republic of Germany, January 2004, p. 4; Written Statement of Italy, pp. 1-2; Statement by the Czech Republic; Statement by the Ministry of Foreign Affairs of the Hellenic Republic; Statement of Malta, 30 January 2004; Statement of the Government of the Kingdom of the Netherlands, 30 January 2004, p. 2; Statement of the Kingdom of Spain, 30 January 2004, p. 2; Written Statement of the Kingdom of Belgium, pp. 1-2. (However, there appeared to be some deviations from this position. See Statement of Sweden, 30 January 2004, para. 2; Statement of the Government of Ireland, January 2004). Norway, Letter Dated 30 January 2004, p. 2; Written Statement of the Government of Japan, 30 January 2004, p. 1; Written Statement of the Government of Canada, pp. 1-2; Written Statement of the Government of Australia, 29 January 2004, p. 4, para. 3; Note Verbale from the Ministry of External Relations, Republic of Cameroon, 28 January 2004; Memorial of the Federated States of Micronesia, 29 January 2004, p. 1; Memorial of the Republic of Palau, 28 January 2004, p. 1; Memorial of the Republic of the Marshall Islands, 29 January 2004, p. 1; Switzerland changed position once it had been decided to submit the matter to the Court for an opinion. See Written Statement addressed to the International Court of Justice by the Swiss Confederation, p. 2, paras. 7-9.}  
intense nationalisms.” It seems to be that it is the political pressures created by these nationalisms that shape the conflict and its potential solutions, and caught between these tectonic forces, a legal right of self-determination may look very frail indeed.

Fifth, despite some assertions to the contrary there is no logical reason why the concept of peoples under alien domination might not be applicable to populations within states. The General Assembly has called the inhabitants of Tibet, which is a part of People’s Republic of China, a “people” and recognised that they have been deprived of their fundamental human rights and right to self-determination. There is also the case of Kashmir, which has been claimed by Pakistan to be one of the peoples under “colonial and alien rule”, while India has maintained that the territory is an integral part of the Indian state. This underlines that there is no category of self-determination to which “peoples under foreign or alien occupation” cannot be potentially applied.

Peoples under foreign or alien domination, undoubtedly captures much of the essence of national self-determination. This may make it useful as a political concept, but it is also extremely slippery as a legal one. The category may be used alternatively to support or challenge legal principles. It may encompass a variety of obligations: respect for the right of the peoples of non-self-governing and trust territories to self-determination; the prohibition of the use of force to frustrate such a right; non-discrimination and the elimination of racial discrimination; respect for the principles of the sovereign equality of states, non-intervention in the internal affairs of states and the prohibition of the threat or use of force against the territorial integrity of states. However, it may also in some circumstances challenge many of those obligations. It is, therefore, questionable whether the category imposes any distinct obligations in itself.

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227 Pakistan: “Pakistan, having come into being as the result of the exercise of the right of self-determination by the Moslems of the subcontinent, naturally supported the exercise of that right by all people under colonial or alien rule that were recognized as being entitled to that right. The exercise of that right by the people of Jammu and Kashmir was intimately bound up with the realization of independence by the people of Pakistan. A lasting solution to the Jammu and Kashmir dispute could only be found on the basis of the right of self-determination. During the 29 years that had elapsed since the achievement of its independence, Pakistan had supported the struggles of many peoples of the third world for self-determination and liberation from colonial rule, including the peoples of Africa, of the Arab Maghreb and of Jammu and Kashmir.” 31 GAOR (1976) 3rd Cmtee., 17th mtg., (A/C.3/31/SR.17) para. 42.
228 India (in reply): “The representative of Pakistan had referred to the so-called Jammu and Kashmir dispute, which, according to that representative, should be solved on the basis of the right of the people of that area to self-determination. India could not accept the position of Pakistan, for the following reasons. Jammu and Kashmir constituted an integral part of the territory of independent India. It had become part of India when it had acceded legally, finally and unconditionally to India on 27 October 1947 and its people had become citizens of India. Like other citizens of India, the people of Jammu and Kashmir had been periodically exercising their right to self-determination within India’s constitutional framework by participating in the five nation-wide general elections that had been held in the 29 years since India’s independence. There could be no question of the people of Jammu and Kashmir exercising the right of self-determination separately from India. That would be a violation of the Indian Constitution and of the sovereignty and territorial integrity of India and an unwarranted interference in its internal affairs, all of which would constitute a violation of the United Nations Charter.” 31 GAOR (1976) 3rd Cmtee., 17th mtg., (A/C.3/31/SR.17) para. 57.
5. Economic Self-Determination or Permanent Sovereignty

Economic self-determination, or permanent sovereignty over natural resources represents an attempt to challenge existing international economic law and to formulate new rules on the basis of the right. The rights of peoples, often equated with the rights of states, were used to enhance states’ sovereign rights in relation to international legal obligations.

Obligations under economic self-determination or permanent sovereignty fall into two categories. First, there are treaty obligations under article 1(2) of the Covenants. Second, there may be customary obligations shaped by instruments such as the Declaration of Permanent Sovereignty over Natural Resources, GA Res. 1803(XVII) and the Charter of the Economic Rights and Duties of States, GA Res. 3281(XXIX).

Article 1(2) of the Covenants may represent the most clearly legally binding provision on economic self-determination, but it is far from clear itself. It can be recalled that it constituted a balance of five interconnected elements: (1) the right of peoples to freely dispose of their natural wealth and resources, (2) obligations arising from international economic co-operation, (3) mutual benefit, (4) international law, and (5) that no people may be deprived of its means of subsistence. The problem, though, was that none of these elements, nor the way they related to each other was ever defined. This meant that a wide range of interpretations, from an extremely contingent right to an almost absolute right, could be extrapolated from the paragraph. Comments by states before the Human Rights Committee, and the Committee’s own comments, including General Comment No. 12 (21), have done little to clarify the issue. Additionally, there is article 25/47, which does not impose positive obligations, but seems to have been intended to prevent restrictions on a right to natural resources. The conclusion must be that obligations under article 1(2) are unclear and open to considerable interpretation.

This leaves customary international law. A principal instrument in this regard is the Declaration on Permanent Sovereignty over Natural Resources, GA Res. 1803(XVII), which was adopted by 87 votes to 2, with 12 abstentions. The Declaration, in its preamble, described permanent sovereignty as a basic constituent of the right to self-determination and this was reflected in the comments of many states. The Declaration was intended to express a consensus

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230 In favour: Jordan, Lebanon, Liberia, Libya, Luxembourg, Madagascar, Mali, Mauritania, Mexico, Morocco, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Rwanda, Saudi Arabia, Senegal, Sierra Leone, Spain, Sweden, Syria, Tanganjika, Thailand, Togo, Trinidad and Tobago, Tunisia, Turkey, Uganda, UAR, UK, US, Upper Volta, Uruguay, Venezuela, Yemen, Yugoslavia, Afghanistan, Algeria, Argentina, Australia, Austria, Belgium, Bolivia, Brazil, Burundi, Cambodia, Cameroon, Canada, Central African Republic, Ceylon, Chad, Chile, China (ROC), Columbia, Congo (Leopoldville), Costa Rica, Cyprus, Dahomey, Denmark, Dominican Republic, El Salvador, Ethiopia, Malaya, Finland, Greece, Guatemala, Guinea, Haiti, Honduras, Iceland, India, Indonesia, Iran, Iraq, Ireland, Israel, Italy, Ivory Coast, Jamaica, Japan. Against: South Africa, France. Abstaining: Mongolia, Poland, Romania, Ukrainian SSR, USSR, Bulgaria, Burma, Byelorussian SSR, Cuba, Czechoslovakia, Ghana, Hungary. 17 GAOR (1962) Plenary Meetings, 1194th mtg., (A/PV.1194), para. 8.
in an area of considerable disagreement, and consequently it was composed of ambiguous formulations capable of accommodating various interpretations on certain key points.

