SELF-DETERMINATION : ITS EVOLUTION
IN INTERNATIONAL LAW AND PRESCRIPTIONS
FOR ITS APPLICATION IN THE
POST-COLONIAL CONTEXT.

by

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A dissertation submitted to the
Faculty of Law, University of Tasmania
in fulfilment of the requirements
for the Award of the degree of
Doctor of Philosophy (Law).
DECLARATION

THIS DISSERTATION IS THE RESULT OF

MY ORIGINAL RESEARCH: BORROWED SOURCES

HAVE BEEN DULY ACKNOWLEDGED IN THE

TEXT.

[Signature]
ACKNOWLEDGMENTS

In the preparation of this work I received invaluable assistance from various people; I very much appreciate this and wish to acknowledge the same.

I am grateful to my supervisor and head of department, Dr. M. Sornarajah, whose patience and criticism have contributed to any semblance of scholarship this work may claim. I also wish to thank Dr. J.P. Fonteyne (Co-ordinator of the Graduate International Law Program, A.N.U.), Professor James Crawford (Professor of Law, Adelaide University), and my colleague, Dr. Martin Tsameryi (Lecturer in International Law, University of Papua New Guinea), whose comments and constructive criticisms of the first draft proved to be very useful. I am further indebted to: my fiancée and close friend, Miss Jayne S. Basheer for her support and understanding when I needed them most; to Miss Barbara Spitzer and Keiren Nixon who proof-read the final draft; Miss Lubuseng Lijane, for helping to sort out the bibliography; and Mrs. Gill, whose secretarial dexterity transformed a hardly legible mess of writing into this final print.

Finally, I am thankful to the staff of the (University of Tasmania) Law Library, Miss Derby Ploughman, and Mrs. H. Stafford for their tolerance in respect of overdue books; I am particularly grateful to Mr. Peter Cohen (Law Librarian), whose familiarity with complex computer search systems became most beneficial during the difficult times in my quest for vital materials.

While accepting any shortcomings in this work to be solely mine, I very much want to share the credits with the aforementioned people.

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MAY, 1984.
ABSTRACT

Since 1945 the focus of the principle of self-determination has been on decolonization. The remarkable success of the application of the principle in the decolonization process has established it as a human right, a norm of modern international law and (arguably) part of jus cogens. With decolonization virtually completed, the question is whether self-determination as a right of all peoples should still be legally valid in the post-colonial era. In this research the conclusion is reached that international law neither recognizes nor prohibits self-determination as a right in the post-colonial context, and that the law is in this sense "neutral".

The neutrality of international law on the subject does not prejudice the issue as to the desirability of a recognition of the right in the post-colonial context. A fortiori it necessitates a rational analysis of the role of self-determination in the context of decolonization and the potential of the principle in the post-colonial setting with the view to regulating competing claims. To this end, the research analyses the function of self-determination in decolonization and arrives at the conclusions that, within that context, self-determination is a putative remedial right aimed at remedying a specific form of human relations manifested by domination, exploitation and (or) a general denial of human rights. In the light of this, the research advances the thesis that in the post-colonial context, where inter-communal relationships in a sovereign state are characterized by similar trends of domination and denials of human rights, the application of self-determination could be a useful remedy. It also indicates that, as an inherently democratic principle, self-determination could be used to settle certain types of territorial disputes.

Using the relationship between human rights and self-determination as the normative basis for a community policy on post-colonial self-determination, the research recommends a set of substantive and procedural
prescriptions on the support for or rejection of specific claims.

The first two chapters of the research deal with the emergence of self-determination as a right in international law and its application in the colonial context. Chapter Three discusses the relationship between self-determination and other norms of international law, namely territorial integrity, domestic jurisdiction and the use of force (within the context of decolonization). In all, the first three chapters define the confines of self-determination as *lex lata*.

Chapter Four addresses the issue as to whether self-determination exists as *lex lata* beyond the context of decolonization and concludes that it does not exist. Chapter Five is devoted to a normative inquiry into the desirability of recognizing a right of self-determination in the post-colonial context. The chapter draws the conclusion that in view of the persistence of competing claims usually accompanied by conflicts of international dimensions, and in view of the relationship between human rights and self-determination, it is desirable to recognize the right, at least in cases that involve gross deprivation of human rights (e.g. genocide).

Chapter Six is devoted to a discussion of separatist movements that seek a right of self-determination in the post-colonial context. In Chapter Seven, human rights as the normative basis for a community policy on post-colonial self-determination is discussed. On the strength of the discussion, recommendations are made as to which claims should be supported and which claims should be rejected. It is also recommended that as a means of expressing popular will, the principle of self-determination could be useful in the settlement of territorial disputes that involve transfer of populations. Chapters Eight and Nine deal with the substantive and procedural conditions that must precede the support of a claim for self-determination in the post-colonial context.
SELECT LIST OF ABBREVIATIONS

A.J.I.L. : American Journal of International Law
B.Y.I.L. : British Yearbook of International Law

Brownlie, Principles : Brownlie, Principles of Public International Law (3rd edn), Oxford (1979)
Buchheit, Secession : Buchheit, Secession, the Legitimacy of Self-Determination. New Haven (1978)

Cal. W. Int'l.L.Journ. : California Western International Law Journal
Case W. Res.Int'l.L. : Case Western Reserve Journal of International Law
Columbia J.Trans.Law : Columbia Journal of Transnational Law

Col.L.Rev. : Columbia Law Review
Crawford : Crawford, J., The Creation of States in International Law, Oxford (1979)
G.A.Res. : General Assembly Resolution

German Y.B.I.L. : German Yearbook of International Law
Hague Recueil : Recueil de Cours de L'Académie de Droit International
I.C.J. Reports : International Court of Justice Reports
I.C.L.Q. : International and Comparative Law Quarterly
I.J.I.L. : Indian Journal of International Law
Int.Affairs : International Affairs (Journal)
I.L.A. : International Law Association
I.L.M. : International Legal Materials
Int.Conc. : International Conciliation
Int.Hist.Rev. : International History Review
Int.Org. : International Organization
L.N.T.S. : League of Nations Treaty Series
M.R.G. Reports : Minority Rights Group Report
NYUJILP : New York University Journal of International Law and Policy
O.A.S. : Organization of American States
O.A.U. : Organization of African Unity
P.A.S.I.L. : Proceedings of the American Society of International Law
P.C.I.J. : Permanent Court of International Justice
POLISARIO : Frente, Popular para la Liberacion de Siguaniá El Hamra y Rio de Ora (Western Sahara)
S.C.Res. : Security Council Resolution
Sov.Y.B.I.L. : Soviet Yearbook of International Law
Transactions : Transactions of the Grotius Society
U.K.Comd.Papers : United Kingdom Command Papers
Va.J.Int'l.L. : Virginia Journal of International Law
WWI : First World War
WWII : Second World War
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INTRODUCTION

THE MEANING AND INTERPRETATION
OF SELF-DETERMINATION

Of the ideas, concepts and principles evolved in the twentieth century few have produced an impact so great as that of "national self-determination". It emerged as a recognized principle of international relations as far back as WWI. However, self-determination as pursued by various groups today is principally articulated in declarations by the United Nations. It is therefore intended to adopt the basic United Nations' definition as the basis of our discussion. In standard United Nations literature, self-determination is defined as the "right" by virtue of which a people "freely determine their political status and freely pursue their economic, social and cultural development". The United Nations' definition is relatively new; and is usually interpreted narrowly in relation to colonial territories to mean the right to freely establish an independent state or to merge or associate with an existing state.

Despite its narrowness, the United Nations' definition is basically a reflection of previous statements on self-determination. During WWI, for instance, President Wilson defined it in terms of "liberty and self-government of all peoples." The Bolsheviks

1. Ofuatey-Kojoe, Self-Determination in International Law (1977), 96. In the course of WWI itself, the principle received a great deal of attentions (see pages 6-7 infra). There is however little agreement as to the period of origin of the principle (see notes 12 and 13, Chapter One).

2. This definition was first adopted in 1952 by the United Nations Commission on Human Rights (page 13 infra). However, the text, of which the definition formed a part was not approved by the General Assembly until 1966. Since 1952, the definition has been used frequently in many United Nations' pronouncements on the principle (pages 13-16 infra).

3. Note 6 infra; see also page 38 infra.

also saw it as the right of every nation to arrange its life according to its own will. The principle so defined, encompasses the elements of human dignity and human identity. Its relationship with human identity concerns those qualities that distinguish a people from others. It emphasizes the parochial factors that are intrinsic to natural human groups (such as the family, the tribe, the clan, the village, etc.). The element of human dignity on the other hand relates to those attributes shared by all peoples. It refers for example, to the common human desire for freedom and the parochially-centred motivations among these groups to control their own social, economic and political affairs. Self-determination is thus a broad concept, the scope of which covers a wide spectrum of human organizations in different situations. The narrow interpretation usually adopted by the United Nations (i.e. in relation to colonial territories) fails to take account of the diversity of human organizations and the relevance of the principle to their different circumstances.

While retaining the basic ideological meaning of self-determination postulated by the United Nations, the principle can be given broad interpretations depending on the peculiar disposition of the beneficiaries. We have indicated that for a people under colonial rule (and indeed under any form of alien rule or occupation) the principle implies the right to freely create an independent state of their choice or to merge or associate with an existing state. In the case of an independent state, self-determination means equality with other like entities.


6. It is in this sense that the principle is explained in General Assembly Resolution 1514 (XV) in relation to peoples under "alien subjugation". It is also in this sense that self-determination is used in Resolution 1541 (XV) Annex (see particularly Principle VI). Generally, all non-self-governing peoples' right to self-determination comes under this meaning. The right of Palestinians to self-determination could also be in this sense.
in international relations. It also related to freedom from external interference in the administration of its internal affairs. This interpretation of the principle is particularly relevant to "politically independent states which (need) protection from external pressure, threats and the use of force and subversive activities".

Self-determination could also have economic relevance to a sovereign state. In this regard it denotes the right of a state in a condition of economic subordination to recover full sovereignty by acquiring complete control over its own natural resources even if this (means) expulsion or nationalization of certain (i.e. foreign) undertakings subject to rules of international law. This aspect of the principle is usually described as economic self-determination. Self-determination in this regard also implies the notion of permanent sovereignty of a state over its natural resources.


Within the sovereign state, self-determination for a people could mean the right of the majority to determine the government they wish to live under through periodic elections. Similarly, the right of such a majority to change their government through a revolution is also an expression of the right to self-determination.

The principle can be interpreted in terms of claim rights against the state. For minorities or racially disadvantaged groups, the principle implies the right to equality and participation in the national political process and the right to recognition of their cultural identity. It also means the right to self-administration over issues directly relating to their racial well-being. Disaffected groups with definite territorial bases demand self-determination as a right to regional autonomy. This interpretation is sometimes labelled internal self-determination or autonomism. Such groups usually accept central authority over certain aspects of national life but advocate local control over local administration. Other groups however do demand complete secession from their parent states. To these groups, the principle of self-determination implies a right of a people to freely separate from the parent state and to determine the government it chooses to live under. It is in effect a right to secession.

Thus to all these groups, self-determination implies a right of separation in one form or the other. For the purposes of our discussion,


12. Rosalyn Higgins suggests that "the right of self-determination is the right of the majority within an accepted political unit to exercise power". Higgins, The Development of International Law Through the Political Organs of the United Nations (1963), 105.

13. The Australian Aborigines and the Black Americans are representative of such groups.

14. Examples are the French Corsicans, and the Catalans of Spain.

15. Examples of such groups are the Eritreans, the Basque people, the people of the Ogaden, the Biafrans and the people of the Southern Sudan, the Quebecians and the Tamils of Sri Lanka.
all these groups will be referred to as "separatists". The broader interpretation of self-determination as in respect to them would be called separatism or separatist self-determination.

Clarification of Basic Terms

The focus of this work is on "separation" and separatist self-determination. The word "separation" is used instead of "secession" because not all groups that pursue the right of self-determination within a state seek secession or a complete break. As indicated earlier, some groups only seek a 'mild' form of separation within the same body politic. Thus the generalized term 'separation' is considered more appropriate. Where a group demands a complete break from the parent state, the word 'secessionist' will be used to describe it.

Separatism is distinguishable from the other forms of self-determination in many ways. Separatist groups are not states. This ipso facto differentiates their interpretations of self-determination from those of sovereign states who seek non-intervention, equality and adequate control over their economic and political affairs. Majority-based self-determination only requires a change in the governmental machinery of the same body politic. Separatist self-determination on the other hand requires at the least, structural and or constitutional changes in the body politic. At the most, separatism, expressed in secession, calls for a total change and the creation of a new body politic. In these respects, separatism is similar to the interpretation of self-determination within the colonial context. This is because under colonialism, self-determination required basic structural and constitutional changes to satisfy the interpretations of the nationalists who pursued the goals of statehood or associate statehood in the process of decolonization. Nevertheless, it would be a misjudgment to consider separatists as colonial peoples and separatism
as anti-colonial. In order to maintain the similarity and the distinction between separatist self-determination and colonial self-determination for the purposes of this work, separatism will be referred to as "post-colonial self-determination" or "self-determination within the post-colonial context". Thus the phrase will be used to refer to claims of self-determination made against any sovereign state irrespective of whether it is a former colony or not.

The phrase 'separatist group' is used to describe any identifiable association of persons within a sovereign state that demands or advances a claim for self-determination in the post-colonial context. The phrase would be used interchangeably with the term 'claimant' or the phrase 'claimant group'. It is important to note that while every separatist group may be a claimant, not all claimants are necessarily separatist groups. A claimant may sometimes be a sovereign state third-party making the demand for, and on behalf of, a group within a parent state. The Somali Republic's claim on behalf of the Somalis in Kenya and Ethiopia is a typical example of such a case. The phrase 'parent state' is any state entity against whom a claim is made and in whose frontiers a separatist group is habitually resident.

The Delimitation of the Problem and Research Objective

Despite the broad interpretations one can attribute to self-determination, the United Nations has in practice persisted on the narrow application of the principle to only colonial peoples. Thus since WWII the principle of self-determination has operated principally in relation to decolonization, supposedly as a matter of international law. It has therefore been suggested that legally, after decolonization, there is no room for self-determination and that in any case, as a
matter of international policy, its continued application to separatists could be dysfunctional. To this school of thought self-determination in the post-colonial context constitutes a dangerous anachronism which could bring in its train, chain-reactions of separatist claims. The risk in any such situation is quite definite: an infectious spread of post-colonial claims could lead to the dismantling of states and foster chaos.

As a result of a combination of the foregoing reasons, existing states do not favour post-colonial self-determination demands generally and secession particularly. As a general practice, the right of self-determination in the post-colonial context is denied to claimants. This usually generates violent conflicts. The conflicts arise principally because there seems to be no definite international law rule that regulates claims and counter-claims. Thus claim-denial situations are characterized by self-help measures. The primary objective of this work is to formulate a set of prescriptions which could be used as a guide in dealing with present and future claims.

The choice of our objective is necessitated by a number of factors. Empirically, claims for self-determination in the post-colonial context with attendant violent conflicts are on the ascendancy. This can be demonstrated with the current insurrection in the Indian State of Punjab where Sikhs are demanding a separate state, the ongoing conflict in Eritrea, the endemic confrontations between Ethiopia and Somalis over the Ogaden, the very recent purported secession of Turkish Cypriots, and the violent clashes between the Tamils of Sri Lanka and their Sinhalese countrymen. The inability of the international community to deal with these cases in any effective or consistent manner underscores the need to evolve

16. See page 173 seq., infra.
17. Ibid.
practical institutional mechanisms to regulate the claims.

It has been indicated that by their nature claims of self-determination in the post-colonial context amount to demands for broader interpretations of self-determination. Given the persistence and the growing number of these claims, it will be unrealistic to insist on the United Nations' practice of restricting self-determination to colonial peoples. The recognition of a right of self-determination in the post-colonial context, and the evolution of internationally acceptable prescriptions for its application could provide a standard for assessing claims. It could also minimize self-help measures in admitting or dismissing claims and reduce violent conflicts that characterize them. Since such conflicts usually attract external intervention and threaten international peace and security, their orderly reduction could minimize the threats. In a world where violations of basic human rights are common, the recognition of a right of self-determination in the post-colonial context in human rights-related situations and the formulation of prescriptions in these respects could also contribute towards the promotion and protection of human rights.

The Status of the Prescriptions

Conflicts generated by claims to self-determination in the post-colonial context are essentially political in nature. The role of the international lawyer in the resolution of these conflicts is to evolve legal postulates that are capable of ensuring order through direct political application by the international community. As indicated earlier, there seems to be no definite rules on post-colonial self-determination, this necessitates the evolution of rules on the subject. Thus, the prescriptions in this work do not constitute *lex lata*. They are meant to be policy formulations and a basis for a rational
assessment of claims. Being normative by their very nature, the prescriptions are rules de lege ferenda.
CHAPTER ONE

EMERGENCE OF SELF-DETERMINATION

IN INTERNATIONAL LAW.

The Principle of Self-Determination Before World War II.

The notion of the 'right' of peoples to self-rule, with its parochial sentiments against aliens, can be traced to the early beginnings of the institution of government.\(^1\) However, the term 'self-determination' is of recent origin. It was first used in the works of radical German philosophers in the mid-19th century.\(^2\) The term was also used in the report of the London International Socialist

1. Umozurike, Self-Determination in International Law (1972) (hereafter cited as Umozurike), 4. For a different opinion see Dalberg Acton, The History of Freedom and Other Essays (1907). He suggests that in dealing with the evolution of self-determination the significant date must be 1831. He describes 1831 as the watershed year because in his view, before that period alien rulers were resisted as oppressors and not aliens. In other words, they were resisted "because they misgoverned (and) not because they were of a different race" (284). Lord Acton's views are misleading. They imply that prior to 1831, groups were quite happy to be governed by "aliens" so long as such rulers were not oppressive. He disregards the basic human parochial instinct that divides communities into 'us' and 'them' and the desire to associate with one's own kind. Historically such sentiments have always existed and "social leaders have found (the) division into 'us' and 'them' a useful, if not always defensible, outlook on human existence" (Buchheit, Secession, The Legitimacy of Self-Determination (1978) (hereinafter cited as Buchheit), 1. Since primitive times, man has maintained his parochial outlook in his clan, tribe, village etc. while generally looking on alien institutions with distrust. (Kohn, The Idea of Nationalism (1943), 5-6. See generally also Hayes, Essays on Nationalism (1926) particularly Chapter 1; Macartney, National States and National Minorities (1934), 21-23.

2. The original term in German is Selbstbestimmungsrecht. Literally, the term refers to the "right" to have a "voice" in matters affecting one's "self". In the German Declaration of Rights in 1848, the term had been used in this sense as the basis of a policy of the voluntary and democratic unification of all Germany (Cobban, The Nation State and National Self-Determination (1969) (hereafter cited as Cobban), 45). The first English translation of the word appeared in one of the resolutions adopted by the Conference of Socialists from Denmark, Holland, Norway and Sweden, at Copenhagen in January 1951. The resolution had called for "the..." (contd)
The evolution of the principle of self-determination in modern political and legal thought is closely related to the institutional development of nationalism and the modern state in Europe. Before the emergence of the state, European society was principally based on feudal institutions. Territory, as a rule, was the property of the king. It was his divine right to dispose of any part of his territory at any time as he thought fit. Social organization was localized and the nation-state, as an organized political institution, did not exist. These were due to limitations on the

2. (contd) recognition of the right to self-determination of...nations" (Wambaugh, Plebiscites Since the War (1933), 3 note 1; Collins, "Self-Determination in International Law, the Palestinians", Case W., Res.J.Int'l.L., Vol. 12 (1980), 137, 138.

3. Lenin, "The Right of Nations to Self-Determination", in Selected Works, Vol. I (1947), 564. Shaheen however notes that "the right of national self-determination had been proclaimed in the first manifesto of the Russian Social Democratic Labour Party at its First Congress in 1898, but it was at its Second Congress that a clause regarding the right of self-determination of all nations forming part of the State was, at Lenin's insistence, adopted in the party program. The term had been used principally in relation to the non-Russian nationalities in the Russian State (Shaheen, The Communist (Bolshevik) Theory of National Self-Determination (1956), 1.


5. In this period, people generally looked upon things not from the point of view of nations, nationality or race, but from the point of view of religion. "Mankind was divided not into Germans and French and Slavs, and Italians, but into Christians and Infidels" (Kohn, op.cit., note 1, 79). Even at the beginning of the 15th century when the church and institutions of higher learning used the term "nation", it did not refer to the nation as a political collectivity in the sense that we have today. It was used to mean associations representing territorial groups without any regard to nationality. Such associations "were nothing but parts of the existing whole subdivided for practical purposes to express a difference of opinion" (id. 107). In fact, at the Council of Constance (1414-1417) voters were generally divided into four nations, French, German, English and Italian. The aim was to represent the major
level of technology and the means of communication in the period. At the end of the fifteenth century, technological and social developments in Europe precipitated revolutionary changes manifested in improved communications and changes in the general perceptions of life in European society. More significantly, the advances in technology also led to the growth and expansion of trade and the emergence of powerful merchant classes who advocated the removal of internal boundaries of feudal municipalities and the unity of territories under the monarch into single exclusive territorial market units. These arrangements became the basis of the monarchical state and the forerunner of the nation state, in which the merchant classes, having displaced the influence of the monarchy, established themselves in authority in the name of the people, calling themselves the nation and ruling in the name of the nation.

5. (cont’d) political divisions in Europe. Thus the German nation comprised Hungarians and Poles while the English also included Scandinavians (id. 108). See also Akzin, State and Nation (1964), 47; Hayes, op.cit., note 1, 4-5. Macartney, op.cit., note 1, Chapter 1.

6. Sabine and Thorson, A History of Political Theory (4th ed., 1973), 311; Kohn, id. 201; Hayes, id. 31; Akzin also notes that two principal reasons accounted for this: on the one hand, the cultural immobility of the large masses of mankind coupled with their lack of literacy kept their outlook geared to their immediate social group, e.g. tribe, clan, village, etc. On the other hand, where loyalties transcended these confines, they were on the basis of common religion or dynastic tradition more often than ethnicity (id. 49-50). See also Hayes, Political and Social History of Modern Europe, Vol. 1 (1924), 36.

7. These developments comprised the industrial revolution on the one hand and the Reformation and Renaissance on the other hand. For an analysis of the combined effect of these developments on Europe see generally Pollard, Factors in Modern Europe (1907); Arthur Slavin (ed.), The New Monarchs and Representative Assemblies. Modern Constitutionalism or Absolutism (1964).


The basis of the nation-state then was seen as comprising "citizens, propertied citizens usually, who inhabited a common territory, possessed a voice in their common government and were conscious of their...heritage and their common interests". The emphasis in the nation-state was on the citizens as represented by their 'voice in their common government'. It was this voice that was expressed in more manifest terms as the 'will' of the governed; the will that had to determine future political association and any peacetime territorial changes. The 'will' came to be regarded as a derivation of the natural rights of man and the basis of legitimate government.

The earliest significant expression of the will of the governed, occurred in the British colonies in America where general anti-imperial sentiments culminated in the American Revolution. The mood of the times among the colonists was clearly expressed in the famous Declaration of Independence:

"We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain inalienable 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 or to abolish it...." 12

10. Id. 105.

11. The notion of the "will" was later to be represented in Rousseau's thesis on the Volonté générale, the common "will", See generally The Social Contract (Cole, ed.), Chapt 6 of Books I and II.

In Europe, the "will" of the governed received a major expression in the French Revolution. The Declaration of the Rights of Man and the Citizen issued after the revolution also emphasized the primacy of the wishes of the people.\textsuperscript{13}

Given the primacy of the wishes of the citizens as the basis of government, it was logical that any territorial transfers had to be preceded by the expressed wishes of the people affected. After the French Revolution, a common method used to ascertain the wishes or the will of the people became the plebiscite. In 1791, it was used to determine the union with France of Avignon and Vanassin and again in 1792, in the case of Savoy and Nice.\textsuperscript{14} Thereafter, the plebiscite became established in Europe as a procedural institution for determining the "will" of nations (usually racial homogeneous groups), in

\textsuperscript{13} There is a further class of authors who take the view that the French Revolution provided the basis for the principle of self-determination. See for instance Woolsey, "Self-Determination", A.J. I.L., Vol. 31 (1919), 302; Mattern, The Employment of Plebiscites in the Determination of Sovereignty (1921), 77; Carr, The Bolshevik Revolution (1917-1923). Vol. 1 (1969), 417. See also Sureda, The Evolution of Self-Determination: A Study of United Nations Practice (1973)\textsuperscript{1}(hereafter cited as Sureda), 17. If one should accept "popular will" as manifested in revolutions as the test, then arguably the American Revolution is the starting point since it was first in time. However, it needs to be emphasized that there is an inherent risk in using these revolutions as the cut-off points for the emergence of the principle. The idea of self-determination, like many others, was not formed overnight in one massive revolutionary action. It was rather the product of social economic and political forces that were prevalent in definite historic periods. Admittedly, these forces precipitated the great revolutions in France and America. But, to say that the idea itself started with the revolutions would amount to disregarding the formative processes of the idea itself. If one addressed oneself to the continuous historical forces that shaped the principle and the great significance of the formative years behind it, it would be impracticable and in any case not prudent to use either revolutions as a definite starting-off point for self-determination. The two revolutions are at best, significant landmarks in the evolution of the principle and not the sources of it origins.

territorial issues. Plebiscites were used as the basis of the new Italian Kingdom and the cession of the Ionian Islands in 1863.\textsuperscript{15} Within the Turkish Empire and the Austrian Empire that comprised the races of Germans, Slavonians and Macedonians, the concept of the will of the people as the basis of government and political association was used as a justification for the union of all the fragmented groups into homogeneous nations. Hence the inception of Pan Slavic and Pan Germanic groupings and the great wave of nationalism that swept Europe in the middle of the nineteenth century.\textsuperscript{16}

Plebiscites (and for that matter the principle of self-determination) declined by the late nineteenth century when forceful annexations assumed prominence in Europe.\textsuperscript{17} However the principle emerged again in European international relations with the outbreak of the First World War when the Central Powers and the Allies employed it as a basis for propaganda to win the support of the annexed and other non-self-governing nationalities.\textsuperscript{18} The Central Powers made political capital out of the colonial possessions of the Allies.\textsuperscript{19}

\begin{itemize}
  \item 15. Wambaugh, \textit{op.cit.}, note 3, 3.
  \item 16. Thomson, \textit{Europe Since Napoleon} (Pelican), 326-7.
  \item 17. After 1870 there were only two plebiscites: that of Saint Batholomew in 1877 between France and Sweden and the case of the separation of Sweden from Norway in 1905. The annexations included the Prussian take-over of Hanover (1866), Schleswig (1868), and Alsace-Lorraine (1871). See Wambaugh, \textit{op.cit.}, note 3, 3; Lecky, \textit{Democracy and Liberty} (1896), 418.
  \item 19. The general position of the Central Powers was summed up in identical notes issued by Germany and Austria: "If the adversaries demand above all the restoration of invaded rights and liberties, the recognition of the principle of nationalities and of the free existence of small states, it will suffice to call to mind the tragic fate of the Irish and the Finnish peoples, the obliteration of the freedom and independence of the Boer Republics, the subjection of North Africa, by Great Britain, France, Italy and last, the violence brought to bear on Greece for which there is no precedent in history" (J.B. Scott, \textit{Official Statements of War Aims and Peace Proposals} (1921), 44).
\end{itemize}
on the other hand declared that they were fighting for the liberation of smaller nationalities and the strengthening of democracy. The general position of the Allies was summed up in the words of President Wilson:

"No peace can last or ought last which does not accept that governments derive all their just powers from the consent of the governed and that no right exists to hand peoples about sovereignty to sovereignty as if they were property." Self-determination was regarded as an "imperative principle of action" which was to be the basis of the post-war settlements.

At the conclusion of the War the principle of self-determination was used in the territorial settlements at the Peace Conference for the creation of several states in Europe. It was also expressed through the Mandate System. In the post-war period, the Allies took the view that non-self-governing communities did not have a right of self-determination except as it accrued under international obligations at the Peace Conference or under the Mandate System. However, in applying self-determination in the territorial settlements, the Allies tended to be selective; generally, they supported the principle only where it favoured their political or strategic interests. This led to the situation of "trapped" minorities in the new states of Europe, and the subsequent introduction

20. Cobban, 49.
23. The new states included Poland, the Kingdom of Serbs, Croats and Solvenes (Yugoslavia), Czechoslovakia, Roumania, Finland, the Baltic States - Estonia, Latvia and Lithuania. The Baltic States were later to be absorbed into the Soviet Union. These new states contained trapped minorities whose lot was often worse than it had been before the war. At the end of the Peace settlements over 47 million Europeans comprising different races were living as trapped minorities. This figure excluded over 10 million Jews in Europe and the Russian nationalities. For a statistical analysis of the distribution of these nationalities see Baran (contd)
of the minorities' regime to protect the rights of the minorities.¹⁴

The Mandate System, on the other hand, was vitiated by the fact that it only applied to the colonies of the Central Powers and not to all colonies. Secondly, even though "the wishes of the populations" were supposed to be taken into consideration in the administration of the Mandates, this requirement applied only to 'A' mandates. The disposition of 'B' and 'C' mandates was hardly different from that of other colonies insofar as the principle of self-determination was concerned.²⁵

To summarize, even though self-determination played a role in the post-war arrangements, it was restricted and not regarded as a norm of international law or a general right for all peoples. After the


24. For a treatment of the position of the minorities and the minorities' regime as a whole, see generally Azcarate, National Minorities (1945), particularly Chapter II. Ladas, The Exchange of Minorities: Bulgaria, Greece and Turkey (1932), particularly the introduction; Stone, International Guarantees of Minority Rights (1932); Regional Guarantees of Minority Rights (1933), for a survey of the procedures and practices of dealing with the minority problems; Macartney, op.cit., note 3, particularly Chapter VI. Inis Claude, The Protection of Minorities (1955); Evans, "The Protection of Minorities", B.Y.I.L. (1923-24), 95, 95-101; Mair, The Protection of Minorities (1928), particularly 17-21. See also Jungham, National Minorities in Europe (1932); Royce, International Protection of Minorities (1933).

post-war settlements, the principle declined in significance.\textsuperscript{26} It was not until the eve of the Second World War (WWII) that it was revived again.\textsuperscript{27} The formation of the United Nations after War was to help consolidate self-determination as an international law norm.

\textbf{Self-Determination and the United Nations}

In August 1941, the United Kingdom and the United States concluded the Atlantic Charter in which both parties pledged \textit{inter alia} that:

- they seek no territorial aggrandizement or other
- they desire to see no territorial changes that do not accord with the freely expressed wishes of the peoples concerned
- they respect the right of all peoples to choose the form of government under which they will live. \textsuperscript{28}

After Pearl Harbour, the principles of the Atlantic Charter as incorporating self-determination were adopted in the "Declaration of the

\begin{footnotes}

\item[27] The earliest manifestations of the principle in this period were implicit in Hitler's exploitation of the many imperfections of the post-war territorial settlements, in his campaign to build a Greater Germany. See his speeches in this regard in Baynes, \textit{Speeches of Adolf Hitler} (1942), Vol. I, 83, and Vol. II., 1568.

\item[28] The full text of the Atlantic Charter is reproduced in Churchill, \textit{The Second World War}, Vol. III (1950), 395. Apparently, these pledges were made with particular reference to the Balkan States and those European territories to be liberated from the Nazi occupation (Ofuatey-Kojoe, \textit{Self-Determination in International Law} (1972)), 97. Churchill confirmed this. In his view the principle of self-determination as incorporated in the Atlantic Charter did not apply to India, Burma or any of the British colonies but only to the European States. (Parliamentary Debates (Gt. Britain), 374, H.O. Deb., cols. 67-69.) Churchill emphasized this point again in his oft quoted statement that he had not "become the King's First Minister in order to preside over the liquidation of the British Empire" (London Times, November 11, 1942).
\end{footnotes}
At the conclusion of the war, the principles of the Atlantic Charter were accepted as part of the framework for the discussions at the 1945 San Francisco Conference which led to the formation of the United Nations.

At the initiative of the Soviet Union, the San Francisco Conference adopted the development of "friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples" as one of its purposes. The principle of self-determination was subsequently incorporated into Article 1(2) and Article 55 of the United Nations Charter. The reference to self-determination in both articles was however a generalized reference to the relations among the members of the United Nations. It related to the concept of equality of states and the right of each state to adopt its own form of government without external interference.

With respect to non-self-governing territories, the San Francisco Conference viewed self-determination as a principle that encompassed either self-government or independence. In other words, self-determination for non-self-governing territories was regarded as an institutional process for acquiring or conferring a definite political status (i.e. either self-government or complete independence). While complete independence meant the acquisition of statehood by the beneficiary territory, self-government involved only internal autonomy.

On the basis of this, the San Francisco Conference...

29. Russell and Mather, A History of the United Nations, Role of The United States 1940-1945 (1958), 51-52. The 'United Nations' at this stage comprised originally the U.S., U.K. and China and 22 other states which were at war with either Japan, Germany or Italy. Thus the 'United Nations' became the forerunner of the United Nations Organization formed after the war.


adopted a Declaration Regarding Non-Self-Governing Territories. In the Declaration, incorporated as Chapter XI of the United Nations Charter, administering powers recognized the "principle that the interests of (dependent) territories are paramount and accept as a sacred trust the obligation to promote to the utmost within the system of international peace and security...the well-being of the inhabitants of these territories".

In pursuance of such recognition, administering powers also pledged 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". The powers further pledged themselves to help the peoples concerned "to develop self-government" taking due account of the political aspirations of the peoples and to assist them in the progressive development of their free political institutions.

Chapter XII of the Charter established an International Trusteeship System that covered three categories of non-self-governing territories: (1) former mandated areas, (2) colonies detached from enemy states after WWII, (3) colonies voluntarily placed under the system by the administering states.

Under Article 76 of the Charter, the purposes of the system were the furtherance of international peace and security. The system also aimed at promoting

"the political, economic, social and cultural 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 people and the freely expressed wishes of the peoples concerned."

The form of independence to be exercised by a territory depended on whether it was a trust territory or an 'ordinary' non-self-governing
unit. Only the former could exercise a right of self-determination leading to complete independence.

Despite the distinctions between Trust Territories and non-Trust Territories the provisions of Chapter XI and Chapter XII were very significant because they emphasized the emergence of a new subject of the 'right' of self-determination. For the first time the principle was considered not only in relation to the nationalities of Europe or former enemy territories but to all non-self-governing peoples, albeit in different terms. The incorporation of self-determination in the United Nations Charter symbolized an institutional recognition of the principle and underscored its role in the post-war world order: an order partly based on the ideal that all peoples have the right to determine their own political destiny. The Charter's recognition of self-determination also provided a basis for nationalist activity in the non-self-governing territories. The nationalist movement, coupled with the efforts of anti-colonial groups in the United Nations, constituted a combined assault on imperial status quo and a challenge to the legitimacy of colonialism in world order. These developments provided a favourable international political climate for the process of decolonization in the years after 1945.

