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Peoples' Right to Self-Determination: From a Political Ideal to an Ever-Evolving Legal Right*

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Un droit imprécis, voire marqué par la contradiction,
est aussi un droit éminemment évolutif.

Michel Virally

Abstract

The “principle of equal rights and self-determination of peoples” is one of the foundational purposes of the United Nations Charter, codified in Article 1 therein. Notwithstanding its political and legal affirmation by the international community as a whole, self-determination remains a vexed legal construct. This paper offers a historical overview of the evolution of self-determination from a political ideal to a legal principle and to a legal right. It argues that the most constructive understanding of the concept is one that acknowledges its composite nature as both a principle and a right, and it seeks to ascertain which categories of peoples are recognized as having the right to self-determination, whether internal or external, under international law, following a wide range of international legal instruments from the UN General Assembly Decisions to the ICJ Advisory Opinions. Using the case of Kosovo as an illustration of this dynamic, it presents a historical and analytical framework that might assist in (re)conceptualising and critically assessing more recent and future claims for self-determination.

Keywords

Self-determination, Human rights, Internal self-determination, External self-determination, Nationalism, Democratic governance, Kosovo

Halkların Kendi Kaderini Tayin Hakkı: Politik Bir İdealden Sürekli Gelişen Hukukî Bir Hakka

Öz

“Eşit haklar ve halkların kendi kaderini tayin (self-determinasyon) ilkesi” Birleşmiş Milletler Şartı'nın kurucu amaçlarından biri olarak 1. maddesinde düzenlenmiştir. Uluslararası toplumun tamamı tarafından politik ve hukukî olarak onaylanmasına karşın, self-determinasyon tartışmalı bir hukukî yapı olarak varlığını sürdürmektedir. Bu çalışma self-determinasyon kavramının politik bir idealden hukukî bir ilkeye ve oradan da hukukî bir hakka evrilişini tarihsel süreç içerisinde sunmaktadır. Kavramın en doğru ele alınışının onun hem bir ilke hem bir hak olarak dinamik ve birleşik bir doğası olduğunu kabul etmekten geçtiğini savunmakta ve BM Genel Kurul Kararlarından UAD Danışma Görüşlerine uzanan geniş bir kapsamda uluslararası hukuk enstrümanlarını takip ederek uluslararası hukukta hangi halk kategorilerinin içsel veya dışsal anlamda self-determinasyon hakkına sahip olduğunu saptamayı amaçlamaktadır. Kosova'nın bağımsızlığı sorununun bu dinamiğin bir örneği olarak kullanıldığı çalışma, self-determinasyon ilkesi ve hakkının ele alınması ve eleştirel değerlendirmeye tabi tutulmasına yardımcı olmak için tarihsel ve analitik bir çerçeve sunmaktadır.

Anahtar Kelimeler

Self-determinasyon, İnsan hakları, İçsel self-determinasyon, Dışsal self-determinasyon, Milliyetçilik, Demokratik yönetim, Kosova

* This paper is based on my LL.M. thesis (Leiden University).

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Extended Summary

Self-Determination is a dynamic concept that constantly evolves. It attaches different legal meanings to different categories of people in accordance with the needs of the international community and the trends in the international system. It started its life as a political ideal, explicitly in the early 20th century, transformed into a legal principle in the immediate aftermath of WWII and was gradually recognized as “people’s right to self-determination”. Today, self-determination exists in a dual form. It is only recognized as a right under certain circumstances. Thus, for other circumstances it still exists as a legal principle.

A similar problem, it may be argued, is the definition of people with regard to the identity of the right-holders of the “people’s right to self-determination”. In international law, this definition too, seems to be of an evolving nature and the attempts of international law bodies to define who constitutes a people is open to debate.

There are four main sections of this paper. After the introduction which lays out the groundwork and the problem, the second section traces the origins of the concept of self-determination. The origins of the concept can be traced back to nationalism and self-government. In its core, it refers to the expression of the free will of the people regarding their political status. The American and French Revolutions may be taken as the early examples of self-determination as a political ideal. In the early 20th century, self-determination was advocated by the Russian revolutionary V. I. Lenin and American president Woodrow Wilson, though with different undertones. The experience of the Paris Peace Conference of 1919 and the Aaland Islands Case attest to the fact that the political ideal did not transform into a legal right and was ignored as a principle for the sake of pragmatism in the context between the two World Wars.