The Declaration, in particular, set the standard of compensation for the nationalisation and expropriation of foreign property as "appropriate".232 This formula was intentionally vague. "The word", the American delegate observed, "had no technical or limited meaning but was merely descriptive."233 It encompassed a wide range of interpretations over the level and timing of compensation, from the United States’ “prompt, adequate and effective” to appeals by Sri Lanka for compensation to be linked to the state’s ability to pay.234 Socialist states, who abstained on the Declaration, on the other hand, rejected any international standard for compensation arguing that this was purely an internal matter.235

In disputes over compensation, the Declaration provided that the national jurisdiction of the nationalising state should first be exhausted.236 Many states stressed the primary role of national

232 “4. Nationalization, expropriation or requisitioning shall be based on ground or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law…”


235 USSR: “compensation could not be paid ‘in accordance with international law’, since international law provided for no compulsory payment of compensation. Experience showed that each country tackled that problem as its own interests dictated.” 17 GAOR (1962) 2nd Cmtee., 834th mtg., (A/C.2/SR.834) para. 31; Hungary: “The basis of any right to compensation was not some rule of international law but the relevant legislation of the State concerned.” Ibid. 846th mtg., (A/C.2/SR.846) para. 2; Byelorussian SSR: “the need for compensation in cases of nationalization… depended on the decision of the country concerned.” Ibid. 848th mtg., (A/C.2/SR.848) para. 35; Czechoslovakia: “payments should… be fixed by the sovereign State”, ibid. 852nd mtg., (A/C.2/SR.852) para. 23;
jurisdiction for settling disputes and that this role should not be prejudiced. However, the Declaration also provided that if sovereign states agreed, disputes could be settled through arbitration or international adjudication. It was significant that this agreement was “by” sovereign states, rather than “between” them, as this covered not just agreements between states, but also between states and companies.

The Permanent Sovereignty Declaration was not formally binding, but its importance lay in the fact that it represented some sort of consensus. Later General Assembly resolutions relied on the voting muscle of the Third World as it pushed for a more absolute interpretation of the right to permanent sovereignty. The culmination of this was the 1974 Charter of Economic Rights and Duties of States, GA Res. 3281(XXIX). Under article 2(2)(c) of the Declaration states had a right to nationalise and expropriate in accordance with their own laws and regulations or any circumstances considered pertinent, without regard to obligations under international law. The standard of compensation was again “appropriate”, but what was appropriate was to be determined under the domestic law and in the tribunals of the nationalising state. International jurisdiction was only to be resorted to if all the parties to a dispute agreed.

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242 Article 2: “1. Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over its wealth, natural resources and economic activities. 2. Each State has the right... (c) To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall
These resolutions highlight the problem of permanent sovereignty as the basis for legal rules. The concept of permanent sovereignty, like self-determination, can play a co-ordinating role between states, but at the cost of clarity. As a relative right, permanent sovereignty allowed states to unite behind it, while retaining their own understanding of the balance of rights and obligations it entailed. GA Res. 1803(XVII) was, therefore, able to build a consensus by creating a balance of rights and obligations in which different views could be contained by ambiguity on certain points. Later resolutions, especially GA Res. 3281(XXIX), shifted this balance towards a more absolute right, but at the cost of breaking the coalition and alienating states. This division of the international community was between a majority and a minority. But, the polarisation was between the capital importing and exporting countries, and as the aim of these instruments was to govern relations between the two, the opposition of the capital exporting minority was significant.

Subsequent practice by tribunals tends to support this. Considerable value has been given to GA Res. 1803(XVII), despite its ambiguities, because as a consensus instrument it may reflect custom. On the other hand, the divisive impact of GA Res. 3281(XXIX) was seen to undermine its legal status. It is also significant, considering the attempt to use permanent sovereignty to review issues such as compensation, that tribunals have continued to support a standard of “full” compensation.

Economic self-determination, like its colonial counterpart, represented an attempt to challenge existing legal rules and replace them with new ones based on self-determination or related concepts. However, the problem again has been that, while the coalition-building role of the right ensures that states can support these principles in general, the resultant obligations remain ambiguous and their legal impact consequently limited.

6. Democratic Government

There has always appeared to be a natural connection between self-determination and democracy. Both are sources of political legitimacy, both are considered to be important for the enjoyment of individual rights and both hold that power derives from the people. It has been considered that there may be a legal right to democratic government and this right may be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.” Article 2(2)(c) was adopted by 104 votes to 16, with 6 abstentions. 29 GAOR (1974) 2\textsuperscript{nd} Cmte., 1648\textsuperscript{th} mtg., (A/C.2/SR.1648) para. 20.


245 See T. M. Franck, “The Emerging Right to Democratic Governance” 86 American Journal of International
supported by self-determination.

In the drafting of international instruments there has been widespread, although not universal, support for a connection between self-determination and democratic government. The two have been connected by states, in particular, in the drafting of the Helsinki Final Act and the Friendly Relations Declaration, the latter including a specific reference to representative government. A connection has also been made between self-determination and article 21(3) of the Universal Declaration of Human Rights. All these examples provide evidence for *opinio juris*. But, it is in the Civil and Political Covenant, where self-determination, in article 1, sits alongside article 25, on the right to take part in public affairs and vote and be elected, that the connection seems most developed.\(^{246}\)

There has been considerable evidence to support an interpretation of article 1 of the Covenants which includes a right to democratic government, both in the comments of states in the drafting and before the Human Rights Committee. This interpretation has not been universal. Some states have argued that self-determination is satisfied in a one party state, although the collapse of communism and the general growth of democracy has reduced their numbers.

In General Comments No. 12 (21) and 25 (57) the Human Rights Committee appeared to support such a connection, while not completely endorsing it. In General Comment No. 12 (21) it called on states to describe the constitutional and political processes which in practice allowed for the exercise of the right.\(^{247}\) General Comment No. 25 (57) was more forthright. It stated that article 25 was related to, but distinct from the right of peoples to self-determination in article 1, on account that article 25 was individually framed. Nonetheless, by virtue of self-determination in article 1, peoples had the right to freely determine their political status and to enjoy the right to choose the form of their constitution or government.\(^{248}\)

There appears, therefore, to be a connection between the exercise of the right of self-determination and the enjoyment of the rights in article 25. It may be reasonably said that respect for the individual rights under article 25 allows the exercise of self-determination of peoples under article 1. This again represents self-determination lending an extra dimension to other legal obligations. What is less clear, though, is whether article 1 has developed into a distinct peoples’ right to democratic government. It should also be noted that, even if such a right existed, in terms of enforcement, article 25 is a more effective formulation of rights connected with democratic government. As General Comment No. 25 (57) noted, rights under article 25, unlike article 1, can be claimed under the Optional Protocol.

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7. The Use of Force

The relationship between the right of peoples to self-determination and the use of force can be conveniently divided into four possible obligations:
1. The prohibition on the use of force by states to deny peoples their right to self-determination.
2. The prohibition on assistance to states which are forcibly denying peoples their right to self-determination.
3. The right of peoples to use forcible means to exercise their right of self-determination.
4. The right of states to provide military assistance to peoples struggling for their right of self-determination.

Of these possible obligations, the first two are the least controversial and the most widely accepted. The duty of states to refrain from the use of force to deny self-determination can be found in principles 1 and 5 of the Friendly Relations Declaration, principle 4 of the Colonial Independence Declaration and the preamble of the Definition of Aggression. This restriction would also appear to be implicit in any provision on respect for the self-determination of peoples. It would be hard to see, for example, how the duty to promote the realisation of self-determination in article 1(3) of the Covenants and principle 5 of the Friendly Relations Declaration could be compatible with such a use of force. The obligation also appears to be supported by the International Court in Nicaragua, in which it considered that this duty, outlined in principle 1 (not principle 5 on equal rights and self-determination) of the Friendly Relations Declaration, was an indication of opinio juris. This was reinforced by the Court in the Wall Opinion, which again citing GA Res. 2625(XXV), found that: “Every State has the duty to refrain from any forcible action which deprives peoples referred to (in that resolution)... of their right to self-determination.” The Court did not specify that Israel’s construction of the West Bank barrier in itself constituted such “forcible action”. Judge Higgins in her separate opinion argued that it was not. However, proceeding from the principle of the illegality of territorial acquisition resulting from the use of force, the barrier was found to give “expression in loco” to such acquisitions, in the shape Jewish settlements and changes to the status Jerusalem. Together with changes to the demographics of the Arab population, these were found to “severely impede”

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251 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion), (2004), www.icj-cij.org (12/07/04) paras. 88, 156.
252 “Every State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of that right to self-determination and freedom and independence.” Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits), ICJ Reports (1986) p. 101, para. 191.
254 Judge Higgins, Separate Opinion, ibid. para. 35.
Palestinian self-determination. This was found to be a breach of Israel’s obligation to respect the right, and, in turn, established an obligation for other states not to recognise, or aid or assist that illegal situation.