**Self-Determination as the Basis for Decolonization.**

In the years after the adoption of the United Nations Charter, the issue of self-determination for dependent peoples appeared settled with the commitments under Chapters XI and XII. However, after 1950, liberal groups sought more concessions for dependent peoples generally and for those areas not covered by Chapter XII particularly. As a basic strategy, the groups demanded a more positive change in the entire setting and international frame of mind in which colonial affairs
had so far been conducted. They sought a link between human rights and colonialism and argued in favour of a "higher law" of decolonization in the international sphere on the basis of which total freedom could be achieved by all dependent peoples. Anti-colonial groups generally called for the speediest possible ending of all colonial relationships and condemned utterly any extension or re-establishment of colonial rule. To the anti-colonial school, self-determination was to serve the purpose of implementing a definite human rights goal - decolonization.

In the United Nations, the new "higher law" of decolonization received its initial expression in 1952 when the General Assembly requested the Human Rights Commission to include an article on self-determination in each covenant on human rights. The Commission consequently adopted a draft with the section on the principle as follows:

1. All peoples and all nations shall have the right to self-determination, namely the right to determine freely 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 whatever manner the exercise of that


34. G.A.Res. 545 (VI), 5th Feb. 1952.
right by another people, shall promote the realization of that right in all their territories...

The draft was significant in the evolution of the principle and the general development of decolonization. For the first time no distinction was made between Trust Territories and Non-Self-Governing territories. The implication was that self-determination was applicable equally to both categories of territories. 35

After the Commission's declaration, anti-colonial groups pursued the relationship between colonialism and human rights more vigorously. At the Bandung Conference in 1955 it was resolved that "colonialism in all its manifestations is an evil which should speedily be brought to an end". More significantly, the resolution stipulated that the subjection of peoples to alien subjugation, domination and exploitation constituted a denial of human rights. 36 The significance of the Bandung Declaration lay in the fact that it represented the first definitive statement on colonialism and its relationship to human rights. Colonialism as a form of human relationship was defined in terms of "alien subjugation", "exploitation" and "domination".

In 1958 and in 1961, the Conference of Independent African States meeting in Accra and Addis Ababa, respectively, affirmed the Bandung Declaration. The three declarations did not perhaps constitute valid international law norms at the time, 37 but they nevertheless represented a cumulative assault on colonialism and gave an indication of existing thought on the issue of decolonization.

Within the United Nations, the general state of affairs also

37. It is however interesting to note that in the Namibia Opinion the declarations were cited as one of the basis of the legal validity of the principles of self-determination. See the separate opinion of Judge Ammoun, I.C.J. Reports (1971), 4, 74.
changed. With the admission of fifteen new African states the balance between the anti-colonial groups and imperial forces changed in favour of the former. The prevailing view of the anti-colonial group in the General Assembly was summed up in the words of the then President of Ghana, Kwame Nkrumah: "possession of colonies is...incompatible with membership of the United Nations".38

At its fifteenth Session, the General Assembly adopted the famous Resolution 1514 (XV) (Declaration on the Granting of Independence to Colonial Countries and Peoples). It repeated the Bandung Declaration on colonialism and added other new elements. Thus the first paragraph read:

The subjection of people to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is both contrary to the Charter of the United Nations and is an impediment to world peace and security.

Resolution 1514 (XV) is of great significance to the evolution of self-determination and the development of decolonization for a number of reasons. Firstly, it was supported by an overwhelming majority in the General Assembly, and constituted the first official condemnation of colonialism by the Assembly. Secondly, it established that colonialism was contrary to the principles of the United Nations Charter and linked the realization of the right of self-determination with the maintenance of international peace and security. This is important because issues affecting the maintenance of peace and security are matters of international concern excluded from the provisions of Article 2(7) of the Charter. By implication the resolution sought to make the realization of self-determination a matter for international concern.39 Thirdly, the resolution affirmed the

39. The relationship between self-determination and Article 2(7) will be treated in more detail later in the work, see p. 118 infra.
necessity of taking immediate steps to bring colonialism to an end. It further paved the path for concerted efforts in the General Assembly to end colonialism. To ensure the implementation of the directives under the resolution, the General Assembly established the Special Committee (of twenty-four members) to monitor the development of decolonization.

After 1960 the General Assembly and the Security Council followed Resolution 1514 (XV) with a consistent series of resolutions on self-determination for all non-self-governing peoples. The high point of these resolutions in the General Assembly was the Declaration on Friendly Relations adopted in 1970 as Resolution 2625 (XXV). The Declaration affirmed the legitimacy of self-determination for decolonization and the right of colonial peoples to seek and receive assistance in their quest for self-determination.

Despite the distinctions made between self-determination for Trust Territories and self-determination for other Non-Self-Governing Territories in the Charter, the General Assembly has over the years continuously affirmed the right of self-determination for all dependent territories without distinction. In the process, the Assembly has, through its resolutions, instituted the development of a decolonization regime quite different from what was envisaged at San Francisco. The question is, What is the legal significance of these General Assembly resolutions? And, in particular, How do they affect the status of self-determination in international law?

The Status of Self-Determination in International Law

Even though a number of authorities argue otherwise, a basic
point about General Assembly resolutions is that generally, they are in the nature of recommendations and as a rule they are not legally binding. However, repeated resolutions or declarations on the same matter supported by overwhelming majorities, could lead to the emergence of a binding rule of customary international law. In the light of this, it is submitted that the repeated affirmations of the principle of self-determination in the General Assembly's resolutions, accompanied by the general international acceptance of the principle has led to the crystallization of self-determination into a rule of law.


customary international law.

At the San Francisco Conference there was the view indicated in the report of the Committee 2 (Commission IV) that if an interpretation of a provision of the United Nations Charter given by an organ of the organization is generally acceptable, such an interpretation acquires binding force in international law. In this regard, where a General Assembly resolution relating to the interpretation of a particular provision of the Charter is adopted by an overwhelming majority, the resolution acquires binding force. The General Assembly's resolutions on self-determination are in themselves authoritative interpretations of the Charter provisions on the principle. To the extent that they are adopted by overwhelming majorities, they have a law creating effect and are legally binding.

The principle of self-determination as established by these

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45. Brownlie, Principles of Public International Law (1979) (herein-after cited as Brownlie, Principles) 696; Tunkin, Theory of International Law (W.E. Butler translation) (1974), 171. But see Vallat, op.cit., note 42, 211, for the view that it is as a "law applying" and not a "law making" body that the General Assembly exercises the function of interpretation. See also Devine, op.cit., note 42, 184, for the argument that the General Assembly's interpretations are not final and conclusive but merely evidence in favour of a particular interpretation of the Charter, the accuracy of which may therefore be contested by states.


47. Resolution 1514 (XV) for instance was adopted by a majority of 89 votes to 0 with 9 abstentions. Resolution 2625 (XXV) was adopted without a vote.
resolutions therefore has the status of a norm of international law and serves as a valid juridical right in decolonization.

Alien domination which necessitates the right of self-determination is an ethical issue. However, the development of rules in international law to ensure and protect the right is a legal and not an ethical exercise. Any rules evolved are nevertheless a set of ethical values translated into legal postulates. The legal in this case however, is only a means and not an end in itself. It requires the direct political action of States in the international community to make it operative. 48 Given the preponderance of the ethical and political elements of self-determination, it is hardly surprising that some writers consider it a moral, and at best a political principle. Such writers deny self-determination the status of a putative legal right in international law. 49 Their views notwithstanding, there is considerable authority for the proposition that the right of self-determination has juridical validity in modern international law.

In the Western Sahara Opinion Judge Dillard observed:

48. For a detailed discussion on the relationship between ethics, law and political action in respect of group protection, see Lador Lederer, International Group Protection (1968), 12.

49. Green, Report of the I.L.A. (1965), 58; In 1971 however, Green admitted that"there is...no right of self-determination in positive international law, although since 1966 there may be one in nascendi" (P.A.S.I.L., Vol. 65, 1971), 46. Schwarzenberger, A Manual of International Law, (1976),49; Emerson, Self-Determination Revisited in the Era of Decolonization (1964), 63-64; From Empire to Nation (1960),307; Eagleton, "Excesses of Self-Determination", Foreign Affairs, Vol. 31 (1953); Stone, Israel and Palestine: Assault on the Law of Nations (1981), Ch.5; Devine, "The Status of Rhodesia in International Law", Acta Juridica (1974), 183-209, "There is no legal right to self-determination and no legal duty to accord it" (208); Ramazini, P.A.S.I.L. (1965),51; Gross, P.A.S.I.L. (1965), 461. Bowett describes it as a "quasi-legal idea" ("Self-Determination and Political Rights in the Developing Countries", P.A.S.I.L. (1966), 129,131). It is however important to note that a lot of writers were prepared to admit that the principle was perhaps a legal right in nascendi. Since most of their assertions were made, some of them could have changed their position. See for instance the implications of the comments by Emerson in A.J.I.L., Vol. 72 (1978), 696-697.
At the broadest level there is the problem of determining whether the right of self-determination can qualify as a norm of international law...I need not dwell on the theoretical aspects of this problem... suffice to call attention to the fact that the present opinion is forthright in proclaiming the existence of the right. 50

In the Barcelona Traction Case Judge Ammoun took this point further and noted that the principle of self-determination has the status of jus cogens. 51 Even though this view has juristic support 52 it remains controversial. 53

Apart from these pronouncements by the International Court of Justice, a number of publicists also supported the juridical validity of the principle. E. Lauterpacht argues that international customary law acknowledges the right of self-determination and that this provides "the meeting point of customary law towards democratic principle(s)." 54 Nawaz describes self-determination as "one of the modern principles of international law", 55 while Brownlie emphatically states: "the present position is that [it] is a legal principle". 56

56. Brownlie, Principles, 259.
Similarly, Rosalyn Higgins argues that it is undisputed "that self-determination has developed into an international legal right". 57

The juridical status of the principle is enhanced by its incorporation in the League Covenant, 58 Atlantic Charter, 59 the United Nations Charter, 60 and other multilateral and regional treaties. 61

57. Higgins, op.cit., note 40, 103.

58. In the Aaland Island Case, The Commission of Jurists took the view that "the principle is not properly speaking a rule of international law and the League of Nations has not entered it in its Covenant". In another report, a Committee of Rapporteurs supported this statement (L.N.O.J., Suppl.No.3 (1920),5-6; Report of Committee of Rapporteurs, L.N.Council Doc. B7/21 68/108(VII) (1921),28). It must however be noted that both reports only dealt with the general application of self-determination in relation to the rights of a people within the frontiers of a state. The principle was not considered in respect of the rights and obligations within the framework of the Mandate System. It is submitted that the Mandate System under Article 22 of the League Covenant incorporated the spirit, if not the letter of self-determination. As an integral part of the substantial provisions of the League Covenant, the principle of self-determination as expressed through the Mandate System, assumed a legal basis giving rise to definite legal rights and obligations. See also Wright, Mandates Under the League of Nations (1968),534-35; the "Hyman Report", L.N.O.J., I (1920),334-41. This report dealt with the legal basis of the Mandate System. It indicated that responsibility of the League under the Mandate was moral rather than legal (338-39). It did not however dispute the legal validity of the Mandate System. It must however be pointed out that the validity of the principle under the Covenant was in specific relation to Mandated Territories only.

59. The Atlantic Charter was the first instrument to recognize the general application of the principle to all non-self-governing peoples. Despite Churchill's initial objections to such a wider interpretation under the Charter, the latter played a significant role in the evolution of the principle among the Allies through the war period and in the immediate post-WWII arrangements. See page 9, supra.

60. Korowicz observes that there is little reason to doubt that the principle is recognized by the Charter as a principle of international law, all the more since it is combined with equal rights of peoples; and the principle of equal rights of states and nations certainly is a principle of international law. (Korowicz, Introduction to International Law (1959),285) See also Wright, "Recognition and Self-Determination", P.A.S.I.L. (1954), 30; Hague Recueil, Vol. 98 (VIII) (1959), 193. The Role of Law (1961), 135; Bokor Szagó, op.cit., note 35, 26-27.

CONCLUSION

In its formative years, self-determination was neither a legal principle nor a general right recognized for all peoples. Deeply rooted in the evolution of the nation-state and nationalism, self-determination was regarded as a political principle which embodied an institutional mechanism for expressing the consent of the governed. Even though this democratic element received considerable emphasis in the years of the First World War, and was subsequently adopted as a guiding principle in the post-war settlements, self-determination was not accorded the status of a legal norm. However, developments in international relations since 1945 have changed the nature and status of the principle. Firstly, the incorporation of self-determination in the Charter of the United Nations provided the basis for the international recognition of the principle as a legal norm. This has been manifested particularly in the pronouncements of the United Nations and the general acceptance of the principle by the members of the organization. Secondly, the exercise of self-determination has come to be associated with the enjoyment of fundamental human rights and the notion of equality of peoples. Within the framework of these developments, self-determination has crystallized into a putative legal right and provided the juridical basis for decolonization in modern international law.

Given its inherent democratic ideal as a right of all peoples to self-government, its recognition as a pre-condition for the enjoyment of human rights, and its general acceptance as a legal norm, the emergence of self-determination after 1945 has not only resulted in decolonization, but has also affected relationships beyond the colonial

context. A basic point about self-determination is that, in all its aspects, it involves an inter-play of people and territory. Above all, it also regulates the political relationship between peoples. We have seen that in its early evolutionary stages the idea of self-determination was used as the basis for the grouping of nationalities that subsequently became the basis of the modern State in Europe. In the years after WWI, the democratic ideal of the principle was employed as a guide in the post-war international relations albeit to a limited extent. Within the context of decolonization (after 1945), self-determination received yet greater emphasis as a norm to regulate the relationship between imperial powers and their colonies. Out of the process of decolonization, almost all former colonies have now become independent and established as sovereign states. With the end of decolonization fast approaching, the right of self-determination of peoples now poses a complex dilemma. As a norm founded on democratic principles, is self-determination relevant to the relationship between the peoples of a sovereign state? In other words, having emerged as a norm in modern international law, the difficulty with self-determination is whether it is still a valid juridical basis for regulating societal relations in the post-colonial context.

The issue of the validity of self-determination in the post-colonial context has generated a debate among modern international lawyers. Out of the debate there has emerged the view among a considerable number of authors that, as an institutional mechanism for decolonization, the principle of self-determination is only applicable to colonial territories. According to this view, once a colony has exercised self-determination, the right cannot be extended beyond the context of colonialism. Generally, established practice lends
considerable weight to this view. Claims to self-determination by "colonial" peoples receive immediate recognition and are considered legitimate. On the other hand, there is a general tendency to deny recognition to claims by 'non-colonial' peoples. In view of the existing dichotomy between 'colonial' and 'non-colonial' people, the questions that arise are: What is a colony; what criteria are used to decide which territories are colonies; when do we say a colonial people have exercised an act of self-determination; what is the role of self-determination within the colonial context that presumably justifies its confinement to colonial territories? It is proposed to address these issues in the next chapter.
CHAPTER TWO

THE ACT OF SELF-DETERMINATION IN
THE CONTEXT OF DECOLONIZATION.

1. The Beneficiaries of Self-Determination

Under Resolution 1514 (XV), and indeed under subsequent resolutions on the principle "all peoples have a right to self-determination". Thus the beneficiaries of the principle are simply "peoples". As one commentator notes in this well-known passage, "on the face of it, it (seems) reasonable: let the people decide (their political future). It (is) in fact ridiculous because the people cannot decide until somebody decides who the people are". 1 Who then is a "people" for the purposes of self-determination?

In 1952, the United Nations Third Committee expressed the view that a "people" was the multiplicity of human beings constituting a nation or the aggregate of various nationalities governed by a single authority. 2 This definition is circular and tends to raise a further question: What then is a nation for the purposes of self-determination? Emerson advises that one must avoid the temptation of defining the nation with any precision. 3 He consequently argues that the nation can only be determined as existing when it has emerged in full bloom and leaves little doubt. Emerson's position tends to beg the question. This is because to determine whether a nation has emerged in full bloom or not, one must know what constitutes a nation. Cobban on the other hand, suggests that "any territorial community, the members of which are conscious of themselves as belonging to the same community

2. 6 U.N. G.A.O.R., 3rd C'ttee (1952), 300.
3. Emerson, "Progress and Nationalism", in Philip Thorpen (ed.), Nationalism and Progress, In Free Asia, (1956), 717-78.
or wish to maintain their identity" constitutes a nation. 4

Claude supports this view when he argues that,

nationality is in essence a subjective phenomenon - a group of people constitute a nation when they feel that they do...These feelings may be related but there is no uniform or necessary pattern of objective factors whence a national feeling is derived or in which it manifests itself. 5

Claude's 'subjective approach' in defining a nation may have a socio-logical value. It, however, fails to hold good in the face of General Assembly practice in decolonization. To ascertain the wishes of "a nation" for self-determination, the General Assembly usually uses plebiscites. In each such exercise, the nation that is consulted is not just a group of people each of whom believes himself to be part of a community. There are usually definite objective criteria applied to determine who belongs to the nation to be consulted. In the case of the Southern Camerouns, one of the interested political parties insisted that the "nation" that had to "determine" the territory's political future in a plebiscite had to comprise all British subjects ordinarily resident within the unit. However, the opposing parties argued that a person could only be considered as part of the determining group if he had either been born in the unit or one of his parents had been born in it. 6 The latter view prevailed. In British Togoland, a U.N. Visiting Mission to the territory recommended that for the purposes of Article 76(b) of The Charter, 7 the "people" who comprised


7. Article 76(b) of the Charter of the United Nations provides that the basic objectives of the Trusteeship System in accordance with the purposes of the United Nations laid down in Article 1... shall be to promote the political, economic, social and education-al 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
the "nation" which had to be consulted in the plebiscite were only those persons who were *bona fide* residents of the unit.\(^8\) In both the Southern Cameroons and British Togoland, we see that the General Assembly did not adopt the same criteria to identify the nation. However, a definite objective criteria was adopted in each case.

Clyde Eagleton argues that in identifying a nation for self-determination, the test ought to be the desire of a group to live together under their own chosen political system.\(^9\) Eagleton's view is more of a normative proposition than a definitive statement. In any case, it is doubtful whether the desire to live together is really a determinate factor. In the case of Cyprus, there were obvious political, social and cultural differences between Greek and Turkish Cypriots. This notwithstanding, the General Assembly looked on Cyprus as one national unit for the purposes of self-determination.\(^10\) In Kenya, too, despite the demonstrated unwillingness of the ethnic Somalis to live with the rest of Kenya, the territory emerged as one unit comprising the "Kenyan people" to whom independence was granted in 1960.\(^11\)

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7. (contd) each territory and the freely expressed wishes of the people concerned....

8. T/1218 para. 149.


Similarly, notwithstanding the differences between Papuans and New Guineans, Australia advocated the merger of both territories to form Papua New Guinea for independence in 1975.12

In a recent study prepared for the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities, Gross Espiell attempts to deal with the problem but offers no solutions. He admits that "self-determination of peoples is a right of peoples" and that even though People and Nation are two closely related principles they are not synonymous.13 More significantly, he argues:

Modern international law deliberately attributed the right to peoples and not to Nations or States. However when a People and the Nation are one and the same and when a People has established itself as a State, clearly that Nation and that State are, as forms or manifestations of the same people, implicitly entitled to the right of self-determination.14

According to Espiell then, a "people" sometimes overlaps with the "nation". In other words, a "people" may sometimes be the "nation". However, he declines to define in any specific terms what a "people" is or when a "people" overlaps with or constitutes a "nation". He consequently fails to explain the definitional criteria the General Assembly uses in identifying beneficiaries of self-determination in the colonial context.

In another study prepared for the Sub-Commission, Aureliu Cristescu offers a definition of "peoples" and "nations". He notes:

11. (contd) another publication by the Somali Govt. based on the NDF Report, it is reported that on the eve of Kenya's independence 87% of Somali resident population wished to be associated with the Somali Republic (Ministry of Foreign Affairs, The Somali Peoples' Quest for Unity (1965), 11).


14. Ibid.
(a) the term "peoples" denotes a social entity, possessing a clear identity and its own characteristics.

(b) It implies a relationship with a territory, even if the people in question have been wrongfully expelled from it and artificially replaced by another population.

(c) 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.15

Cristescu's treatment of "peoples" is rather vague and tends to avoid the central issues. Does a "social entity" become a "people" by reason of the relationship between it and a territory? In the context of decolonization, is "people" a social or a political concept? Is there a difference between "peoples" and "nations" in analysing the beneficiaries for self-determination in the colonial context? If there is, then when is a people a "people" and when is a nation a "nation" and when do they overlap if they ever do?

In an earlier study prepared by the United Nations Secretariat, a "nation" was defined as a term that encompasses colonies, mandates, protectorates, quasi-states and states. "Peoples" was defined as groups of human beings who may or may not comprise a nation. This definition is preferable because it is a more realistic reflection of the practice of the United Nations in respect of self-determination. The cases of Cyprus, British Togoland, Kenya and Papua New Guinea indicate the range of units for which the General Assembly has recognized the right. The practice of the Assembly in these cases supports the view that a "nation" as a self-determination unit, is a collection of human beings (i.e. "peoples") usually confined to a territorial base, the frontiers of which coincide with a colonial territory. The beneficiaries of self-

determination are the residents of the nation irrespective of their cultural or social differences. In other words, even though self-determination is the "right of peoples" nations as such are the subjects of the right. The nation in this regard is a geopolitical unit, often, but not always, historically determined and which may include all or part of one or more "people(s)". "Peoples" is an ethnographic concept. It is a collection of human beings knit together by a common cultural identity, manifested in common linguistic, religious and other traditional practices. A "people" may therefore be a tribe, an ethnic group, or a linguistic or religious sub-group.

The relationship between a "people" and a "nation" in the context of decolonization is well illustrated in the case of the new states of Africa. On the eve of independence, the colonies that were regarded as self-determination units were in fact a collection of "peoples" in each case. That is to say, each unit was usually a cluster of heterogeneous tribal groups which had been administered as a single colonial polity. In the decolonization process, the ethnographic distinctions between the "peoples" and the "nation" assume relative significance. The General Assembly is inclined to the position that a territory is a prima facie self-determination unit where it is identifiable and has a population that shares a distinct identity founded on the common political experience of colonization.

Even though the General Assembly adopts a geopolitical method to identify self-determination units in decolonization, it needs to be emphasized that this is only a general practice. There have been exceptions usually dictated by the interests of peace and security, or the peculiar circumstances of the units concerned. In such instances, the "nation" as a subject of self-determination is not necessarily seen as the single pre-existing colonial unit. The
General Assembly may rather take cognizance of the ethnographic or religious constitution of the unit in granting or permitting the exercise of self-determination. For instance in Palestine, the General Assembly approved what came to be called the Partition Plan for Jews and Palestinian Arabs. Other examples include the Camerouns and the separation of the Gilbert and Elice Islands. The General Assembly also impliedly accepted the partition of India when it admitted India and Pakistan as two separate members.

On the basis of these exceptions, it is correct to suggest that the General Assembly is more likely, in a given case, to accept the division of a territorial unit as separate beneficiaries of self-determination where there are strong ethnic, religious or other divisional tendencies.

Michla Pomerance describes the approach of the Assembly in these exceptions as a mark of inconsistency. His criticism fails to take account of the pragmatism required in dealing with decolonization issues. It is sufficient to point out that the approach of the Assembly is attributable more to a sense of flexibility than an indication of inconsistency. The identification of the beneficiary of self-determination is not subject to any rigid legal definitions; the identification process itself is a political act but assumes legal consequences once completed. The sole aim is decolonization as such and not necessarily the creation of single territorial units out of existing colonies even if conditions militate against such creations.

19. The General Assembly also accepted the division of Rwaunda-Urundi into Rwaunda and Burundi (G.A. Res. 1748 (XVI) and G.A. Res. 1949 (XVI)). However in this case, the territory originally consisted of the two separate districts before it came under Belgian administration under the Mandate System. So the acceptance of the division actually amounted to reverting to the status quo ante.
In conclusion, the collectivity of peoples that make up a nation is the beneficiary of self-determination. The nation as a geopolitical entity is conterminous with the colony as a territorial unit. In decolonization, the colony as such is a primary unit of self-determination. What then constitutes a colony?

What is a Colony?

In simple terms, a colony is a non-self-governing territory. In drawing the guidelines for the application of Article 73(e) of the Charter the General Assembly provided in the annex of Resolution 1541 (XV) that a territory is prima facie non-self-governing when it is administered by another territory and it is "geographically separate and...distinct ethnically and or culturally from the country administering it." The principles further provide that when such a prima facie case is established, other elements such as economic, administrative and judicial factors may then be considered. If such factors "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 the territory is non-self-governing. Let us examine the principal features of a non-self-governing unit closely.

Geographical Distinctions

Races inhabiting different territories tend to have separate cultural and ethnic values. Thus ethnic and cultural separation may sometimes, but not always, come with geographical separation. The exceptions may be the former British Dominions of Canada, New Zealand and Australia who maintained and still maintain fairly similar cultural and ethnic values despite the fact of geographical separation.
Resolution 1541 (XV)? It has been suggested that it implies a "salt-water" separation. The salt-water approach has two possible interpretations. On the one hand, it could mean the absence of geographical contiguity between the administrative territory and the metropolis. This means that a territory cannot claim to be non-self-governing if it is naturally and geographically contiguous to the administering state. Such an interpretation probably helps to explain the case of East Pakistan which some authorities classified as non-self-governing before the creation of Bangladesh. But it would not be useful in explaining the case of Namibia which shares a natural geographical territorial community with South Africa.

On the other hand, the salt-water concept could mean a separation of the metropolis and the administered territory by actual salt-water - i.e. sea. In this case the concept would seem to mean that a territory is non-self-governing only when it is an overseas possession of a state. By implication, a territory administered by another on the same land mass cannot be non-self-governing despite any domination and exploitation inherent in their relationship. This view of salt-water separation is hardly correct. In the Western Sahara Case, despite the fact that Morocco and Western Sahara share common frontiers, the two territories were held to be geographically distinct from each other. The decision suggests that the phrase "geographically distinct" implies a physical separation evidenced by territorial

23. Nayar, "Self-Determination: The Bangladesh Experience", Revue des Droits de L'homme, Vol. 7 (1974), 231,233; See also Sill's (ed.), International Encyclopaedia of the Social Sciences, Vol. 3 (1968), p.1. He writes that the institution of colonialism has "come to be identified with rule over peoples of different races inhabiting lands separated by salt-water from the imperial centre". See also Wright, op.cit., note 21, "the colony is not territorially contiguous with the motherland. It is separated by such natural barriers as a range of mountains, a desert, and sea."


25. I.C.J. Reports (1975), See particularly the opinion of Judge Castro, 148, 152.
frontiers. This interpretation is consistent with the San Francisco discussions on Article 73 of the U.N. Charter. At the Conference, it was generally agreed that Article 73 did not apply to people within the metropolitan frontiers of any state. It is quite instructive to note that at San Francisco the delegates were keen on the distinction between metropolitan frontiers and those of the non-self-governing frontiers. That distinction was not made on the basis of the "salt-water" concept.

One must admit that modern colonialism as motivated by the Industrial Revolution involved principally the acquisition of colonial markets overseas. It is important however to note that the issue of geographical location was only incidental to the colonial phenomenon. What made a territory a colony was not the fact that it was overseas. Colonialism with the general state of dependence is an institution premised on a relationship of domination, usually by a given "alien". Such a phenomenon could arise irrespective of an actual sea-water separation. When taken literally, the salt-water approach is definitely an incorrect interpretation of geographical distinction. The United States, for instance, administered the Panama Canal Zone and Alaska as non-self-governing units. Both units are located on the mainland of North American just as is the United States. This did not make any difference in their status. Both units were however geographically distinct from the United States because they were located


27. See however Wright, "Recognition and Self-Determination", P.A.S.I.L. (1954), 23,30. "It seems clear that territories which are geographically distinct were in the minds of drafters, although it might well be that mountains, lakes, rivers, deserts or other barriers would establish that geographical distinctiveness as well as salt water." His view involves the risk of a fallacy. For instance, a desert cannot in itself divide two territories and make them distinct without the territories being necessarily contiguous. In any case, the existence of a desert between two territories is not what makes one a colony and the other a metropolis.
outside its frontiers.

In sum, it is submitted that geographical distinctiveness within the context of decolonization implies the existence of a unit, distinct territorially from its administering power. In order to identify a unit as a colony, the test is whether as a territory, it exists or it is located outside the existing frontiers of the administering state.

Status of Subordination

The General Assembly resolutions do not define what may constitute a "status of subordination". However, the administration of a territory which is located outside the frontiers of the administering state, presupposes control over its political, economic, juridical and cultural affairs. It is this form of control that puts the administered territory in a status of subordination. When the relationship between two territories exhibits traces of such control, the General Assembly will consider the controlled territory as non-self-governing.

In the case of the Status of the Sultanate of Muscat and Oman, a group of Arab states in 1963 asked the General Assembly to declare Oman as being a colonial situation in view of its subordinate relationship with the United Kingdom. There had been a series of agreements between the Sultan and the United Kingdom. It was generally believed that the agreements favoured the United Kingdom and bore out an unequal relationship. The United Kingdom initially protested on the grounds that "it was not true that the Sultan was pledged to accept its advice in either external or internal matters". The General Assembly nevertheless established an Ad Hoc Committee to

examine the relationship as evidenced in the agreements.

At the end of its work the Committee noted that although each of the agreements was quite compatible with the sovereign status of the Sultanate, grave doubts arose when the agreements were considered collectively. The Committee consequently went on to say that:

these doubts are strengthened when it is also considered that the Sultan employs a senior British advisor, that his army is officered mainly by British subjects, that his case is presented at the U.N. by the U.K., that he was represented by the U.K. in negotiations with Saudi Arabia...and that it is a British company which is beginning to exploit the oil resources of the interior. 30

Significantly enough, the Committee did not declare that Oman was a colony. It did however, admit that "the relationship of the United Kingdom with the Sultan enables it to exercise great influence on the policies of the Sultanate". 31 The General Assembly consequently decided by Resolution 2073 (XX) that Oman was a "colonial situation". The Omani case is quite interesting and deserves attention. The territory was not listed as non-self-governing; British presence there was more indirect. But such factors did not stop the General Assembly from seeing the territory as a colony. The criteria used by the Assembly was the degree of influence and control that one state has over the affairs of another territory. This test was applied in the recent case of Puerto Rico. After several years as an associated state of the United States, the territory was reinstated on the non-self-governing list. In doing so, the United Nations justified its action on the grounds that Puerto Rico occupied a "subordinate" status, because the United States still maintained considerable control over the territory's political, economic, administrative and juridical processes. 32 The cases of Oman and Puerto Rico

30. A/5648, para 418.
31. Id., at para 619.
32. See note 111. infra.
will be discussed in more detail later in this work. On the basis of the foregoing analysis, it can be concluded that the formal administration of a territory located outside the frontiers of the administering power is \textit{prima facie} evidence of the subordinate status of the administered unit. The state of subordination itself consists of the control of the internal and external affairs of the administered territory. Where these elements of control are present in the relationship between a state and another territory, the latter would be classified as non-self-governing.

\underline{Termination of Colonial/Non-Self-Governing Status}

When does a territory become self-governing? One answer that immediately presents itself is: "when the territory exercises self-determination". But this only leads to other questions: How does the territory exercise self-determination and when do we say a territory has exercised self-determination?

In Resolutions 567 (VI) and 647 (VII) (of 1952) the General Assembly recognized the need to provide factors indicative of the exercise of self-determination and a full measure of self-government. These factors were to enable the Assembly to decide which territories were covered by Article 73(b). Conversely, the factors could help to determine which territories were no longer under Article 73(b) and on which transmission of information could be terminated. The General Assembly consequently appointed an Ad Hoc committee to conduct a study of factors to be taken into account in determining when information should cease to be transmitted on a non-self-
governing territory.\textsuperscript{34}

The committee recommended factors that fell under 3 main categories, viz.:

- the attainment of independence or other separate system of self-government
- the attainment of other system of self-government by association with the metropolitan state or in other form
- free association of a territory with the metropolis or another state as an integral part.\textsuperscript{35}

In 1953 the General Assembly adopted a Fourth Committee draft resolution based on the report of the Committee on Factors.\textsuperscript{36} The resolution (G.A.Res.742(VIII) affirmed the competence of the Assembly to consider factors indicative of self-determination and to make appropriate recommendations. It provided that:

For a territory to be deemed self-governing in economic, social or educational affairs, it is essential that its people shall have attained a full measure of self-government.\textsuperscript{37}

It further listed factors indicative of the attainment of a full measure of self-government.\textsuperscript{38} In the Principles annexed to Resolution 1541 (XV) of 1960, the General Assembly affirmed the three alternative means of attaining a full measure of self-government. It also provided guidelines for implementing association and integration arrangements.

Neither Resolution 1541 (XV) (reproduced in Appendix II) nor Resolution 742 (VIII) or Article 73 of the Charter provides for any definite supervisory or terminating functions for the General Assembly in respect of colonial territories. Nevertheless, over the years, the

\textsuperscript{34} The Committee comprised Australia, Belgium, Burma, Cuba, Guatemala, Iraq, the Netherlands, the United Kingdom, the United States and Venezuela.

\textsuperscript{35} A/2428(21-30th July, 1953).

\textsuperscript{36} G.A. Res 742 (VIII).

\textsuperscript{37} Ibid.

\textsuperscript{38} The list of factors is reproduced in full in Appendix I.
Assembly has consistently asserted its competence to determine when information should be transmitted over a territory and when it should not be, and when the specific indicative factors are present with regard to a territory and when they are not. The Assembly has subsequently arrogated to itself a terminating and supervisory function in respect of all issues of decolonization. Today, the competence of the Assembly is hardly disputable. It is reinforced by consistent affirmation through the Assembly's resolutions which have given rise to customary law norms on the operation of self-determination in the colonial context. 39

To ascertain whether a people has exercised its right to self-determination, the General Assembly would normally consider the condition of the territory in the light of the Principles of Resolution 1541 (XV) and the indicative factors of Resolution 742 (VIII). The practice of the assembly can be seen in more concrete terms by examining specific cases under the various alternatives of full self-government.

**Sovereign Independent Status**

This is the most common form of self-determination exercise adopted by most non-self-governing territories. It constitutes the attainment of statehood in international law and the General Assembly readily endorses it.

The principles of Resolution 1541 (XV) make no reference to the specific method for expressing a desire for sovereign status. However popular elections based on universal adult suffrage are usually regarded as valid means of expression. So in colonies like Ghana, Nigeria, Kenya and Papua New Guinea, self-determination came with the election

39. See pages 16-18, supra.
of an indigenous, independent parliamentary government.

Sometimes, a group of colonies could merge to form a single state or a federation in exercising their right. In the case of the Gold Coast and British Togoland, the two territories had been administered jointly since the end of WWII. On the eve of independence in 1957, British Togoland opted in a plebiscite to be part of the then Gold Coast. Thus on 6th March of the same year, both territories emerged as the independent state of Ghana. Other similar mergers include the union of Papula and New Guinea to form Papua New Guinea for independence in 1975, and the formation of the Mali federation by Senegal and Mali in 1960.