The third section addresses the codification of self-determination as a legal principle in the UN Charter. It fleshes out the tensions in this codification process between Socialist and Third World states on the one hand, and Western states on the other, framing them through the lenses of a clash between the Leninist and the Wilsonian conceptions of self-determination explored in the previous section of the paper. It also provides an overview of the treatment of this concept in chapters XI and XII of the UN Charter.

The *fourth section* addresses the evolution of this concept from a legal principle into a modern right to self-determination. The term “modern” is used to describe the first codifications of the principle of self-determination. The principle hardened into a legal right for 3 kinds of peoples: *colonial peoples*, *people as a whole* and *racial groups* (i.e., people being systematically discriminated based on their race). The strong insistence of the Socialist and developing states led to the 1960

Declaration on the granting of independence to colonial countries and peoples (“Resolution 1514(XV)”), the first legal recognition of the principle; an *external right to self-determination* for colonial people. It is followed by the *right to internal self-determination* for the whole people living in an existing state through Common Article 1 of the “UN Human Rights Covenants”, that is, the International Covenant on Civil and Political Rights (“ICCPR”) and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”). The reaction of the UN to racist regimes led to a racial groups’ right to self-determination, finding support both in the text of the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (“Friendly Relations Declaration”, “1970 Declaration”), and the UN practice towards the racist regimes of South Africa and Southern Rhodesia.

The *fifth section* analyzes the contemporary discussions on the further extension of the right towards *indigenous peoples* and *minorities* or *minority peoples*. It is dubbed a post-modern right as the basis for its claim by these peoples is mainly facilitated by the ever-increasing importance of human rights and democratic governance in the world reshaped after the destruction of the Berlin Wall, followed by the break-up of the Socialist Federal Republic of Yugoslavia (“SFRY”) and the Union of Soviet Socialist Republics (“USSR”, “Soviet Union”). The modern *versus* post-modern dichotomy also symbolizes the challenge of the ramifications of the post-Berlin Wall world and the changing balance between the key concepts of international law (sovereignty *vs* human rights and democratic governance). Consequently, an analysis is put forward in this section in order to determine the relationship of indigenous and minority peoples with the concept of self-determination.

Concerning *indigenous peoples*, their right to self-determination found support in the United Nations Declaration on the Rights of Indigenous Peoples (“2007 Declaration”). The analogies drawn between it and Resolution 1514 makes it possible that a right to self-determination for indigenous peoples does exist. The scope of the right is the *internal* right to self-determination. This is evident in the language of the 2007 Declaration. Moreover, the democratic and human rights foundations also point to the same conclusion.

Minorities or *minority peoples* is a concept understood as including any people living in a state other than the dominant people of the said state which constitutes the majority of the population. A lack of sufficient international instruments made it hard to distinguish the legal situation of the concept regarding minorities. Nevertheless, the emerging consensus both in the international judiciary and international legal academia points to the emergence of the legal right to self-determination for minority peoples as well. The scope of self-determination is again *internal* for the

same principle as stated above. Nevertheless, secession as a last resort (“*remedial secession*”) is also recognized by some authors, therefore leaving the door open for *external self-determination*, albeit subject to a very narrow interpretation. This argument was upheld by the Supreme Court of Canada in its Advisory Opinion on *Re Secession of Quebec*.

This section concludes with the case study of the secession of Kosovo from Serbia. After a brief summary of the events which led to Kosovo’s declaration of independence, the Advisory Opinion rendered by the International Court of Justice (“ICJ”) on the matter is analyzed. As the ICJ was asked about the legality of the declaration of independence according to international law, the Court refrained to make comments whether the people of Kosovo had the right to (internal or external) self-determination. Even though, it is open to debate whether the external self-determination of the people of Kosovo was the execution of a principle or a rule, the case still amounts to a valid and important recognition of the remedial secession as external self-determination of a minority people by the majority of the international community.

I. Introduction: Principle-Right Dichotomy & The Evolutive Character of the Concept of Self-Determination

The debate over the characterization of self-determination is one fraught with confusion.¹ The idea of self-determination of peoples “sits uneasily within the state-centric Westphalian system.”² The fundamental concepts of this international legal system, one which to a large extent prevented the recurrence of the horrors of the early 20th century, often clash with the fundamental ideas enshrined in self-determination. On one end of the spectrum are the classical notions of state sovereignty, territorial integrity, and non-intervention. On the other end are concepts such as collective human rights, self-government, and free will. Notwithstanding this apparent dichotomy, as is shown throughout this paper, self-determination is an evolutive idea by its nature and it owes this character to the conflicts and changing balances between these concepts as time and trends progress.