The third rule on the use of force by a people in exercise of the right of self-determination has been more controversial. The Friendly Relations Declaration referred to the right of peoples deprived of exercise of the right to self-determination by forcible action to take actions against and resist such forcible action. The Definition of Aggression referred to the right of peoples forcibly deprived of the right of self-determination to struggle to that end. Subsequent instruments, such as the Vienna Declaration 1993 and the UN Fiftieth Anniversary Declaration 1995 have spoken more ambiguously about, “the right of peoples to take any legitimate action, in accordance with the Charter of the United Nations, to realize their inalienable right to self-determination.” The drafting, in particular, of the 1995 Declaration revealed conflicting interpretations of what this meant.

Both the Friendly Relations Declaration and the Definition of Aggression, of course, represented consensus agreements in an area of sharp disagreement between states. Neither endorsed an inherent right of peoples to use forcible action in self-determination, referring only to peoples who had been forcibly deprived and action against that forcible deprivation. The nature of the “resistance” and “struggle” of those peoples was never specified, although by implication it would appear to involve forcible action. A right to resist in those circumstances, though, would appear to be no more than an exercise of the right to self-determination. This, in itself, does not impose any new obligations on states, which already have a duty to refrain from forcible action that deprives peoples of self-determination.

The fourth rule on assistance by states is the most controversial. This appears to represent self-determination being used to legitimise a challenge to a number of basic international legal principles: the prohibition of the threat or use of force against the territorial integrity of states, non-intervention and respect for state sovereignty. Like other challenges, such as colonial self-determination and permanent sovereignty, it shows that it is one thing to challenge legal principles and another to replace them.

The basic statements on state assistance can be found in the Friendly Relations Declaration and the Definition of Aggression. Both refer to peoples struggling against the forcible denial of self-determination being entitled to seek and receive “support” in accordance with the “purposes and principles” and the “principles”, respectively, of the Charter. The formula in both resolutions was not to specify what “support” included, but to refer to the principles of the Charter. This, in turn, depended what that support was. If it involved humanitarian assistance it was unlikely to clash with the principles of Charter. The real issue was whether military assistance, arms and personnel, which under normal circumstances would be a violation of article 2(4) of the Charter, could be compatible with it in the context of self-determination.

From the original drafting of the Charter there was little reason to believe that it was. The Charter was the product of a devastating war and sought to unambiguously restrict the use of force in the relations of states, except in the limited situations of self-defence and authorisation.
by the Security Council. The Second World War may have been presented as a struggle for self-determination, and the principle seen as a basis for peace, but its use as a pretext for intervention, as in the case of Austria, was only cited as an abuse.

Times, though, change and in the late 1960s and 1970s this position was challenged in the Declaration and the Definition using self-determination. This challenge took the normal two stages: first, self-determination was used to attack the legitimacy of existing rules; and, second, new rules were formulated based on the right. The results, however, were mixed.

Coalition-building can again be seen in this mixed picture. The Friendly Relations Declaration did build coalitions around self-determination in some areas, such as the use of “speedy”, which nodded to both immediate and progressive interpretations of the right. However, the question of whether self-determination could encompass military assistance proved much more divisive, splitting states into sharply contrasting positions. The compromise was to move this controversy into the purposes and principles of the Charter. From a legal perspective, considering that the purpose of these resolutions was to develop Charter principles, this might seem like the drafters shooting were themselves in the foot. The result of the resolutions was to make the principles, if anything, even more ambiguous. However, from the nationalist perspective, it was a success. Self-determination had been used to inject a margin of uncertainty into the Charter principles on force. It can be noted that legal writers are now divided on the issue and that the ICJ passed over the issue without comment in Nicaragua. The Court in the Wall opinion also failed to clarify what action in accordance with the “United Nations Charter” and “international law” actually entailed.

From a legal perspective, it is obvious what an unsatisfactory situation moving the ambiguity into the principles of the Charter has created. However, this ambiguity seems also to have mitigated against the second stage in the challenge. Any new rules on state support have to be derived from ambiguous formulations, reflecting deep divisions in the international community. It is questionable whether the provisions in the Friendly Relations Declaration or the Definition of Aggression provide any coherent opinio juris, much less sufficient legal intent to effectively amend article 2(4) of the UN Charter.

8. Principle or Right?

The next three categories deal with how self-determination is viewed as a norm. The first concerns the question of whether it is properly expressed in international law as a principle or a

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262 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (2004), www.icj-cij.org (12/07/04) para. 159.
right. This, in turn, begs two further questions: what is the difference between self-determination as a principle and a right; and what is the significance of it being one or the other? There are various arguments about the legal status of self-determination. One school of thought holds that self-determination is best expressed as a principle in international law. However, another particularly popular one proposes that self-determination has been transformed from a principle into a right and it is this claim on which this section will focus.

The idea that self-determination is either a principle or a right suggests that a clear distinction can be drawn between the two. However, this tends to be undercut by practice. Principle and right have frequently been used interchangeably or combined when describing self-determination and this can be seen throughout the legal process.

Instruments like the Friendly Relations Declaration and the Helsinki Final Act refer to self-determination both as a principle and a right. The UN Charter proclaims the principle of equal rights and self-determination of peoples. This language suggests not only that self-determination is a principle, but that in principle peoples have an equal right to self-determination. And comments by the Rapporteur for the subcommittee responsible for the provision support both interpretations: “what is intended… is to proclaim the equal rights of peoples as such, consequently their right to self-determination. Equality of rights, therefore, extends in the Charter to states, nations and peoples.” He also stated that: “the principles of equal rights of people and that of self-determination are two component elements or one norm.”

This fluidity between principle and right was also reflected in states’ opinions. The Human Rights Covenants, though, do only refer to a right of self-determination. Moreover, they were also an attempt to specifically frame self-determination as a right, which succeeded in the face of some considerable opposition. Nonetheless, given this background, one might expect states in the drafting to be highly conscious of the difference between a principle and a right. But, instead, they used the terms interchangeably or combined them as “the principle of the right”, and this has continued in reports to the Human Rights Committee.

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International bodies have also used the terms interchangeably. The International Court of Justice used both principle and right to describe self-determination in Western Sahara and East Timor. In Western Sahara it also considered that GA Res. 1514(XV) enunciated, “the principle of self-determination as a right of peoples”, suggesting that a principle could be simultaneously framed as a right. In the Burkina Faso/Mali Frontier Dispute case, the Court appeared to equate principle and right, and in the Wall Opinion combined them: “the principle of the right”. In Namibia it did just call self-determination a principle (in one of two references), but later on referred to the “rights of the people of Namibia.” Principle and right were also equated by the Canadian and Russian courts in Re. Secession of Quebec, the Badinter Commission in Opinion No. 276 and Chechnya, the Badinter Commission in Opinion No. 278 and the Committee on the Elimination of Racial Discrimination in General Recommendation XXI (48). The fact that this interchangeable use has been so widespread throughout the law of self-determination by people who are trained to be careful with words suggests that there is more to it than simple linguistic carelessness.

Descriptions of principle and right also tend to point to the difference between them being one of emphasis and perspective. India, for example, in the drafting of the Covenants, argued that principle and right, “were two aspects of the same reality: what was a principle and an obligation was an emphasis and perspective.” India, for example, in the drafting of the Covenants, argued that principle and right, “were two aspects of the same reality: what was a principle and an obligation was an emphasis and perspective.” In view of the evolution of legal thought, to draw a precise boundary line between what was a principle and what was a right.” India, for example, in the drafting of the Covenants, argued that principle and right, “were two aspects of the same reality: what was a principle and an obligation was an emphasis and perspective.” In view of the evolution of legal thought, to draw a precise boundary line between what was a principle and what was a right.”