Under Resolution 742 (VIII) a territory has sovereign status when it:

1. assumes full international responsibility for the acts inherent in the exercise of its external sovereignty and for the corresponding acts in the administration of its internal affairs,
2. is eligible for United Nations membership,
3. is capable of entering into international relations with other states,
4. has complete freedom to choose the government it desires and has complete control over its internal affairs without any external intervention.

Such a territory also has the sovereign right to organize its own system of defence.

The foregoing factors are the normal attributes of a sovereign state. Consequently their absence tends to throw the sovereignty of the "state" concerned into serious doubt, in the eyes of the General

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40. The Federation was however short-lived. It was formed on the 20th June 1960. It broke up on the 20th August the same year.
Assembly. The Assembly's general practice is evidenced in the following cases.

(i) **The Case of Oman:** In the case of Oman we have indicated that the Sultan was apparently sovereign and had in fact entered into valid agreements with the U.K. During the discussions on the Status of Oman, the Sultan, in correspondence to the President of the Assembly declared

> We...remind the...delegates that we continue to hold responsibility for all matters within our territories which are sovereign and independent, not subject to any form of trusteeship nor in any sense non-self-governing.\(^{42}\)

In the discussions on the status of the Sultanate of Muscat and Oman, the Secretary-General's special representative who headed a U.N. Mission to the territory, noted that during discussions in the course of the Mission's work, "The Sultan emphasized...that the major policy-making decisions were his and his alone".\(^{43}\) The U.K. representative at the General Assembly confirmed this view in 1963 when he argued that the U.K. Parliament had never had the right to legislate in respect of Oman and Muscat and that "it was not true...that the Sultan was pledged to accept U.K. advice in either external or internal matters".\(^{44}\)

Despite the foregoing affirmations of the territory's apparent sovereign status, the Ad Hoc Committee investigating the issue found that there was no colonial case in the "formal sense" but the relationship of the U.K. with the "Sultan...enables it to exercise great influence on the policies of the Sultanate".\(^{45}\) The General Assembly

41. See text accompanying notes 28-30, supra.
42. A.5562 para. 164.
declared Oman to be non-self-governing. As indicated earlier, this action was based on the extent of British control over the territory.

Within the context of decolonization, the Oman case was quite unprecedented at the time. In 1953 some political organizations in Puerto Rico appealed for oral hearings before the Fourth Committee on the subordinate status of the territory to the United States. On two separate occasions the Committee rejected the requests to review the relationship between the United States and Puerto Rico. The General Assembly affirmed the Committee's position. Before 1953, there had been at least one case of "sovereign" territory which exhibited some of the Omani characteristics. In the U.S. Nationals in Morocco Case in 1952, the I.C.J. noted that Morocco had "made an arrangement...whereby France undertook to exercise certain sovereign powers in the name and on behalf of Morocco, and in principle, all of the international relations of Morocco". Despite this, the court indicated that Morocco "remained a sovereign". It is important to note that the relationship between France and Morocco was one of subordination and not agency. As Brownlie notes:

A protected state may provide an example of international representation which leaves the personality

46. See page 36, supra.

47. A majority of the members of the committee took the view that such an appeal or request did not constitute a petition on a non-self-governing territory under Article 87(b) of the Charter. Some members further argued that in any case the request came from a minority group within Puerto Rico. It was believed that a hearing could set a dangerous precedent. Any hearing in the view of the Committee could be entertained only when there were grave doubts about conditions in the territory. The Committee decided by 25 votes to 19 with 11 abstentions to reject the first request. On the second occasion the Committee decided by 29 votes to 17 with 8 abstentions to dismiss the request. (A/C.4/236, A/c.4(239)).


49. The U.S. Nationals in Morocco Case, I.C.J. Reports (1952),176,188.

50. Ibid.

51. Brownlie, Principles, 79.
and statehood of the entity represented intact, though from the point of view of the incidents of personality, the entity may be "dependent" in one or more...senses.  

The Omani case was a deviation from this practice in international law. Hence, its significance. In a way, it established a precedent for the General Assembly to "lift the veil" and examine the relationships between one territory and another in endorsing its independence. Where the relationship manifests a situation of political subordination, the General Assembly is most likely to reject any purported exercise of self-determination. This is well evidenced in the case of the Bantustans of South Africa.

(ii) The Bantustans: In 1971 South Africa announced that it would grant "self-determination" or "sovereign independence" to ten tribal reserves which had been designated as homelands. Consequently in 1975, Transkei was declared a sovereign state under a South African Act. It became the first "independent" Bantustan and was followed

52. Id., 78.
54. The South African Status of Transkei Act 1976. It provides in Section I(1) The Territory known as Transkei and consisting of the districts mentioned in Schedule A, is hereby declared to be a sovereign and independent state and shall cease to be part of the Republic of South Africa.
(2) The Republic of South Africa shall cease to exercise any authority over the said territory. The Act is reproduced in I.L.M., Vol.15 (1976),1175. See also the Constitution of Transkei Act 1976 reproduced in id.,1136. For the view that the South African parliament could still pass legislation on Transkei and for that matter other Bantustans see Kahn, "Some Thoughts on the Competency of the Transkei Legislative Assembly and the Sovereignty of the South African Parliament", South African Law Journ., Vol. 80 (1963), 473-82 particularly 481-82. But see also Richings, for a different opinion in "The Inapplicability of South African legislation in the Self-Governing Bantu (contd)
in December by the "states" of Bophuthatswana, Ciskei and Venda.\textsuperscript{55}

Despite the purported grant of self-determination, the General Assembly and the OAU have refused to endorse the independence of the Bantustans and have called on the international community not to recognize them.\textsuperscript{56}

A brief examination of the Bantustans would explain the international attitude. They are confined to a total area which is less than 13\% of the national territory of South Africa.\textsuperscript{57} As a general rule, whites are prohibited from settling in the Bantustans. The Bantustans, with about 50\% of the country's population, are located on some of the least fertile and arable lands in South Africa.\textsuperscript{58} "The subsistence agricultural economy, the erosion of some 30\% of the land, and over-population combine to make the economic and social development of the Bantustans quite difficult."\textsuperscript{59} All the Bantustans are landlocked and would have to rely on South Africa for their external links.

The true nature of the Bantustans and the relationship envisaged between them and South Africa were summed up by a South African senator:

> How could small scattered states arise? These areas will be economically dependent on the Union. It stands to reason that when we talk of the Nation's right to self-determination we cannot mean that we intend by that to cut up large slices of South Africa to turn them into independent states.\textsuperscript{60}


\textsuperscript{55} Slovo, "South Africa, No Middle Road", in Davidson, Slovo and Wilkins (eds), Southern Africa. The New Politics of Revolution (1976), 152.


\textsuperscript{57} Richardson III, op.cit., note 134, 187.

\textsuperscript{58} Ibid. \textsuperscript{59} Ibid. \textsuperscript{60} Quoted in Umozurike, 135.
In Resolution 2775E (XXVI), the General Assembly condemned the Bantustan Policy. It declared that the forcible removal of people to the homelands was "a violation of their inalienable rights, contrary to the principle of self-determination and prejudicial to the territorial integrity of the countries and the units of their peoples". When Transkei was declared "independent", the Assembly again condemned the policy and referred to Transkei's status as "sham independence". The OAU called it a "fraudulent pseudo-independence". There could be two rational bases for the international negative response to the creation of 'states' like Transkei: (1) the violation of the territorial integrity of the country and (2) the lack of economic and political independence. However one looks at these bases, the Bantustan problem and the attendant international response raise interesting questions for the international lawyer. For instance, does the reference to territorial integrity relate to South Africans as a whole or is it only relevant to the 50% predominantly black population affected by the policy? As a sovereign state, is the Republic of South Africa not allowed to cede part of its territory in any manner it chooses? Will the economic viability of the Bantustans be any different from that of the sovereign enclave state of Lesotho which relies totally on South Africa?

The rejection of the Bantustans implies that within the philosophy of the General Assembly, the people resident in each Bantustan do not constitute "a people" for the purposes of self-determination. Alternatively, each Bantustan unit does not constitute a legitimate unit for which self-determination could be claimed. The logical extension of this view is that, in terms of the right of self-

62. OAU Res. 493 (XXVII).
determination, South Africa is an integral unit. Thus apart from the unsavoury economic and racial aspects, to accept the Bantustan policy will imply an endorsement of the dismemberment of the territory and the forced relocation or dispersal of its majority.

We have indicated earlier that there have been instances in which the General Assembly either explicitly or implicitly accepted the divisions of a territorial unit for the purposes of self-determination. There is a fundamental distinction between the Bantustan situation and such divided territories. In the case of such divided units the General Assembly's action has usually been a response to divisive demands by the peoples concerned. In the case of the Bantustans, there are no such divisive claims. The demands of Black South Africans as championed by the African National Congress (ANC) of South Africa and other nationalist forces there, are generally opposed to the Bantustan policy. Thus the creation of the Bantustans lacks the support of its intended "beneficiaries". This in itself throws doubt on the legitimacy of the entire policy.

One must admit that "the principle of territorial integrity does not provide a permanent guarantee of present territorial divisions, nor does it preclude the granting of independence to (any) portion of the metropolitan territory even where such a grant is contrary to the wishes of the majority of the metropolitan state". A corollary to this view might be that as a sovereign state, South Africa can dispose of its territorial possessions as it chooses. In response to this, it may be suggested that in examining South Africa's sovereign rights with respect to the Bantustans, one should look at

63. See pages 31-32, supra.
65. Crawford, 225.
the problem in a contextual framework, consider the peoples involved and the history of the territory concerned. Within this context it is subsequently argued by one commentator that the South African government cannot dispose of part of the territory as it wishes, because the "Republic of South Africa" ought to be considered as holding the territory in trust pending the rise to power of the Black Majority. Assuming it is possible to draw a distinction between the Republic of South Africa on the one hand and the Black Majority on the other, this view would imply that every territorial transfer made by the South African Republic is invalid. Such an implication would obviously be hard to sustain. The commentator therefore admits that perhaps not all transfers are invalid but that a more precise analogy on the limitations on the Republic "might be made to the prohibition against divertitude of part of the territory in contemplation of self-determination much as the common law prohibition of transfer in contemplation of death". There seems to be no authority in international law for this interesting proposition. In empirical terms, the closest the General Assembly has come to this analogy was the prohibition in relation to the division of Mauritius prior to independence. But, the Assembly did not consider its actions in the light of any common law principle as such.

A more preferable argument is that the sovereign competence of

66. Richardson, op.cit., note 53. 67. Ibid. 68. Admittedly, Article 38(c) of the I.C.J. Statute lists the general principles of law recognized by civilized nations as a possible source of international law. However, the main spheres in which these principles have been held to apply have been either the general principles of legal liability and of the reparations for breaches of international obligations or the administration of justice. It is thus doubtful whether one can cite a common law principle to draw an analogy in respect of South Africa's actions on the Bantustans. In any case, Article 38 under which one can perhaps justify the use of common law principles, relates to the settlement of international disputes; one can classify the Bantustan issue as an international dispute.

South Africa over its territorial possessions is beyond question in international law. However, the exercise of sovereign authority is conditioned by the state's international obligations. Territorial transfers that involve the forceful relocation and denationalization of a state's citizens and the perpetuation of racial inequalities constitute violations of fundamental norms of international law. These factors, coupled with the need to respect the principle of territorial integrity make the Bantustan policy unacceptable.

Transkei, Bophuthatswana, Ciskei, Venda and the rest of the Bantustan 'states' to be created would not be possessed of all the indicia of sovereign statehood. It may well be that in this respect their disposition would not be any different from a considerable number of existing small states who have to rely on rich and powerful neighbours for existence. However a significant distinction between states in this category and the Bantustans is that the latter are deliberate creations in furtherance of racial inequalities contrary to international law and *jus cogens*, and in violation of the principles of territorial integrity. Above all, their peculiar disposition perpetuates their subordination to South Africa politically and economically. The existing situation manifests a definite control over these "states" by South Africa and consequently undermines their exercise of genuine sovereignty.


72. There are nine Bantustans at present. The remaining five are KwaZulu, Labowa, Gazankulu, Swazi and Basotho Qwagua.

73. *Barcelona Traction Case* (Phase II). I.C.J. Reports (1970), Witkin, *op.cit.*, note 135, 467. "It is evident that the recognition of Transkei was denied not only because the Bantustan's complete economic dependence on South Africa renders independence questionable; but more importantly because it represents the ultimate application of apartheid policy."
The indicative factors under Resolution 742 (VIII) are generally used as a guide to help promote a territory's enjoyment of self-determination. Where, in a given situation, a strict adherence to the factors would impede a territory's enjoyment of the right, the General Assembly tends to adopt a flexible approach. One therefore sees a marked difference between the General Assembly's treatment of Bantustans and its "liberal" treatment of Guinea Bissau a year earlier.

(iii) Guinea Bissau: In the case of Guinea Bissau the African Independence Party of Guinea and the Cape Verde Islands (PAIGC) was formed in 1956 to secure the territory's independence from Portuguese rule. In the mid-1960s, the PAIGC engaged in armed resistance against Portugal. By early 1970, it had "liberated" a substantial part of the territory. The PAIGC came to be recognized as the legitimate representative of the territory. In September 1973 it formed a government over the areas it controlled and proclaimed independence. By late 1973, not less than forty countries had recognized the PAIGC government and the state of Guinea Bissau. More significantly, the General Assembly in Resolution 3061 (XXVIII), recognized the "accession to independence of the people of Guinea Bissau, thereby creating the

74. In approving the Committee's report on the indicative factors the members of the General Assembly took the view that the factors were only to serve as broad guidelines and that each case had to be examined within its own context. The rationale was to allow for flexibility in dealing with each case (see G.A. Res.648(VII).


78. Among the countries were the U.S.S.R., China and India.
sovereign state of Guinea Bissau. The territory was subsequently admitted to United Nations membership after a unanimous Security Council recommendation in 1974.\textsuperscript{79}

The case of Guinea Bissau is significant for a number of reasons. For one thing, at the time when the Assembly endorsed independence, the PAIGC did not have effective control over the entire territory. Secondly, Portugal still administered and controlled parts of Guinea Bissau. Thirdly, the territory had not been granted independence. Fourthly, Portugal had still not recognized the PAIGC government and state of Guinea Bissau. In effect, the PAIGC was still a rebel government \textit{vis-à-vis} Portugal. So at the time of its recognition as a state and its subsequent admission into the United Nations, Guinea Bissau lacked some of the fundamental attributes of sovereign statehood. This notwithstanding, the sovereignty of the territory and its genuine exercise of self-determination was never questioned. On the contrary, the General Assembly condemned the continued presence of Portugal in the unliberated parts of Guinea Bissau describing it as an illegal occupation and act of aggression committed against the people of the Republic. When approving the credentials of Portugal’s representatives a month later, the General Assembly indicated that the approval was based on the understanding that the delegation represented only "Portugal as it exists within its frontiers in Europe and that they do not represent the Portuguese-dominated territories of Angola, Mozambique nor could they represent Guinea Bissau, which is an independent state".\textsuperscript{80}

Unlike the Bantustans, there was no doubt that the area controlled by the PAIGC was politically independent of the former administering power, and that the new government constituted the genuine and

\textsuperscript{80} G.A. Res. 3061 (XXVIII), 2 Nov. 1973 (emphasis mine).
legitimate representative of the peoples concerned.

The practice of the General Assembly supports the following conclusions: For the purposes of decolonization, the test for independence is actual exercise of sovereign authority by the territory concerned and a manifestation of political independence from the former administering power. The Assembly is most likely to reject a purported grant of independence where there is evidence that a unit's peculiar political or economic disposition is likely to undermine the genuine exercise of its sovereignty or place it in a subordinate status *vis-à-vis* the former administering power. The Assembly would not support a grant of independence if the exercise of self-determination in the given context is in furtherance of an illegal policy. Finally, where a strict adherence to the indicative factors is likely to affect a self-determination unit adversely, the Assembly would overlook them and ensure the territory's independence.

**Association Status**

An association arrangement involves a union between a non-self-governing territory and an existing state. The former however retains complete control over its internal affairs while exercising joint sovereignty with the existing state on matters that may be agreed on. The arrangement represents a useful alternative particularly for small states which might lack the appropriate natural and human resources to establish themselves as independent sovereign states.  

81 On the advantages of associated statehood for small states see Mautner, "West Bank and Gaza: The Case for Associate Statehood", Yale Studies in World Public Order, Vol. 6 (1980), 297-360, particularly 302-312; Keohane, "Small States in International Politics", Int.Org., Vol.23 (1969), 291. However as Mautner notes, no matter what the benefits of a state's participation in an association are, the relationship still entails significant constrictions on its authority and there could be a number of other viable and more preferable alternatives" (*id.*, 314).
Resolution 1541 (XV) provides that:

1. 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...the freedom to modify the status of that territory through the expression of their will by democratic means and through constitutional processes.

2. The associated territory should have the right to determine the 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.

Apart from the foregoing requirements, Resolution 742 (VIII) provides additional criteria indicative of an associated status. The people of the associated territory must possess a level of political advancement sufficient to enable them to understand and decide on the status of their territory. There must also be evidence that there is joint exercise of sovereignty in matters common to both territories and that the people of the associated territory participate effectively in the central administration. The territory must have complete internal self-government as evidenced by its control of local executive, judicial and legislative organs and cultural economic and social matters. Under Resolution 742 (VIII) these factors are to be considered against a background of geographical, ethnic and cultural considerations in each context.

We have indicated elsewhere that, even though no definite supervisory or terminating roles are provided for the General Assembly under Article 73 or Resolution 742 (VIII) and 1541 (XV), it has assumed these functions over time.82 Thus the Assembly's surveillance of a process of self-determination exercise is usually considered essential.

82. See pages 38, 39, supra.
to ensure the freedom of choice as required under Resolutions 742 (VIII) and 1541 (XV). It is also customary for the United Nations to send a visiting mission to a territory to ensure that there is a desirable level of political advancement and that the people of the territory to be associated are aware of all other alternatives and the implications. Where the United Nations' supervision is not secured the validity of the exercise could be doubtful. Similarly, where any of the requirements under Resolutions 742 (VIII) and 1514 (XV) are not met, the General Assembly would normally not endorse the self-determination exercise. The practice of the Assembly is evidenced by the following cases:

(i) **Afars and Issas**: In the case of the French territory of the Afars and Issas (French Somali now independent as Djibouti) the General Assembly adopted a resolution requesting France to organize, *in consultation with the Secretary General, arrangements for a U.N. supervised referendum* in the territory. The referendum was to help determine whether the people wanted an association with France or preferred to establish an independent state. France did not comply with the General Assembly recommendations when it conducted the referendum in the territory unilaterally. Fifty-eight percent of the people voted for association with France. But the General Assembly rejected the results of the referendum and retained the territory on the list of non-self-governing territories. 83

(ii) **The West Indian Associated States**: In 1967, the British Parliament passed the West Indian Act which granted associated status to a group of British colonies in the Caribbean. 84 Under the Act, the

83. G.A. Res. 2228 (XXI), para. 4.
84. G.A. Res. 2356.
85. The territories were: Antigua, Dominica, Grenada, St. Kitts-Nevis Anguilla, St. Lucia and St. Vincent.
United Kingdom was to be responsible for matters of nationality and citizenship and any matters which in the opinion of H.M.'s Government is a matter relative to defence (whether of an associated state or of the U.K. or any other territory for whose government H.M.'s Government in the U.K. is wholly or partly responsible) or to external affairs.  

In introducing the associated arrangement to the General Assembly Special Committee in 1967, the United Kingdom emphasized that the territories had complete autonomy over their local affairs. But, in fact, the 1967 Act left "with the United Kingdom a substantial degree of power to intervene in local affairs, so the division of authority between defence and foreign affairs on the one hand, and internal matters on the other (was) not adhered to".  

In the Fourth Committee, the United Kingdom further indicated that the proposed association was based on the free consent of the peoples concerned, expressed through referenda and elections. Australia and the United States hailed the arrangement as a constructive new approach to the problems of small countries. The rest of the Committee were of a different opinion. The general view was that the United Kingdom had not allowed a United Nations Mission into the territories; furthermore, the referendum and general elections were not supervised by the United Nations or any international group. The General Assembly was therefore in no position to confirm whether the association represented the genuine and free choice of the people or whether they had been made aware of the other alternatives.  

In Resolution 2357 (XII), the General Assembly took note of the

86. Section 2(1)(a) of the Act, text reproduced in U.K.Cmd.Papers (1967).  
88. Crawford, 374-375.  
89. Note 86.  
90. The States opposed to the association included the U.S.S.R., Poland, Tunisia, Yugoslavia, Chile and Uruguay (Yearbook of the United Nations (1967), 683).
proposed association. However, on the 15th December 1967, the United Kingdom notified the Assembly that it was terminating the transmission of information on the territories. The United Kingdom in effect took the view that it had discharged its obligations under Resolution 1514 (XV) and that the proposed association was consistent with the requirements of Resolutions 1541 (XV) and 742 (VIII). The General Assembly disagreed. In Resolution 2422 (XXII), the Assembly "strongly regretted" the decision of the United Kingdom. It then called on the latter in Resolution 2701 (XXV) to continue to transmit information on the territories.

The West Indian case is important because it underscores the suspicions and protectionist attitude of the General Assembly when dealing with the rights of dependent peoples vis-à-vis former colonial masters. Admittedly, the terms of the association did not conform to all the requirements of Resolution 742 (VIII). Nevertheless, there was the common view that the associated states enjoyed "a status which conferred full internal self-government". In the Special Committee's debate on the territories, the issue as to the existence of internal self-government in the territories was not disputed. The Committee only questioned the issue of procedure in rejecting the association. The General Assembly's treatment of the West Indian Associated States was in sharp contrast to its acceptance of the Cook Islands' association with New Zealand in 1965.

(iii) The Cook Islands: Discussions on the political future of the Cook Islands began in 1962 between the Islands' Legislative Assembly

91. Id., 727.

and New Zealand (the then administering power). The Assembly was asked to consider four main options: complete independence; a Polynesian Federation; association or integration with New Zealand.  

In the debates that followed on the issue, the Islands opted for association with New Zealand. The *Cook Islands Constitution Act 1964* (as amended in 1965), subsequently conferred association status on the Islands. Unlike the case of the West Indian Associated States, the Cook Islands' arrangement was consistent in every way with the requirements of Resolution 1541 (XV) and the general demands of the United Nations. The arrangement was preceded by free and open debates and general elections based on universal adult suffrage. "In accordance with the recommendations to the General Assembly by the Committee of Twenty-four and at New Zealand's request, the elections were supervised, the constitutional debates and the decisions of the new Legislative Assembly observed, by a panel of United Nations' observers."  

The substantive elements of the arrangements also met the indicative factors of Resolution 742 (VII). The Islands retain full internal self-government.  

New Zealand legislation does not apply to the Islands unless requested specifically.  

New Zealand is responsible for external affairs but subject to consultation with the Premier of the Cook Islands.  

As Head of State of New Zealand, the Queen is also the Head of State of the Islands.  

The citizens are consequently British subjects and New Zealand citizens.  


95. Article 39 of the Cook Islands Constitution.

96. *Id.*, Article 46.

97. Section 5, Cook Islands Constitution Act 1964.

98. Article 2, Cook Islands Constitution.
2064 (XX). It, however, declared that it retains the responsibility under Resolution 1514 (XV), "to assist the people of Cook Islands in the eventual achievement of full independence if they so wish at a future date".

So far, the association has proved satisfactory to both New Zealand and the Islands. The General Assembly's intervention has therefore not been necessary. It is important to note that in pursuit of what it regards as its responsibilities under Resolution 1514 (XV), the Assembly is most likely to intervene in the established association arrangement if the terms were to undermine the self-government of the Islands. This view is supported by the General Assembly's treatment of Puerto Rico in recent years.

(iv) **Puerto Rico:** We have already discussed Puerto Rico in relation to the General Assembly's perception of what constitutes a status of subordination. We noted that despite the longstanding association arrangement between the territory and the United States, the General Assembly has determined that Puerto Rico is still a non-self-governing territory. The Assembly has consequently rejected association status for Puerto Rico. This action is of interest because in 1953 the Assembly admitted that the association arrangement was valid. The operative part of the Assembly's resolution, accepting the arrangement, declared that on the basis of available documentation, the people of Puerto Rico have been vested with

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100. Page 36, supra.
the attributes of political sovereignty which clearly identify the status of self-government by the Puerto Rican people as that of an autonomous political entity. 101

Under the terms of the arrangement, which is in the nature of a "pact", Puerto Rico enjoys what is described as a Commonwealth Status. 102 Puerto Rican citizens have automatic United States citizenship. The territory elects a President Commissioner who represents it in the United States. He is also a non-voting member of the House of Representatives in Washington. 103 Puerto Rico has complete internal self-government and "control" over all its public domains. 104

Despite these features, the association arrangement has several defects in the light of the requirements of Resolution 740 (VII) and Resolution 1541 (XV). The many defects are best summed up in the words of Rueben Beirios Martinez when he argues that under the association:

Puerto Rico lacks the juridical power to modify the basic statutes which regulate its relationship with the metropolitan power. This is true not only in


104. Ibid.
theory but in practice, for in the last 20 years the U.S. Congress has repeatedly refused to effectuate changes proposed by the Commonwealth Government. Neither can Puerto Rico freely make important amendments to its own internal Constitution as required by United Nations Law since most important aspects of internal affairs...fall within the control of the U.S. Government. Such modifications are always subject to the will of the U.S. Congress which by disposition of the territorial clause in the U.S. Constitution has the power to regulate the territories belonging to that country. In fact, the measure of autonomy which Puerto Rico had in 1953 has actually decreased, for the U.S. Federal Government has further pre-empted such areas as wages, labour relations, health measures, oil imports, pollution, transportation and the like.

The Puerto Rican case is unique because despite these severe shortcomings in the relationship, the people of Puerto Rico voted in a plebiscite in 1967 to affirm their support for the Commonwealth status. As part of the plebiscite, it was made clear that a vote for the Commonwealth implied:

The reaffirmation of the Commonwealth...as an autonomous community permanently associated with the United States and for the development of Commonwealth to a maximum of self-government compatible with a common defence, a common currency and the indissoluble link of the citizenship of the United States.

It is important to point out that the plebiscite was not supervised by the United Nations or any other international body. And it is also arguable whether the people of Puerto Rico were presented with all the range of alternatives under Resolution 1541 (XV). It is however doubtful whether the absence of international supervision was material to the validity of the results of the plebiscite. For


106. 85% of the electorate were reported to have participated. 60% of them voted in favour of the Commonwealth. See a detailed breakdown of the results in Benitz, op.cit., note 102,10.

107. Ibid.

108. Martinez argues that the plebiscite was "in reality limited to the defenders of two political formulas, the so-called association (Commonwealth) and integration"(op.cit., note 102, 15).
one thing, Puerto Rico was not a *non-self-governing territory* in 1967. It is therefore not clear whether international supervision was a necessary prerequisite. However, given the United Nations' approach to the sensitive issues of integration and association, it would have been advisable to procure international supervision for the plebiscite. The United Nations' surveillance of the plebiscite would have only served an evidentiary role and attested to the true wishes of the people.

**Later United Nations' Reactions to the Puerto Rican Case:** After the 1967 plebiscite, the Committee of Twenty-Four received a proposal to examine the relationship between Puerto Rico and the United States.\(^{109}\) After a short debate the issue was adjourned indefinitely. Another attempt was made in 1971 but the issue was not put on the Assembly's agenda. In 1973, after considering a report on territories covered by Resolution 1514 (XV), the Special Committee adopted a resolution that

1. affirmed the inalienable rights of the People of Puerto Rico to self-determination, in accordance with Resolution 1514 (XV); (and)
2. requested the U.S. Government to refrain from taking any measures which might obstruct the full and free exercise of that and other rights.\(^{110}\)

In the subsequent years the Special Committee monitored developments in Puerto Rico. Finally in 1978 the Committee considered the status of Puerto Rico in more substantive terms. The Committee heard evidence from thirty-three petitioners, twenty of whom pleaded that Puerto Rico was still a 'colony' and that it occupied a subordinate status to the United States.\(^{111}\) At the end of its deliberations the

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110. A/8441.
Committee voted by 10 votes to none with 12 abstentions to reinstate Puerto Rico on the non-self-governing list. 112

The Puerto Rican case is very significant even though its full implications are not very clear. The Committee's considerations of the issue and subsequent reinstatement of the territory on the non-self-governing list supports the view that self-determination is a continuing right; and that in the specific case of association arrangements the United Nations may well have the competence to intervene if existing relations are inconsistent with the required indicative factors. On the other hand, Puerto Rico is still an associated state of the United States for all practical purposes. At best, the indictment by the Committee may have prompted the awareness for reforms in the relationship but the status of Puerto Rico remains fundamentally unchanged. 113 In the territory itself, nationalist demands now encompass commonwealth (i.e. association) status, statehood (i.e. incorporation as a state of the United States of America) and independence. Since 1976, the demand for statehood has assumed great prominence in Puerto Rican politics under the New Progressive Party (P.N.P.). 114

113. In 1979 however, the U.S. Congress passed a resolution affirming its "commitment to the right of Puerto Rico to determine their own political future" (U.S. Con.Res.35, 96th Cong.1st Sess. 125 Cong.Res.S11,371(1979). This has been interpreted as a strong indication by the U.S. Congress to admit any possible changes in the Puerto Rico-American relationship based on the wishes of the Puerto Rican people. A favourable alternative for Puerto Rico's political future is generally thought to be an option for a statehood, i.e. incorporation into the U.S., see note 114.

114. The New Progressive Party under Governor Carlos Romero Barcelo favours statehood as the best alternative for Puerto Rico. Under his leadership a plebiscite was scheduled for 1981 to determine the wishes of Puerto Ricans on the issue of incorporation into the United States. However, following a thin majority in the elections preceding the set date, the idea of the plebiscite was shelved indefinitely. See Mauero, op.cit.,note 102. On the statehood movement generally see the account by Cabranes, "Puerto Rico: Out of the Colonial Closet", Foreign Policy No.33(1978-79), 66-91. See however Martinez, "Independence for Puerto Rico: The Only (contd)
To summarize, the practice of the General Assembly supports the following conclusions on association arrangements. An associated status must be the free choice of the people of the associated territory. The choice process must be supervised by the United Nations or an impartial international agency and there must be evidence that the people have been made aware of other alternative means of exercising their right to self-determination. The associated territory must have full internal self-government evidenced by its control over its domestic affairs. This requirement is central to the entire arrangement. The territory must also retain the option of terminating or modifying the relationship within the terms of the arrangement. The General Assembly will normally not insist on separate international participation by an associated territory. It will regard effective consultations in respect of the conduct of foreign affairs and the joint exercise of sovereign power as adequate. Where all such elements are lacking, the General Assembly considers itself competent to intervene to ensure conformity with the factors indicative of the genuine exercise of self-determination.

Integration Status

Integration provides a means for a non-self-governing territory to exercise its right to self-determination by uniting with an existing state. However, unlike association, integration makes the territory concerned an integral part of the existing state.

For an integration to be valid under Resolutions 1541 (XV) and 742 (VIII), it must be implemented "on the basis of complete equality for the view that statehood (i.e. incorporation in the U.S.) could lead to a wave of violence and subsequent repression and that it is not a proper alternative. It is of interest to note that in considering Puerto Rico's case in 1978, the Decolonization Committee also took the position that statehood was not a suitable alternative and that in Puerto Rico's present situation it would constitute the culmination of colonialism (see the comments on this issue by Mauero).
between the peoples of both territories. The citizens should have equal rights and opportunities for representation and effective participation at all levels in the executive legislation and judicial organs of government. Resolution 1541 (XV) provides:

(a) the integrating territory should have attained an advanced stage of self-government with free political institutions, so that its people 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 the 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 U.N. could when it deems it necessary, supervise these processes.

Cases of such integration include the formation of the Malaysia Union in 1963, in which Singapore, Sarawak and Saban voted to join the independent state of Malaya. In 1964 the protectorate of Zanzibar also voted to join the independent state of Tanzania. Alaska and Hawaii are further examples. Both territories opted for integration with the U.S. The incorporation of the Northern Camerouns into the Republic of Nigeria in 1961 is another case of self-determination by integration.

The Issue of Political Advancement in Cases of Integration

Resolution 742 (VIII) provides that the people of an integrated territory should have a level of political advancement high enough to enable them to decide on the status of their territory. Resolution 1541 (XV) affirms this requirement in more specific terms: "the

115. Singapore later withdrew from the federation (1965).
117. G.A. Res. 1469 (IXV).
118. Ibid.
territory should have attained an advanced state of self-government with free political institutions..."

The political requirement in both resolutions appears to contradict the provisions of Resolution 1514 (XV) that:

inadequacy of political economic, social or educational preparedness should never serve as a pretext for delaying independence.

To resolve this contradiction, the General Assembly normally gives precedence to the provisions of Resolution 1541 (XV), depending on the peculiar circumstances of a territory. The test in each case is whether upholding the provisions of Resolution 1541 (XV) would be more beneficial to the integrating unit than insisting on an adequate level of political advancement or vice versa. The Assembly's practice is illustrated in two contrasting cases – Namibia and West Irian.

(i) The Case of South-West Africa (Namibia): The General Assembly dealt with the first case of integration in 1945 well before the formal adoption of Resolution 742. In the course of 1945-46 when South Africa indicated its intentions to annex the Mandated Territory of South-West Africa, it undertook consultations with the resident population. The method of consultation was a mixture of traditional tribal processes (for the Black peoples) and normal democratic forms (for the White population). South Africa justified its use of the tribal consultations by arguing that:

in the less advanced communities such as comprise the Natives of South West Africa, the tribe is the recognized political unit...any form of consultation therefore which did not have proper regard to Native tribal customs and susceptibilities, which was not in accord with the form in which the Natives are consulted in the course of normal administration and government by the chiefs and councils, would not have resulted in a valid expression of their wishes. [119]

The results of these "consultations" favoured integration with South Africa. The latter consequently requested the Fourth Committee to support its incorporation of South West Africa. It indicated that "to give effect to the wishes of people would be the logical application of the democratic principles of political self-determination". 120

The Fourth Committee however was of the general view that an integration between the two territories was impermissible. India argued that "in view of the state of development of the native population, it was impossible to believe that the latter had fully understood the nature and extent of the consultation it had undergone". 121 It maintained further that since South Africa itself adopted tribal methods of consultations instead of normal democratic processes in South West Africa, it could only be inferred that "the territory was not sufficiently developed to determine its own fate". 122 The Chinese delegation supported this view and argued that even though the consultations indicated the peoples wish for integration, "it was doubtful whether they had sufficient political advancement to permit a full understanding of the purpose and consequences of their decision". 123 In the view of the Czechoslovakian delegation, the wishes of the people of South West Africa expressed in the consultations were immaterial because the right to self-determination did not include the right to commit political suicide. 124

The General Assembly rejected the claim for self-determination for South West Africa. It explained that:

120. Ibid.
121. G.A.O.R. 4 C'ttee, 15th meeting, Nov. 5th, 1946.
122. Id., 19th meeting Nov 13, 1946; (A/C.4/68),288 (views presented by Cuba.
123. Id., 16th meeting, Nov. 7th, 1946, 78.
124. Id., 17th meeting, Nov. 8th, 1946, 86-87.
The African inhabitants of South West Africa have not as yet secured political autonomy or reached a stage of political development enabling them to express a considered opinion which the Assembly could recognize on such an important question as incorporation of their territory.  