This paper argues that the rigidity of international legal thinking on self-determination, where legal scholarship tends to see self-determination only as a rule,³ is of two orders: First, it fails to take into account the evolutive and composite nature of self-determination as both a legal principle⁴ and a right. In international law, new rights are always in process of generation and self-determination is a perfect example.⁵ It was born as a political ideal, later recognized as a legal principle, and gradually recognised as a right of peoples, which continues to expand as a result of the necessities of the international community and the international legal system. The failure to acknowledge the coexistence of the principle and the right is the product of a static understanding by the international system which would marginalize and limit the capacity (or at least the perception of the capacity) of international law in its quest to maintain international peace and security, the *raison d'être* of the Charter of the United Nations⁶ (“UN Charter”).

Second, the artificial construct that requires that a “people” be identified in order to allow for its “self-determination” seems to, often times, detach international law from reality and therefore affects its credibility and undermines its role to solve the emerging problems of the world. It is argued that international law is perhaps not the best suited venue to determine whether a particular group amounts to a people

¹ Helen Quane, ‘The United Nations and The Evolving Right to Self-Determination’ (1998) 47 *ICLQ* 537, 537.

² Christopher J. Borgen, ‘States and International Law: The Problems of Self-Determination, Secession, and Recognition’ in Başak Çalı (ed), *International Law for International Relations* (OUP 2010) 197.

³ Karen Knop, *Diversity and Self-Determination in International Law* (CUP 2002) 30.

⁴ “Principle of self-determination is in a way “a principle of justification of change”. Harm Hazewinkel, ‘Self-determination, territorial integrity and the OSCE’ (2007) 18(4) *Helsinki Monitor: Security and Human Rights* 289, 289.

⁵ Patrick Thornberry, ‘The Democratic or Internal Aspect of Self-Determination’ in Christian Tomuschat (ed), *Modern Law of Self-Determination* (Martinus Nijhoff 1993) 119, n 52.

⁶ Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) <<https://treaties.un.org/doc/Publication/CTC/uncharter-all-lang.pdf>> accessed 8 July 2020.

or not. Hence, if minorities or indigenous peoples or any other polity that behaves like a people do not have the legal right to self-determination, this only means that the international legal system has not recognized them as peoples with a right to self-determination yet. As future developments come into being, certain groups may be entitled to self-determination, as this has indeed been the case so far. Moreover, the failure to recognize the progressive nature of the concept of self-determination seems at odds with the Charter which itself refers to the *peoples* of the United Nations *determined* “to reaffirm faith in fundamental human rights” and “to promote social progress and better standards of life in larger freedom”.⁷

As “[e]ach juridical institution is the product of its time”⁸ so is each legal category. The right way to perceive the notion of self-determination, this paper suggests, is to analyze the meanings given to the term in its context in order to identify a pattern, its meaning and value today. As stated in the *Gentini Case*:

“A ‘rule’ ... ‘is essentially practical and, moreover, binding...; there are rules of art as there are rules of government’ while principle ‘expresses a general truth, which guides our action, serves as a theoretical basis for the various acts of our life, and the application of which to reality produces a given consequence.’”⁹

As such, the fundamental importance of a principle derives from the fact that a “principle can serve as a basic *standard of interpretation* in cases when a customary rule is either unclear or ambiguous”¹⁰ and “[it] can be used *in cases not covered by specific rules*.”¹¹ Principles are guides when there is no rule (i.e., legal right), but they are in themselves insufficient because they are not binding on states as such.¹² Consequently, the principle as an abstract notion serves as a ground to create legal rights to respond the emergent problems of the ever-changing world in an ever-developing system. As such, they serve an important and non-negligible function in a legal system.

Going forward, the *second section* of this paper traces the origins of the concept of self-determination which, in its core, refers to the expression of the free will of the people regarding their political status. The concept’s origins can be traced back to nationalism and self-government. The political ideal of self-determination manifested

⁷ *ibid*, Preamble.

⁸ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion), Separate Opinion of Judge Cançado Trindade [2008] ICJ Rep 523 [88].

⁹ *Gentini Case (Italy v. Venezuela) M. C. C. (1903) X UNRIAA 556*. This quote from the Gentini case is itself made of two quotes from “Bourguignon & Bergerol’s Dictionnaire des Synonymes” and the original quotes are in French. The English translation used above is cited in Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (CUP 1987) 376.