270 Western Sahara (Advisory Opinion) ICJ Reports (1975) p. 31, para. 55.
271 Burkina Faso/Mali Frontier Dispute Case: “At first sight this principle conflicts outright with another one, the right of peoples to self-determination”. ICJ Reports (1986) p. 567, para. 25.
272 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, (2004), www.icj-cij.org (12/07/04) at para. 118.
273 Namibia (Advisory Opinion), ICJ Reports (1971) p. 31, paras. 52-3.
274 ICJ Reports (1971) p. 54, para. 118.
275 Re. Secession of Quebec: “The existence of the right of a people to self-determination is now so widely recognized in international conventions that the principle has acquired a status beyond ‘convention’ and is considered a general principle of international law”. 161 DLR (1998) 4th Series, pp. 434-5, para. 114. See also p. 438, para. 127.
276 The Tatarstan Case: “[T]he right to self-determination is one of the basic principles of international law.” 30:3 Statutes and Decisions of the USSR and Its Successor States (1994) p. 40.
277 The Chechnya Case: “[T]he right to self-determination ‘must not be interpreted as sanctioning or encouraging any actions that would lead to the division or the complete violation of the territorial integrity or political unity of sovereign and independent states acting in accordance with the principle of the equal rights and self-determination of nations.’” 31:5 Statutes and Decisions: The Laws of the USSR and Its Successor States (1995) p. 52.
whole seems to be seen to be more general. It is neutrally framed, being applied to a subject rather than being held by a subject or against an object. It is also visibly relative. Principles are weighed against each other to determine how they are to be applied. A right of self-determination, on the other hand, is held by a subject, a “people”, against an object, states, which have obligations towards that subject. It is seen as more active, being claimed by a people rather than being applied to them, and the word itself is emotionally and politically charged. Nonetheless, this reflects more a difference in approach. It would not be unreasonable to say that recognition of the principle of self-determination potentially implies a right for peoples and obligations for states, each one being a different aspect of the other. This would certainly account for the interchangeable use of the terms.

However, is it possible to draw a more substantial line between the two which might justify self-determination being one or the other, or changing from one into the other? The main line between a principle and a right tends to be drawn around the issue of the people. Both the principle and the right of self-determination are ultimately centred and dependent on the identification of a people. However, as a right is actually held by a people, it puts much more emphasis on the subject than a principle, which only applies to a people. Whereas a group cannot exercise a right unless it is a people, and thus identification as a people is a prerequisite to enjoy a right, a principle could possibly exist for a long time in a general form, with peoples only being identified on its application. Thus, Britain, in particular, has argued that self-determination in international law is best expressed as a principle, “primarily because of the almost insuperable difficulty of defining or identifying the category of persons possessing the right.”

Certainly in terms of the exercise of the right of self-determination this is important. The most important attempt to create a legal framework for the exercise of the right has been the Optional Protocol to the Civil and Political Covenant. This might have potentially allowed persons claiming to represent peoples to bring complaints over the violation of self-determination. However, such petitions have been excluded and it is fairly clear from the Human Rights Committee in *Lubicon Lake Band* and *South Tirol* that an important factor in this exclusion has been the problem of identifying peoples.

However, this relates to the exercise of the right of self-determination within a legal framework, not necessarily the existence of a right itself. An argument can and has been made that rights do not in themselves depend on their enjoyment. As a matter of principle I can still have a right even if I am prevented from exercising it. Indeed, rights are usually most valuable where they are least respected. The fact that a dictatorship prevents people from exercising

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282 “[T]he notion of a right has no meaning unless, first of all, we can determine the bearers of the right and the persons who are obliged to respect it.” Crawford op. cit. no. 200 at p. 8;


human rights makes those rights more rather than less relevant. Similarly the right of self-determination is invoked much more for peoples under foreign domination than for peoples without it.

Once this connection between the exercise and the existence of a right is broken, then the line between principle and right also crumbles. With no requirement for a legal framework for its implementation, a right of self-determination has no need for peoples to be defined in order to exist. This seems to be born out in practice. The Human Rights Covenants and the Colonial Independence Declaration were able to declare self-determination as a “right” without ever defining the peoples who exercised it. The African Commission on Human and Peoples’ Rights appeared to have no problem in proclaiming that, “[a]ll peoples have a right to self-determination”, and continuing, “[t]here may however be controversy as to the definition of peoples and the content of the right.”

Similarly, the Canadian Court in Re. Secession of Quebec could recognise both that, “[i]nternational law grants the right to self-determination to ‘peoples’”, and that, “the precise meaning of the term ‘people’ remains somewhat uncertain.”

The Badinter Commission also seemed to find no contradiction in its statement that international law as it currently stands does not spell out all the implications of the right to self-determination. The identification of peoples, then, does not seem to separate a right from a principle. Ambiguous principles far from preventing the formation of rights, simply lead to ambiguous ones.

If there is, then, no fundamental difference between self-determination as a principle and a right in international law, what is the significance of the claim that it has been transformed from one into the other? Behind this assertion is the idea that self-determination in the UN Charter was originally a mere principle, which through state practice and instruments like the Covenants and the Colonial Independence Declaration was changed into a right, at least in the colonial context. It is a claim very much focussed on colonial self-determination. The clear implication of this theory is that peoples and their rights, and conversely states and their obligations, have become increasingly defined in the colonial context.

There are two basic objections to this claim. First, it can be questioned whether self-determination was really just a principle in the UN Charter. The language of articles 1(2) and 55 and the drafting suggests a more fluid interpretation. It was true that the Covenants and the Colonial Independence Declaration did frame self-determination as a right. However, later instruments, like the Friendly Relations Declaration referred to both a principle and a right. Thus, in the twenty-five year period between the Charter and the Friendly Relations Declaration there was arguably no change in the status of self-determination as both a principle and a right. One could argue for a change in emphasis between principle and right, but to argue that self-determination was transformed from one into the other seems to ignore a more fluid reality. This is also equally true of the argument that self-determination at the time of UN Charter was a mere principle.

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principle because it had not yet been incorporated into customary law. However, if self-determination was generally a political principle, why could it not also be a political right? When the Commission of Jurists found in 1921 that self-determination was not part of positive international law, it was expressed as the, “principle that nations must have the right of self-determination”. Thus, in the periods when it was essentially political, primarily a treaty-based law and finally part of customary law, self-determination has been expressed both as a principle and a right.

Second, it may be questioned how much the concept of a right can be connected to the clarification of peoples and obligations in the decolonisation process. The right of self-determination promoted in instruments like the Covenants and the Colonial Independence Declaration was always simultaneously broader and narrower than the populations of all non-self-governing and trust territories. On one hand, the right was extended to the extremely ambiguous category of peoples under foreign or alien domination. On the other, the right did not automatically extend to all colonial populations. As the ICJ underlined in Western Sahara, colonial self-determination is still determined by balances of principles and the “consideration” that a population is a “people”. This seems much closer to the idea of a principle than a right. It may be that various instruments and the practice of decolonisation have worked to expand and develop the content of self-determination in the colonial context, but, as Namibia demonstrates, this can be expressed by a principle as much as a right.

Nonetheless, even if self-determination’s supposed transformation from a principle into a right may be legally questionable, it had other implications. Rights generally appear more active and politically charged, and on their flip side they emphasise obligations. These features were particularly important for self-determination when it was being used to challenge the legitimacy of colonial rule. One problem in this challenge was that self-determination, expressed mainly as a principle, sat in the UN Charter alongside the Trust and Non-Self-Governing systems, which regulated, and thus legitimised, colonial government. Such a formulation hardly looked like the stick with which to beat colonialism. Therefore, if self-determination was to challenge colonial rule, it needed to appear more active and political, to emphasise obligations, and above all to be seen to be in the hands of the people. A right fulfilled all these functions. Thus, self-determination was seen to have, in the words of Sudan, “graduated from the level of principle to that of right.” It was a change that more than anything reflected a new attitude to self-determination. It can be noted that states’ views and the literature on this change are often

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293 See Saudi Arabia: “The right of peoples to self-determination was... not only a recognized principle, but a well-established right. If its implementation required a spirit of compromise, it should be asked of the peoples who were fighting to gain the right when the time came for them to negotiate the conditions of their freedom, rather than the delegations which upheld the right.” 10 GAOR (1955) 3rd Cmtee., 633rd mtg., (A/C.3/SR.633) para. 24; Philippines: “He could not agree with those representatives who held that self-determination, as contemplated in the Charter of the United Nations, should be regarded as a guiding principle and not as a right. Such a contention ignored the fact that the Charter, like the constitution of any country, required constant adjustment to new needs and consequently had to be flexible... The [General] Assembly, alive to the increasing assertiveness of the peoples' aspirations towards independence, had indicated unambiguously in its resolution 637(VII) that it regarded self-determination as a right. During the ten years in which it had been in existence, the United Nations had never slavishly adhered to the actual words of the Charter, the letter and spirit of which the General Assembly had often had occasion to interpret. Accordingly, so far as the right of peoples to self-determination was concerned, the
focussed on political aspects, or the changing nature of legal obligations. Thus, in terms of the legitimacy, the transformation from a principle into a right was an integral part of the development of colonial self-determination, even if its legal significance is more questionable.