As indicated earlier, the consultations in South West Africa were not supervised by the United Nations or any international agency. It is not clear whether the Assembly's decision would have been any different had there been international supervision. Apartheid had not become a significant international issue in 1946. It is thus doubtful whether the Assembly's decision was influenced by South Africa's racial policies. Its actions appear to have been motivated more by the immediate post-war policy to discourage annexations of mandated and trust territories. This is more so since the South West African issue was regarded by the Assembly as a case of annexation and not integration.

(ii) West Irian: When the issue of political advancement came up in the case of West Irian, the General Assembly reacted differently. Indonesia and the Netherlands had agreed in the New York Accord of 1962 that the musjawarah system (a traditional form of consultation) was to be used to determine the "procedures and appropriate methods" to be followed in the territory for the act of self-determination.

126. The United Nations' concern with apartheid begun in 1952 with the issue of the treatment of Indians in South Africa. In 1953 the General Assembly declared the apartheid policy and its consequences to be contrary to the Charter. It was not until 1962 that the Assembly established its Special Committee on apartheid. The Security Council concerned itself with the issue for the first time in 1960. Sohn and Buergenthal, International Protection of Human Rights (1973), 540).
127. Suspicions of South Africa's annexation interests arose from the annexation proposals of General Smut in the post-war settlements and in South Africa's outright refusal to submit the mandated territory to the trusteeship system after WWII. See Zimmern, The League of Nations and the Rule of Law (19 ).
128. Article 18(a) of the New York Agreement. See text in U.N.T.S., (contd)
The Accord also provided rather ambiguously, that any method decided on had to be in "accordance with international practice". It was further agreed that any consultation had to involve the participation of "all adults, males and females", of West Irian.\(^{129}\)

When the time came for a decision on the method to be used, Mr. Ortiz Sanz, the Secretary General's Representative in West Irian suggested that the "democratic, orthodox and universally accepted 'one-man-one-vote' would be most appropriate".\(^{130}\) But he also admitted that "the geographical and human realities in some parts of the territory required the application of realistic criterion".\(^{131}\) He consequently proposed a normal adult suffrage for the city areas and a form of tribal consultation for the rural areas. Indonesia, on the other hand, favoured a wider use of the tribal system. In a special report, it maintained that West Irian was primitive and that the musjawarah traditional consultations would be most suitable for

\(129\) Id., Article 18(c) of the New York Accord.
\(130\) Report of the Secretary General's Representative on Indonesia, 82.
\(131\) Ibid.
the entire territory. It argued:

In West Irian there exists, as is generally known, one of the most primitive and underdeveloped communities in the world. To measure the method and conduct of the act of free choice in such a community against purely Western democratic methods and procedures would indeed be erroneous and unrealistic.

Indonesia further suggested that since West Irian was "known to be one of the most underdeveloped areas in the world, one should have specific consideration for (its) specific circumstances".

If the people of West Irian were too primitive to be suitable for normal democratic processes, it would be logical to conclude that they did not have the level of political advancement or the appropriate political institutions required for integration under the resolutions. Nevertheless the General Assembly overlooked the lack of political adequacy and accepted Indonesia's methods of consultation and consequently endorsed the incorporation of West Irian. It must however be noted that unlike the case of South West Africa, the United Nations sent observers to supervise the consultation process.

133. Id., para. 55.
135. Black African states had misgivings about the Indonesian method. Ghana took the view that since the people were said to be primitive they ought to be provided with an "accelerated economic development" under the auspices of the United Nations to help to bring them up to a level that could enable them to exercise their right (G.A.O.R. 4th C'ttee, Plenary sess. 1812th Meeting, paras. 36-38). The Sierra Leonean delegate stressed that the people of West Irian deserved to be given the chance to use normal democratic processes because "No society could be so primitive... in the modern world that the vital exercise of democratic government should be indefinitely denied to its peoples" (Id., para.6).
136. The participation of the U.N. was however very minimal. In all, it involved only 195 out of about 1000 consultative assemblies (Report of the Sec. General's Representative in West Irian, paras. 128-37). On the dispute over West Irian and its settlements see generally Henderson, West New Guinea: The Dispute and its Settlement (contd)
The West Irian case has a number of interesting features. Indonesia was not a colonial power. As a former colony, it justified its integration with West Irian on the basis of territorial integrity. The incorporation was regarded as the final solution to Dutch colonialism over the territory. On the basis of the West Irian and the South West African cases a conclusion has been suggested by Michla Pomerance on integration:

In the U.N....any act of self-determination (even one conducted by scrupulously democratic procedures) other than independence is suspect, this is so only where the outcome is seen as perpetuating a colonial relationship. But where a claim to self-determination and independence is pitted against a territorial integrity claim of a non-colonial power, the latter claim generally takes precedence.

The logical extension of this view is that in such cases, the principle of territorial integrity overrides claims to self-determination as the basis for decolonization. It is submitted that this conclusion is incorrect and misleading given the evidence of existing cases. The

136. (contd) (1973); Bone, The Dynamics of the Western New Guinea (Irian Barat) Problem (1962); Szudek, "Crisis in West Papua", New World (July, 1969); Sharp, The Rule of the Sword: The Story of West Irian (1977). There is evidence that the purported settlement did not accord with the true wishes of the Irianese and that it has led to separatist agitation, see Henderson, "West Irian, A Problem Settled or Post-poned?", Current Affairs Bull., Oct.1969; Separatist guerrilla activities have intensified in recent times (Sydney Morning Herald, 4th April 1984).

137. Throughout the debates on West Irian, Indonesia took the view that the territory was an integral part of what used to be called Netherlands East Indies. It was argued that "West Irian...was part of the Netherlands East Indies, an entity that was distinctly recognized and recognizable which had functioned as a unitary and integral territory for over 50 years (G.A.O.R., 16th Sess.plen. mtg. 1065th, para. 100, cited in Sureda, 146). The Burmese delegate cynically concluded the Indonesian argument by observing that the Netherlands East Indies had always been considered as an integral colonial unit. Such an "arrangement had continued until Indonesia had attained independence". It was only then that the Dutch had apparently become aware, New Guinea (West Irian) was not part of Indonesia. (U.N. G.A.O.R., 9th Sess. 1st C'ttee, 729th meeting, para. 28.)

General Assembly would not necessarily admit a territorial integrity claim if the people of the territory affected oppose incorporation and request self-determination. The issue in these cases involves a conflict between self-determination and the principle of territorial integrity. In general terms, it is one reflection of the tensions that exist between the principle of self-determination and other Charter norms. These tensions require careful analysis which we shall attend to in our next chapter.

CONCLUSION

Self-determination is a right of peoples. In the context of decolonization, peoples as beneficiaries are the residents of colonial or non-self-governing territories. A non-self-governing territory is a distinct territorial unit which is administered by another territory and is subordinate in status. A territory is subordinate in status when its internal and external affairs are controlled by the administering territory.

Non-self-governing status is terminated when an administered territory exercises self-government. A territory attains full self-government when it emerges as a sovereign state or when it associates with an existing state or when it wilfully accepts to be integrated into an existing state. In all these forms of self-determination exercises, the most material elements are the genuine expression of the will or wishes of the people concerned evidenced through plebiscites, referenda or elections or some other form of internationally supervised consultations and the actual control of the affairs of the territory by the peoples as beneficiaries. Where these important elements are found to be lacking, the United Nations General Assembly is likely to reject a purported grant or exercise
of self-determination.

Within the context of decolonization then, self-determination plays the role of an institutional mechanism for "liberating" a subject people. The full significance of this role can be analysed in terms of its external and internal consequences. Externally, self-determination guarantees the emergence of a unit into a legitimate state entity or as part of an existing state entity with the same rights and privileges accorded to all states irrespective of its size or wealth. Self-determination in this regard also ensures the unit's political independence through the requirement of respect for the principle of non-intervention. Internally, self-determination guarantees that all peoples have a government of their choice which responds to their political economic and cultural needs. In this respect self-determination also involves the right of the peoples of the unit to make inputs into the decision-making process of their community. It amounts to the right of participation.

It needs to be emphasized that even though the right to participation is related to fundamental democratic ideals, nothing in the United Nations resolutions on self-determination requires that in exercising self-determination, a unit must adopt Western-style or any particular form of democratic government. However within the context of decolonization, popular representation and participation are in themselves the raison d'être of the operation of self-determination insofar as the internal administration of the unit is concerned. Under colonial rule, we have indicated that domination of the administered territory was manifested, inter alia in the absence of popular government. The decision-making process was usually the prerogative of the colonial administration. The essence of decolonization was to remedy this form of relationship through the application
of self-determination. Consequently, where the exercise of the right of self-determination fails to guarantee popular participation in one form or the other, the role of self-determination in the decolonization process is vitiated.

In effect, at the international level, self-determination guarantees the equal participation of the beneficiary unit in the international process. At the national level, self-determination ensures the participation of peoples in their national process. In either case, the operation of self-determination plays a primary role in decolonization.
CHAPTER THREE

THE RELATIONSHIP BETWEEN SELF-DETERMINATION
AND OTHER NORMS IN THE
CHARTER OF THE UNITED NATIONS.

In the last chapter, we indicated that within the context of decolonization, self-determination plays a primary role. In this role, the principle sometimes conflicts with other norms of international law enshrined in the Charter of the United Nations. In this chapter, it is intended to examine the relationship between self-determination and the other Charter norms. In specific terms, we would examine the relationship between the principle of self-determination and (1) the principle of territorial integrity, (2) the prohibition of the use of force in international law and (3) the domestic jurisdiction principle. We have chosen these three areas because they are the most recurrent sources of conflict with claims of self-determination in decolonization.

TERRITORIAL INTEGRITY VERSUS SELF-DETERMINATION IN DECOLONIZATION

In the process of decolonization, the exercise of self-determination by a unit may sometimes conflict with the historic title of an existing state over the unit. In such cases, it is common for the state to claim the territory of the unit on the basis of the principle of territorial integrity. The question is, in the event of a conflict between the demands for self-determination by a unit and the claims of territorial integrity by a state, which takes precedence?

As indicated, a claim of territorial integrity is usually founded on a historic title to or relationship with the unit claimed.
In simple terms, it implies a remedial right of the reintegration of a previously dismembered territory. In this context, it is an appeal that a historic past be given juridical recognition in modern times. International Law accepts the concept of historic titles.¹ The United Nations Charter also recognizes the validity of the principle of territorial integrity. So it is generally thought that in the decolonization process, the United Nations General Assembly contemp­ plated the relevance of territorial integrity claims with respect to some colonial units. The principle of territorial integrity was thus included as paragraph 6 of Resolution 1514 (XV):

Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is compatible with the purposes and principles of the Charter of the United Nations.

Advocates of the territorial integrity principle argue that these provisions are relevant in respect of colonial territories which may be the subjects of historic titles. To this extent, paragraph 6 is a limitation of, or a qualification to, the general application of paragraph 2 of Resolution 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.

The wording of paragraph 6 is rather vague and therefore allows for several possible interpretations. The use of the word "country" instead of "state" is significant. The term "country" as used in the paragraph relates more to a geographical territorial unit. Thus it could well mean an existing sovereign state, or colonial entity or the totality of a previously dismembered territory. In view of this, the territorial integrity principle in paragraph 6 can be interpreted in terms of: (i) the reintegration of a precolonial territory, (ii) the

¹ See generally Blum, Historic Titles in International Law (1965).
non-dismemberment of a non-self-governing unit prior to independence, and (iii) the non-dismemberment of an existing sovereign state.

(i) The reintegration of a precolonial territory.

A demand for territorial integrity in pursuit of the reintegration of a pre-colonial territory is a historic claim. It implies a remedial action by virtue of the right of retrocession. During the drafting of paragraph 6, some delegates had interpreted its provisions in such terms. The Indonesian delegate had noted

"My delegation was one of the sponsors of paragraph 6, and in bringing it into the draft resolution we had in mind that the continuation of Dutch colonialism in West Irian is a partial disruption of the national unity and territorial integrity of our country."2

The Indonesian observation had eventually led to the withdrawal of a more categorical Guatemalan amendment which was framed as follows:

"The principle of self-determination may in no case impair the right of territorial unity of any state or its rights to the recovery of territory."3

Considering the interests of Guatemala and Indonesia in Belize4 and West Irian5 respectively, their interpretations were of direct relevance to the relationship between territorial integrity of a claimant state and the rights to self-determination of a colonial unit. Their views were supported by a few other delegates.6 Their interpretations amounted to a demand for a recognition of the rights of retrocession in respect of colonies which were parts of their territories in

4. The interest of Guatemala in Belize is discussed at pages 86-88, infra.
5. See pages 66-69, supra.
pre-colonial times.

The right of retrocession by virtue of a historic title entails a specific condition that the claimant state be identical to the pre-colonial entity of which the territory being claimed was an integral part. The arbitrariness with which the colonial powers demarcated colonial units has meant that except for a few exceptional cases the frontiers of the new emergent states do not necessarily coincide with those of the pre-colonial times. The rarity of the situation is manifested in the reluctance of the General Assembly to support the territorial integrity principle as a general rule, to override the self-determination claims in decolonization. So far, the Assembly has accepted the interpretation of paragraph 6 in favour of the reintegration of a pre-colonial territory in the very few cases of enclaves and to some extent in the case of the Falklands. These exceptions are discussed elsewhere in this work.

(ii) The non-dismemberment of a colonial or self-determination unit prior to independence.

During the drafting of paragraph 6 a considerable number of delegates interpreted the provisions in terms of the non-dismemberment of non-self-governing units. The Cyprus delegation succinctly summed up the raison d'être of the territorial integrity principle of paragraph 6 as being "to counter the consequences of the policy of 'divide and rule' which is the sad legacy of colonialism and carries its evil effects further into the future". In supporting paragraph 6, many of the delegates appear to have been motivated by the need "to prevent a part of the non-self-governing territory, in particular the


8. Pages 94 to 103 infra.

wealthiest part, from negotiating a separate agreement with the
former colonial power. There were also fears that the wealthiest part
might become, apart from the remainder of the territory, an associated
state of that power".  

In empirical terms, the General Assembly has always condemned and
sought to prevent the divisions of a territory by the administering
power, prior to independence. In 1965 when the United Kingdom decid­
ed to detach the British Indian Ocean Territories (BIOT) from the
colonies of Mauritius and the Seychelles, the General Assembly reminded
the United Kingdom that the separation of the islands was against
paragraph 6 of the Resolution 1514 (XV).  

When the United Kingdom proceeded with the separation, the Assembly condemned the action as
a violation of the territorial integrity principle. It is import­
ant to note that in this case the territorial integrity principle
was directed against conduct of an administering unit and to prevent
the dismemberment of the non-self-governing unit as such. The issue
in the BIOT instance was not whether the principle of territorial
integrity pre-empted self-determination or vice versa. It was whether
an administering power could legally divide up a colonial unit prior
to its independence. There is a definite distinction between this
issue and a situation that involves a claim of territorial integrity
by a state in respect of a colonial unit on the one hand and a claim
to self-determination by that unit on the other. The General Assembly
also upheld the territorial integrity principle in respect of the
offshore islands of Aden and disapproved of the United Kingdom
decision to detach the units from Aden prior to independence in

Norms on Self-Determination and Aggression", Yale Studies in World
Public Order, Vol. 7 (1980), 2,30. See also Franck and Hoffman,
76), 331, 370, for the view that paragraph 6 was seen as a
"grandfather clause to prevent 'Katanga-type' secessions".


12. G.A. Res. 2340 (XXIII), 2357 (XXII); U.N. Monthly Chronicle (1970),
1967. On the other hand, in the case of Papua New Guinea where there had been evidence of separatist tendencies to detach New Guinea from Papua, the Assembly "strongly endorsed the policies of the Administering Power and Government of Papua New Guinea (i.e. Australia) aimed at discouraging separatist movements and at promoting national unity" prior to Papua New Guinea's independence.

In all these cases, territorial integrity was not upheld against the principle of self-determination as such. It was applied to preserve the unity of a territory to enable it to exercise self-determination as a single unit. In other words, it was not a question of one principle overriding the other, there was rather a unity of purpose in applying both principles with one being regarded as creative of the appropriate conditions for the exercise of the other.

Where the General Assembly is unable to prevent a breakup of a territory by the colonial power prior to independence, it might continue to support the application of the territorial integrity principle even after independence and separation. Thus in modern times, the Assembly has supported the claims of the Comoro Islands to their integration with Mayotte over which the French retained control at the time of Comoro independence. Similarly, the Assembly has recognized the right of Madagascar to reintegration with the islands of Juana de Nova, Glorieuses, Europa and Bassas de India. The islands were administered as part of colonial Madagascar but remained under French control after Madagascar's independence.

The claims of the Comoro Islands and Madagascar belong in a different category. They must not be confused with claims of territorial

13. G.A. Res. 2623 (XX), 2183 (XXI). Despite the Assembly's opposition, the U.K. proceeded with the separation. See Sureda, 119-120.
The latter cases are founded on pre-colonial ties, and the former on the violations of paragraph 6 of the Resolution 1514 (XV) which forbids the dismemberment of a colonial unit prior to its exercise of self-determination.

(iii) The non-dismemberment of an existing sovereign state

Where paragraph 6 is interpreted in terms of a sovereign state's frontiers, it implies that the unity and territorial integrity of the state cannot be impaired on the pretext of alien subjugation, exploitation or domination. Paragraph 6 will apply in this regard to prohibit the secession of the Somalis from Ethiopia or Kenya or the Austrian-Germans from the South Tyrol of Italy in favour of their respective parent communities today. In other words, the operation of self-determination within the context of decolonization must be without prejudice to the existing frontiers of a sovereign state.

In the 1970 Declaration on Friendly Relations, Resolution 2625 (XXV), the General Assembly reaffirmed the relevance of the territorial integrity principle to existing states with qualifications.\textsuperscript{17}

The provisions on territorial integrity in the 1960 and 1970 declarations are relevant to sovereign states only insofar as they relate to claims to self-determination by groups resident within the boundaries of such states. The territorial integrity principle in these instances has no relevance whatsoever with respect to claims to self-determination by a distinct colonial unit.

Conclusions and General Empirical Observations

The territorial integrity principle can be interpreted with respect to three different circumstances, viz.: in respect of

\textsuperscript{17} The relevance of the territorial integrity principle and its attendant qualifications in respect of sovereign states are discussed in detail at page 190, \textit{infra}. Resolution 2525 (XXV) is reproduced in Appendix IV.
(a) sovereign states, (b) colonies prior to independence, and (c) the reintegration of a pre-colonial territory. Where it is interpreted in terms of the rights of a sovereign state, the principle of territorial integrity has no relevance to a claim of self-determination of a colonial people resident in a separate territorial unit. In the case of colonial territories, the territorial integrity principle takes precedence over all claims of self-determination by the constituent units of the territory. However this cannot be taken to imply that territorial integrity overrides the principle of self-determination in respect of these colonies since the role of the territorial integrity principle is to provide a unified basis for the eventual exercise of self-determination. Furthermore, the operation of the territorial integrity principle in such instances relates only to the action of the administering power in dividing up the unit. It has no relationship with the demands of territorial integrity by a sovereign state on the one hand and the claims of self-determination of a unit on the other. Apart from an exceptional category of cases, the General Assembly does not admit claims to colonial units by existing states on the basis of territorial integrity principle. 18

The practice of the Assembly indicates that as a general rule, the principle of self-determination stands *erga omnes* to all other claims in respect of a given colonial unit in the decolonization process. The general situation is well manifested in the following cases:

*East Timor*

On the eve of independence in East Timor, following the overthrow of the Caetano regime in Portugal, three political parties emerged in the territory. They were (1) Uniao Democratic de Timoe (UDT) which favoured the continued presence of Portugal, (2) Prete

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Revolucionarie de Timor Leste Independence (FRETELIN) which advocated independence and (3) Associacao Popular Democratic de Timor (APODETI) that supported integration with Indonesia. 19

As a result of their conflicting positions, civil war broke out before formal self-determination could be granted. Before the war, the FRETELIN controlled a substantial part of the territory. 20 However, the UDT later changed its position, moved to (Indonesian) West Timor and requested assistance from Indonesia. Indonesian troops consequently moved in and helped UDT and APODETI to establish a Provisional Government of East Timor. 21 For all practical purposes the territory has since been incorporated into Indonesia.

Indonesia justifies its annexation of the territory on the basis


20. The FRETELIN after taking over a substantial part of the territory proclaimed the Democratic Republic of East Timor (DRET) on the 29th November 1975. Considering the chaotic situation in the territory, Portugal refused to recognize the proclamation and the purported establishment of the state of East Timor. The DRET was not recognized by any state till its demise in December 1975 when Indonesia invaded the territory. Suter, "International Law and East Timor", Dyason House Papers, Vol. 5, No. 2 (December 1978), 1-10, 1-2; Lawless, op.cit., Note 18.

of territorial integrity founded on blood and culture and historic ties between the people of the East Timor and their kin in Indonesian Timor. It further defends the annexation on the basis of self defence and its long-term security interests which necessitate its control over East Timor. Indonesia also argued that it "invaded" East Timor on invitation and that the territory, without Indonesian presence would not be economically viable. The final defence put up by Indonesia is that given the chaotic situation in the territory after the departure of the Portuguese colonial administration, it intervened to help protect human rights on invitation. Thus its annexation is justifiable on the grounds of humanitarian intervention. 22

Following the invasion of the territory, the Security Council adopted Resolution 384 (1975) in which it deplored the action and affirmed the inalienable right of the people of East Timor to self-determination. It further called on Indonesia to withdraw its forces to enable the people to exercise their right to self-determination. Since the 1975 invasion, the General Assembly has consistently adopted resolutions at each annual session to condemn the Indonesian presence in East Timor and to affirm the right of the people to self-determination.

The first General Assembly resolution adopted on East Timor was 3485 (XXX), passed five days after the invasion. Even though it has followed up with other resolutions similar in tone at every session, attitudes in the Assembly could possibly change in favour of Indonesia in the future. This is reflected in the dwindling votes in the Assembly on the resolutions against Indonesia. The general trend in the voting pattern has been as follows since 1979: 62 for, 31 against.

22. Decolonization, cited note 18, 49. Clark, op.cit., note 10, 12. See also the same author's analysis and critique of Indonesia's arguments in id., 12-32.
With 45 abstentions; 1980: 58-35-46; 1981: 54-45-46 respectively.\(^{23}\)

The general voting pattern indicates the possibility that in future the Assembly may not adopt any resolution against Indonesia on the issue. In fact, in its 1983 session, the U.N. Decolonization Committee postponed the discussion of the Timor case till 1984.

Even though the general trend indicates diminishing support for Timor's claims to self-determination, it is doubtful whether one can categorically argue that the East Timor case indicates a growing preference in the Assembly for the territorial integrity principle as opposed to self-determination. The situation rather shows an increasing recognition in the Assembly of the fact that the Indonesian take-over is now a fait accompli, in which case, even though the act itself was initially illegal, the Assembly may be willing to come to terms with the realities of the case and accord the Indonesian action a sanction of legitimacy. Any conclusions in this regard are however, necessarily tentative since the existing figures, though diminishing, show a rejection of Indonesia's actions.

The persistence in the United Nations for consultations in West Irian and the general rejections of the legitimacy of the Indonesian annexation of East Timor supports the proposition that in issues of decolonization, self-determination as manifested through popular and democratic consultations is an overriding factor. As a rule, competing claims based on historical considerations or territorial integrity are of relative significance and are at best only tangential to the claims for self-determination.

It must be admitted that in the General Assembly the Indonesian invasion has met with the approval of the United States and other super powers (excluding the Soviet Union). In the Australasian region, Indonesia's action has also received the tacit support of Australia.

24. A legal title cannot be acquired through an illegal act. This is the basis of the concept of ex injuria non oritur jus. However, international law may also make a concession to a situation of fact and occasionally allow this general maxim to be overruled by the rule of ex facto oritur jus. In other words, in certain exceptions circumstances, States may be "willing" to lend their sanction— for the sake of preserving peace and stability— to certain situations of fact, even if the origins of such situations are not free from doubt" (Blum, op.cit., note 1,4.)
and the States of South East Asia. However the support of these 
powers is dictated by political considerations and their perceptions 
of their strategic requirements against the possible spread of 
communism in the region. It is not based on any conviction that in 
the decolonization process territorial integrity overrides the demands 
for self-determination.

The cases of East Timor and West Irian support the thesis 
that an integration of a territory must be preceded by consulta-
tions and the free choice of the peoples of the territory to be inte-
grated under impartial international supervision. Where these elements 
are lacking, the integration may well be treated as annexation irres-
pective of the preponderance of any competing claims. A logical 
corollary of this view is that in issues of decolonization, self-
determination is central and is categorically pre-emptory, except for 
a special regime of cases. The recent issue of Belize supports this 
contention.

25. Aldrich. Statements made before the Sub-Committee on Internation-
al Organizations of the House Committee on International Relations, 
ment did not question the incorporation of East Timor into 
Indonesia...This did not represent a legal judgment or endorsement 
of what took place. It was simply the judgment of those respons-
ible for our policy in the area that the integration was an 
accomplished fact, that the realities of the situation would not 
be changed by our opposition to what had occurred, and that such a 
policy would not serve our best interests in the light of the 
importance of our relations with Indonesia." Another commentator 
took a more ideological approach in appraising the problem: "the 
truth is that Indonesia has become some kind of policeman in South-
East Asia. With the extraordinary victories of the heroic peoples 
of Vietnam, Cambodia and Laos, the balance of power in that region 
has been radically changed and Indonesia has perforce become the 
stronghold of imperialism...East Timor is situated in a strategic 
area vital to the imperialistic, economic and nuclear strategy in 
the region." (Jose, R. Horta (DRET representative submission to 
See also Suter, East Timor and West Irian, M.R.G. Rep. No. 42 
(1982 ed.), 16.)
Belize

In September 1981, Belize emerged as a state in international law and was subsequently admitted to the United Nations. Its independence had been preceded by a dispute between the United Kingdom (the administering power) and Guatemala for over three centuries. A brief discussion of the dispute would be helpful. Guatemala claimed the territory on the basis of the principle of *uti possidetis*, a regional customary law principle among the Latin American States under which they agree that the boundaries of the newly independent states must remain the same as those of the former Spanish colonies they replaced. Guatemala's claim rested on the fact that Belize was administered as part of the former Spanish colony and now independent state of Guatemala. As a successor state it had a logical claim to Belize. Guatemala further reinforced its claims with the principle of territorial integrity and territorial contiguity.

On the other hand, the people of Belize objected to any incorporation of Guatemala and claimed the right to self-determination. In pursuance of its obligations under the United Nations Charter, the


United Kingdom subsequently accepted the demands and granted self-government to the territory in 1964 and promised to grant independence in due course.\(^{29}\) These developments prompted considerable diplomatic efforts by Guatemala to prevent the possible grant of independence pending the settlement of its claims.\(^{30}\) In the United Nations, Guatemala emphasized its territorial and historical claims. The United Kingdom on the other hand, consistently maintained the rights of the people of Belize to self-determination in accordance with their expressed wishes. With its involvement in the dispute, the United Nations persistently rejected any settlement that did not accord with such expressed wishes.\(^{31}\) In 1980 the General Assembly adopted resolution 35/20 demanding the Belize be granted independence in accordance with the wishes of its people as soon as possible and in any case before 1981, irrespective of the historical and territorial claims of Guatemala.\(^{32}\)

The accession of Belize to independence was the result of these developments and amounted to the most recent rejection of the territorial integrity argument in decolonization in the United Nations.


\(^{31}\) Since 1968 the United Kingdom Government has persistently declared that the dispute with Guatemala will not be settled on a basis which was not in accordance with the wishes of British Honduras (Belize). See Report of the Special Committee, 23 U.N. G.A.O.R. Annexes, Add 23, at 360. U.N.Doc. A/7200/Rev.1(1968).

It underscores the contention that where a given colonial people expressly reject incorporation in favour of independence, the General Assembly will, as a general rule, accept the pre-eminence of the principle of self-determination over any other competing claims as the basis of decolonization of the territory concerned.

In recent times, it has been suggested that in the decolonization process, self-determination does not necessarily override other competing values as a general rule, and that the principle is not "categorically pre-emptory". It is rather "contingently pre-emptory". In other words, in appropriate circumstances, "a strong historical claim overrides the right of an indigenous population to self-determination even though the claim is centuries old". Conversely, a "weak claim will not affect the right of self-determination no matter how recently the claim arose. It is further suggested that the correct position in international law is that "when self-determination and historical claims clash, it is not a matter of categorically overriding one in favour of the other. It is instead a matter of weighing and balancing the merits on either side. There are a number of difficulties with this view. It presupposes that there is a standard for measuring the strength and weakness of a given historical claim. If we are to accept it, what would constitute a strong claim and when do we say a claim is strong enough to override a self-determination claim founded on the expressed wishes of a colonial people? Will the forceful integration of a territory on the basis of a historical claim against the expressed wishes of its "people" not

33. Maguire, op.cit., note 27, 862-872.
34. Id., 871. Maguire uses the cases of Ifni and Goa as the premises of his proposition. But see page 94 seq. infra, for a discussion of these peculiar cases.
35. Maguire, id., 871-2.
36. Id., 872.
provide the fundamental ingredient for irredentism? The many problems associated with the proposition make it hardly acceptable. In any case, as an empirical proposition, it is wrong because it is inconsistent with actual cases we have considered. It may perhaps be sustainable by distorting available evidence and at the risk of confusing the special regime of enclaves and leased territories with normal self-determination units.

In the case of West Irian, East Timor and Belize, the General Assembly did not specifically consider the historical claims advanced on their merits before upholding the right of self-determination. In other words, the reasons for rejecting the historical claims in favour of self-determination in each case was not simply that the historical claims were weak. The general rationale in the Assembly appears to have been that whatever the merits of a historical claim might be, the wishes of the people took precedence in the disposal of their territories as a general rule. So far, one case in which the General Assembly seemed prepared to consider the merits of a historical claim in relation to the application of self-determination was that of Western Sahara. The Western Sahara case is therefore of great significance to the issue and deserves a careful examination.

**Western Sahara**

In 1969, 1970 and 1972, the General Assembly passed a series of resolutions requesting Spain as an administering power, to grant self-determination to Western Sahara. In compliance with its obligations, Spain announced that it would grant self-government to the territory in 1974 and organize a subsequent United Nations supervised

37. See the cases discussed at pages 77-78, supra. But see Maguire, op.cit., note 27, 864, notes 91 and 92 where the author uses the same cases to support a contrary opinion.

38. Discussions at pages 94-102, infra.

39. G.A. Res. 2229 (XXI), 2353-11 (XXII), 2428 (XXXIII), 2591 (XXIV), 2711 (XXV).
plebiscite in 1975 for a final act of self-determination. Following Spain's announcement, Morocco and Mauritania made claims to the territory demanding its incorporation. They indicated that they had historic ties with the territory originating from the pre-colonial period and that a grant of self-determination to the territory would be in breach of the territorial integrity principle. They, through the General Assembly, requested an advisory opinion on the issue.

After the pleadings and an examination of the relevant historical material, the majority in the Western Sahara Opinion concluded that:

the materials and information presented to it [did not] establish any ties of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco or the Mauritanian entity. Thus the Court [could not] find legal ties of such a nature as might affect the application of resolution 1514 (XV) in the decolonization of Western Sahara and, in particular, of the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory.

In the absence of the appropriate "legal ties" the court did not find it necessary to pronounce on the relationship between territorial integrity manifested by pre-colonial sovereign ties on the one hand, and the application of self-determination on the other hand. The court's conclusion left open the possible interpretation that pre-colonial sovereign legal ties could affect a claim of self-determination.

However the court also noted impliedly that such instances

41. G.A. Res. 3292. In the resolution the questions put to the Court were as follows: (1) was the Western Sahara...at the time of colonization by Spain a territory belonging to no-one (terra nullius)? If the answer to the question is in the negative, (2) what were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity?
42. I.C.J. Reports (1975), 12.
43. Id., 68, para. 162.
44. (contd) For other commentaries on the Western Sahara Opinion see Janis, "The I.C.J. Advisory Opinion on the Western Sahara:,
Harvard Int. Law Journ., Vol.17 (1976), 609-21; Reidel, "Con­
frontation in the Western Sahara in the light of the Opinion
of the I.C.J. of 16th October 1975 - a Critical Appraisal",
op.cit., note 27, 335-342; Amankwah, op.cit., note 20; Crawford,
96-99. "The Question of Western Sahara", at the U.N. in
Decolonization No.16 (1980).
would have to be exceptions and could not be interpreted to mean that self-determination was not the overriding principle in decolonization. It noted in relation to other similar instances:

the validity of the principle of self-determination defined as the need to pay regard to the freely expressed will of the peoples is not affected by the fact that in certain instances, the General Assembly has dispensed with the requirement of consulting the inhabitants of a given territory. Those instances were based either on the consideration that a certain population did not constitute a people entitled to self-determination or on the conviction that a consultation was totally unnecessary in view of the special circumstances.45

Throughout the opinion, the court's general position favoured the primacy of self-determination. A brief survey of the separate opinions of the judges clearly demonstrates this. Judge Dillard made reference to "the cardinal restraints which the legal right of self-determination imposes" and noted that "viewed in this perspective, it becomes almost self-evident that the existence of ancient legal ties...while they may influence some of the projected procedures for decolonization, can have only a tangential effect in the ultimate choices available to the people".46 Judge Singh also emphasized that "consultation of the people awaiting decolonization is an inescapable imperative" and that it was "the very sine qua non of all decolonization".47 Judge Boni was more unequivocal and stated in express terms what the majority opinion failed to do. He observed that "even if the General Assembly had had before it an advisory opinion of the court declaring that there were...sovereign ties, the Assembly would have been obliged to consult the inhabitants in conformity with resolution 1514 (XV)".48

The advent of colonialism affected and displaced pre-colonial

45. The Western Sahara Opinion, I.C.J. Reports (1975), 33. (Emphasis mine)
46. Id., 122.
47. Id., 81.
sovereign authority in several colonies. Viewed from the inter-temporal law perspective, it could be argued that colonial authority, having replaced pre-colonial sovereignty in such colonies, created a new regime that gave the territories a new status in international law. The development of decolonization in contemporary times has displaced colonial authority. A new regime of rights has emerged for the peoples of such colonies. On the basis of intertemporal law, it is therefore doubtful whether territorial integrity could be allowed to override self-determination as such. In the Western Sahara Opinion Judge Castro took up this point. He noted that "colonization created ties and rights that must be adjudged with the law in force at the time". Therefore, "whatever the existing legal ties with the territory may have been at the time of colonization,...legally, those ties remain subject to intertemporal law and that as a consequence they cannot stand in the way of the application of the principle of self-determination".