¹⁰ Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (CUP 1995) 132.

¹¹ *ibid*

¹² “Even those [principles] which look most like rules do not set out legal consequences that follow automatically when the conditions provided are met.” Ronald Dworkin, *Taking Rights Seriously* (HUP 1978) 25. For Dworkin’s discussion regarding the importance of principles in a legal system and the difference between a principle and a rule see 22-31.

itself as “self-government” in the context of American Revolution. For the French Revolutionaries it was a criterion with regard to territorial changes. The experiences of the Paris Peace Conference of 1919 and the Aaland Islands Case¹³ attest to the fact that the political ideal did not transform into a legal right and was ignored as a principle for the sake of pragmatism in the context between the two World Wars.

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The *fourth section* addresses the evolution of this concept from a principle into a modern right to self-determination. The term “modern” is used to describe the earlier codifications of the principle of self-determination. Here, the principle hardened into a legal right for three kinds of peoples: colonial peoples, people as a whole and racial groups (i.e., people being systematically discriminated based on their race). The strong insistence of the Socialist and developing states led to the 1960 Declaration on the granting of independence to colonial countries and peoples¹⁴ (“Resolution 1514(XV)”), the first legal recognition of the principle as a right to *external self-determination* for colonial peoples. It is followed by the *right to internal self-determination* for the whole people living in an existing state through Common Article 1 of the “UN Human Rights Covenants”, that is, the International Covenant on Civil and Political Rights¹⁵ (“ICCPR”) and the International Covenant on Economic, Social and Cultural Rights¹⁶ (“ICESCR”). The reaction of the UN to racist regimes led to racial groups’ right to self-determination, finding support both in the text of the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations¹⁷, (“Friendly Relations Declaration”, “1970 Declaration”) and the UN practice towards the racist regimes of South Africa¹⁸ and Southern Rhodesia.¹⁹

¹³ ‘Report of the International Committee of the Jurists entrusted by the Council of the League of Nations with the task of giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question’ (1920) League of Nations Official Journal Spec Supp 3.

¹⁴ Declaration on the Granting of Independence to Colonial Countries and Peoples, UNGA Res 1514 (XV) (14 December 1960) UN Doc A/RES/1514 (XV).

¹⁵ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

¹⁶ International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976), 993 UNTS 3.

¹⁷ Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) (24 October 1970), UN Doc A/RES/2625 (XXV).

¹⁸ See, e.g., UNSC Res 417 (31 October 1977) UN Doc S/RES/417.

¹⁹ See, e.g., UNGA Res 31/154 A (20 December 1976) UN Doc A/RES/31/154A.

The *fifth section* analyzes the contemporary discussions on the further extension of the right towards indigenous peoples and other minorities. It is dubbed a post-modern right as the basis for its claim by these peoples is mainly facilitated by the ever-increasing importance of human rights and the concept of democratic governance in the world reshaped after the destruction of the Berlin Wall, followed by the break-up of the Socialist Federal Republic of Yugoslavia (“SFRY”) and the Union of Soviet Socialist Republics (“USSR”, “Soviet Union”). The modern *versus* post-modern dichotomy also symbolizes the challenge of the ramifications of the post-Berlin Wall world and the changing balance between the key concepts of international law (state sovereignty *vs* human rights and self-government). Consequently, an analysis is put forward in this section in order to determine the relationship of indigenous and minority peoples with the concept of self-determination.

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²⁰ United Nations Declaration on the Rights of Indigenous Peoples, UNGA Res 61/295 (2 October 2007) UN Doc A/RES/61/295.

²¹ *Re Secession of Quebec* [1998] 2 SCR 217 (Canada).

²² *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2008] ICJ Rep 403.

declaration of independence according to international law, the Court refrained to make comments whether the people of Kosovo had the right to (internal or external) self-determination. Even though, it is open to debate whether the external self-determination of the people of Kosovo was the execution of a principle or a rule, the case still amounts to a valid and important recognition of the remedial secession as external self-determination of a minority people by the majority of the international community.

Finally, the paper concludes with an overview of the evolution of self-determination and its present status with regard to human rights and democratic governance in the international legal system. The transformation of the principle into new rights has been essential for the international legal system to cope with the emergent problems of the international community and to develop smart solutions to address them. It is argued that this flexibility is not only essential to address the multiplicity of rights-warranting situations in an international legal system but also that it will be required to address future realities and ensure the relevance of international law as a system.