9. Jus Cogens and Peremptory Norms

It is argued throughout this work that self-determination is a doctrine of political and legal legitimacy. When applied to international law, it enhances the status of some legal principles, but may attack the legitimacy of others. International law also has a legal mechanism for ranking legal rules and determining their validity: peremptory or jus cogens norms. A peremptory norm is defined in article 53 of the Vienna Convention on the Law of Treaties 1969 as “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” The Vienna Convention also provided that a treaty would become void if at the time of its conclusion it conflicted with a peremptory norm (article 53), or if after its conclusion a new and contradictory jus cogens norm emerged (article 64).

Commentators seem divided over whether self-determination actually amounts to such a norm, although there is substantial support for the idea. The right has also been mooted for a long while. General Assembly had already taken a decision which it could hardly reverse. Nationalism was on the march and the United Nations could not ignore that historic fact, if the Organization was to continue to exist.” Ibid. 646th mtg., (A/C.3/SR.646) para. 39; Venezuela: “[R]egarded self-determination not merely as a political principle but as a right, for which his country, like so many others, had had to struggle before achieving independence.” Ibid. para. 42; Ecuador: “[T]he peoples who had thrown off the colonial yoke wished the principle of self-determination to be applied to all the remaining colonies, but, being anxious to observe the rule of law, wanted to formulate the principle as a right and to include it in a legal text which would be universally recognized.” Ibid. 650th mtg., (A/C.3/SR.650) para. 13;

294 “Under the moral and political imperatives of decolonization, however, the vague ‘principle’ of self-determination soon evolved into the ‘right’ to self-determination.” Hannum op. cit. no. 289 at p. 12; “The vague principle of self-determination developed through the decolonization process into a full-blown right and this because of the moral and political imperatives of the process.” Henrard op. cit. no. 289 at p. 284; “During the postwar period, self-determination gradually made the transition from a political principle to a legal right. The impetus behind the transformation was the evolution of human rights norms in general and the need to create a legal vehicle for decolonization in particular.” Wippman op. cit. no. 289 at p. 10; “[S]elf-determination was no longer a mere guiding principle but a right that could be invoked by the peoples concerned to assert their entitlement to sovereign independence.” Alston op. cit. no. 289 at p. 263.

295 “[I]t seems academic to argue that as Assembly resolutions are not binding nothing has changed, and that ‘self-determination’ remains a mere ‘principle’, and Article 2(7) is an effective defence against its implementation.” Higgins op. cit. no. 65 at pp. 101-2.


time by the International Law Commission as a “possible” example of *jus cogens*. The 2001 commentary on the draft articles on state responsibility tentatively and non-committedly noted that in regard to *jus cogens*, “the obligation to respect the right of self-determination deserves to be mentioned.” However, this was rather less than a ringing endorsement that the right did actually have this status.

The definition of *jus cogens* in the 1969 Vienna Convention, in fact, provides three possible tests for assessing whether self-determination is peremptory. First, would be evidence of a consensus around self-determination as *jus cogens*, which might be consistent with recognition by the international community of states as whole. However, while there have been statements of support by some states in the drafting of the Vienna Convention on the Law of Treaties, the Friendly Relations Declaration and in submissions to the ICJ in the Wall Opinion, this would seem to fall short of acceptance by the community of states “as a whole”.

The second is the status of treaties. If self-determination were *jus cogens* there may be examples of treaties which were found to be void when concluded because they conflicted with it. If no such treaties were concluded at all, that might, at least, point in the same direction.

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301 USSR, 1 UNCLT (1968), (A/CONF.39/11), Plenary Meetings, 52nd mtg., para. 3; Sierra Leone, ibid. 53rd mtg., para. 9; Ghana, ibid. para. 16; Cyprus, ibid. para. 66; Czechoslovakia, ibid. 55th mtg., para. 25; Ecuador, 2 UNCLT (1969), (A/CONF.39/11/Add.1), Plenary Meetings, 19th mtg., para. 35; Cuba, ibid. para. 42; Poland, ibid. para. 71; Byelorussian SSR, ibid. 20th mtg., para. 48; Iraq, 25 GAOR (1970) 6th Cmtee., 1180th mtg., (A/C.6/SR.1180) para. 6; Ethiopia, ibid., 1182nd mtg., (A/C.6/SR.1182) para. 49; Trinidad and Tobago, ibid., 1183rd mtg., para. 5.


There might also be examples of treaties concluded in earlier times which have subsequently been treated as void because they clashed with self-determination.

However, there are a number of treaties which seem to conflict with self-determination. The Timor Gap Treaty 1989 between Australia and Indonesia, which provided for the exploitation of East Timor’s natural resources after its forcible annexation by Indonesia, scarcely seemed in conformity with self-determination. Yet practice with this instrument does not suggest that violated a *jus cogens* norm. The treaty, of course, lay at the centre of the 1995 *East Timor* case, although the Court declined to exercise jurisdiction. Nonetheless, with East Timor’s transition to independence, the United Nations Transitional Authority in East Timor (UNTAET) did provisionally uphold the treaty in 2000. Indeed, its ultimate fate was not decided by *jus cogens* but by *lex posterior*. In 2001 UNTAET and Australia signed a new accord, the Timor Sea Arrangement, which maintained many of the Timor Gap Treaty’s provisions, but gave a greater share of oil revenues to East Timor. None of this would seem to be compatible with a treaty that was void.

The Treaty of Utrecht 1713, which in article X provides for a Spanish right of pre-emption if Britain relinquishes its title over the non-self-governing territory of Gibraltar, might be seen as a treaty which conflicts with the subsequent emergence of self-determination. The article, which also prohibits Jews and Moors from residing in the territory, would, at least, seem inconsistent with subsequent standards on non-discrimination and minority rights. Nonetheless, both Britain, the administering state, and Spain have argued that the treaty restricts the exercise of self-determination in Gibraltar.

Both types of treaty may be seen in Hong Kong, which was also originally designated as a non-self-governing territory. In 1997 the territory was transferred by Britain to China on the basis of a treaty, the Sino-British Joint Declaration of 1984, without regard to the wishes of the population, on the basis of previous commitments under the Treaty of Peking of 1898.

It may, of course, be argued that populations like Gibraltar and Hong Kong were simply not “peoples” with a right to self-determination. This might be harder for East Timor, which is now

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309 Article X: “And in case it shall hereafter seem meet to the crown of Great Britain, to grant, fell, or by any means to alienate therefrom the propriety of the said town of Gibraltar, it is hereby agreed, and concluded, that the preference of having the same, shall always be given to the crown of Spain before any others.” Treaty of Utrecht 1713, 28 CTS (1713-4) pp. 325-347 at p. 331.

310 Article X: “And her Britannic Majesty, at the request of the Catholic King, does consent and agree, that no leave shall be given, under any pretence whatsoever, either to Jews or Moors, to reside or have their dwellings, in the said town of Gibraltar”. Ibid. at p. 330.

311 See statement by the British Minister, Foreign and Commonwealth Office: “Under the treaty of Utrecht independence is not an option, unless Spain is prepared to agree.” 61 *British Yearbook of International Law* (1990) p. 510; also the Spanish representative to the United Nations Special Political and Decolonisation Committee: “Gibraltar could continue to be a British colony or revert to Spain. No other solution was possible. Spain would continue to oppose any initiative that would lead to the question of Gibraltar being settled other than in accordance with the retrocession clause of the Treaty of Utrecht...” 6 *Spanish Yearbook of International Law* (1998) at p. 140.

an independent state and was recognised as a people in Security Council and General Assembly resolutions. However, at the same time, this ambiguity over non-self-governing territories undermines the idea that self-determination is a well-established legal principle with a status of \textit{jus cogens}.

The third test is evidence of self-determination’s relationship with other legal principles. If self-determination were \textit{jus cogens} it should prevail over other norms unless they were peremptory too. The law of self-determination is normally structured as a balance between the right and other principles, so one would expect to see the right normally override those principles unless they could also be shown to be \textit{jus cogens}. However, generally in its relations with principles like state sovereignty, territorial integrity, \textit{uti possidetis} and the inviolability of frontiers, self-determination seems to take a subordinate role.

Its peremptory status might still be tenable if those principles were likewise \textit{jus cogens}, but for some of these principles this is questionable. \textit{Uti possidetis}, for example, is a pragmatic rather than a fundamental principle,\textsuperscript{313} derived from a Latin defence of the status quo: \textit{uti possidetis, ita possideatis} (as you may possess, so you may possess).\textsuperscript{314} If it were a peremptory norm then colonial borders could not be overturned even by mutual agreement. Such borders, though, have been changed, for example, in British Togoland, British Somaliland, the British Cameroons, the division of Rwanda and Burundi, and the union of Zanzibar with Tanganyika.\textsuperscript{315} It would also mean that border disputes in Africa or Latin America could not be settled by adjudication or even by agreement between the parties if the result deviated from \textit{uti possidetis}. This again would seem inconsistent with practice.\textsuperscript{316}

The same argument can be made for the inviolability of frontiers, which balanced self-determination in both the Helsinki Final Act and Paris Charter. States in the drafting of those instruments specifically recognised that “inviolability” did not mean “immutability” and allowed that frontiers might be changed by mutual agreement.