The rest of the court did not address itself to this interesting approach to the problem. The intertemporal law view underscores an important element in the whole issue of the significance of pre-colonial ties in the application of self-determination; the role of the law of decolonization is not to re-open old titles that were swept away by colonization. Its fundamental function is to create a new "higher law", based on the emergence of new values and attitudes in international law that give rise to specific rights for colonial peoples.

Despite the ambiguity in the conclusion of the majority opinion, one can conclude that the general tenor of the court's judgement favoured the paramountcy of self-determination and that as a general rule, the self-determination is \textit{erga omnes} to all other competing

49. \textit{Id.}, 169.  
50. \textit{Id.}, 171.
claims in issues of decolonization. This proposition will however not be applicable to an exceptional category of cases in decolonization listed below:

(i) **The Falklands and Gibraltar**

The General Assembly has rejected the primacy of self-determination in the decolonization disputes over the Falkland Islands and Gibraltar. The two units however belong to a unique category of "colonies". Colonial rule which necessitates the application of self-determination implies the subjection of a people to "alien subjugation". Neither the residents of the Falkland Islands nor Gibraltar are subject to alien rule. In fact, in either case, the prospective beneficiaries for whom self-determination is sought are nationals of the United Kingdom who, for

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one reason or the other have settled in the territories. In this respect they could be described as "plantations" of the administering power - the United Kingdom. Not surprisingly, in the process of decolonization, both units have always insisted on maintaining the status quo or adopting some form of association arrangement with the United Kingdom.

The General Assembly's recommendations on settlement of the disputes over Gibraltar and the Falklands are discussed elsewhere in this work. For our present purposes, it may just be noted that the Assembly's general attitude to the two territories, suggests that they do not constitute self-determination units. From the Assembly's point of view, what is at issue in the disputes over the Falklands and Gibraltar is not whether the "plantations" have a right to self-determination or not. The issue rather relates to who has title to the territory on which the "plantations" are resident. In pursuance of the territorial integrity principle, the General Assembly has demonstrated a willingness to admit the claims of states which are able to prove that they have historic title to such territories. What is at issue here, is the rationalization of the Assembly's practice in respect of the units we have described as "plantations". The conclusion drawn does not for that matter prejudge the issue as to the desirability of resolving the conflict on the basis of self-determination.

(ii) Colonial Enclaves

For the purposes of decolonization, a colonial enclave is usually


52. See pages 101; 329-330, infra.

53. In this regard see the discussion at pages 329-330.
a small territorial unit which is surrounded by an independent state on all frontiers except where it is limited by sea. In some cases, the enclave may have been part of the enclaving state in precolonial times. In the process of decolonization, it is not uncommon for the enclaving state to lay claim to the enclave for one reason or another. In such instances, the practice of the General Assembly has been to dispose of the territory not as a self-determination unit. The views of the residents are consequently not considered relevant and the territory may be awarded to the enclaving state.

The exact legal basis for this practice is not clear. However, it is commonly believed that it draws its strength from the territorial integrity principle in Article 6 of the Declaration on Colonies: "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 of the Charter". The practice is generally accepted in international law. However, as Crawford points out, it is restricted to "minute territories which approximate in the geographical sense, to 'enclaves' of the claimant state, which are ethnically and economically parasitic upon or derivative of the State and which cannot be said in any legitimate sense to constitute separate territorial units". Existing practice in respect of enclaves is evidenced by the following cases:

_Goa_

Goa was a Portuguese enclave located on the Arabian seaboard of India. In 1962, India invaded and subsequently annexed the territory. It justified its action on the grounds that Goa was historically and legally Indian territory. Even though a majority of the

55. U.N. S.C.O.R., 16th Year, 987th M'tting, para. 46. The view was advanced that Goa and other Portuguese colonies in India are
members of the Security Council took the view that India's action was contrary to Article 2(4) of the Charter, India escaped condemnation by the Council. Arguably, the seriousness of the illegal use of force must have been blunted by the fact that the issue involved decolonization. The significance of decolonization in this context is not so much that "it cures illegality as that it may allow illegality to be more readily accommodated through the processes of recognition and prescription, whereas in other circumstances aggression partakes of the nature of a breach of *jus cogens* and is not or not readily curable by prescription, lapse of time or acquiescence". Despite the apparent illegality, India's absorption of Goa is now regarded as an acceptable case of retrocession of a colonial enclave.

It is not certain how the United Nations would have disposed of the enclave if India had not annexed it by force. It may well be that given its size and its peculiar location, the United Nations would have eventually supported a transfer of the territory to India through a peaceful change. The cases of Ifni and Walvis Bay support this.

55 (contd) "linked with the Indian Union both by reason of their geographical position and by their history, culture, language and traditions. They were wrested from the Indian state at the time when the countries were establishing their colonial empires". See also *ibid.*, para.60, "India is one; Goa is an integral part of India". The Indian argument implies that Goa was taken from the Indian Union on the eve of colonization. However, given the fact that the Union only came into being after the 1947 partition of the subcontinent, the Indian historic claim is rather dubious. Perhaps it may be possible to justify its claims on the grounds that the Union is successor to the precolonial Indian entity, but the difficulty with this view will be that pre-colonial India, and indeed colonial India comprised the modern day state of India and Pakistan. With the partition, it is doubtful whether India alone can claim to be the legitimate successor of the precolonial entity. See the arguments of the Portuguese delegate on the issue during the Council Debates on Goa (*id.*, para. 39).

56. Moves by the Security Council to condemn India's actions were prevented by a Soviet Veto: S/5033.

57. *Crawford*, 113.


59. For a different view see *Wright, "The Goa Incident", A.J.I.L.*, (contd)
Ifni and Walvis Bay

The territory of Ifni was a Spanish colonial enclave located on the Atlantic coast of Morocco. Covering an area of 1,500 square miles, the territory had a population of only 50,000. In the process of decolonization, the General Assembly repeatedly requested Spain as the administering unit and Morocco as the claimant state to settle the issue of the territory's disposal through negotiations. The requests culminated in the Treaty of Fez under which Spain agreed to the retrocession of Ifni to Morocco in 1969. The General Assembly subsequently endorsed the transfer.

The practice of the Assembly indicates that it regards the enclaves as part of the enclaving states for all practical purposes. It therefore accepts reversion or retrocession as the most appropriate method of resolving the claims that arise over such territories. The Assembly's position is dictated more by pragmatic considerations than by the need for a rigid adherence to the principle of territorial integrity. This is because even though reversion presupposes previous ownership, the Assembly may still support a claim to an enclave by an enclaving state even where the available historical evidence does not indicate previous ownership. This seems to be the case with respect to Walvis Bay.

Covering an area of only 434 sq. miles, Walvis Bay is a South African possession located on Namibia's Atlantic shore. In the

59. (contd) Vol. 56 (1962), 618. "Since legally, Goa was under the administration of Portugal, the latter was under the obligation to promote self-government in the territory, and the General Assembly was competent to see that this obligation was fulfilled" (626). See also Higgins, The Development of International Law Through the Political Organs of the United Nations (1963), 187.

60. G.A. Res. 2078 (XX), 2229 (XXI), 2354 (XXII), 2428 (XXIII).

61. G.A. Res. 2354 (XXII).
The decolonization of Namibia, SWAPO claims Walvis Bay. The enclave is of great economic importance to a future independent Namibia. It is the only deep water port in the territory and an active commercial centre with a flourishing fishing industry that employs a considerable number of Namibians. Walvis Bay is also a South African military base. Politically, it is very doubtful whether a future independent Namibia will find it desirable to have this piece of South African territory located on its shores. For all these reasons, the General Assembly has persistently supported SWAPO's claims to the enclave in spite of the fact that historical evidence indicates South Africa may have a better title.

(iii) Internal Self-Determination

We have discussed that a non-self-governing territory exercises

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63. The industrial activities of Walvis Bay provides over 30,000 jobs for Africans most of whom are Namibians. See "South Africa's Legal Title to the Sovereignty over Walvis Bay", Release by the Ministry of Foreign Affairs, Johannesburg, South Africa (1977).

64. G.A. Res. 32, 19D November (1977). G.A. Res. 5-91 on the "Declaration of Namibia and Program for Action in Support of Self-Determination and Independence", S.C.Res. 432 (1978). During the 9th session of the General Assembly some of the African delegates were very unequivocal about the political and economic aspects of the Walvis Bay issue. See for instance the statement by the Nigerian delegate, "Walvis Bay is Namibia's umbilical cord and to sever it from the rest of Namibia will adversely affect the economic viability of an independent Namibia" (*Objective Justice*, op.cit., note 62, 4); statement by the Ethiopian delegate: "There can be no independent state without Walvis Bay and this is certainly not an issue for equivocation (*ibid.*).

self-determination when it emerges as an independent sovereign state or associates or integrates with another state, depending on its wishes. In some cases, however, despite a unit's desires to be established as an independent state, the General Assembly may rather recommend only internal autonomy or internal self-determination for the territory. The Assembly's action could be the result of a number of factors ranging from the interests of peace to the peculiar location of the territory. Eritrea is a typical example of such cases.

**Eritrea**

In the case of Eritrea, the territory applied for an independent status in a consultation undertaken in 1947. The option was later affirmed in another consultation in 1950.\(^{66}\) Notwithstanding such positive affirmations, the General Assembly decided to federate Eritrea with Ethiopia.\(^{67}\) The Assembly's action was rationalized on the basis of the need to protect Ethiopia's interests, and to ensure Eritrea's economic viability.\(^{68}\) Eritrea was given an autonomous status in the federation. The federation was abolished in 1962 in favour of a unitary state of Ethiopia.\(^{69}\) The current situation of Eritrea is discussed elsewhere in this work.\(^{70}\)

(iv) **Existing Right of Pre-emption over a Territory**

Where the territory of a non-self-governing unit is the subject of a treaty obligation, it could constitute an exception to the operation of self-determination. The General Assembly practice supports

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68. Ibid.


70. Page 282, infra.
the view that where a state can prove an existing right of pre-
emption over a territory, its rights could take precedence over other
claims. The following cases illustrate the point:

**Gibraltar**

In the case of Gibraltar, Spain ceded "the full and entire pro-
PERTY of the town and Castle" to Great Britain in 1913 under the
Treaty of Utrecht. It was agreed that "in case it shall hereafter
seem[meet]to the Crown of Great Britain to grant, sell, or by any
means alienate the property...the preference of having the same shall
always be given to the Crown of Spain before any others". In the de-
colonization of Gibraltar, Spain contends that its rights of retro-
cession to the territory takes precedence over the claims of "any
others". The crux of the Spanish argument being that the phrase 'any
others' under the Treaty includes the residents of Gibraltar.

Great Britain on the other hand maintains Gibraltar is a self-deter-
mination unit and that no cession can be effected without the free
consent of the residents. The latter have expressly indicated that
that they wish to be British subjects. Despite the British argu-
ment and the wishes of the residents the General Assembly has request-
ed the United Kingdom to negotiate a transfer of the territory to
Spain.

71. Crawford, 380.

72. Article 10 of the Treaty. On the issue of Gibraltar see general-
(1967), 265-277; Fawcett, "Gibraltar, The Legal issues", Int.Affairs,
Vol. 43 (1967), 236-251; Sureda, 190-198; Franck and Hoffman,
op.cit., note 10, 371-379.

73. But see the comments of Fawcett, id., 250. "The transfer of title
which would take place upon a grant of independence, to Gibraltar
would not be an alienation for the purpose of Article XI of the
Treaty of Utrecht."

74. See page 95, supra.

Other cases in a similar situation include the leased territories of Hong Kong\textsuperscript{76} and the Panama Canal Zone.\textsuperscript{77} The very nature of a lease in international law presupposes the continuation of the sovereignty of the leaser state (albeit dormant) over the leased territory. To this extent the rights of reversion of the leaser pre-empts all other claims in the event of a disposal of the territory or at the end of the term of the lease.

It is of course possible to argue that as non-self-governing territories, these entities are within the regime of Chapter XI of the Charter and that the administering states have specific legal obligations in respect of such units under Article 72 of the United Nations Charter. Article 103 of the Charter provides that,

\begin{quote}
In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreements their obligations under the present Charter shall prevail.
\end{quote}

If one takes the view that the Treaty of Utrecht and the lease arrangements constitute international agreements, it would follow that the obligations of the administering states under Article 72 take precedence over their obligations under such international agreements.

The only logical explanation of the Assembly's approach to the issue may be found in the support for the principle of territorial integrity in such cases. In other words, the exercise of a right of pre-emption is regarded as consistent with the notion of re-integration of a previously dismembered territory.

\textsuperscript{76} Part of the territory was leased to United Kingdom in 1898 by China for a period of 99 years. In 1972 it was taken off the list of units to which Resolution 1514 (XV) were considered applicable (note 71, supra.).

\textsuperscript{77} The Zone is the subject of a lease between the leaser, Panama and the leasee, the United States. It was part of a package of agreements labelled the Panama Canal Treaties. See I.L.M. (1977), 1021.
The relationship between self-determination and the use of force in international law can be examined in two respects (1) in relation to the use of force to suppress the demands of a unit and (2) in relation to whether a unit can use force to pursue its claims.

(1) The Use of Force to Suppress the Demands of a Unit

Under Resolution 1514 (XV) "all armed action and repressive measures of all kind directed against dependent peoples are prohibited in order to enable them to exercise their right of self-determination". How consistent is this prohibition with the Charter prohibition of the use of force? Under the United Nations Charter, the use of force is regulated by Article 2(4) and Article 51. For our purposes Article 2(4) is relevant at this stage. It provides that

All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.

On the one hand, there is support for the argument that this provision relates specifically to the conduct of states as such, "in their relations, and that it is directly related to the use of force against "the territorial integrity or political independence of any State." Since colonial entities are not states, Article 2(4) does not apply to the use of force to suppress the demands of a self-determination unit. There is therefore no relationship between the


79. The general force of this proposition is premised on the view that in general, the use of force unaccompanied by an intent to violate the territorial integrity or political independence of a state is not contrary to Article 2(4); Brownlie, International Law and the Use of Force by States (1963), 268; Bowett, Self-Defence in International Law (1958), 152. But see Bokor Szegő, New States in International Law (1970), 36.
prohibition of force in Resolution 1514 (XV) and Article 2(4).

It has also been argued that in international law, colonial peoples assume the nationality of the metropolitan state. Consequently, the use of force by a state against its colonies could in fact amount to an action against its own nationals rather than an action against another state. There is also support for the view that the provisions of Resolution 1514 (XV) do not relate easily to the definition of aggression. For the purposes of aggression, the victim must be a state. Since colonial territories are not states one can not speak of the prohibition of the use of force against a colonial unit in terms of

80. Dugard, "The Organization of African Unity and Colonialism. An Inquiry into the Plea of Self-Defence as a Justification for the Use of Force for the Eradication of Colonialism", I.C.L.Q., Vol. 16 (1967), 157,172. In the case of the Indonesia for instance, the Netherlands argued initially that its use of force in the Indonesia colony was a matter essentially within its domestic jurisdiction. Higgins suggests that "had the situation been put before the Council in terms of Article 2(4), it could equally well have been argued that the action of the Netherlands was not a use of force in international relations", op.cit., note 5 (221). During the drafting of the Resolution 2625 (XXV), The Declaration on Friendly Relations, a substantial number of states also took the view that the provisions of Art. 2(4) could not be stretched to cover internal disorders arising in non-self-governing units. For this reason these types of situations should be viewed in the light of the principle of equality and self-determination and not the prohibition of the use of force. (Statements by U.S.A., Canada, Australia and U.K. in U.N. Doc. A.AC.125/Sr, 17, 66-68.)

81. Aggression has been defined as "the use of force by a State against the sovereign, territorial integrity or political independence of another state or in any other manner inconsistent with the Charter of the United Nations as set out in (the) definition". "The term state (a) is used without prejudice to the questions of recognition or to whether a state is a member of the United Nations and (b) includes the concept of a group of states where appropriate." (G.A. Res. 3314 (XXIX). See the text in I.L.M., Vol. 13 (1974), 710.) For the view that the definition does not cover colonies and non-state entities see Stone, Conflict Through Consensus (1977), 130-131. On the definition of aggression generally see Ferencz, Defining International Aggression: The Search for World Peace (two Vols.) (1975), particularly Part 4. of Vol. 2.
the general prohibition of aggression. But on the other hand, it could be argued that in modern times, a colonial unit has a status and personality distinct from the administering unit. The use of force to suppress the demands of the colonial unit can therefore not be properly regarded as an action against the "nationals" of the administering power. Any resultant conflict is consequently not a civil strife but an international war subject to the laws of war. In view of this, the disposition of the territory of a self-determination unit may well be equivalent to that of a State for the purposes of Article 2(4) prohibition, and aggression in international law. The difficulty is that this formidable proposition has no substantive authority as such in international law, apart from the simple analogical

82. In this respect it is instructive to note that despite the constant condemnation of the use of force against colonial peoples, the General Assembly has generally been reluctant to brand such armed activities as aggression. The one occasion in which the Assembly freely accused a colonial power of aggression appears to be in the case of Portugal's presence in Guinea Bissau. However in this instance, the Assembly's assertions were based on the fact that Guinea Bissau had been declared independent. It was in other words, a state to which the definition of aggression fitted. (See G.A. Res. 3061 (XXVIII).) See also Stone, Israel and Palestine. Assault on the Law of Nations (1981), 86-87.

83. See G.A. Res. 2625 (XXV). "The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State 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". See also Sureda 347, "For the purposes of the use of force, colonies are no longer considered to be an integral part of the metropolis".

inference that, if colonial conflicts are international wars, then
the colonies are equivalent to States for the purposes of the use of
force. It is one thing to say that colonial conflicts are inter­
national wars and it is another thing to say that the territory of a
colonial unit is equivalent to that of a state. The fact that colon­
ial conflicts are considered as international wars does not necessar­
ily transform the territory of a colonial unit into a state in inter­
national law. 85

A more convincing argument about the link between the prohibition
of the use of force against a self-determination unit and the Charter
prohibition of the use of force lies in the interpretation of the
"second limb" of Article 2(4). The article prohibits the use of
force against states or the use of force in any manner inconsistent
with the Purposes of the United Nations. Under the Charter, Chapter
XII, territories have a right to independence. Since the objectives
of Chapter XII are an integral part of the Purposes of the United
Nations, the use of force to suppress a Chapter XII territory's claim
would be contrary to the Purpose of the United Nations. Furthermore,
one of the Purposes of the United Nations is 'to develop friendly

84. (contd) Effect of United Nations Treatment of African Liberation
Movements and the P.L.O." , Harvard Int'l.L.Journ., Vol. 17 (1976),
561-80. Pomerance, Self-Determination in Law and Practice
(1982), 52-56.

85. But see Boko-Szegö, op.cit., note 79, 37."Since international
law has recognized the right of self-determination, the use of
force against a dependent territory could practically be qualified
as being in defiance of the prohibition of the use of force
against the territorial integrity or political independence of
a State." Her argument is non sequitur. The fact that the right
of self-determination has been recognized as a norm of internation­
al law does not mean that the use of force to prevent its exercise
by a unit, can be qualified as the use of force against the
territorial integrity of a state. This argument of course does
not prejudice the issue as to whether the use of force against
a self-determination unit is consistent with the Purposes of
the United Nations. See the discussion in the text following
Note 85.
relations among nations based on respect for the principles of equal rights and self-determination of peoples'. It is significant that the word "nations" was used instead of states. Since "nations" and "peoples" may well be colonial peoples, the use of force to suppress the demands for self-determination would be inconsistent with the Purposes of the United Nations and a consequent breach of the "second limb" of Article 2(4).  

In any case, the use of force or other measures against a colonial unit to suppress demands for self-determination may *ipso facto* constitute a denial of human rights and fundamental freedoms. Since respect for human rights and fundamental freedoms are both Purposes of the United Nations, the use of force in such circumstances would be a breach of Article 2(4).

After the adoption of Resolution 1514 (XV) in 1960, several subsequent General Assembly resolutions affirmed the prohibition of the use of force to suppress the demands of colonial peoples. More significantly, the resolutions added a new dimension to the use of force in relation to the units by consistently declaring that colonial peoples:

1. may resist by force, any suppression of their demands for self-determination; (and)
2. are entitled to seek and receive "moral and material assistance" in their resistance against such forms of suppression.

This leads us to the second issue:

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87. Note 78.
(ii) Whether a Self-Determination Unit Can Legally Use Force to Pursue its Demands

This issue raises a number of difficulties in relation to existing Charter principles. For instance, is the use of force in such circumstances a breach of Article 2(4), and is it consistent with Article 51? Does it amount to aggression? We have indicated that in decolonization, a colonial unit has a status and personality distinct from the administering power. Consequently, the use of force by peoples of a colony inside the territory to expel the administering power cannot be a breach of Article 2(4) which prohibits armed action against "the territorial integrity or political independence of any State". In other words, for the purposes of self-determination in decolonization, the "territorial integrity of any State" referred to in Article 2(4) is exclusive of the territory of a self-determination unit. Bearing this interpretation in mind, the question is, will the use of force by a unit in itself, not be consistent with one of the Purposes of the United Nations, viz.: the maintenance of international peace and security? The answer, according to a number of authorities, would seem to be 'no'. They argue that the use of force in

88. Note 83, supra.

89. In the Western Sahara Opinion, Judge Ammoun noted that in respect of the struggle of peoples for self-determination: "there is one case which deserves to be mentioned specifically: that is the legitimate struggle for liberation from foreign domination". His view was however not based on any specific relationship between the struggles in themselves and the purposes of the Charter as such. He based his point on the fact that "the General Assembly has affirmed the legitimacy of that struggle in at least four resolutions...which when taken together already constitute custom." (I.C.J. Report (1975),99.) During the drafting of Resolution 2625 (XXIV), i.e. the Declaration on Friendly Relations, it was generally agreed the use of force by colonial peoples in order to exercise their right to self-determination was excluded from the general prohibition of force under Article 2(4); Sukovic, "Principle of Equal Rights and Self-Determination of Peoples" in Sahovic (ed.), Principles of International Law Concerning Friendly Relations and Co-operation (1972), 32,367 See also Espiell, op.cit., (1980), note 84, "the right of peoples to (contd)
pursuit of self-determination is consistent with the Purposes of the United Nations which include self-determination of peoples and the respect for fundamental freedoms. 90

It is submitted that with the exception of Articles 42 and 51 cases, the use of force in international law is prima facie inconsistent with the preservation of international peace and security, which is one of the purposes of the United Nations. Admittedly, respect for the principle of self-determination is also one of the aims of the organization. But the issue is whether within the terms of Article 2(4), it is permissible to use force to pursue one or any of the Purposes of the United Nations. In other words, does the use of force in pursuit of one purpose justify a breach of Article 2(4)? The answer must necessarily be in the negative because no provision in the United Nations Charter suggests otherwise.

The use of force in a war of national liberation to pursue self-determination could undoubtedly disturb peace and security and therefore be inconsistent with one of the Purposes of the United Nations. This is to say that the use of force for self-determination could well

89. (contd) self-determination necessarily implies the right of peoples to struggle by every means available to them when the possibilities of obtaining the right...by peaceful means have been exhausted"; Bokor Szegő, op.cit., note 79, 37-38; Ronzitti, "Resort to Force in Wars of National Liberation" in Cassese (ed.), Current Problems of International Law. Essays on U.N. Law and the Law of Armed Conflict (1975), 350; Bowett, "Reprisals Involving Recourse to Armed Force", A.J.I.L., Vol. 66 (1972), 12, 19. Akehurst also notes that "there is general agreement that peoples who have a legal right to self-determination are entitled to fight a war of national liberation". (Akehurst, A Modern Introduction to International Law (1982), 256.)

90. A number of authorities take a different view based on the intended use and origins of Article 2(4). See Henkin, How Nations Behave, Law and Foreign Policy (1968), 229, 152; Dugard, op.cit., note 80, 176, the U.N. envisages decolonization by peaceful means: Wright, "The Goa Incident", A.J.I.L., Vol. 56 (1962), 628; Brownlie, op.cit., note 79, 268, the "second limb" of Art. 2(4) was not intended to restrict prohibition of force in favour of self help.
be a contradiction of the "second limb" of Article 2(4). The contradiction can only be resolved on the basis that within the context of decolonization, respect for self-determination and fundamental human rights enjoys primacy among the Purposes of the United Nations. In view of this, where the maintenance of the international peace and security would lead to condoning a denial of self-determination and fundamental freedoms, the United Nations would accept the use of force as appropriate. The rationale would seem to be that in the long term, the Purposes of the United Nations are best served through this option since a continued deprivation of self-determination and denials of fundamental freedoms are bound to disturb peace and security.

Sureda defends this reasoning by arguing that in adopting this option it is up to the United Nations organs to weigh whether condemning the use of force to eliminate a given situation is more desirable for maintaining peace than allowing the situation to deteriorate to become more explosive in future. In permitting the use of force, it is also up to them to balance the possible advantages against any disadvantages which may arise from the gradual erosion of the absolute character of the prohibition of the use of force.  

It must be emphasized that nothing in the United Nations Charter suggests that the Purposes of the organization can be viewed in a hierarchical order which permits self-determination to assume primacy. However, it can be argued that in a situation of colonial domination and a general denial of self-determination of peoples, it is doubtful whether the maintenance of peace and security in particular and the respect for other Purposes of the United Nations would be a reality. There is a complementary relationship between the Purposes of the United Nations. The compliance with one purpose is in itself a pre-

91. Sureda, 350-51.
requisite for achieving or upholding other purposes. In more specific
terms, it can be said that the compliance with or respect for the
principle of self-determination of peoples is an essential basis
for peace and security. In issues of decolonization, the position
of a majority of the members of the United Nations therefore appears
to be a paradoxical one that permits the use of force in decolonization
on the basis that the achievement of self-determination by all peoples
is the pre-condition for lasting international peace and security.


**Aggression - Self-Defence**

Can the use of force by a self-determination unit be justified
on the basis of a continuing state of aggression that gives rise to
the right of self-defence? The right of self-defence accrues to a
state under Article 51 of the United Nations Charter, in the event of
an aggression or threat thereof against the State. Self-defence
is therefore a right for a specific category of international sub­
jects - states. Since self-determination units are not states, it
would seem to follow that they cannot use force by virtue of the
right of self-defence. 92 In response to this, it
has been suggested that since the use of force is *prima facie* legal,
the resort to the right of self-defence is superfluous. 93 The flaw
in this argument is that it fails to take into account the debates
on the issue of self-defence and colonial peoples in the United
Nations. If therefore confuses the question of the legitimacy of
the use of force as such by colonial peoples with the right of self­
defence in international law. While every action of self-defence
would amount to a legitimate use of force, it is not every legitimate
use of force that amounts to self-defence. So far, the debates in

93. Ronzitti, *op.cit.*, note 89.
the United Nations clearly indicate that while there is a general consensus on the legitimacy of the use of force to expel a colonial power, there is no such agreement to extend the right of self-defence to colonial peoples. During the drafting of the Declaration on Friendly Relations, Third World States had taken the view that colonial peoples' rights to self-defence were inherent in their right to use force to prevent repressive measures by colonial powers to deny their right to self-determination. The Third World States had therefore advocated for the right to self-defence for all liberation movements. There was little agreement with this view. The general opinion that prevailed and led to the express exclusion of self-defence in the declaration was that its recognition for the liberation movements would have no basis in the Charter which restricts Article 51 to sovereign states.  

On the other hand, it has also been argued that since self-determination units are potential states, should a forceful repression of their claims not be considered as aggression for which they are entitled to self-defence? This argument appears to be one of the theoretical foundations of the Soviet view on aggression and self-defence with respect to dependent territories. It is argued that "national sovereignty" is both spiritually and materially the inalienable right of every human group; that every nation by virtue of its natural endowment with sovereignty is a fully-fledged person in international law. Consequently a nation struggling for self-liberation automatically satisfies whatever criteria is required for it to enjoy or take      

113.

The basis of this argument is rather dubious. Firstly there is a definite distinction between a state in international law and an entity (e.g. a mandate or a colony or a protectorate) which is capable of becoming a state. The rules on aggression relate specifically to states. This argument is reinforced by the fact that the preamble of the Consensus Definition of Aggression (i.e. G.A. Resolution 3314 (XXIX) only reaffirms "the duty of states not to use armed force to deprive peoples of their right to self-determination, freedom and independence"). The word "states" is used in contradiction with peoples of non-self-governing territories. General opinion during the debates on the consensus definition of aggression did not favour the inclusion of non-state entities in the definition of aggression. This explains why there is no mention of non-self-governing territories in the substantive part of the resolution.

In conclusion, it is submitted that in modern international law, the use of force by self-determination units is accepted as a qualification to the Charter provisions in Article 2(4). However, the use of force in itself cannot be necessarily rationalized as an act of self-defence unless one adopts the view that for the purposes of self-determination, the territory of a unit is equivalent to that of a "state" and that the presence of the administering power constitutes aggression for which self-defence arises in favour of that unit. Alternatively, it may well be that on the basis of the series of General Assembly resolutions recognizing the right of colonial peoples to resist


the armed repression in pursuit of self-determination, there has emerged new norms in customary international law which admit the right of self-defence for colonial peoples, as represented by the various liberation forces. In contemporary times, the widespread international recognition of these forces and acceptance of the "legitimacy" of the use of force against South Africa in Namibia and formerly, against the Portuguese in Mozambique, Guinea Bissau and Angola, are eloquent manifestations of the emergence of these new norms as custom. The general point about these developments in the United Nations and in international law is that they amount to a derogation from the unqualified ban on the use of force under Article 2(4). Above all, the developments admit the legitimacy of a new basis for the use of force (i.e. apart from Articles 42 and 51 cases under the Charter), and consequently bring the international community back to the era of "just" and "unjust" war dichotomy, with wars of national liberation considered as "just" war.

A considerable number of authorities have taken a rather cataclysmic view of these developments. It is submitted that whatever its evils, the admission of the just and unjust war dichotomy within the context of decolonization is a desirable alternative particularly in the entrenched cases of colonial domination such as in Namibia and

96. On the basis of a similar reasoning, Abi-Saab suggests that the liberation movements have a jus ad bellum subsequently their conduct and their treatment are subject to jus in bello ("Wars of National Liberation and Law of War", Annales D'Etude Internationales, Vol. 3 (1972) 93.

in the former Portuguese colonies. These developments represent new trends in contemporary values among the majority of the members of the international community and underscore the great significance of self-determination in the decolonization process.

The Case of Third Parties Assisting in the Use of Force in Pursuit of Self-Determination

As indicated earlier, General Assembly resolutions have consistently affirmed the right of colonial peoples to seek and receive moral or material assistance in resisting colonial rule. The resolutions also emphasize that Member states of the United Nations have a "duty" to assist such peoples. What is the legal position in respect of third parties who assist self-determination units in the use of force? We have concluded earlier that the use of force by self-determination units is a qualification to Article 2(4). It therefore is submitted that the action of third parties who assist such units in response to General Assembly resolutions are not in breach of Article 2(4). Furthermore, bearing in mind our conclusion that in contemporary times there are new norms of customary international law that recognize the right of self-defence for the colonies, it may well be argued that assisting states can justify their action on the basis of collective self-defence.

98. Page 107, supra.
100. Pages 113-114, supra.
101. On this point see the comments of Akehurst, op.cit., note 89, 244-245. See however the critical observations of Dugard,op.cit., note 80, 160-187; also Wohlgemuth, "The Portuguese Territories and the United Nations", Int.Conc.No.544 (1963),57. On the other hand, Henkin, admits the possibility of this defence. He however restricts it to the Goa-type situations, i.e. where the assisting state basis its actions on historic title (Henkin, "Force, Intervention and Neutrality in Contemporary International Law", P.A.S.I.L. (1963), 147, particularly at 152-153.
The 1970 Declaration on Friendly Relations affirms that, "in their actions against and resistance to...forcible action in pursuit of the exercise of their right to self-determination, (colonial) peoples are entitled to seek and receive support in accordance with the purposes and principles of the Charter of the United Nations". However, the Declaration also stipulates that

Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands including mercenaries for incursion into the territory of another state. Every State has the duty to refrain from...assisting...in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts...

On the face of it, it would seem that the assistance to a colonial people to expel a colonial power would be in breach of these provisions. However a careful analysis of the provisions indicates that assistance offered by a third state to a colonial people is consistent with the Declaration. For one thing, the Declaration prohibits assistance to acts: (1) directed against the territory of a state, or (2) of violence in another state. According to the Declaration, "the territory of a colony or other non-self-governing territory has, under the Charter of the United Nations, a status separate and distinct from the State administering it". Consequently assistance to a dependent people in pursuit of self-determination inside the dependent territory does not constitute assistance to acts against the territory of the administering state or to acts of violence in the administering state.

In Article 3(g) of the Consensus Definition of Aggression, an act of aggression is defined to include:

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 or of such gravity as to amount to the acts listed above or its substantial involvement therein.
However, Article 7 provides a definite qualification to Article 3(g) by stating that

Nothing in this Definition, and in particular Article 3, could in any way prejudice the right of self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right, and referred to in the Declaration on Friendly Relations particularly to peoples under colonial and racist regimes or other forms of alien domination, nor the right of these peoples to struggle to that end and to seek and receive support in accordance with the principles of the Charter and in conformity with the above mentioned Declaration.

This qualification is significant because it reinforces the legitimate basis of the assistance by states to colonial peoples.

There is however, a problem with the issue of assistance. General Assembly resolutions request assisting states to provide "material" and "moral" assistance. The exact form or meaning of material assistance is open to debate in the absence of any specific definitions by the General Assembly. It is not clear whether the resolutions permit an assisting state to commit its own forces to aid a self-determination unit in a colonial struggle or not. In other words, it is not clear whether "material" assistance means material aid in the form of combat troops, weapons or logistics, medical supplies and financial assistance. In terms of actual practice, the bulk of material assistance supplied by States has usually taken the form of logistics, territorial sanctuaries and financial assistance. The few cases in which assisting states committed combat troops includes the Cuban involvement in Angola and the Indian assistance to Bangladesh. However, these two instances are of relative significance because in the case of Angola, the Cuban troops did not assist in the expulsion of a colonial power as such. The troops only fought on the side of the MPLA (Popular Movement for the Liberation of Angola) as against other competing nationalist movements, after the withdrawal of Portugal, the administering power. Bangladesh, on the other hand, was not a case of decolonization.
In conclusion, we can say that for the purposes of decolonization, assistance to colonial peoples is permissible in modern international law. However, in the absence of clear directives on what form any assistance offered should take, the exact limits of permissible assistance to colonial peoples is quite debatable. In more specific terms the issue of assistance raises questions as to who decides which colonial situations merit assistance, which of the several competing groups in a colonial territory (as in the case of Angola) can legally be assisted in a colonial struggle, at what point should the assistance be terminated, etc?

**SELF-DETERMINATION VERSUS THE PRINCIPLE OF DOMESTIC JURISDICTION**

The domestic jurisdiction principle is founded on the concept of sovereignty of states and their recognized rights to non-intervention in their internal affairs as sovereign entities. In the United Nations Charter, the Domestic Jurisdiction Principle is embodied in the provisions of Article 2(7) which provide that

*Nothing contained in the...Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the members to submit such matters to settlement under the Charter.*

The question is, within the context of decolonization, are issues of self-determination precluded from the operation of this provision? We have indicated earlier that under Resolution 1514 (XV), the subjection of peoples to alien subjugation, domination and exploitation is contrary to the Charter of the United Nations and it is an impediment to the promotion of world peace and co-operation.\(^{102}\) Under the United Nations Charter, issues affecting international peace and co-operation are precluded from the operation of Article 2(7). Thus by

\(^{102}\) See pages 15-16 *supra.*
drawing a link between "alien subjugation, domination and exploitation" on the one hand and international peace and co-operation on the other hand, the resolution implied that issues of self-determination are not covered by Article 2(7). 103

Within the context of decolonization, how valid is the implied exclusion of issues of self-determination from Article 2(7) in the light of the provisions of the United Nations Charter on self-determination generally? We discussed earlier that the Charter recognizes respect for the principle of self-determination of peoples as one of the purposes of the United Nations. The inclusion of self-determination in the Charter amounts to an institutional recognition of the principle in international relations. Consequently, issues relating to cases of respect for or violations of the right of self-determination are matters of legitimate international concern to which Article 2(7) does not apply. Furthermore, Chapters XI and XII of the Charter impose definite obligations on administering powers regarding the administration of non-self-governing territories. Under Chapter XII, the administration of Trust Territories is made subject to international supervision through the Trusteeship Council. The issue of self-determination in respect of a Trust Territory is therefore not one that is "essentially within the domestic jurisdiction" of the administering power.

Under Article 73 of Chapter XI however, similar international supervision is not required for non-Trust Territories. Nevertheless, The Charter imposes other obligations in respect of such territories. Under paragraph 73 administering powers accept to transmit regularly to the Secretary General, for the purposes of information, "statistical

103. In this regard see the comments by Bokor-Szegö, op.cit., note 79, 21. For a treatment of the relationship between Article 2(7) and Resolution 1514 (XV) and self-determination (contd)
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 the trust territories.

Under paragraph 'b' they also undertake to develop self-government in the colonial territories, taking into account "the political aspirations of the peoples and to assist them in the progressive development of their political institutions. The progressive development of the political institutions in non-Trust Territories is consequently a definite international obligation over which an administering state cannot have a right of domestic jurisdiction. It would be ludicrous for a state to accept an obligation under an international agreement to develop a dependent territory towards self-government and later claim that the question as to whether it fulfils this obligation is one which is essentially within its domestic jurisdiction. 

In modern times, the right of self-determination has been affirmed in such significant resolutions as the Declaration on Colonies and the Declaration on Friendly Relations. In view of the lack of any opposition to the international recognition of the principle in these resolutions, and in view of the fact that colonialism has virtually been eliminated through the United Nations, it has become academic and rather unrealistic to suggest that a state can invoke Article 2(7) as a defence against the implementation of self-determination in the context of decolonization.


CONCLUSION

Since 1945, by far the greatest revolution in international relations has been decolonization. The basis for decolonization has been self-determination in the status of an institutionalized legal right. Given the prominence of decolonization after 1945, the right of self-determination has acquired pre-eminence among the other international law norms in modern times. It has been suggested that self-determination is not a juggernaut - that tramples upon all other principles of international law. Far from being an absolute right, its exercise must have due regard for other principles of international law. 105 It needs to be noted in response that the pre-eminence of self-determination does not make it a "juggernaut". It only implies that within the context of decolonization modern international law would not admit the denial of self-determination to a dependent people founded on some other norms of international law apart from an exceptional category of cases.

In more specific terms, we can make the following conclusions on the relationship between self-determination and the other three Charter norms we have considered: In decolonization, the principle of self-determination categorically pre-empts territorial integrity claims of a state where a self-determination unit demands an exercise of the right as a separate entity. This proposition however does not apply to the exceptional cases of units which are the subjects of rights of pre-emption or to "plantations", enclaves and leased territories. In these exceptions, the territorial integrity principle overrides self-determination.

The use of force to pursue self-determination where all peaceful means have been exhausted is considered a qualification to

105. Umozurike, 273.
the general prohibition of the use of force under Article 2(4) of
the United Nations Charter. Even though other states can legiti-
mately assist a colonial unit in its struggle for self-determination,
the exact scope of permissible assistance is not clear. Finally, the
provisions of Article 2(7) are not a defence to the respect for and
implementation of self-determination in the context of decolonization.

In this discussion, the emphasis has been on the singular impor-
tance of self-determination within the context of decolonization. Our
pre-occupation with the decolonization content is necessitated by the
fact that it is within this context that the principle's recognition
as a legal norm has come about. It is consequently within this con-
text that one can properly establish the scope of self-determination
as lex lata. Bearing in mind the emergence of self-determination as
lex lata in the decolonization context, the question is, does the
scope of self-determination, as a right of all peoples to freely deter-
mine their political status, extend beyond decolonization? In our
concluding remarks in Chapter One it was indicated that this question
has generated a debate among international lawyers and that there is
now a general view that as the basis for decolonization, self-deter-
mination is only applicable to non-self-governing peoples. We conse-
quently devoted Chapter Two to an analysis of what constitutes a non-
self-governing territory and the role of self-determination in the
context of decolonization. We established that the role of the prin-
ciple to guarantee among others, the equality of the individual in
his society and to provide the basis for his participation in the
decision-making processes of his community. In view of these roles,
is the principle of self-determination still relevant to community
relations in the post-colonial context? In our next chapter, it is
intended to address the issue as to whether there is a right to self-
determination after decolonization.
CHAPTER FOUR

IS THERE A RIGHT OF SELF-DETERMINATION IN THE POST-COLONIAL CONTEXT?

The question of the existence of a right of self-determination in the post-colonial context is concerned with whether international law as such, recognizes self-determination as a putative right for all peoples after decolonization or in a non-colonial setting. This must not be confused, as is often the case, with the issue as to whether it is desirable or not for international law to recognize the general right of self-determination in the post-colonial context. The two issues are different. The former is concerned with whether self-determination exists as lex lata in the post-colonial context. The latter, on the other hand, relates to a normative inquiry, based on self-determination as de lege ferenda. In this section of the work, the focus of discussion is on whether self-determination exists as lex lata. We are thus concerned with a definitive, as opposed to a normative inquiry, into the status of self-determination in the post-colonial context.

In order to admit a rule as law in a given legal system, it needs to be shown that the rule is the product of one or more law creating processes in that system. Consequently, the inquiry into the existence of a legal right of self-determination in the post-colonial context must be made by reference to the principal and subsidiary sources of law in international law, namely: conventions, international customary law, the general principles of law recognized by civilized nations, the decisions of tribunals and the teaching of the most highly qualified publicists.  

1. These law determining agencies are provided as the areas to (contd)
CONVENTIONS OR TREATIES

Treaties in themselves are, strictly speaking, sources of obligations rather than sources of law. Sometimes however, a treaty may be a codification of existing law. In such cases, the treaty becomes a convenient statement and vital evidence of what the law is. The treaty would of course not be the source of law. On the other hand, a treaty may sometimes incorporate a new rule by which the parties may consent to be bound, under the doctrine of *pacta sunt servanda*. In such cases, the rule incorporated may not necessarily be law, but the consent to observe the rule, amounts to a recognition of its validity and provides the basis for legal obligations in respect of the rule. Hence the importance of treaties in our enquiry.

As indicated earlier, a number of treaties embody the right of self-determination. However, no existing treaty expressly rejects or

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1. (contd) which the International Court of Justice may resort in identifying rules of law in the settlement of international disputes under Article 38(1) of the Court's Statute. The Statute does not state categorically that provisions of Article 38(1) are the sources of international law. However, the provisions are generally considered as a complete statement of the sources of law in international law. See Brownlie, Principles, 3. On the sources of law, see generally Parry, Sources and Evidence of International Law (1965); Verzijl, International Law from a Historical Perspective II (1968), 1-89; Brierly, The Law of Nations (1963), 56-66; Harris, Cases and Materials on International Law (1979), 22-54; See also the cases discussed in relation to the sources of law and the editor's note on the subject in Briggs, The Law of Nations (1952), 25-52.


3. Page 21, supra.
recognizes self-determination in the post-colonial context. So to find out whether the parties to a given treaty, by incorporating self-determination, envisaged its relevance to the post-colonial contexts or not, one must consider the interpretation of self-determination within the context of the treaty as a whole and against a background of the *travaux preparatoires*. Let us consider specific treaties briefly.

The United Nations Charter

As stated earlier, the principle of self-determination was incorporated in the United Nations Charter at the insistence of the Soviet Union at San Francisco.\(^4\) During the debates, it was emphasized that the right of self-determination "conformed to the purposes of the Charter only insofar as it implied the right to self-government of peoples and not the right of secession".\(^5\) By implication self-determination was not considered as a right for non-colonial peoples or for peoples resident in sovereign states.

In other developments during the San Francisco debates, France specifically requested the Technical Committee to explain whether self-determination as incorporated in the Charter implied "the right of a state to have its own democratic institutions or the right of secession".\(^6\) In the reply the chairman of the Technical Committee explained rather ambiguously: "The right of self-determination meant that a people may establish any regime they favoured".\(^7\) He did not explain whether this implied that people within a sovereign state could exercise the right. Despite the ambiguity, general opinion in

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5. Doc. 343, 1/1/16, 7 U.N.C.I.O.Docs. 293 (1945).
the United Nations did not favour the extension of self-determination beyond the colonial context. In the years after San Francisco, Belgium's attempts to interpret self-determination in the Charter to include such peoples as the Pathans, Kurds, Nagas and Karens were persistently rejected by the United Nations.8

In all, it can be said that nothing in the United Nations Charter suggests that the principle of self-determination was meant to cover cases in the post-colonial context.

The Charter of the Organization of African Unity (OAU) (1963)

The Charter of the OAU does not make any explicit references to the right of self-determination. However, support for the right within the colonial context is implied in the Organization's objective to "eradicate all forms of colonialism from the continent". On the other hand, there is an implicit rejection of any right of self-determination in the post-colonial context. This is reflected in the members' pledge under the Charter to "defend their sovereignty, their territorial integrity and independence". In conclusion, the OAU Charter does not support the existence of a right of self-determination in the post-colonial context.9

The International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights (1966)

Article 1 of both covenants provide that "all peoples have the right of self-determination", and that "by virtue of that right they


freely determine their political status and freely pursue their economic, social and cultural development". The provision in both instruments is a verbatim affirmation of the principle of self-determination in the Declaration on Colonies and other United Nations statements on the principle. The provision relates to the recognition of self-determination as a right in the colonial context. This is because in Article 1(3) of both covenants, the respect for and realization of the right of self-determination is related to the administration of "Non-Self-Governing and Trust Territories". Neither covenant makes mention of self-determination as a general right that transcends the colonial context.

During the drafting stages, there were debates on whether self-determination as in Article 1 of the covenants applied in the non-colonial context or not. There was the view that a distinction had to be made between the rights of individuals in a sovereign state in relation to their government on the one hand, and the question of collective rights of international consequences such as self-determination on the other hand. The latter issues concerned the rights of peoples in the post-colonial context to which many members were not willing to extend the right of self-determination. 10 The issue, as the British delegation later noted, was "whether ... States having no colonies were indeed prepared to face the consequences of assuming a legal obligation to promote self-determination within their borders". 11 The delegates were divided on the question. Egypt argued that the right of self-determination of peoples "was the right to free expression of popular will (and that) whether that will was in favour of

secession or association, it had to be respected. While New Zealand found this interpretation of self-determination unacceptable, Panama took the view that attempts to exclude groups resident in sovereign states from the right of self-determination, would only drive such groups to resort to violence to claim it. The delegate from Ireland thought that the right of self-determination ought to be validly applicable to a group in the post-colonial context "where political, economic, national or cultural rights were not secured."

General opinion in the Commission did not favour broad interpretations of self-determination to include a right in the post-colonial context. In the end, the draft that was adopted as the International Covenant on Civil and Political Rights implicitly distinguished the rights of non-self-governing peoples to self-determination and the rights of minorities in a sovereign state.

While Article 1, as indicated earlier, provides for the rights of Non-Self-Governing and Trust Territories, Article 27 deals with the rights of minorities separately. It 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 progress and practice their own religion, or to use their own language.

Today, there is considerable juristic support for the view that the separate provisions for non-self-governing peoples on the one hand, and minorities on the other hand, is an implied rejection of any

13. Id., 460 m'tting, at 260, para. 24.
right of self-determination for minorities (in the post-colonial context). 16

The Helsinki Accord (1975)

The Helsinki Accord, adopted as the Final Act of the Conference on Security and Co-operation in Europe (CSCE) incorporates the principle of self-determination. 17 In Section VIII, the participating States accept to respect "the equal rights of peoples and their right to self-determination". More significantly the section also provides that:

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.

A very significant feature of the Helsinki Accord's provisions is that they were not made in reference to Non-Self-Governing and Trust Territories. Section VIII therefore stated self-determination as a general right applicable to the constituent communities of the participating states. The formulation of self-determination in the


17. The Final Act is reproduced in 14 I.L.M. (1975), 1293.
text of the Accords was the result of intense negotiations between the Western state participants and the Eastern Bloc countries, particularly the Soviet Union. In pursuing the inclusion of self-determination in the Accords, the Western States had been motivated primarily by the desire to restrain the Soviet Union from any future Czechoslovakian-style invasion under what is usually described as the Brezhnev Doctrine, and to provide a recognised basis for the claims to self-determination by the Baltic Nations under Soviet rule. In specific reference to the Baltic Nations, it has thus been suggested that self-determination as incorporated in the Accords is a recognition of the "universal nature of (the principle) for all peoples who have lost their political independence through force or who have been separated against their will".

The provisions of the Accord are not legally binding. In pressing for the inclusion of self-determination, the West had therefore been aware that its practical effects could well be marginal for the intended beneficiaries. Today, the Baltic Nations are still integral parts of the Soviet Union. The apparent recognition of self-determination in the post-colonial context in the Accords has made no difference.

To summarise, the Helsinki Accords recognize self-determination as applicable to the constituent communities of the signatory states. In effect, the Accords admit a right of self-determination in the post-colonial context. However, the provisions of the Accords are not legally binding, and their practical significance for the intended beneficiaries remains to be seen.

The African Charter on Human and Peoples Rights

The African Charter on Human and Peoples Rights, otherwise known as the Banjul Charter, provides for a "bundle" of individual human rights on the one hand, and collective human rights on the other hand, hence the name "Charter on Human and Peoples Rights". In Article 20 the Charter provides that:

(1) ...all peoples...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 have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community. (emphasis mine)

The use of the phrase "all peoples" in paragraph 1 when contrasted with the phrase "colonized or oppressed peoples" in paragraph 2 leads to a rather interesting conclusion: within the context of the Charter, the word "peoples" is a general term or category of which "colonized or oppressed people" constitute a sub-category. In other words, the specific reference to "colonized or oppressed peoples" indicates that such peoples constitute a distinct beneficiary group.


as opposed to "all peoples". Throughout the Charter the phrase "all peoples" is used consistently in contradistinction to "every individual". The Charter does not define peoples. However, within the context of the provisions it could be said that "all peoples" refers to the collection of individuals who make up the constituent communities of Africa and to whom the collective rights provided in the Charter are applicable. It is therefore logical to suggest that within the framework of the Banjul Charter, "all peoples" as such (including the distinct category of colonized and oppressed peoples) have a right to self-determination. By implication, it is possible to interpret self-determination in the Charter as applicable to peoples in a post-colonial context. The possibility of this interpretation is enhanced by the fact that in the Charter, there is no mention of the affirmation of "territorial integrity" which is a very significant feature of the OAU Charter and other OAU pronouncements.

This is not to say that under the Banjul Charter, the signatory states pledge themselves to support self-determination demands in the post-colonial context. The essential point, in analysing the provisions in the Charter, is to indicate the possibility of interpreting the provisions on self-determination broadly to go beyond the colonial context. During the drafting of the Charter, in 1979, the possibility of this interpretation was raised by some of the experts. Consequently, in 1981 when the OAU Secretary General presented his report before the Plenary Session of the OAU Council of Ministers, there were considerable objections on the grounds, inter alia, that the provisions, broad as they were, were capable of

25. For a report on the various views expressed by the experts see Réunion des experts pour l'élaboration d'un avant-projet de Charte Africaine de droits de l'homme et des peuples (on file with the International Human Rights Law Group, Washington D.C., 1979).
Despite these objections, the OAU's Eighteenth Assembly of Heads of Government adopted the Charter without changes.

In drafting the Charter the experts aimed at preparing a human rights instrument derived from African legal philosophies and responsive to contemporary African needs. In so doing they chose not to foreclose the issue of post-colonial self-determination altogether as was the case under the OAU Charter. On the other hand, they refrained from an explicit recognition of the right of self-determination in the post-colonial context. In the end, the Banjul Charter provisions on the principle appeared vague and left open the possibility of a broad interpretation which could be applicable to peoples in the post-colonial context.

To sum up our discussion on conventions, it may be noted that apart from the possible exception of the Banjul Charter, no instrument of legal consequence recognizes the right of self-determination. In stating that the Banjul Charter is a possible exception, we must hasten to add a caveat that the interpretation of its provisions on self-determination is rather contentious particularly in view of the practice of the African states.

INTERNATIONAL CUSTOMARY LAW AS EVIDENCED BY STATE PRACTICE

The formation of international customary law requires similar and repeated acts or practice of states, repeated with the conviction that in so doing, they are acting in conformity with existing


27. The Assembly only deleted the word 'Africa' from the title African Charter of Human and Peoples Rights and replaced it with 'Banjul', the capital of the Republic of Gambia where most of the deliberations on the draft and the Assembly itself were held. The change was instituted to avoid any confusions between a title such as African Charter... with the "Charter of the Organization of African Unity" (OAU Diary, June 1981).

28. The practice of the African States is discussed at page 159, infra.
law. For the purposes of our inquiry, the issues are whether there is a consistent practice of states in respect of post-colonial self-determination and whether such practice is founded on a conviction that it is in accordance with existing law. In dealing with these issues, we would analyse the conduct of states as reflected in the practice of the United Nations. The choice of the United Nations is considered appropriate for a number of reasons. Firstly, its practice is a reflection of the general position of the majority of the member states. Secondly, the organization has dealt with issues of post-colonial self-determination in the past and therefore provides an immediate source of reference for our inquiry. Thirdly, since the pronouncements of the United Nations Security Council and General Assembly could have legal effect in some cases, the organizations' reactions and resolutions on specific claims of post-colonial self-determination could be a vital source of evidence to the existence or non-existence of the right.

We would also analyse the practice of African States as manifested in the reactions of the OAU to claims of post-colonial self-determination. Africa necessarily deserves a special and a detailed treatment because since the early 1960s when most of the states attained their independence, the continent has become the arena for a series of separatist activities. The proliferation of separatist groups has resulted in the evolution of specific community responses to post-colonial self-determination. The practice of the African States is consequently

a unique source for our inquiry in establishing at least the existence of a regional customary law rule on the issue.

(1) The Practice of the United Nations

The organization has dealt with a number of separatist claims. For the purposes of clarity we will examine each case separately.

(i) The Katanga Secession

The 1960 Katanga secession was the first test of the United Nations position on post-colonial self-determination. A few days after the independence celebrations of the Congo Republic, civil unrest broke out in the country. In the midst of the crisis, the copper-rich Katanga Province seceded from the rest of the country and declared its independence. 30 It subsequently invited Belgium to assist it in maintaining law and order. Belgium obliged to the invitation and dispatched its troops to the rebel territory.

Following the Belgium intervention, the Congolese Government requested United Nations' assistance. In a cable to the Security Council, the government expressly stated that the assistance had been necessitated by the "dispatch to the Congo of metropolitan Belgian troops". The government further explained:

The essential purpose of the required military aid is to protect the national territory of the Congo against present external aggression which is a threat to international peace.31

The purpose of the Congolese request was therefore not the Katanga secession as such. The initial United Nations' response conformed strictly to the letter of the request. The Security Council authorized the dispatch of United Nations' troops (ONUC) to the Congo. It

30. The Katanga Case is treated in detail later in this work. See page 256, infra.
then called on Belgium to withdraw its forces from the territory.  

Even though Chapter VII of the Charter was invoked as the basis of the Council's actions, no specific article was cited. However, a careful analysis of the language and the subsequent United Nations' actions in the Congo indicates that Article 40 could be considered as the applicable provision under Chapter VII.  

Article 40 provides that:

in order to prevent an aggravation of the situation, the Security Council may, before making recommendations for deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims or position of the parties concerned.

Arguably, the "provisional measures" under Article 40 constitute a different regime and are thus distinct from "making recommendations" or deciding upon measures provided for in Article 29. Assuming Article 40 is applicable, two implications would seem to follow:

(1) the provisional measures did not constitute enforcement actions under the Charter.  

Any actions taken under Article 40 were:


34. In the Certain Expenses Case, the majority opinion took the view that the operations of the ONUC were not enforcement actions within the compass of the Charter (I.C.J. Reports,(1962), 151, 166). The Court later explained that this was because the operations of ONUC "did not involve 'preventive or enforcement measures' against any State under Chapter VII and therefore did not constitute "action" as that term is used under Article 11 (id., 177). See however the different views expressed by Judge Quintana in his dissenting opinion: "any armed force intended for whatever purpose implies by definition enforcement action" (id., 246).
consequently subject to Article 2(7)\(^{34}\). (2) The measures could not be used to prejudice the position of the parties.

Even though Katanga was not a state,\(^{36}\) these two implications were reflected in the initial United Nations' handling of the Congo crisis. Both the Security Council and the Secretariat went to great lengths to explain that given the withdrawal of Belgium, (1) the secessionist conflict was a domestic issue; (2) the United Nations had a duty not to influence any particular form of settlement in favour of any party. With the arrival of the ONUC in the Congo, the Secretary General stressed that the forces were not going to "take any action which would make them a party to internal conflicts in the country".\(^{37}\) The Security Council reaffirmed this by declaring that the ONUC would not be a party to or in any way intervene to influence the outcome of any internal conflict constitutional or otherwise.\(^{38}\) By implication, the United Nations was to remain neutral beyond the Belgian intervention. By virtue of this, the organization was to treat both the secessionists and the central government equally.

In a significant development, the Congolese Government requested the assistance of the ONUC to crush the secession. It justified its

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\(^{35}\) The Secretary General confirmed this view in the interpretation of his mandate in respect of the Katanga crisis. He stated: "in the light of the domestic jurisdiction (provisions) of the Charter, it must be assumed that the Council did not authorize the Secretary General to intervene with armed troops in an internal conflict when the Council has not adopted enforcement measures under Article 41 or 42 of Chapter VII". (U.N.Doc. S/P.V. 887, 17). In another statement, it was further noted that the Security Council resolutions on the Congo could not be construed as "endowing the United Nations with the right to interfere in the domestic affairs of a State and to assume responsibility for a country's domestic laws" (S/P.V. 879, para. 116 and 120).

\(^{36}\) Certain Expenses Case, I.C.J.Reports(1962),177. See also the discussion on the status of Katanga in Crawford. 264. In the Certain Expenses Case, Judge Quintana held the view that Katanga was arguably "a belligerent community recognised under international law as possessing a legal personality" (246).

request on the grounds that the Security Council had put ONUC at its disposal until its own forces could take up the task of maintaining law and order. The Secretary General interpreted the mandate of the ONUC differently, maintaining the neutral position. He turned down the request declaring that:

(1) United Nations' forces could not be used on behalf of the Central Government to subdue or to force Katanga to a specific line of action.

(2) United Nations' facilities could not be used to transport civil or military representatives of the Central Government to Katanga without the consent of the Katanga government.

(3) The United Nations had no duty to protect civilian or military personnel representing the Central Government arriving in Katanga beyond what followed from its general duty to maintain law and order.

(4) The United Nations had no right to prevent the Central Government from taking any actions which, by its own means in accordance with the principles of the Charter, it could carry through in relation to Katanga.

These points were to apply mutatis mutandis to Katanga. 39

At that stage of the crisis certain logical inferences could be drawn to establish the policy of the United Nations: (1) a claim to self-determination in the post-colonial context was neither legal nor illegal in international law; there were no rules on separatist conflicts as such. (2) Beyond the threat to international peace and security, the only relevant international law rule applicable to such cases was the inviolability of domestic jurisdiction; by virtue of that, the United Nations, like any other entity, was precluded from inter-

vening to effect any settlement. The parties were thus at liberty to pursue any solutions (relying on their own means) in accordance with the Charter". 40

In late 1961, following the assassination of the leftist Congolese Prime Minister, Patrice Lumumba, and the death of Dag Hammarskjold, the United Nations Secretary General, in a plane crash in the Congo, the Security Council changed its position on the crisis. On the 3rd November 1961, Ceylon, Liberia and the United Arab Republic submitted a draft resolution on the Congo to the Council. In its revised form, the draft required the Council to:

1. affirm the territorial integrity and political independence of the Congo;
2. deplore the secession and reject the Katangan claim to secession and statehood;
3. declare that the secession was contrary to the *loi fondamentale* (the constitution of the Congo) and to Security Council decisions;
4. demand the termination of all secessionist activities;
5. give the Secretary General a clear mandate to deal with the problem. 41

All the members of the Council expressed opposition to the secession. There were, however, some reservations on the proposed draft. France took the view that the problem in the Congo ought to be resolved through persuasion and negotiation. It argued further that the issue was an internal one in which the United Nations could not intervene. Sweden and China supported this view. The United Kingdom argued that the problem required pacification and reconciliation and not force. The United States called for the strengthening of the

40. Apart from the issue of threat to peace however, the Secretary General did indicate at one stage that human rights violations, e.g., the murder of civilians including women and children, could not be regarded as an internal issue (U.N.DOC.S/P.V.896,58).
41. U.N.DOC. S/4985 and Rev. 1. See also *id.*, S/5002.
Central Government's forces. Ecuador, Chile and the Soviet Union on the other hand, supported the draft. In the end, the three-power draft was adopted as Resolution S/5002 on the 24th November with France and the United Kingdom abstaining and none voting against.

The resolution was the most significant declaration of the Council on the crisis. It marked a change in policy and led to its active intervention in the conflict itself and subsequently influenced a specific settlement in favour of the Central Government. At the end of the crisis, U Thant declared that the United Nations had "avoided any intervention in the internal politics of the (Congo) beyond the opposition to secession in general (as) required by the Security Council resolutions".

In the Katanga crisis, the United Nations unequivocally rejected the existence of any right of self-determination in the post-colonial context. We have noted earlier that in the formation of international customary law, mere practice or action is not enough. It has to be supported by *opinio juris sive necessitatis*, that is, the subjective or psychological element that the practice or action is rendered necessary by the existence of a rule of law requiring it. The question then is: in rejecting the right of self-determination for Katanga, did the United Nations Security Council consider its action as rendered necessary by existing law? Was the Council in any case competent to deal with the secession of the Katanga Province? The Council did not reject the claims of Katanga on the basis of any pre-existing international law norms. In its condemnation of the secession, it had only noted that the secession was contrary to the *loi fondamentale* (i.e., the constitution of the Congo) and the decisions of the Council.

42. For detailed discussion on the debates see Yearbook of the United Nations (1961), 65-71.
Assuming the secession was in fact a breach of the *loi fondamentale*, was the Council the competent authority to make such a judgment, particularly since the *loi fondamentale* was a domestic legislation under the jurisdiction of the Congolese government? Arguably, the pronouncement of the Council on the legality of the actions of Katanga under the municipal laws of the Congo had no validity. On the other hand, if one takes the view that the secession was a threat to international peace and security, then it would follow that the Council was competent to issue any directives in that respect in pursuance of the United Nations Charter and its directives were in conformity with existing law. But was the secession in itself a threat to peace and security?

In his first report on the crisis to the Security Council, the Secretary General had noted that the breakdown of the government in the Congo represented a threat to peace justifying United Nations' intervention on the basis of the explicit request of the Government of the Republic of Congo. 45

Thus in the opinion of the Secretary General, "the two main elements from the legal point of view, were on the one hand (the) request and on the other hand, the finding that the circumstances...were such as to justify United Nations' action". 46 It needs to be noted at this juncture that there were three features of the crisis in the Congo, namely: (1) the breakdown of Government; (2) the secession; and (3) the Belgian intervention. The breakdown in government was accompanied by intense faction fighting and occasional threats of intervention by the super powers to support some of the internal groups. The breakdown consequently constituted a threat to peace. Given the possibility of


46. Ibid.
confrontation between Congolese forces and Belgian troops, the Belgian intervention also amounted to a threat to peace. However, the secession of the Katanga Province in itself did not amount to a threat to international peace and security. It was felt that the breakdown in government and the Belgian intervention could be resolved by the United Nations without having to deal with the issue of secession. The Security Council and the United Nations Secretariat attested to this by admitting earlier in the conflict that the secession per se was an issue which was essentially within the domestic jurisdiction of the Congo. By implication, the United Nations did not consider the Katanga secession in itself to be a threat to international peace and security when it intervened in the Congo. In view of this it is submitted the basis for the general opposition to the secession in the Security Council as expressed in Resolution S/5002 in late 1961 was not because the Council considered secession to be a threat to peace. Consequently the Council's action on Katanga was not based on any opinio juris as such.

There are two possible alternative conclusions in respect of the Council's opposition to the Katanga secession: (1) the secession was not a threat to peace and was for that matter an internal issue; the Council's actions were therefore ultra vires and lacked any opinio juris; (2) on the other hand, it could be said that the Council's action was a belated response to the Congolese Government's earlier request for United Nations assistance to crush the secession. In international law, an incumbent government can request assistance to

47. In the Certain Expenses Case, the majority opinion took the view that the actions of the U.N. in respect of the crisis were intra vires. However, it must be noted that the opinion did not relate specifically to the issue of the authority of the U.N. to intervene to declare the secession illegal as such. It concerned the authority of the U.N. to commit its forces to maintain peace in the Congo.
resolve an internal disorder. Consequently, by opposing the Katanga secession, the Security Council was obliging to the Congolese Government's request in pursuance of existing international law rules.

The latter conclusion seems preferable given the express requests of the Congolese Government. It however raises a number of problems. In the event of a secessionist conflict, can the parent state request and expect military assistance from the United Nations? Would attempts to assist the parent state be consistent with the peace-keeping efforts of the United Nations? Would the latter not be bound by international law to respect the rules on belligerency? There are no definite

48. In 1958, the U.K. and the U.S. used this "request" argument as the basis for intervention in Jordan and in Lebanon. In 1965, the U.S. again used it to intervene in Santa Domingo. In more recent times, the involvement of troops and other multilateral forces in Lebanon has also been justified on the "request" thesis. There is however, the view that any assistance offered to the incumbent state must be restricted to the pre-insurgency stage. In other words, where an internal conflict assumes the form of a civil war, and the rebels are consequently recognised as insurgents, assistance to the incumbent may not be permissible. Norton Moore, "Towards an Applied Theory for the Regulation of Intervention", in Norton Moore (ed.), Law and Civil War in the Modern World (1974), 3-37,24. But see also Bowett, "The Interrelated Theories of Intervention and Self-Defence", in id., 38-50, 42-43. It has also been suggested that any assistance should be limited to tactical support in the form of advisers, volunteers, etc. and not military equipment. Fager, "Intervention in Civil Wars: A Modest Proposal", Col.L.Rev., Vol. 67 (1967), 266, 275. See also the views expressed on the issue by Friedman, "Intervention and the Developing Countries", Va.J.Int'l,L., Vol. 10 (1970), 205, 210.

49. Higgins gives a negative answer to this question. She suggests that in civil conflicts, 'intervention by invitation' is permissible "provided that the insurrection has not yet reached the dimensions of a civil war (thus giving rise to rights of belligerency in favour of the insurgents)". Higgins, op.cit., note 45, 230. She however observes that in the case of secessionist conflicts this may not necessarily be the case because the doctrine of belligerency "applies to a civil war situation, which implies the existence of two parties engaged in a military dispute (and that) it is not absolutely clear that it applies both to the situation where these two parties are each claiming the right to rule the whole state...and to the situation where one party is attempting to secede". She therefore cautions that the reference to rights of non-intervention in civil war is ambiguous and that "the desirability of applying the doctrine to modern Africa is perhaps doubtful". More significantly, she notes:

(contd)
answers to these questions in view of the fact that the limits of permissible intervention in civil life generally and secessionist conflicts in particular are not well defined.\textsuperscript{50}

\textbf{Is Katanga a Precedent?}

There is the general view that the United Nations is, as a rule, opposed to self-determination claims in the post-colonial context. The Katanga case is frequently used as one of the authorities for this

49. (contd)

The existence of a legal right to revolution is a much debated rule of international law, gaining in stature; the existence of a right to secession...is even more moot; and when it is coupled with undoubted foreign support and intervention causing a threat to the peace ...it should not be canvassed with any assurance. (\textit{id.}, 231).

50. Thomas and Thomas, \textit{Non-Intervention} (1956), 67. "... there is no satisfactory agreement among jurists as to the meaning and content of intervention in international law;...not only the authorities but even the practice of states are in confusion." Arguably, customary international law recognizes a level of permissible intervention for humanitarian purposes. However, in the post-Charter period, given the emphasis on Article 2(7) and the prohibitions of force under Article 2(4), the value of these customary law rules on intervention has been thrown into doubt. For a general survey on the problem, see Brownlie, "Humanitarian Intervention" in Moore (ed.), \textit{Law and Civil War in the Modern World} (1974), 217. Lillich, "Humanitarian Intervention: A Reply to Dr. Brownlie and a Plea forConstructive Alternatives", in \textit{id.}, 229; Moore, "Towards an Applied Theory for the Regulation of Intervention", \textit{id.}, 3. See also Bowett, "Interrelated Theories of Intervention and Self-Defense" in Black and Falk (eds). \textit{The Future of the International Legal Order}, Vol. III, 1971, 38, 45, "...it is believed that the recognition of a general right of intervention is neither legally nor politically acceptable". Chilstrom, on the other hand takes the view that intervention for humanitarian purposes "... would serve as an effective remedy to redress current violations of human rights and would provide a credible deterrent to future deprivations", in "Humanitarian Intervention Under Customary International Law: A Policy Oriented Approach", \textit{Yale Journ. of World Public Order}, Vol. 1, (1974), 93, 147. See also Fonteyne, "The Customary International Law Doctrines of Humanitarian Intervention: ItsCurrent Validity Under the United Nations Charter", Cal.W.Int'l.L.Journ. (1973-74), Vol. 4, 203.
Buchheit, for instance notes that:

in retrospect, the action in the Congo stands as a major precedent against an international recognition of secessionist legitimacy in circumstances similar to those surrounding the Congo at independence. 52

The value of the Katanga case as a precedent is rather limited. For one thing, the circumstances surrounding the United Nations actions were quite unique. There had been signs of the secession just prior to independence, and since the secession had in fact occurred almost immediately after independence with the help of Belgium, 53 the latter's role as a former metropolitan country could well have been equivalent to that of an administering power fostering the dismemberment of a self-determination unit in violation of the territorial integrity principle. This and the deaths of Dag Hammarskjöld and Patrice Lumumba had all contributed to the United Nation's decision to assist the Congo in crushing the rebellion. Given the uniqueness of the circumstances, it would be misleading to suggest that at some future date, the United Nations would, as a rule, intervene militarily to deny the legitimacy of a separatist claim and assist the incumbent, if and when such assistance is requested to crush a separatist movement. On the other hand, it is conceded that by virtue of the Charter, the United Nations may well intervene in a separatist conflict and indeed any other type of conflict where it threatens international peace and security. However, in such cases, it must be emphasized that the basis of the organization's


52. Buchheit, Secession, 151.

53. See pages 256-257, infra.
actions will be the maintenance of international peace and security and not any pre-existing rule against self-determination claims in the post-colonial context.