Thus, although self-determination proposes that legal obligations which run counter to it are invalid, the idea that this can be explained by \textit{jus cogens} is contradicted by the available evidence. A better explanation might be that self-determination is doctrine of legitimacy, which underpins international law, but is not necessarily integral to it. From such a position it can challenge the validity of legal obligations, while not necessarily needing legal mechanisms to do so. If the law of self-determination glows with legitimacy and appears more important than other principles (and it may be that much of the support for its peremptory status simply reflects this perception)\textsuperscript{317} it may be from reflected light whose source lies elsewhere.


\textsuperscript{316} \textit{Beagle Channel Arbitration} (Argentina v. Chile), 52 ILR at p. 133; \textit{Case Concerning the Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua)}, ICJ Reports (1960) at pp. 199-200, 215; \textit{The Indo-Pakistan Western Boundary (Rann of Kutch) Case (India v. Pakistan)}, 50 ILR at p. 470.

\textsuperscript{317} “The studies on the notion of \textit{jus cogens} and on the identification of rules having that character have often been influenced by ideological conceptions and by political attitudes.” \textit{Case Concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)}, 83 ILR at p. 25.
10. Erga Omnes

This leads on to self-determination as an erga omnes principle.\(^{318}\) Erga omnes, like jus cogens, presumes a mechanism for ranking the importance of legal rules. As defined by the ICJ in Barcelona Traction in 1970, erga omnes obligations were held by states, “towards the international community as a whole”, and in view of their “importance”, “all States can be held to have a legal interest in their protection”.\(^{319}\) In East Timor in 1995 the Court found the idea that self-determination had an erga omnes character was “irreproachable”,\(^{320}\) and this was reaffirmed in the Wall Opinion in 2004.\(^{321}\) But what did this actually mean? Did the label of erga omnes simply reflect the perception that self-determination was important, or did it give the right a new legal significance?

There are a number of reasons why self-determination might be considered to be erga omnes. First, the right has been widely presented as a cornerstone of the international community. Friendly relations between nations, in articles 1(2) and 55 of the UN Charter, were based on respect for the principle, and it was seen to promote friendly relations and co-operation among states in the Friendly Relations Declaration. In the drafting of the Covenants it was frequently argued that self-determination was the prerequisite for human rights and this was explicitly affirmed in GA Res. 637(VII). With such apparently fundamental roles self-determination would seem to be necessarily the concern of all states.

Second, self-determination is framed universally as a right of all peoples. If states assume the obligation to respect the right of self-determination, they necessarily have the duty to respect its exercise by all peoples. The Friendly Relations Declaration spells out the duty of every State to promote realisation of the equal rights and self-determination of peoples and this was cited by the International Court in the Wall Opinion.\(^{322}\) Article 1(3) of the Covenants also imposes the duty on states parties to promote the realisation of self-determination and in the Wall Opinion the Court considered that this applied for “all peoples”.\(^{323}\) The Human Rights Committee in General Comment No. 12 (21) affirmed that the provision extended to all peoples unable to exercise the right.\(^{324}\) The Russian Constitutional Court in Tatarstan also recognised that article 1 imposed

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\(^{319}\) Case Concerning the Barcelona Traction, Light and Power Company Limited (Belgium v. Spain), (Second Phase), ICJ Reports (1970) p. 32, para. 33.

\(^{320}\) Case Concerning East Timor (Portugal v. Australia), ICJ Reports (1995) p. 102, para. 29.

\(^{321}\) Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion), (2004), www.icj-cij.org (12/07/04) paras. 88, 156.

\(^{322}\) Ibid. para. 156.

\(^{323}\) Ibid. para. 88.

obligations on “all states” for “all peoples”. 325

Third, self-determination is closely connected with a number of principles which by their nature would seem to be the concern of all states. The principle of sovereign equality must by definition equally apply to all states. Non-intervention in the internal affairs of states or the prohibition of the threat or use of force would be meaningless if they did not apply to all states in their relations with all other states.

The proposition that every state has a legal interest in the right of self-determination may then reflect its fundamental character, its political importance, its universal application and the generality of the obligations it imposes. However, a legal interest for all states in the self-determination of all peoples does not need to be expressed through the language of erga omnes. It can be quite simply accommodated in the statement that the right of peoples to self-determination is part of customary international law. This proposition, which is widely accepted, would establish a general obligation on states to respect, and even promote, the self-determination of all peoples. The question is, what would erga omnes add to such an obligation? The International Court has now had two opportunities to spell out what the “irreproachable” erga omnes character of self-determination means. On both counts the results have been question-begging.

The Court in East Timor did not elaborate on why it considered the erga omnes character of self-determination to be irreproachable, although it did subsequently describe it as “one of the essential principles of contemporary international law”. 326 The Court has used similar language in other cases, like Corfu Channel, 327 Reservations to the Genocide Convention, 328 Barcelona Traction, 329 Tehran Hostages, 330 Nicaragua 331 and the Nuclear Weapons Opinion, 332 when accepting principles of a clear moral or humanitarian character without enquiring as to their formal source. The legal consequences of this finding were also obscure.

One possible consequence of every state having a legal interest in the right of self-determination of any people might be actio popularis, a right of any interested state to bring actions before the ICJ. 334 Controversially, this concept was rejected by the Court in the South

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327 “Such obligations are based, not on the Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity”. Corfu Channel Case (Merits), ICJ Reports (1949) p. 22; Also cited in Nicaragua, ICJ Reports (1986) p. 114 para. 218 and Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion), ICJ Reports (1996) p. 257, para. 79.
328 “[P]rinciples which are recognized by civilized nations as binding on States, even without any conventional obligation.” Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion) ICJ Reports (1951) p. 23.
332 “[U]niversally recognized humanitarian principles”. Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion), ICJ Reports (1996) p. 258, para. 82; see also the Court’s application of the Martens Clause p. 260, para. 87.
333 See Simma and Alston loc. cit. no. 304 at pp. 105-6.
West Africa Cases in 1966. In this case Liberia and Ethiopia as members of the former League of Nations attempted to bring an action against South Africa over the violation of its mandate over South West Africa (Namibia), including the denial of self-determination.335 Nonetheless, despite its erga omnes rhetoric, the Court in East Timor did not appear to make this connection. On the contrary, it stated that: “the erga omnes character of a norm and the rule of consent to jurisdiction are two different things.”336 It is by no means clear whether erga omnes would allow states to bring actions in the ICJ over violations of self-determination to which they are not directly parties.

Erga omnes was also developed in the Wall Opinion, but this also underlined the uncertainty in the concept. The Court confidently stated that, “self-determination is today a right erga omnes”,337 but its later application appeared less sure. In considering the obligations for states as a result of the illegality of the Israeli construction of the wall, the Court recalled the “erga omnes character” of self-determination. But, it appealed equally to customary international law, and the provision in the Friendly Relations Declaration that every state had a duty to promote the realisation of the principle of equal rights and self-determination of peoples.338 Its other finding that certain obligations under international humanitarian law also had an erga omnes character was similarly backed by custom.339 In neither case did the Court extend erga omnes where it could not demonstrate existing general obligations for states under international custom. As Judge Higgins noted in her separate opinion, the obligations covered by erga omnes flowed either from the “self-evident” principle that, “an illegal situation is not to be recognized or assisted by third parties”, or from, “customary international law, no more and no less.”340

The obligations which the Court attributed to other states, in part, on the basis of erga omnes were non-recognition, non-assistance and, while respecting the UN Charter and international law, to see to it that any impediment to Palestinian self-determination resulting from the construction of the wall was brought to an end. The relationship between the latter obligation and the use of force has already been looked at, but the statement also suggests the possibility that states might deploy countermeasures in support of self-determination. It is recognised that states with a legal interest in certain legal obligations may be entitled to use proportionate, non-forcible countermeasures to ensure compliance with those obligations.341 This entitlement does not extend to “a third State”.342 States must have a direct legal interest. The Court’s statement may suggest

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338 Ibid. para. 156.  
339 “[A] great many rules of humanitarian law... are ‘to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law’. In the Court’s view, these rules incorporate obligations which are essentially of an erga omnes character.” Ibid. para. 157.  
342 Nicaragua (Nicaragua v. United States of America) (Judgment), ICJ Reports (1986) p. 127, para. 249. But see Judge Schwebel, Dissenting Opinion, Nicaragua (Nicaragua v. United States of America) (Request of Indication of...
that states might have that interest, although this could be based as much on customary law as *erga omnes*. In the past, sanctions in the UN framework have been called for on Portugal, Southern Rhodesia, and South Africa for their failure to respect the self-determination of peoples.