The United Nations and the Case of Biafra

In May 1967, the Eastern region of Nigeria seceded and declared itself the Republic of Biafra.\(^{54}\)

The United Nations' response to the Biafran case was totally different from that of Katanga. At best it was passive. It refrained from either discussing the issue or issuing any statement on the Biafran claims to self-determination. The then Secretary General, U Thant, attempted to rationalize the United Nations' failure to respond to the crisis. He said:

> the issue must be brought to the attention of the United Nations. So far not one single Member State out of 126 has brought the question of the civil conflict in Nigeria to the United Nations, not one Government...\(^{55}\)

The Secretary General's remarks were rather curious. Admittedly no state had brought the issue to the United Nations. However, under Article 99 of the Charter, the Secretary General himself could have drawn the Security Council's attention to the issue. Article 99 provides that:

> The Secretary General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security.

Given the extent of external intervention in the conflict the massive costs in terms of human and material resources, and the general repercussions for regional security, the Secretary General, like all other members of the United Nations owed a duty to bring the issue to the Security Council.

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54. The Biafran case is discussed in detail at page 2121, infra.
It has been suggested that one reason for the "hesitancy of member states to bring the Nigerian crisis before the U.N....was their knowledge that the United Nations would simply refuse to discuss it". If this view is right, it would put the passive reactions of the United Nations members in this case in sharp contrast with their responses to the Katanga crisis. It is important to note that in declining to raise the Biafran case before the United Nations, the member states did not consider themselves compelled to act in conformity with any existing law. *A fortiori* they did not consider themselves obliged to oppose, or support, the secession in pursuance of any international law rule. In other words, their action was not based on any *opinio juris*. The United Nations' Secretary General on the other hand, had his own preconceptions about the position of the organization. In an interview on Biafra, he declared, rather emphatically:

> as far as the question of secession of a particular section of a Member State is concerned, the United Nations' attitude is unequivocal. As an international organization, the United Nations has never accepted and does not accept and I do not believe it will ever accept, the principle of secession of a part of its Member States.

In another interview he again emphasized: "self-determination of the peoples does not imply self-determination of a section of a population of a particular Member State". The authority behind U Thant's statements at the time is not clear. By 1970, the only similar case that had gone before the United Nations was Katanga. As indicated earlier, Katanga does not provide a proper basis for a reliable precedent. It is therefore submitted that U. Thant's views had a rather doubtful empirical basis. Secondly, they

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56. Buchheit, Secession, 169.
58. Id., 39.
did not amount to a statement of the United Nations' rules (if any) on the subject. Legally, his views were therefore of no value. Thirdly, if his observations were a purported exposition on or evidence of the practice of the United Nations, then he was wrong. The creation of Bangladesh about twelve months later confirmed the error in his judgment.

The United Nations and Bangladesh

Bangladesh, formerly East Pakistan, seceded from the Republic of Pakistan following a wave of anti-Bengali massacres in the country. Unlike the case of Biafra, Bangladesh was brought to the attention of the United Nations through many channels. For the purposes of clarity, it is necessary to trace the treatment of the case in the United Nations by its various organs.

ECOSOC: In May 1971, India submitted the issue to the Social Committee of ECOSOC. However, the discussions were confined to the humanitarian aspects of the crisis. In August 1971, 22 Non-Governmental Organizations (NGOs) also raised the issue before the United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities. The NGOs requested the Sub-Commission to "examine all available information regarding the allegations of the violation of human rights and fundamental freedoms of East Pakistan and to recommend to the Commission on Human Rights, measures which might be taken to protect the human rights and the fundamental freedoms of the people of East Pakistan".

59. The Bangladesh case is discussed in detail at page 215, infra.


Jurists gave evidence on the situation before the Sub-Commission. Despite his testimony of the atrocities and the bizarre conditions in East Pakistan, the Sub-Commission did not discuss the matter any further.

The Committee on the Elimination of Racial Discrimination: The issue was raised before the Committee on the Elimination of Racial Discrimination in April 1971. The Committee considered a preliminary report by Pakistan and decided that the information available was inadequate. It subsequently requested Pakistan to submit a supplementary report for consideration in its August-September session. The report was never submitted and the matter was not discussed again by the Committee.

The General Assembly: The Bangladesh case was brought to the attention of the General Assembly by India and at least three other states. However, the discussions in the Third Committee on the matter were confined to the humanitarian aspects of the problem even though the Republic of Bangladesh had been proclaimed as far back as April, the secession itself was never discussed.

The Secretary General/Security Council: In stark contrast to his negative reaction to the Biafran case, the Secretary, in pursuance of his authority under Article 99 of the Charter, drew the attention of the Security Council to the Bangladesh crisis. In his report to the President of the Council in July 1971, three months after the declaration

of Bangladesh, he described the events in Pakistan as a "potential threat to peace and security". Contrary to his previous assertions on the issue of self-determination, he acknowledged this time that there was a problem between the pursuit of the principle and the need to maintain the territorial integrity of states. He also admitted that there was a need to evolve some form of regulations for separatist agitation. He added:

"the tragic situation in which humanitarian, economic and political problems are mixed in such a way as almost to defy any distinctions between them, represents a challenge to the United Nations as a whole which must be met. Other situations may well occur in the future. If the Organization faces up to such a situation now, it may be able to develop the new skills and the new strength required to face future situations of this kind."

Despite the passionate plea of the Secretary General, the Security Council did not seriously consider his view. Meanwhile, war broke out between India and Pakistan over India's support for the secession. With the outbreak of the Indo-Pakistan war in December 1971, the Council made attempts to call on the parties to end hostilities. Following a Soviet veto of two draft resolutions on the conflict, the issue was referred to the General Assembly under the "Uniting for Peace Resolution". On 7th December, the Assembly adopted Resolution 2793 (XXVI), calling on India and Pakistan to cease fire. In the debates that preceded the resolution, Ceylon and a number of members argued that "a peaceful resolution of the conflict depended on the will of the people of that area as expressed by their representatives". Given that the Awami League, the accepted representative body of East Pakistan, had indicated the desire to secede and had in fact organized the secession of the region, the views expressed by the members indicated some support for the secession of East

Pakistan. Their views, however, remained the only ones ever expressed on the secession in Assembly.

General Assembly Resolution 2793 (XXVI) produced no positive results. The discussion of the conflict was subsequently returned to the Security Council. But before the Council could take any significant action, India announced that Pakistani forces in Bangladesh had surrendered, Bangladesh was free, and that it had ordered its troops to cease fire.\(^\text{70}\)

For all practical purposes the Indo-Pakistan war ended with that announcement. The secession of East Pakistan became a *fait accompli*; Bangladesh was established as a state and was subsequently admitted into the United Nations.\(^\text{71}\) The United Nations admission of Bangladesh raises interesting questions. For instance, did the admission amount to a recognition of the right to self-determination in the post-colonial context? Was the peculiar subordinate position of Bangladesh *vis-à-vis* the rest of Pakistan a determinate factor? Even though throughout the debates on Bangladesh, the General Assembly never discussed the issue of self-determination for the territory, one must concede that by admitting Bangladesh as a member state, the United Nations impliedly recognized its right to self-determination. But did this signify the recognition of a general right of self-determination in the post-colonial context? There is nothing in the United Nations' debates on the territory during the crisis to suggest that in admitting Bangladesh the organization felt its action was in accordance with a rule of law relating to the legitimacy of post-colonial self-determination. We can therefore not say in any certain terms that the United Nations' action amounted to a recognition of the existence of a right of self-

\(^{70}\) Id., 156.

determination in the post-colonial context.

What then was the significance of the United Nations' admission of Bangladesh? It is a fact that even though East Bengal was part of Pakistan, it was physically (i.e. geographically) separated from the rest of Pakistan by a wide expanse of Indian territory. It was also subjected to gross violations of human rights perpetrated by the central government. There was also evidence of economic disparities between Bengalis and the rest of Pakistan. The Awami League which

72. See map in Fig.IV.above.
provided the vanguard for the secession had the total support of the Bengali people. In the light of these facts, could it be said that the United Nations' admission of Bangladesh amounted to an indication that at a more restricted level, the members of the organization would recognize the legitimacy of a claim to self-determination in post-colonial context for a community in similar circumstances?

In the debates on Bangladesh the United Nations did not consider the merits or demerits of Bangladesh's claim to self-determination on the basis of the territory's peculiar circumstances or on any other basis. The organization only concerned itself with humanitarian aspects of the crisis in relation to refugees who had fled their homes as a result of the Indo-Pakistan war. In admitting Bangladesh to the United Nations, there was no reference to its special situation. It is therefore logical to suggest that the organization did not base itself on the fact of human rights deprivation or the physical separation of Bangladesh from Pakistan. In the author's opinion, in admitting Bangladesh, the determinate factor was one of effectiveness founded on the fact that the territory had succeeded in breaking away from the parent state. In other words, the successful separation from Pakistan was a condition precedent to the admission of the territory and the implied recognition of its rights to self-determination. The fact of Bangladesh's peculiar circumstances leading to the secession seemed to be of relative significance and at best of only a tangential effect on the decision of the United Nations.

To summarise, the Bangladesh case does not indicate that the United Nations necessarily recognizes the existence of a right of self-determination in the post-colonial context for a community subject to gross violations of human rights. It however supports the view that where a territory successfully secedes from the

73. Pages 216-217, infra.
parent state the United Nations is most likely to recognize
the entity as a state. It must be emphasized that the basis for the
recognition in such cases would not be because the United Nations
feels itself compelled to act in conformity with some existing law to
recognize a right to self-determination in the post-colonial context.
It would rather be due to the fact that the United Nations does not
view the creation of a state in such circumstances as a violation of
any international law rule. On the other hand, where there is evidence
that the creation of a state entity is in breach of an existing inter­
national law obligation, the United Nations would not recognize its
claims to statehood. In such instances, the rejection of the entity
notwithstanding its effective separation from the parent state,
would not be due to the United Nations opposition to a claim of post­
colonial self-determination per se. It would be due to the fact that
the purported exercise of self-determination is in breach of a specific
existing international law rule or obligation. The recent case of
Cyprus illustrates this point.

The United Nations and Cyprus

On the 15th of November 1983, Turkish Cypriot authorities de­
clared the northern sector of the Republic of Cyprus an independent
state under the name of the Turkish Republic of Northern Cyprus (TRNC). The northern sector had been under Turkish Cypriot exclusive control
since 1974 when, following communal violence between Greek and Turkish
Cypriots, Turkey had intervened and secured the sector for the Turkish
Cypriots. In several respects, the Turkish Cypriot control over the

1983, p.20. Nejatigil, Turkish Republic of Northern Cyprus in

75. For a treatment of the background to the communal violence and
other related aspects of the Cyprus question see Ehrlich,"Cyprus,
The 'Warlike Isle': Origins and Elements of the Current Crisis", (contd)
northern sector had amounted to a secession. The Greek Cypriot
controlled government in Nicosia had no control whatsoever over the
area. It (i.e. the Northern Sector) had become more of a *de facto*
state. In fact in 1975, Turkish Cypriot authorities even proclaimed
the area as the "Turkish Cypriot Federated State" which was never re-
cognized. The November 15th declaration was therefore an attempt to
formalize or to seek a *de jure* recognition for a pre-existing state of
secession.

Despite the fact that the northern sector had existed as a *de
facto* state since 1974, the United Nations Security Council deplored the
November 15th declaration of the Turkish Republic of Northern Cyprus
and declared the purported secession legally invalid. The strong
opposition of the Council to the Turkish Cypriot claims to post-colon­
ial self-determination must be understood within the framework of the
history of the Republic of Cyprus. The Republic attained independence
in 1960. Since then the country has been plagued with ethnic conflicts.
At the centre of the conflicts are Greek Cypriots and Turkish Cypriots
who constitute the bulk of the territory's population. In the pre-
independence era, Greek Cypriots pursued *enosis*, i.e. unification of
the territory with Greece, as the basis for self-determination for
Cyprus. Turkish Cypriots on the other hand demanded a partition of the

75. (contd) Stanford Law Rev., Vol.18 (1965-66), 1021; Loizos and
Evriviades, "The Legal Dimensions of the Cyprus Conflict",
*Cyprus from Rebellion to Civil War* (1964); Xydis, *Cyprus, Conflict
76. White, "The Turkish Federated State of Cyprus: A Lawyer's View",
78. G.A. Res. 1489 (XV).
79. Greek Cypriots constitute 80% of the islands population.
Turkish Cypriots make up 17%-20%. For the nature and background
to the communal conflict see works cited in note 75, *supra.*
territory into two units based on the ethnic composition. To resolve these conflicting demands, Turkey, Greece, the United Kingdom (the then administering power) and representatives of the Cypriot countries concluded a series of agreements that became the basis of the territory's independence. The agreements were the "Treaty of Guarantee", the "Treaty of Alliance" (between Cyprus, Turkey and Greece only) and the "Basic Structure of the Republic of Cyprus". The "Basic Structure" was fundamentally a carefully designed series of checks and balances aimed at protecting the rights of the Turkish Cypriot minority.

Under the Treaty of Guarantee, Cyprus undertook to ensure the maintenance of its territorial integrity and security as well as respect for its constitution (and) not to participate, in whole or in part, in any political or economic union with any State. It accordingly prohibited any activity likely to promote directly or indirectly, either union with any other State or partition of the Island.

(Art. II)

Under Article IV of the Treaty, it was further provided that "in the event of a breach of the provisions,...Greece, Turkey and the United Kingdom undertake to consult with respect to the representations or measures necessary to ensure observance of those provisions. Where concerted action proved impossible each of the guarantor powers reserved "the right to take action with the sole aim of re-establishing the state of affairs created by the...Treaty".

Under the Treaty of Alliance, Greece and Turkey undertook to resist any attack or aggression direct or indirect, directed against

81. Id., 1255.
83. See note 79, supra.
84. The issue as to whether the Treaty was consistent with the sovereignty of Cyprus has been discussed elsewhere. See Jocovides, Treaties Conflicting with Peremptory Norms of International Law and the Zurich-London 'Agreements'(1966). See also Ehrlich, op.cit., note 74, 1060.
the independence or the territorial integrity of the Republic of Cyprus. It is within the context of these agreements that one can properly analyse the reactions of the Security Council to the establishment of the Turkish Republic of Northern Cyprus.

By virtue of the agreements, particularly the Treaty of Guarantee and the Treaty of Alliance, the observance of the independence and territorial integrity of Cyprus became a subject of international obligations. The *raison d'etre* of the Treaty of Guarantee was the prohibition of either a Greek-inspired or a Turkish-engineered partition. This prohibition was the fundamental basis of the creation of a united Republic of Cyprus. All parties (including the Turkish Cypriots) to the Treaties were therefore legally bound to observe the relevant provisions. Consequently, the Security Council viewed the secession by Turkish Cypriots as a breach of their existing international law obligations and therefore illegal. Resolution 541, adopted by the Security Council following the declaration of the Turkish Cypriot Republic, specifically stated that the Council:

Concerned at the declaration by the Turkish Cypriot Authorities on 15 November which purports to create an independent state in Northern Cyprus,
Considering that this declaration is incompatible with the 1960 Treaty concerning the establishment of the Republic of Cyprus and the 1960 Treaty of Guarantee

...  
1. Deplores the declaration of the Turkish Cypriots 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...
7. Calls upon all states not to recognize any Cypriot state other than the Republic of Cyprus.

In considering the legitimacy of the Turkish Cypriot secession, the Security Council concerned itself with existing treaty obligations and rights of the Cypriot communities and the guarantor powers. In other words, the Security Council determined the legal invalidity of the
purported secession within the narrow context of the specific inter-
national obligations which were binding on the Turkish Cypriots and 
the violations of which could lead to an international conflict. The 
Council's decision was therefore not based on any pre-existing general 
international law rule against post-colonial self-determination. 

Apart from the Security Council, a considerable number of states 
have also condemned the purported secession. It is submitted the 
general international opposition to the establishment of the Turkish 
Republic of Northern Cyprus is not based on any rule against post-
colonial self-determination. It is rather based on the fact that poli­
tically, the current crisis created by the secession is a potential 
threat to international peace and therefore undesirable. Turkey main­
tains a force of over 20,000 men in the northern sector to protect the 
interests of the Turkish Cypriots. Under the Treaty of Alliance and 
the Treaty of Guarantee, Greece reserves the right to intervene in 
Cyprus to resist any infringements of the territory's territorial inte­
grity and restore the status quo ante as created by the Constitution of 
Cyprus. The United Kingdom could take a similar action under the 
Treaty of Guarantee. Given the traditional hostilities between Greece 
and Turkey, the secession, which has the full support of Turkey, at 
the very least threatens to upset the delicate balance in the relation­
ship of the states in the region.

85. The British Foreign Secretary declared unequivocally that the 
United Kingdom recognizes only one Cyprus and that the purported 
secession does not alter the status of the Turkish Cypriots 
(The London Times, 16th Nov. 1983, p.1). The United States also 
declared "we have consistently opposed a unilateral declaration of 
independence by the Turkish community believing it would not be 
helpful to the process of finding a final negotiated settle­
ment to the Cyprus problem"(id., 6). At the 1983 New Delhi 
summit, members of the (British) Commonwealth also condemned 
the Turkish Cypriot action and decided to form a five-nation 
action group to help the United Nations in trying to resolve the 
issue (Cyprus Bulletin, 28th Nov. 1983,1). The members of the 
E.E.C. also rejected the claims of the Turkish Cypriots (id.,3).
To summarize, despite the de facto separation of northern Cyprus since 1974, the Security Council and the international community in general have rejected the claims of the Turkish Cypriots to post-colonial self-determination. However, in so doing, their objections were founded on specific pre-existing legal obligations of Cyprus on the one hand, and cogent political considerations on the other hand. The general reaction against the Turkish Cypriot claims was therefore not determined by any need on the part of the Council or the international community to conform to any rule of international law that prohibits self-determination in the post-colonial context.

(ii) The practice of the Organization of African Unity

The issue of self-determination in the post-colonial era is of great significance to contemporary Africa. The continent comprises several ethnic groups. In pre-colonial times, political organization in African societies was based mainly on such ethnic arrangements and in some cases on imperial structures. The ethnic unit was one linked up by socio-political ties and constituted a nation (in the sociological sense). The mad scramble which led to the Partition of Africa in the 18th Century resulted in arbitrary demarcations of the continent into colonies. Thus the colonial polities that emerged were usually clusters of ethnic groups brought together under the authority of the

86. See generally, Novogrod, "Internal Strife, Self-Determination and World Order". Bassiouni and Nanda (eds), A Treatise of International Criminal Law I (1973),211; Mojekwu, "Self-Determination; the African Perspectives" in Alexander and Friedlander (eds), Self-Determination, National, Regional and Global Dimensions (1979),221.

87. Mojekwu and Dors (eds), African Society, Culture and Politics (1977), 191-200 (Chapter 10).

88. In almost all cases the demarcations cut across ethnic groups. Carrington, in a research on African boundaries, observes that "they seem to bear little relation to the natural geographical zones or to the ethnic or cultural frontiers" (Carrington, "Frontiers in Africa", Int.Affairs (1960), 424). Examples of the 'split ethnic groups' are the Ewes in Ghana and Togo, the Masai in Kenya and Tanzania, the Yorubas in Benin and Nigeria, and the
(contd)
given metropolitan powers.

Colonialism was brief in Africa. It could therefore not bring about any meaningful coherent sentiments among the various ethnic groups that constitute a given colony. At best, where they had been united, it had been a superficial and convenient alliance to oppose the European colonists.

The sanctity of the colonial demarcations was upheld mainly by the colonial powers. However, in the process of decolonization, the African nationalists demanded, and were granted, self-determination on the basis of such colonial units. Thus the new states that emerged in Africa were the political structures inherited from colonialism with all the arbitrary demarcations. The fact that a collection of ethnic groups lived together peacefully under colonial rule may not necessarily be an indication that such groups may want to coexist in the post-colonial period. For the groups who may desire a separation from their parent states for one reason or the other, self-determination lends itself as a principle with great promise.

In 1958, with less than ten independent states in Africa, the All African Peoples Conference meeting in Accra denounced what was described as "the artificial boundaries drawn by imperialist powers to divide peoples of the same stock". The Conference subsequently called for the "abolition or the adjustment of such frontiers at an early date".

Given the polyglot dimensions of Africa's situation, the implementation of the 1958 suggestions would have amounted to an exercise

of post-colonial self-determination *par excellence*. It would also have meant a reshuffling of the political cartography of Africa. However, barely five years after the 1958 conference, a majority of African states became independent. With this came a change in attitude. The new states expressed objections to any changes in their frontiers. As one author notes "The new African countries dread serious challenge to their colonially defined boundaries for fear that the existing framework of political order in the continent might be swept away in an anarchy of tribal...conflict".\(^91\) In an effort to save the situation of "anarchy of tribal...conflict" the members of the OAU resolved in 1964 to "respect boundaries existing on their achievement of national independence".\(^92\) The 1964 resolution which effectively discouraged the redrawing of the geopolitical boundaries in Africa as a matter of political realism is frequently cited as one of the bases for the African objections to claims of post-colonial self-determination.\(^93\)

Apart from the pledge to respect colonial boundaries, the African states also oppose post-colonial self-determination for political considerations. The general view is that outside the colonial context, self-determination is the very antithesis of territorial integrity and a symptom of disunity. It is therefore, incompatible with the political ideal of African Unity.

In 1965 when Tanzania recognized Biafra during the Nigerian civil war, President Nyerere admitted that the secession was a setback for African unity.\(^94\) His belief draws strength from the assumption that territorial unity of the constituent states in Africa is the basis for


\(^{92}\) OAU Res. AHG/15/1 (July 1964).

\(^{93}\) Buchheit, *Secession*, 103; Emerson, *op.cit.*, note 91.

continental unity. During the Nigerian crisis Emperor Haile Selassie expressed a similar belief. As the head of the Consultative Committee on the crisis, he observed quite categorically that "the national unity and territorial integrity of (OAU) member states is not negotiable" and that "the national unity of individual African states is an essential ingredient for the realization of the larger and greater objective of African unity".  

On the face of it, the 'unity argument' appears common-sensical and plausible. However, an in-depth examination reveals that it is untenable. The major premise of the 'unity argument' is that territorial unity is a precondition for continental unity. At a glance, continental unity may appear like territorial unity writ large. The two phenomena are however totally different from each other. The factors that account for one do not necessarily account for the other. Territorial unity essentially concerns the inter-group relations within a given state system. Continental unity is an issue of international relations and follows the dictates of the foreign policy of states.

It is in fact possible that an ethnically homogeneous and cohesive state like Somalia could constitute an impediment to African unity due to its foreign policy. It is equally possible for an ethnically divided state (such as Ethiopia with its problems in Eritrea) to pursue the ideal of African unity as an important aspect of its foreign policy. Haile Selassie himself proved this point when he helped found the OAU at the time when the Ogaden and Eritrea were making secessionist claims.

The 'unity argument' frowns on the proliferation of new states. Impliedly, it would seem to suggest that the more states there are in Africa, the more difficult it would be for them to unite and

vice versa. One only needs to point out that, the existence of too many states has never been listed as one of the impediments to African unity. Language barriers, disparities in economic development, the personal suspicions of leaders and political instability have often been listed as the main problems. However these could pose impediments to unite two states just as they would to the fifty-one states of Africa or any number of states that may emerge.

For instance, military intervention in Syria contributed significantly to the break-up of the United Arab Republic which had a membership of two. The overthrow of Milton Obote by Amin and emphasis on the development of Tanzania which was the least developed in the East African community led to the eventual disintegration of the latter. The community had a membership of three. The Ghana, Guinea, Mali Union collapsed with the overthrow of President Nkrumah of Ghana and Modibo Keita of Mali.

The rational basis for the African objection to post-colonial self-determination is faulty as we have indicated. However, this in itself does not affect the validity of any rules of customary international law that may have evolved in the region as a result of the state practice on the issue. We have noted earlier that in 1964 the OAU members adopted a resolution pledging their respect for pre-existing colonial boundaries. The resolution reinforces the politically-based objections to post-colonial self-determination. The question is, does the 1964 resolution constitute a valid source of law on African boundaries, the uniform respect for which consequently creates customary international law against post-colonial self-determination?

As a rule, it is doubtful whether OAU resolutions have any legal effect in international law.\textsuperscript{98} This is not to deny that the resolutions of international organizations play a significant role in the creation of international law.\textsuperscript{99} Resolutions of international organizations in themselves are not creative of law. They are therefore not legally binding unless they are repeated consistently to provide a basis for custom or they embody existing rules of law. In the latter situations however, the binding basis of the rule would not be the resolutions but the pre-existing law.\textsuperscript{100}

In the specific case of the 1964 OAU resolution, the rule on boundaries "coincides with the hitherto generally accepted view that frontiers do not 'lapse' when decolonization or secession takes place".\textsuperscript{101} This view itself is premised on the general practice of the United Nations by which the latter identifies self-determination units by their existing colonial boundaries.\textsuperscript{102} In international law, boundaries, once established, assume a dispositive character. However, there is no evidence to suggest that the United Nations' practice is based on this rule or any particular rule of international law. In fact, given the evidence of the organization's practice, it is correct to suggest that in the delimitation of self-determination units, it feels itself bound by a rule of commonsense and expediency rather than by any rule of law. In the author's opinion, the United Nations' practice of identifying self-determination units by pre-existing colonial boundaries therefore lacks

\textsuperscript{100} See the discussion in this regard at page 17, \textit{supra}, and the authorities cited therein.
\textsuperscript{101} Brownlie, African Boundaries (1979),11. \textsuperscript{102} Page 29, \textit{supra}. 
the support of the necessary *opinio juris* required to make it a rule of customary international law. The 1964 resolution can consequently not derive any depth of legality from United Nations' practice.

There is however one convincing argument in favour of the resolution. Since it has become the rule of conduct of a majority of African states, it provides the basis for a rule of regional customary international law binding on those states which have unilaterally declared their acceptance of the *status quo* as at the time of independence. The resolution, in effect, provides the basis of a regional customary law rule similar to the *uti possidetis* doctrine in the Latin Americas. Consequently, it could be said that a consistent rejection of post-colonial self-determination partly founded on respect for the "colonial boundaries rule" would constitute a valid basis for the emergence of a regional customary law rule on the issue.

African responses to actual cases of post-colonial self-determination have sometimes been contradictory. On the one hand, the OAU has been known to take the view that issues of self-determination claims in its members states are matters within the domestic jurisdiction. On the other hand, it has unreservedly condemned some post-colonial claims. During the Katanga crisis, the OAU had not been formed, however, African states collectively rejected the secession.

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103. The principle of *uti possidetis* laid down the rule that the boundaries of the newly established states (i.e. the Latin American Republics) would be the frontiers of the Spanish provinces or colonies which they were succeeding. See the *Columbia-Venezuela Award*, 1 U.N. R.I.A.A. 2 (1922). See also the translation in *A.J.I.L.*, Vol. 16, 428.

104. There was however a division among the African States as to how best the situation could be resolved. While "militant states" led by Ghana, Guinea and the United Arab Republic called for outright U.N. intervention to crush the secession, "moderate states" led by the Ivory Coast and Nigeria urged national reconciliation. (For samples of the trend of arguments in the United Nations, see *Yearbook of the United Nations* (1961), 68 seq.).
Biafra, despite the initial determination that the issue was one of domestic jurisdiction, the OAU later condemned it. It is however significant to note that notwithstanding the collective action, four African states, Tanzania, Gabon, the Ivory Coast and Zambia recognized the Biafran claims. In the case of the Sudan, the OAU did not condemn nor support the self-determination claims made by the South. It, however, supervised the settlement which was negotiated between the Sudanese government and the secessionists in 1972. In more recent times, the OAU has objected to the secessionist efforts in the Shaba Province of the Congo. But in stark contrast to those responses, the organization has declined to discuss the issues of Eritrea, the Ogaden, and the Tigrinyan claims in Ethiopia on the grounds that these cases are domestic issues. Arguably, the non-interventionist approach of the organization constitutes a negative response to post-colonial claims because it favours the parent state which can then employ any method within its means to stifle the claims.

We can make the following conclusions on the African practice: as a rule, African states (as reflected in the practice of the OAU) are opposed to post-colonial self-determination claims for policy considerations. Even though the rational basis of such considerations seem

105. Paragraph V of the resolution adopted by the Fourth Summit meeting of the Heads of State of the OAU held in Kishasha (Sept. 1967), stated quite clearly that the organization recognized the situation as an internal affair, the solution of which (was) the responsibility of the Nigerians themselves. (See Brownlie, Basic Documents on African Affairs (1971), 364).

106. Paragraph (iii) of the 1967 resolution (ibid.).


dubious, the consistent negative practice of the OAU membership has evolved into a regional rule of customary international law on post-colonial self-determination. However the restrained support for Biafra by a few African States during the Nigerian civil war seems to suggest that at least to some states (albeit few) the prohibition of post-colonial self-determination is not an absolute rule and that they may be prepared to look at each claim on its own merits and within the context of its peculiar circumstances.

THE GENERAL PRINCIPLES OF LAW RECOGNIZED BY CIVILIZED NATIONS

There has been considerable debate as to what is meant by the phrase "general principles of law". A comprehensive survey of the different definitions of the phrase is beyond the scope of this work. For our purposes it is considered sufficient to note that a majority of jurists support the view that the general principles of law comprise those rules of national law "which constitute a reservoir of principles which an international judge is authorized...to apply in an international dispute, if their application appears relevant and appropriate in the different context of inter-state relations". As Lord Asquith noted in the Abu Dhabi Arbitration, they are the rules that relate to "the good sense and common practice of the generality of civilized nations". They are consequently rules "inherent in and common to" the legal systems of most, if not all, states. The question then is,


are there any rules of law inherent in the legal systems of States
that recognize a right of self-determination in the post-colonial
context? Apart from the very debatable exception of the regime of
natural law principles, the answer to the question is negative. There is
no general principle of law common to all nations that permits sections
of the populations to exercise a right of self-determination at will.

We have indicated that the regime of natural law principles could
be a possible exception. The principles of natural law, natural justice
or 'natural equity' are recognized by and are inherent in the legal
system of most states. Some early natural law philosophers conceded
a right to civil resistance and to secession to a section of a state's
population under certain conditions. They viewed each individual as
possessed of inalienable or indefeasible rights which he retained upon
his entry in society. In the event of oppression at the hands of
authority, the individuals could assert their inalienable rights in
concept and institute a resistance against the oppressive authority.

111. (contd) P.C.I.J. Reports Series A/B No. 70 (1937), 76; The
Corfu Channel Case, I.C.J. Reports (1949), particularly at 22.

112. Vattel, for instance, argued that a group could abolish its
government in the event "of clear and glaring wrongs" to the people.
He cites an example of such wrongs as "when a prince for no appar­
etent reason attempts to take away our life or deprive us of things
without which life would be miserable" (Vattel, The Law of Nations
or the Principles of Natural Law, Bk. I, Chapt.4, §54 (C.Fenwick
translation 1916). Hugo Grotius also maintained that even though
resistance to civil authority is generally not permissible it
could be excused where a minority suffer oppression under a given
government ( Grotius, De Jure Ac Paxis Tres., Chapt.6, §4, 7(4).
(Kelsey translation 1965); Locke also argued that the power of
government is "limited to the public good of the Society. It is
the power that hath no other end but preservation, and therefore
can never have a right to destroy, enslave or designedly to impover­
ish the Subjects". Consequently, where governmental authority fails
to serve these ends and there is thus a long train of abuses,
prevarications and artifices then "the Body of the People or any
single Man" may take steps to save the situation (Locke, Two
Treatises of Government, Vol.II (Laslett translation 1960),
Sections 135-225. See generally also the works of Spinoza,"A Theologi­
Spinoza (R. Elwes translation 1887), 10.
A major difficulty with the natural law thesis is that its application to the modern state system is simply incongruous. The medieval philosophies of natural law were propounded at a time when the unified state as we know it today did not exist. In any case, the medieval thesis of natural rights emphasized the inalienable rights of citizens to civil resistance which could well be distinct from the right to exercise self-determination within an independent state.

The American and French revolutions, which, as we have indicated, were the earliest manifestations of the will of the governed, embodied principles of natural law. Furthermore, in contemporary times aspects of natural law principles are inherent in the notion of human rights. However no matter how one construes the modern concept of human rights and the relevance of natural law tenets to the act of government, there is nothing that suggests that their inherent principles as recognized by states today allow a right of post-colonial self-determination. This does not of course prejudice the issue as to whether it is desirable to use human rights and natural law principles as the policy basis for

113. Page 2, supra. See also the North American Dredging Company Case in which it was argued that:

"The law of nature may have been helpful, some three centuries ago...and the conception of inalienable rights of men and nations may have exercised a salutary influence, some one hundred and fifty years ago on the development of modern democracy...; but... (it) cannot be used as substitute(s) for... positive international law, as recognised by nations and governments through their acts and statements." (R.I.A.A., Vol. 4(1926), 26).

But see the view of Fitzmaurice that the notion of the general principles of law inherently involves natural law which is still valid, (Symbolae Verstjil 22).

114. Buchheit, Secession, 55.
115. Pages 4-5, supra.
recognizing a right of self-determination in the post-colonial context in the event of severe oppression. 117

JUDICIAL DECISIONS

The most significant judicial decision which dealt directly with the issue of self-determination in a non-colonial context was that of the Aaland Islands Case. At the Paris Peace Conference, the people of the Aaland Islands, who were under the jurisdiction of Sweden, made a formal request to be annexed to Sweden. They based their request "on the ground of the right of peoples to self-determination as enunciated by President Wilson". 118 The request was supported by Sweden on the same basis. Finland on the other hand took the view that the request of the Aaland Islands people was one within its domestic jurisdiction and with which neither Sweden nor any other entity could interfere. 119 The League Council subsequently sought an advisory opinion on the issue from an International Commission of Jurists.

In the opinion, the Commission noted inter alia that "positive International Law does not recognize the right of national groups as such to separate themselves from the State of which they form(ed) part by the simple expression of a wish, any more than it recognize(d) the right of other States to claim such a separation". 120 In another report

117. Page 196, infra.


119. Sweden argued principally that the islands formed a distinct geographical unit and that its economic value to Finland was negligible. Consequently the secession could not have any adverse effect on Finland. It also maintained that the territory's history and general sentiments of its people favoured the Secession (L.N.O.J., Vol. 2 (1921), 703. For a detailed documentary account of the dispute see L.N.O.J. Special Supplement (1920). See also Barros, The Aaland Islands Question: Its Settlement by the League of Nations (1968).

120. L.N.O.J., Suppl. 3 (1920), 5.
to the League Council, a Commission of Rapporteurs supported this view and further stated that:

> to concede to minorities either of language or of religion or any fractions of a population, the right of withdrawing from the community to which they belong, because it is their wish or their good pleasure would be to 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 entity. 121

Despite their objections to claims of self-determination by sections of a sovereign state, both the Commission of Jurists and Rapporteurs did not state their prohibitions in absolute terms. The Commission of Jurists noted that its opinion did not prejudge the issue as to whether a manifest and continued abuse of sovereign power to the detriment of a section of the population of a State which could give rise to an international dispute was necessarily confined to domestic jurisdiction. 122 The Commission of Rapporteurs on the other hand was quite unequivocal. It noted that the right of a minority to separate from its parent community could be permitted as a "last resort when the State lacks either the will or the power to enact and apply just and effective guarantees to protect the rights of the disaffected minority". 123

In modern times, no international tribunal has been presented with the issue of post-colonial self-determination directly. The I.C.J. however dealt with a related issue in the Northern Camerouns Case. 124 After the plebiscite that joined Northern Camerouns to the Republic of Nigeria,

122. Note 120, supra.
123. Note 121, supra.
the State of Camerouns brought an action at the I.C.J. against the United Kingdom. The basis of the action was that as former administering power of the Trust Territory, the United Kingdom had failed to honour its obligations under the Trusteeship Agreement in respect of the territory by not ensuring an appropriate level of political education. In the view of the State of Camerouns, the failure had accounted for the option by the Northern Camerouns to be integrated with Nigeria.

In its submission to the I.C.J. the State of Camerouns admitted that it could not ask for a *restitutio ad integrum* having the effect of non-occurrence of the union with Nigeria since the integration was a *fait accompli*. It however asked for "a finding...of the breaches of the Trusteeship Agreement committed by the Administering Authority". The Court decided by a majority that any "judgment which (it) might pronounce would be without object" because it had not been asked to redress the alleged injustice or award reparation of any kind. 

The Court consequently declined to adjudicate on the merits of the case.

The adjudication on the merits would have inevitably touched on the issue as to whether after a decision to exercise self-determination by integration, the integrating unit and indeed any other party can request a review of the decision. We have noted that the State of Camerouns conceded in its submissions that it could not ask for a *restitutio ad integrum*. In other words, it admitted that once a community decides to be incorporated into a state, the exercise of self-determination assumes the effect of *res judicata*. It (i.e. the State of Camerouns) could consequently not seek a review of the decision which would involve a return to the *status quo ante* or the abolition with the union with Nigeria in its favour. The Court neither supported nor rejected this admission since it was not asked.

125. *Id.*, 132.
to deal with it in the first place. The issue as to whether self-determination once exercised can be reviewed or not in respect of an integrating community was therefore left open.

In summary, the issue as to whether there is a right of self-determination in the post-colonial context has rarely been dealt with by international tribunals. In the only directly relevant decision of the Aaland Islands Case one finds an express exclusion of the right in international law, except as a last resort in cases where the state fails to provide adequate guarantees for a section of its community.

THE WRITINGS OF PUBLICISTS

The I.C.J. Statute lists the writings of publicists as one of the subsidiary means which may be used by the Court in determining rules of law. However, it is important to emphasize that even though they might be influential, the writings of publicists do not create international law. They are not in themselves sources of law in the strictest sense. They are only evidentiary of the existing practice of states and a reflection of the state of the law at a given point in time.126

On the issue of post-colonial self-determination, there is hardly a consensus among publicists. One school of thought supports the view that once exercised by a people, self-determination becomes a fait accompli and assumes the effect of res judicata. By implication, the principle can be applicable to a state once only. It can therefore not be claimed later by sections of the state. Emerson, the leading exponent of this school, therefore concludes that "with the great current exception of decolonization", there is hardly any room for self-determination in the sense of the attainment of independent statehood.127


Similarly, Van Dyke takes the view that self-determination only applies to colonial peoples and has no relevance to the post-colonial context. In his opinion, if such a restrictive interpretation is adopted, "the United Nations and its various members have a better chance of avoiding involvement in efforts to redraw boundaries over much of the world". 128

In the view of Ofuatey-Kojoe, the right should be made to apply effectively to all subject peoples "whether they be colonies, ethnic minorities or religious minorities". 129 He, however, concedes the possible difficulties in expanding the scope of the principles: "So far as the right of self-determination includes the right for secession, the states will resist the notion of self-determination for internal minorities". 130

Roslyn Higgins on the other hand maintains that the extent and scope of self-determination is still open to debate. However, a minority in a state could not validly claim the right because in her view, "self-determination is the right of the majority within an accepted political unit to exercise power". 131

In the view of Fawcett, a restriction of self-determination to colonial peoples only, would imply erroneously that in the politics of the United Nations some people have more right of self-determination than others. 132 Fitzmaurice supports this view when he suggests that the exclusion of peoples in a post-colonial context to self-determination

127. (contd) also Sureda, "Self-determination has come to mean emergence as an independent state by getting rid of colonial rule" (261).
130. Ibid.
amounts to a double standard and constitutes a juridical absurdity.\footnote{133} Basing himself on the provisions in paragraph 7 of the Declaration on Friendly Relations, Rosentock argues that "a closer examination will reward the reader with an affirmation of the applicability of the principle to peoples within existing states".\footnote{134} He is supported in this regard by Nayar, Olga Sukovic\footnote{135} and Calogeropoulos Stratis.\footnote{136} Stratis argues that self-determination is related to general human rights and freedom. It is in the main a humanitarian rather than a political right. Accordingly to limit its application to colonialism would amount to distorting the classical meaning of the principle.\footnote{137}

We have indicated earlier that the views of publicists are not in themselves creative of law. They are only evidentiary of the sources of law. We have also seen from the various sources discussed earlier in this chapter that there is no law determining agency that recognizes the existence of a right of self-determination in the post-colonial context. In view of this, it is submitted that the views expressed by Nayar, Rosentock and Stratis are too assertive. They incorrectly tend to state as \textit{lex lata} rules which are at best \textit{de lege ferenda}. As has been correctly noted by Akehurst\footnote{138} and Umozurike, and as a review of

\begin{itemize}
\item \footnote{133} Fitzmaurice, "The Future of Public International Law", Livre de Centenaire, Institut de Droit Int. (1972), 235.
\item \footnote{138} See a critique of Stratis' view in Crawford, \textit{ibid}.
\item \footnote{139} Akehurst, \textit{A Modern Introduction to International Law} (1982), 53.
\item \footnote{140} Umozurike, 199; Johnson, \textit{Self-Determination Within the Community of Nations} (1967), 61.
\end{itemize}

\footnote{* See Appendix IV for the provisions.}
sources of law indicates, generally, modern international law neither forbids nor permits a right of post-colonial self-determination in any certain terms. Thus any views on the legal status of the right of self-determination in the post-colonial context must as of necessity be normative propositions rather than assertive indications of existing law.

Adopting such a normative approach, Ved Nanda suggests that under certain conditions, i.e. genocide and gross violations of human rights, self-determination in the post-colonial context ought to be permissible in international law.\(^{141}\) In the view of Suzuki, where self-determination is demanded by a cohesive group with a strong sense of identity under such conditions, the support for their claims might be necessary in the interest of human dignity.\(^{142}\) It has also been suggested that the fundamental idea underlying the principle appertains to justice for the individual. In this light, self-determination might still be relevant to protect claimants subject to exploitation and violations of human rights.\(^{143}\)

Soviet writers adopt the view that self-determination includes the right of separation. However unlike most of their Western counterparts, they do not require a quantum of oppression as an antecedent condition for separatism. Levin notes: undoubtedly, the most important element of self-determination is freedom of state secession and the formation of an independent state.\(^{144}\) His view is a

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144. Levin, "The Principle of Self-Determination in International... (contd)
reflection of the general Soviet position on the scope of the principle of self-determination. It is thus supported by other Soviet jurists.

There is no uniform opinion among publicists as to the existence of a right of self-determination in the post-colonial context. In view of the fact that the opinions of publicists are only reflections of existing law, the differences among them are manifestations of the lack of any definite rules on the subject in international law.

A significant number of authorities take the view that for pragmatic political considerations there is not and there cannot be a right of self-determination in the post-colonial context. On the other hand, a yet more significant number support the existence of such a right. All these views may be valid only insofar as they relate to post-colonial self-determination as de lege ferenda.

CONCLUSION

A survey of relevant international conventions does not indicate any positive recognition for a right of self-determination in


international law. In more specific terms, the United Nations Charter and the Human Rights Covenants only provide for self-determination in the colonial context. While the Helsinki Accords seem to support post-colonial self-determination, the force of the provisions are vitiated by the fact that the Accords do not constitute binding legal obligations. On the other hand the Charter of the OAU impliedly rejects post-colonial self-determination through a commitment to the maintenance of territorial integrity. The African position as reflected in the OAU Charter is reinforced by a consistent opposition to separatist claims by African states based on an agreement by the states to respect their pre-existing colonial boundaries and on other political considerations. The consistency of the African practice as founded on the pledge of the States could be said to have provided the basis for a valid regional rule of customary international law against post-colonial self-determination. It is however doubtful whether the African negative position is absolute in view of the ambiguity of the provisions on self-determination in the African Charter of Human and Peoples Rights and in view of the fact that some African States were willing to make exceptions for the case of Biafra.

In contrast to the consistent African practice one sees that the general international practice as reflected through the United Nations has been far from uniform. The organization was silent on the claims of Biafra, but it impliedly admitted the claims of Bangladesh when the territory effectively separated itself from the parent state. On the other hand, the organization actively assisted the suppression of the Katanga claims and has condemned the purported secession of Cyprus in recent times. Apart from the inconsistent treatment of the cases, the response of the United Nations in each was not based on any existing international law rule against post-colonial self-determination.
In all, the practice of the organization neither supports nor rejects the existence of the right as a matter of law.

One searches in vain for any general principles of law recognized by the legal system of independent States that permit post-colonial self-determination. On the other hand, there are no existing principles that prohibit such claims. With regards to judicial decisions, the most relevant and direct one is the *Aaland Islands Case* which seemed to support the right but only as a last resort or the very exceptional circumstances where a section of a state's population is deprived of the state's protection. As a rule however, the decision unequivocally rejected the existence of the right of self-determination for peoples in a non-colonial context.

With the exception of the African case and the decision in the *Aaland Islands* dispute, the various law determining agencies we have examined do not indicate any recognition or rejection of a right of post-colonial self-determination in international law. The African practice only relates to a regional situation and is consequently restricted. The Aaland Islands decision on the other hand, stands isolated without any collaboration from international practice, conventions, the general principles of law or even other judicial decisions. In the light of this, it is submitted that the current international law position on the status of the right of self-determination in the post-colonial era is more or less "neutral". This is to say that there are no definite international law rules that forbid or permit a claim to the right. The state of neutrality of the law has been reflected in the lack of consensus among jurists on the subject.

In this chapter we have been concerned with the narrow issue as to whether international law recognizes a right of self-determination in the post-colonial context. It has been noted that a careful review
of the law determining agencies in the international legal system reveals that the law neither supports nor rejects the right. The conclusion that the law is "neutral" on the question does not prejudice the issue as to whether it is desirable or not to recognize the right in the post-colonial context. In the next chapter it is intended to examine the arguments for and against the recognition of the right.
CHAPTER FIVE

THE CASE FOR AND AGAINST THE RECOGNITION
OF A RIGHT OF SELF-DETERMINATION IN
THE POST-COLONIAL CONTEXT.

Is there a need for the recognition of a right of self-determination in the post-colonial context? In modern times this question has generated considerable debate among international lawyers. On the one hand, one school of thought maintains that on the basis of political pragmatism and legal considerations, self-determination is simply inadmissible and in any case undesirable in the post-colonial context.\(^1\)

To this group self-determination can only be valid within the narrow context of decolonization. On the other hand another school of thought takes the view that in a world of oppression and general denials of human rights, it is both desirable and prudent to recognize the right of self-determination in the post-colonial era, as an institution to protect the rights and interests of constituent communities of sovereign states.\(^2\)

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ideal is wider; it embraces all peoples in all territories irrespective of whether they are colonies or sovereign states. This school of thought sees a relationship between human rights and self-determination that necessitates the continued application of the principle. Let us examine each side of the debate in detail.

1. The Case Against Self-Determination in the Post-Colonial Context.

The Nature of the Principle

It has been suggested that by its very nature, the principle of self-determination is not suitable for application within the frontiers of a sovereign state and that, in any case, the principle is not meant for peoples who are not under colonial rule. The general tenor of this argument is that self-determination is meant to remedy the undesirable relationship between an oppressed local population and an oppressive alien, usually white and as represented by a colonial power. Consequently, once the alien is removed through an exercise of self-determination, the principle loses its raison d'être. It then becomes nonsensical to speak of self-determination in the post-colonial context.

The main drawback of this argument is that it emphasizes subjugation by aliens as a necessary precondition for self-determination. In so doing, it glosses over the role of self-determination as an institution aimed at remedying a specific form of human relationship which is manifested through colonial domination. The focus of the principle is on domination as such. The relevance of self-determination then is not necessarily restricted to patterns of interaction involving alien rulers and native ruled. It is true that


colonialism was largely an institution of alien (usually white) domination. Consequently the main concern of self-determination in decolonization had been on the alien and the specific relationships he stood for. However, it needs to be emphasized that decolonization was only an aspect of the implementation of the principle and not the sole basis of it. Thus the utility of self-determination as a remedial right against domination could well extend beyond decolonization.

Even if one accepts that self-determination concerns only alien domination and not domination per se, the relevance of the principle in the post-colonial context is not vitiated. The identification of a group as alien is the result of that element of human parochialism that underlies social behaviour and gives rise to the "us" and "them" sentiments associated with human societies. However, the issue as to who is an alien is usually relative. In the pre-colonial times, the alien, from the point of view of one ethnic group, was anyone who did not belong in that community. In the period of colonization several ethnic groups which were sometimes very distinct and regarded each other as aliens were brought together to form the basis of colonial administration. The common colonial experience provided a new basis of identification among such groups. But on the other hand, the colonial experience also 'created' a new alien symbolized by the colonial ruler. Thus in the context of decolonization the alien was defined not in terms of who belonged to the ethnic group, but by reference to the distinctiveness of the political identity of all colonial peoples in relation to their European rulers.

It is possible that after decolonization, some distinct ethnic groups may revert to their pre-colonial parochialism to regard other constituent groups of the same state as aliens. In the post-colonial era, the depth of this parochialism could be accentuated where there
are obvious disparities in the distribution of national wealth, political power and other community privileges. In such instances the disaffected group may regard itself as being dominated by the privileged groups in the community. It may subsequently consider itself as being under alien domination that requires a remedial action through self-determination. In the post-colonial context, the demands of such a group cannot be casually dismissed on the grounds that there is no identifiable alien and that the very nature of self-determination precludes it from claiming the right.

Peoples as beneficiaries of self-determination excludes non-colonial peoples.

The thrust of this argument is that self-determination is a right of peoples. A claim for self-determination therefore presupposes that the claimant is a "people". For the purposes of self-determination, a people is the collectivity of the residents that make up the nation or a self-determination unit. The constituent sections of a state can therefore not claim the right severally because in their individuality they are not legitimate beneficiaries. In other words, racial, linguistic or other minorities resident in a state have no right of self-determination as such. One can therefore not speak of self-determination in the post-colonial context in the absence of legitimate beneficiaries.

The basic thesis of this argument amounts to a statement of the exact scope of self-determination as lex lata and enjoys


6.  Pages 29-30, supra.
juristic support. However it offers little use in the debate on the relevance of self-determination in the post-colonial context. For one thing, it perceives self-determination as static. Secondly, it glosses over the desirability of extending self-determination to minorities and other residents of sovereign states. Let us examine each point in detail:

Admittedly, in the decolonization process, the United Nations General Assembly has defined the beneficiaries of self-determination only in terms of colonial peoples. This is understandable because in that context the beneficiaries of the right must obviously be the residents of the colonial units. However, to insist on the relevance of self-determination to colonial peoples only is to take a static view of the principle. Before decolonization, self-determination had been applied extensively in Europe. The beneficiaries had been distinct nationalities who were non-self-governing. With the emergence of colonialism and the subsequent need for decolonization, colonial peoples became identified as a new category of beneficiaries. As a result of the emphasis of self-determination on decolonization since 1945, international lawyers analysing the nature of self-determination have tended to dwell only on its relevance to colonial peoples. In so doing such analyses have glossed over the essential similarity between the relevance of self-determination as applied to minorities and nationalities in the pre-1945 period on the one hand, and the post-1945 era on the other hand. Above all, they have ignored the teleological

dimensions behind self-determination over the years a right which has applied mutatis mutandis to nationalities, occupied countries and to colonial units to remedy the status of subordination.

The application of self-determination to these diverse categories of beneficiaries underscores the flexibility of the principle. It also lends weight to the view that in the post-colonial context, we ought to regard self-determination as a dynamic principle applicable to different beneficiaries in different circumstances. Just as the principle was used to 'correct' cases of political subordination in previous stages of its evolution, so can it be applied to similar situations in the post-colonial context.

In modern times, the United Nations General Assembly has impliedly admitted the dynamic application of self-determination by recognizing the relevance of the principle to Palestinian Arabs \(^8\) and non-white races of South Africa subject to apartheid, \(^9\) none of whom are under colonial rule. This vitiates any arguments that seek to reject post-colonial self-determination on the grounds that non-colonial peoples cannot qualify as beneficiaries.

**Pacta sunt servanda**

In simple terms the doctrine of *pacta sunt servanda* implies that an agreement once made must be observed. The relevance of this contractual concept to the issue of self-determination is that when groups of people agree to come together to form a state and subsequently exercise the right of self-determination, they impliedly commit themselves to stand by their commitment and to remain part of the state.

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\(^9\) See for instance, G.A. Res. 2396 (XXII); G.A. Res. 2671F (XXV).
The constituent groups in the state are therefore barred from withdrawing from the association. The theoretical basis of this argument is the idea of the "social contract" which views society as the product of a contract between either the constituent citizens or the constituent citizens on the one hand and the sovereign on the other.

As a basis for rejecting post-colonial self-determination, the doctrine of *pacta sunt servanda* has numerous difficulties. Firstly, it presupposes that the creation of every state is based on a general consensus of the citizens and is thus analogous to a contractual arrangement. The reality is that in the case of the new states (i.e. the former colonies) where the issue of post-colonial self-determination is of great relevance, the basis of the creation of the state could be anything but one of consensus. In many instances, self-determination was granted to the former colonies despite the expressed objections by some of the constituent groups to any association with the rest of the community. To deny such groups the right of self-determination in the post-colonial context on the basis of *pacta sunt servanda* would be ludicrous.

Secondly, recourse to the maxim of *pacta sunt servanda* must in itself bring into play the related concept of *sic rebus stantibus* by virtue of which, a change in circumstances after assuming a contractual obligation, is considered a legitimate justification for a party to demand the modification or abrogation of the terms of the contract. By implication, even if one accepts the validity of *pacta sunt servanda* as a bar to the application of post-colonial self-determination, one would need to add a vital qualification that this holds good only for as long as the conditions on which the claimant community became part

10. Examples of such groups include the Somalis in Kenya and the Turkish Cypriots. See pages 27-28, *infra*. 
of the state are not violated.

Assuming then that the basis of the state is a contractual arrangement, the attendant conditions or terms for membership would include the right of each participating section to share in the value processes of the community and the right to equal treatment, etc. Where these conditions are breached or where there is a radical change in the circumstances or conditions under which the claimant "contracted" to become part of the state, the right of self-determination could be invoked. By its very nature the *pacta sunt servanda* thesis can not impose an absolute bar on post-colonial self-determination. In fact, by virtue of the related concept of *sic rebus stantibus*, the thesis impliedly admits the relevance of post-colonial self-determination.

**The Claim that Self-Determination is an Exhaustive and Not a Continuing Right.**

A logical extension of the *pacta sunt servanda* thesis is that once a unit or a people exercises self-determination, the right is exhausted. Constituent sections of the unit can therefore not seek a unilateral application of the principle in the post-colonial context. The rationale behind the "once-and-for-all" argument is that if claims in the post-colonial context are recognised they could lead to a situation of indefinite divisibility and balkanization in the existing international state system.

As a bar to post-colonial self-determination, the once-and-for-all thesis has no juridical basis. As was indicated earlier, there is no definite international law rule that supports the view that once self-determination is exercised, it assumes the effect of *res judicata*. Since the 1950s there have been several instances of self-determination exercises or claims which undermine the "once-and-for-all" thesis.

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The United Arab Republic (U.A.R.), for example, was a federation of Egypt and Syria, formed in 1958. Syria withdrew in 1961. The federation was reformed later with Iraq, Syria and Egypt. Iraq and Syria withdrew in 1963. 12 Singapore, Saba and Sarawak, were incorporated into the Malay Federation in 1963. Singapore withdrew from the arrangement two years later. 13 Similarly Senegal and Mali were federated as the Mali Federation in June 1960. Two months later, Senegal withdrew.

In 1981, following persistent demands for secession by French Canadians (in Quebec), Canada organized a referendum to enable the people of the claimant region to decide whether they wanted to continue association with the rest of Canada. The majority cast a positive vote.

As an international policy prescription, the once-and-for-all thesis is objectionable because it ignores the fact that in the post-colonial era, cases of gross violations of human rights (e.g. genocide) could make the restructuring of the relationship between a group and its parent community through self-determination desirable. It also involves the risk of a value judgment that emphasizes the ideal of state stability at the expense of other community values. Stability is certainly desirable. However it is not an end in itself. It is a prerequisite for the preservation of human rights. 14 To condone violations of human rights in order to avoid balkanization or to ensure stability would consequently amount to confusing a means with


The rejection of post-colonial self-determination based on the fear of balkanization, assumes erroneously that balkanization is dysfunctional in every instance. In plural societies where ethnic tensions and animosities are endemic, the right of self-determination in the form of regional autonomy or outright secession could be a useful method of resolving ethnic differences. In the case of Nigeria for instance, after the abortive Biafran secession, the country's elite saw it fit to diffuse ethnic tensions by restructuring the federation to create twelve autonomous states in the federation. There were four states in the federation originally.

The claim that the application of self-determination in the post-colonial context would violate the principle of territorial integrity.

We have already discussed the relationship between the principle of territorial integrity and the principle of self-determination in regard to decolonization. The point in issue here is the relationship between the two principles in the post-colonial context. The argument is that as a matter of international law, the operation of self-determination must be without prejudice to the territory of an existing sovereign state. In other words, since purported claims of self-determination in the post-colonial context are bound to affect the territorial possessions of the parent states against whom they are made, the claims are barred by virtue of the principle of territorial integrity.

As indicated earlier, the relationship between the territorial integrity principle and self-determination is expressed in Resolution

1514 (XV) and Resolution 2625 (XXV). We have also discussed that the provisions of Resolution 1514 (XV) concern specifically the right of colonial territories to self-determination in relation to the territorial claims of existing sovereign states. Consequently its provisions on territorial integrity preclude the application of self-determination in a non-colonial context. On the other hand, Resolution 2625 (XXV) addresses the relationship between post-colonial self-determination and territorial integrity directly. Under paragraph 7 of the resolution, respect for the principle of territorial integrity is made conditional to states conducting themselves in "compliance with the principle of equal rights and self-determination of peoples". In other words, where a state does not comply with these conditions and an aggrieved section of its population subsequently claim self-determination, one cannot use the territorial integrity argument as a bar to the claim. The International Commission of Jurists was in support of this view when it observed in its study on *The Events in East Pakistan (1971)*, that paragraph 7 of the resolution is an attempt to reconcile the principle of self-determination and the principle of territorial integrity. More significantly, the Commission also noted that as a rule, a claim of self-determination in the post-colonial context is impermissible, but this is:

subject to the requirement that the government does represent the whole people without distinction. If one of the constituent peoples of a state is denied equal rights and is discriminated against, it is submitted that their full right of self-determination will revive. 17

The qualifications attached to the territorial integrity principle in Resolution 2625 (XXV) undermines any prescription that seeks to bar totally self-determination in the post-colonial context on the grounds of territorial integrity.

There is the general belief that the recognition of a right of self-determination in the post-colonial era is politically undesirable because the successful claim by one claimant could have a demonstration effect on prospective claimants and trigger off a chain reaction of claims. This argument is very significant to new states (particularly those of Africa and Asia) which are constantly plagued by tribal-based separatist claims. We have indicated earlier that in the case of Africa for instance, the state as a former colonial unit is made up of a cluster of ethnic groups which were brought together during colonization. In the post-colonial era, the argument is that, given the rather artificial unity between these groups which is in itself a source of instability, self-determination constitutes a dangerous anachronism. Once exercised by one ethnic group, other groups would be encouraged to pursue similar claims. The recognition of self-determination for one group could therefore have a "domino" effect which would lead to the dismantling of the state-system and provide the basis for chaos and instability. The converse of the "domino theory" effect is that the non-recognition of post-colonial self-determination and the suppression of one case could deter prospective claimants.

The "domino theory" argument lacks any sound basis. As one secessionist leader noted, "a country never disintegrated because another one did,..one so-called secession does not necessarily lead to another". Despite the secession of Bangladesh, the rest of Pakistan is still intact up to this day. Similarly, Singapore's separation from the Malay Federation has not resulted in the dismantling of the
rest of Malaysia.  

The "domino theory" assumes that the basis of all post-colonial self-determination claims are the same. They are not. Past and present cases indicate that while all separatist movements demand self-determination in one form or the other, the internal dynamics of each movement differ from the others. Consequently, the suppression of one case would not necessarily discourage future cases as the converse of the "domino theory" would imply. In practical terms one sees that neither the fiasco of Katanga nor the bloodshed that came with the Southern Sudanese abortive secession deterred the Biafran secession attempt. The failure of Biafra in itself has not discouraged other movements in Eritrea and the Ogaden. In Europe, the futility of Basque secessionist efforts is in no way related to the fluctuations in the separatist activities of the Croatians or the Corsicans or the Catholics of Northern Ireland.

The Claim that it is Unrealistic to Expect Existing Sovereign States to Recognize a Right of Post-Colonial Self-Determination.

A demand for post-colonial self-determination by a group constitutes a rejection of the parent state's authority. At the very least, it amounts to a challenge of the continued legitimacy of the state as a unified entity of which the claimant forms a part and a manifest demand for a change in the status quo. In a world system based on the unified state, demands for the recognition of a right of post-colonial self-

21. Lyon, "Separatism and Secession in the Malaysian Realm, 1948-65", in The Politics of Separatism. Collected Seminar Papers, No. 19, University of London Inst. of Commonwealth Studies (1974-75), 69, the simply executed and the peaceable separation of Singapore from Malaysia in August 1965 at least challenges a currently fashionable orthodoxy by suggesting that dangers and costs of "balkanization...have been exaggerated as against the costs involved in forcing different peoples to co-exist unwillingly as co-members of one sovereign state" (75).
determination would thus appear politically objectionable to the existing states. It has therefore been suggested that it is unrealistic to advocate a recognition of the right because, as a rule, governments have been very reluctant to support it. More significantly, it has been argued that

except in the rarest of circumstances, no state will accept the principle that at their own choosing, some segment of its own population will be free to secede either to become independent or to join a neighbour. Similarly, no organization is in the least likely to lay down the law that its members must yield if they are challenged by an internal demand for self-determination. 22

As a counter to this argument, it is sufficient to point out that historically, the reluctance of states to admit self-determination claims of any kind has never resolved the problems posed by such claims. The phenomena of separatist claims is quite divorced from the negative responses of the states. As Walker Connor notes: "the appeal and power of self-determination are quite independent of considerations of what a government ought to do or what it is up to do. It is granted that governments...will continue to resist their minorities' requests for independence, but in such cases it is expected that the State's existence will be increasingly challenged by secessionist-minded groups".23 The situation would continue to be like that unless prescriptions are formulated to regulate claims and denials of the right of self-determination in the post-colonial period.

There is on the other hand a school of thought that maintains that the formulation of prescriptions to regulate self-determination in the post-colonial context is unnecessary in the light of objective realities. To this school, what determines the validity of a claim is


not an issue of legal rights; it is the success of the separatist action itself. Similarly, it has been argued that the revolutionary character of secession derives its legitimacy only from its success, and that in a separatist conflict, "whatever the outcome of the struggle, it will be accepted as legal in the eyes of international law".

This school shies away from legal analysis involved in separatist claims. Its approach is unacceptable because it adopts a non-liquet position and implicitly condones self-help situations. It also dispenses with the desirability of determining the legitimacy of the separatist issues on legal merits within appropriately formulated regulations. The severe shortcomings of this approach are further noted by Buchheit:

It has no predictive value...The international jurist can act only as an historian chronicling instances of valid claims of self-determination after they succeed but unable to offer an opinion concerning their legitimacy before they reach, or fail to reach, fruition. This approach seems to preclude legal or rational analysis altogether, with the final judgement left to an often bloody trial by combat.

2. The Case for Self-Determination in the Post-Colonial Context

Apart from the several defects in the case against self-determination in the post-colonial context, there are cogent arguments in favour of its application. Before we consider these arguments, it needs to be emphasized that when we say that there is a case for post-

27. Buchheit, Secession, 45.
colonial self-determination, we are not implying that every ethnic group, because it is distinct from other groups in the community, should be granted self-determination simply because it demands it. What is rather implied is that it is desirable, in view of political and legal considerations, to examine specific self-determination claims, each on its own merits, within the context of formulated regulations with a view to seeking a peaceful resolution to the conflicts such claims generate. A fortiori by saying there is a case for self-determination we do not mean that international law recognizes it as a norm. What we mean is that as a matter of policy, the formulation of international legal prescription on the issue is desirable for a number of reasons. Let us examine these reasons.

(i) **There is a relationship between self-determination and the fundamental human rights of the individual**

Self-determination is basically a community right. However, the ideal it represents, that is, the right of a people to determine their own political, social and economic destiny, relates to justice for the individual in the community. In modern times, the individual is recognized as a legitimate subject of international law. In essential terms, the individual is at the centre of international or community organization. The ideal of self-determination is to ensure the appropriate environment through which the individual as a member of his community, can participate in the value processes of that community.

The individual's participation is in itself an important prerequisite for the respect or preservation of his human rights. It is founded on the basic democratic principle that the consent of the governed is the basis of legitimate government. Hence the General Assembly resolution that self-determination is a necessary pre-condition for the enjoyment of human rights.²⁸

Where the individual's access to participation in the value processes is removed by virtue of his identification with a subgroup in the community, there is wisdom in advocating for a policy prescription that seeks to restore the basis of his participation and in effect to provide the necessary conditions for the enjoyment of his human rights. The desirability of recognizing self-determination in such circumstances arises from the need to "focus on the essential relationship between the principle...and human rights to assert the essential nature of self-determination as a right that justifies the remedying of a deprivation by restoring self-government". In other words, within the post-colonial context, the recognition of self-determination is desirable as a remedial technique for dealing with deprivations of human rights.

(ii) *Self-determination in the post-colonial context is a recurrent conflict generating phenomenon which requires the formulation of appropriate prescriptions.*

On the basis of past and present trends, it could be said that separatism and nationalist movements generally are on the ascendency and the concept of self-determination has proved to be a permanent fixture on which separatists would rely for international support. One also sees that conflict-generating separatist claims have become recurrent phenomena. As one author observes, "it has happened in the past. It is happening now. And there is every indication that it will continue to happen in future". There is therefore a great need for

30. *Id.*, 5. See also Ali Mazrui, "Violent Contiguity and the Politics of Retribalization in Africa", *Journ.Int.Aff.*, Vol. XXIII (1969), 104; Connor, *op.cit.*, note 23, "If the past and present are instructive, it can be expected that cultural and political consciousness will spread with increased communications and the ethnic hodgepodges that are Asia and Africa will produce a host of new demands for the redrawing of political borders" (46).
establishing practical institutional mechanisms to regulate the application of self-determination to the separatist groups. The international community could choose to ignore the claims of such groups and insist on a blanket disapproval of self-determination. There is however past and present evidence to suggest that such a position would be dysfunctional. As far back as 1925, Arnold Toynbee stressed this point when he observed that the controversy about self-determination is one of those great permanent forces that have to be reckoned with in human affairs; in our historical retrospective we have already taken the measure of the havoc which it has caused; it is evident that the recurrent outbreak of the struggles have been as violent as they have been, just because the problem has usually been left out of account or dismissed as insoluble. 31

In recent times separatist conflicts in Cyprus, Eritrea and Ogaden have vindicated the view of Toynbee. The establishment of acceptable prescriptions for post-colonial self-determination would help to regulate such claims. Since separatists normally rely on international support, internationally accepted formulations could provide a standard of legitimacy for assessing the validity of a claim. They could also minimize the use of self-help measures to support or dismiss claims and consequently reduce recurrent cases of separatist-based conflicts.

CONCLUSION

In a world based on the unified state system, suggestion for the recognition of self-determination in the post-colonial context very readily attracts political and legal objections. The objections arise from a fear of what may be described as the spectre of post-colonial self-determination. The principle in this context is considered as an institution with a great potential for disintegration. The pre-occupation

with the spectre tends to blind advocates of the non-recognition of post-colonial self-determination from appreciating the defects in their position and the need to assess the potential of post-colonial self-determination with a view to ascertaining whether it is capable of a functional role or not. Above all, in their fear of the spectre they tend to advocate the primacy of the unified state system over other community values for the realization of which the state exists. In other words, they confuse the state system as a means, with the ends of international organization.

On the other hand, there is much to be said for a case for self-determination in the post-colonial context. This is not to deny that there is some basis for concern in recognizing the principle in this context. What is rather meant is that when the balance is drawn between the case for and against post-colonial self-determination, there emerges ample justification for supporting the case for it.

In supporting a case for post-colonial self-determination, one must admit that it entails the risk of opening a Pandora’s box, particularly in plural societies. However, the awareness of this risk only heightens the need to draw a proper balance between the rights of the individual and his subgroup in the community and the requirements of the existing unified state system which provides the vehicle for the realization of the interests and goals of the community at large. Support for post-colonial self-determination entails other specific problems. For instance, what conditions must precede a claim to make it admissible, what criteria must be used to ascertain these conditions, who must decide on the existence of these conditions and who would be the admitting authority? Would attempts to regulate the right not conflict with the norms of non-intervention? These issues will be
discussed later in this work. For the moment let us review the nature and types of post-colonial self-determination claims that necessitate the formulation of the prescriptions on the subject.