Thus, it remains questionable from the practice of the ICJ whether self-determination as *erga omnes* actually involves distinct legal obligations, rather, to the extent that it might be seen to produce obligations, it seems to shadow the general nature of obligations under customary international law. However, if the legal consequences of *erga omnes* remain open, it appears to have significance in terms of legitimacy. The designation of, “a right *erga omnes*”, suggests that self-determination is somehow something more than a mere “right”. The Court’s discussion of *erga omnes* in *Barcelona Traction*, *East Timor* and the Wall Opinion are punctuated with words like “importance”, “essential” and “character”. *Erga omnes*, whatever its ambiguous legal significance, may also function as a ribbon, which can be attached to the right of self-determination to highlight its importance and the legitimacy of its obligations.

**Final Remarks**

**a. Legitimacy and Obligations**

This survey of obligations under self-determination again underlines that the law of self-determination is the product of the interaction between nationalism and international law. Self-determination may be referred to as a legal principle, but the doctrine is fundamentally not a legal one. It does, however, occupy a strategic position from which it can both underpin international law and remain outside it. This means that it can be appealed to both to support or challenge other legal principles and this framework provides an effective model for examining self-determination in international law.

Indeed, many aspects of self-determination, such as its supposed transformation from a principle into a right, and assertions of its *jus cogens* and *erga omnes* status appear to be best explained in terms of legitimacy. Other aspects, such as the right of colonial peoples to self-determination or permanent sovereignty, appear as powerful statements on the legitimacy of certain areas of international law, but when looked at in terms of specific obligations appear less substantial. Other supposed obligations, notably remedial secession, seem to owe their position almost entirely to perceptions of legitimacy. It was considered in Chapters 3 and 4 how the

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348 “Given the character and the importance of the right and obligations involved…” *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (2004), www.icj-cij.org (12/07/04) para. 159; “As the Court indicated in the *Barcelona Traction* case, such obligations are by their very nature ‘the concern of all States’ and, ‘in view of the importance of the rights involved, all States can be held to have a legal interest in their protection.’” Ibid. para. 155; *East Timor (Portugal v. Australia)*, ICJ Reports (1995) p. 102, para. 29.
development of the law of self-determination in drafting committees and judicial bodies has been extensively shaped by the issue of legitimacy. It may be concluded here that legitimacy occupies a primary position in defining the content of the law of self-determination. It might further be argued that specific legal obligations under self-determination, frequently limited and ill defined in terms of their scope and content, almost seem to take a secondary position.

In its supporting role self-determination may lend additional legitimacy to principles such as non-intervention, sovereign equality, the prohibition of the threat or use of force against the territorial integrity of states and rights associated with democratic governance. Self-determination gives these state or individually framed rights an extra dimension, namely the dimension of peoples’ rights. However, while there is considerable support for a connection between self-determination and these principles and rights, it is also undermined by the fact that the right may alternatively in other circumstances be used to challenge them.

On the other hand, self-determination may be used to challenge international law. Its main application in this context has been colonial self-determination, permanent sovereignty and assistance to peoples struggling for self-determination. However, these examples also show that it is one thing to challenge the legitimacy of a legal rule: and self-determination provides an effective means of doing this: but another to produce coherent rules as a replacement. Here, in fact, self-determination as a doctrine of legitimacy works against such rules. One function of its legitimacy is coalition-building, which means that states can unite behind the right in general, while retaining their own interpretations on the particulars of its application. The rights of colonial self-determination and permanent sovereignty were established in this way, in broad coalitions. Differences among states as to what those concepts meant were contained by ambiguous formulations, like “immediate steps” and “appropriate” compensation, which allowed different, perhaps even contradictory interpretations. As a result there was broad support for those rights in general, and this was certainly important for establishing their legal status. Much has been made, in particular, of the fact that instruments like GA Res. 2625(XXV) and 1803(XVII) reflected a consensus and that GA Res. 1514(XV) was adopted by 89 votes to 0, with only 9 abstentions. However, this coalition shattered when the right was looked at in terms of specific legal obligations. The superficially impressive rights broke down into a range of deeply contested obligations. This, in turn, ultimately undermined the effectiveness of the challenge. In the case of military assistance, a coalition was constructed around the “purposes” and “principles” of the UN Charter, but states views differed so sharply that its impact on existing obligations is questionable.

b. Nationalism in the Legal Process

This conclusion that self-determination in international may perhaps be more a doctrine about the legitimacy of legal rules than a source for them affirms the view that the structure of the law is defined by the interaction of nationalism and international law. This interaction can be charted throughout the legal process. Any position in the law of self-determination is constantly held up to the two competing standards of nationalism and positive international law. Positive international law is based on sovereign states and looks to establish defined categories of obligations and rights (like self-determination) and rights-holders (like peoples), which allow for consistent application. Nationalism and national self-determination, while undoubtedly related to the politics of states and international law, are based on nations and peoples, and demand that the law should conform to the rights of authentic peoples without any arbitrary restrictions. These are
clearly very different demands and they do not allow for a stable middle ground between them. However, this conflict does effectively define the law of self-determination.

The general method of navigating between these two rocks in the drafting of international instruments has been balancing. Balancing is a technique by which self-determination is balanced with other principles which effectively limit its application. This allows an instrument to proclaim self-determination as a right of all peoples (satisfying nationalist demands), while restricting it to certain situations (satisfying positive law). Mostly this is done in different provisions (e.g. articles 1(2) and 2(7) of the Charter or principles 2 and 6 of GA Res. 1514(XV)), or sometimes it is implicit (e.g. the Covenants). Only in the CSCE instruments does the proclamation and the restriction of self-determination occur in the same article.

Unfortunately, the flaw in the technique is that it does not fully satisfy either position. From the legal perspective, the balancing of self-determination is never free from ambiguity. For example, the balance between self-determination and territorial integrity in principles 2 and 6 of the Colonial Independence Declaration boiled down to how a “people” and a “country” were interpreted, and this was fertile nationalist territory. On the other hand, the balancing principles were obviously inserted with the intention of restricting self-determination and protecting states’ interests, and from a nationalist perspective this made any declaration that all peoples had the right somewhat hollow.

One solution has been to create a more sophisticated balance, and the present formula first appeared in paragraph 7 of principle 5 in the Friendly Relations Declaration, although a similar balance had been used fifty years earlier in the Åland Islands cases. This made the balance between self-determination and territorial integrity less arbitrary by linking territorial integrity to a government representing the whole people belonging to a territory without distinctions and thus conducting themselves in compliance with self-determination. Its advantage was that, by connecting self-determination to representative government, it restricted the right by satisfaction rather than arbitrary limitation. However, the drafting and subsequent practice in Re. Quebec, Tatarstan, Chechnya and General Recommendation XXI(48) suggest that paragraph 7 and its successors in the Vienna and Fiftieth Anniversary declarations were really only more sophisticated devices for protecting the integrity of states. The formula, thus, still suffers from the problem of arbitrariness.

Balancing, therefore, shows two problems. The first is that the balances of principles remain closely connected to nationalist ideas. As we saw in Chapter 1, nationalist ideas and the ties that are used to create them, can be readily accommodated by legal principles. A nationalist argument can equally be made with national ties or legal principles. The second is that balancing appears as an arbitrary and state-centred limitation on peoples’ rights. These problems have, in turn, effected the approach of courts and tribunals to the issue of self-determination.

These problems were highlighted in Chapter 4. Balancing by itself suffered from a problem of legitimacy with the result that a decision might appear as a defence of states’ rights (Katangese People’s Congress v. Zaire) or become incoherent (Badinter Opinions). It was argued, therefore, that courts and tribunals often supplement balancing with nationalist ideas. That they should do this is quite understandable. As has been said, a balance between, for example, self-determination and territorial integrity may boil down to how a “people” and a “country” are interpreted. To that extent, building up or knocking down national ideas is only fleshing out this interpretation. If legal principles and national ties are interconnected, why should they be separated? But, there is also more to it. Self-determination argues that the legitimate basis for legal institutions and principles lies in nations and peoples. Correspondingly, nations and peoples may be elaborated specifically to legitimise those principles. Balancing with nationalist construction, in fact, seems
to be the normal method when judicial bodies engage with self-determination. It can, at least, be found in a majority of such cases: the Burkina Faso/Mali Frontier Dispute, the Åland Islands cases, Re. Quebec, Tatarstan, Chechnya and Western Sahara. It can also be seen in individual opinions, most notably Judge Ammoun’s Separate Opinion in Namibia. The national ideas presented in these cases appear as political ideas intended to legitimise certain positions, rather than simply stating the facts or filling in the background, and many follow familiar nationalist themes. The basic nationalist counter-argument can be seen in Tatarstan and Chechnya, while the counter-arguments in the Rapporteurs’ decision in the Åland Islands and Re. Quebec are from a conservative school with affinities to Burke. Burkina Faso/Mali hugs the contours of African nation-building and Judge Ammoun’s opinion fits snugly into Pan-Africanist thought.

What emerges from this study is a single thread running through the law of self-determination, which consists of a doctrine of legitimacy that shapes the drafting of instruments, the decisions of judicial bodies and the nature of obligations. It was said in the introduction that considering that the law of self-determination is logically the product of the interaction between nationalism and international law, focussing solely on positive law is only to tell half the story. The problem with telling one side of a story is not only that important details are missing, but that the narrative itself may be lost. The narrative of the law of self-determination is that it is continuously shaped by perceptions of legitimacy resulting from the interaction of nationalism and international law. The only way to really understand the law in this area is to look outside it.

c. Nationalism, Liberalism and the Structure of International Law

It was claimed in the introduction that international law is institutionally orientated towards the nationalist argument. This statement may run counter to the preferred self-image of international lawyers, but it follows logically from the law’s basic structure. Sovereign states, which form the basis for international law, have, in turn, a national basis. Correspondingly, one would expect relations between states to be expressed in national and nationalist terms. This is borne out in instruments like the UN Charter and the Covenants, among others, and self-determination’s prominent position in these instruments was justified on the grounds that it was a “basis for friendly relations” and a “prerequisite for human rights”.

Despite the status of these conventions, these claims must be treated with some caution. The phrases “basis for friendly relations” or “prerequisite for human rights” are simplistic slogans that do little justice to the complex relationship between individuals, nations, states and international law. As Hans Morgenthau noted:

“It has been its moral virtue and its besetting political sin to look at nationalism as though it were a self-sufficient political principle and could bring freedom, justice, order, and peace simply by being consistently applied. In truth, no political principle carries within itself such a force for good. What good and evil it will work depends not only upon its own nature, but also upon the configurations of interest and power in which and for the sake of which it is called upon to act.”

A similar point can be made about the “internal” and “external” aspects of self-determination. This is the most explicit expression of the liberal nationalist matrix which underpins much of the

law of self-determination, the UN Charter system and international law more generally. The doctrine of liberal nationalism has taken quite a knocking since the nineteenth century and many of its suppositions cannot be accepted uncritically. The question is whether this is what internal and external self-determination actually does? On the face of it, this does appear to be the case. The language of the division certainly implies that national government (external self-determination) is an extension of liberal government (internal self-determination). This may have been plausible in John Stuart Mill’s day, but it was looking shaky by Woodrow Wilson’s time and must be treated with considerable scepticism today.

But, there is another way of looking at internal and external self-determination. This is, proceeding from the fact that the two aspects may not always be complementary, and that rights may be most valuable where they are least established, there is a need for an internal, or liberal counterpart to national self-determination. Self-determination as a pure slab of nationalism can be pretty unappealing, and thus splitting the right in two, at least, provides a means to emphasise the liberal as well as the national potential of the right. There may be support for this in the Covenants and the Helsinki Final Act, where the division was introduced in the context of promoting liberal government. It also may be seen in the criticism by Antonio Cassese, the commentator who has been most prominent in promoting the division, that: “The work of the United Nations has… been one-sided [note the emphasis] in that it has concentrated on ‘external’ self-determination and neglected ‘internal’ self-determination.” Nonetheless, the formula is undoubtedly problematic. The best defence for presenting the internal and external aspects of self-determination as extensions of each other is the fact that the two can work against each other, and the aim is to prevent this antagonistic relationship under the rhetoric that they are complementary.

If this is the case, perhaps it might be more useful to talk directly about the “national” and “liberal” aspects of self-determination. This would, at least, have the advantage of clarity. However, this might also be its biggest drawback. Self-determination does not always want to be clear. The substitution of liberal for national government in the Friendly Relations Declaration or in Re. Secession of Quebec, might appear less convincing if it was actually spelt out in terms of liberal and national aspects of self-determination. The actual argument that the right of peoples to self-determination is satisfied by liberal government and does not have a nationalist aspect is actually quite a hard one to make. Nonetheless, it does remain true that much of the contemporary analysis of self-determination revolves around the relationship between its liberal and national aspects, even if lawyers often seem to prefer to mince their words.

Liberal nationalism for all its faults does occupy an important position in international law, both in the UN Charter and the law of self-determination. This relationship also has historical depth and can be traced back to Bentham and Bluntschli and even to Montesquieu and Vattel. There are institutional reasons why liberal nationalism should have this position. As was seen in Chapter 2, liberalism, nationalism and international law have similar origins in the modern state and in their own ways fill in the internal and external aspects of sovereignty. However, just as the internal and external aspects of sovereignty are clearly related, so there is also a need for a doctrine which can encompass all three.

On the external aspects of sovereignty, although international law contains rules and principles governing the relations between states, it does not explain why those states should

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exist in the first place. Liberalism also, while providing a rationale for the state, does so in a very generic way. It does not address why the state system should take the particular form that it has. Nationalism fills this void by providing each state with its own identity based on a supposed “natural” foundation for the state and correspondingly the inter-state system. Equally international law fills a void in nationalism. While the idea of a world of nations is implicit in any nationalist doctrine (a nation is only a fragment of humanity), the idea that the nation is the basis for the state provides little explanation, aside from the aforementioned slogans, on how states should interact and co-operate.

On the internal aspects of sovereignty, liberals from Locke and Rousseau to Bentham and Mill to Rawls and Dworkin have recognised the connection between a liberal order of individual freedoms, representative government and the rule of law, and national identity and institutions that reflect and even promote that identity. Individual human rights cannot be isolated from political and legal institutions, and society at large, and nationalism provides a model for both. However, while there may be a connection between liberal and national government, the assertion that self-determination is the prerequisite for human rights is too simplistic. Nationalism is focussed on peoples as collective entities and, it is argued, abstract ideas, rather than the individuals that compose them. Indeed, it can be highly destructive of both individual rights and individuals themselves. Liberalism and doctrines of individual human rights, thus, fill an important blind spot in nationalism.

Liberal nationalism, which combines liberalism and nationalism with an idea of an international community, therefore, provides a complete model that encompasses the individual, the state and international society. Complete, though, is not the same as coherent. Liberal nationalism, both conceptually and institutionally, is inherently unstable, combining actors and interests which may be as much competitive as complementary. This probably accounts for both how poorly the doctrine has stood the test of history, but also how often it is appealed to in spite of this. The result is a familiar dilemma summed up well by former UN Secretary-General Boutros Boutros Ghali in his *Agenda for Peace*:

> “Globalism and nationalism need not be viewed as opposing trends, doomed to spur each other on to extremes of reaction. The healthy globalization of contemporary life requires in the first instance solid identities and fundamental freedoms. The Sovereignty, territorial integrity and independence of States within the established international system, and the principle of self-determination for peoples, both of great value and importance, must not be permitted to work against each other in the period ahead. Respect for democratic principles at all levels of social existence is crucial: in communities, within States and within the community of States. Our constant duty should be to maintain the integrity of each while finding a balanced design for all.”

However, the strength of self-determination has always been that it seems to encompass something good, while avoiding being pinned down on exactly how that good is to be achieved. Its basic role is as a legitimising process which thrives in ambiguity. It might be argued, it has been argued, that given this inherent ambiguity international law would be better off without it.

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Realistically this is neither possible nor desirable. Self-determination underlines that international law is not a stately edifice, but a dynamic process in which principles are negotiated and renegotiated. After all, if the basis of international law is the sovereign state, it is only reasonable that it should have its roots in the foundations of modern statehood.
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