II. Self-Determination as A Political Ideal: Origins

A. Prehistory: Luther, the Printing Press and Nationalism

Surprising as it may seem, in order to place the origins of self-determination one has to investigate the concept of “nationalism”.²³ As Thornberry observed, self-determination has exhibited elements of both “nationalism” and “democracy”.²⁴ In practice, before internal self-determination entered the realm of international law, the concept was closer to nationalism than to the idea of democracy. In this sense, “[t]he history of self-determination is a history of the making of nations and the breaking of States.”²⁵

Although the example generally given for the emergence of modern nationalism is the French Revolution, there is a particular example that pre-exists it: The Protestant Reformation. When Martin Luther nailed his 95 Theses to the door of the church of Wittenberg on 31 October 1517, there was already growing discontent among the emerging middle class of Northern Germany – the *burghers*- on account of the heavy taxes imposed on them, the revenues of which were disproportionately sent to the Pope in Italy instead of being kept in the country.²⁶ In Thesis 86, Luther asked:

²³ According to Benedict Anderson, first self-described nations in the modern sense were the newly Independent United States of America and South American states –latter probably influenced by the American Revolution. It could be argued that these states constitute the early examples of *self-determination of peoples*. See Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Verso 1991).

²⁴ Thornberry (n 5) 105.

²⁵ Alfred Cobban, *The Nation-State and National Self-Determination* (Collins 1969) 42-43.

²⁶ The original name of the 95 Theses is “*Disputatio pro declaratione virtutis indulgentiarum*” and it was written as a criticism to the sale of the indulgences to finance the renovation of the St. Peter’s Basilica in Rome. For the political influence of Luther’s actions and the Protestant Reformation see Alan Ryan, *On Politics: A History of Political Thought from Herodotus to the Present* (Penguin 2012) 321 ff.

“Again: — “Why does not the pope, whose wealth is to-day greater than the riches of the richest, build just this one church of St. Peter with his own money, rather than with the money of poor believers?”²⁷

Even though Luther was later excommunicated by the Pope and declared an outlaw by the Emperor, he was also often protected by the unsettled German princes of the Holy Roman Empire. The growing discontent of the German population with regard to taxation was combined with Luther’s prolific writings in German, which were read by a large segment of the population thanks to the brand-new phenomenon of the printing press. His translation of the Bible (which in turn inspired others to translate the holy book into their own respective languages) and his publishing of the “German Mass” as a response to increasing demands for liturgy in his mother tongue, attest to the influence of the printing press and how it transformed common people into a threat against the old system. The support shown to Luther by German princes culminated in a movement against the Roman Catholic Church and the Holy Roman Empire. It resulted in the creation of the ‘Schmalkaldic League’ as an opposition religious alliance which grew into a territorial political movement and led to the first of many Catholic-Protestant wars.²⁸

Ultimately, even if these events and their impact cannot fully encapsulate the birth of nationalism *per se*, the impact of Luther’s German writings, assisted by the novelty of the printing press and the manner in which it increased and democratized the circulation of ideas amongst the common people made a significant contribution to the formation of the idea of the modern nation.²⁹

B. The impact of the American and French Revolutions

In 2007, a former civil servant of the Dutch Foreign Ministry posited that:

“[E]ven if a case could be made for the American Revolution and the wars of independence in Latin America as early forms of self-determination, these events were far away from Europe, and might perhaps just as well be considered very early forms of decolonisation – a concept that did not exist at that time either.”³⁰

This unfortunate statement underpins a primarily Euro-centric understanding of the concept of self-determination. Benedict Anderson, by contrast, sees the newly independent United States of America and South American states as early examples

²⁷ Martin Luther, ‘Disputation of Doctor Martin Luther on the Power and Efficacy of Indulgences’ in Adolph Spaeth et al. (trs and eds), *Works of Martin Luther*, vol. 1 (A. J. Holman 1915), available at <<http://www.projectwittenberg.org/pub/resources/text/wittenberg/luther/web/ninetyfive.html>> accessed 8 July 2020.

²⁸ Thirty Years’ War, as they came to known, was put an end by the Treaty of Westphalia in 1648, which, in turn, gave birth to the some of the most important principles of international law; such as territorial integrity, legal equality between states and state sovereignty. See Ryan (n 26) 321 ff, 847.

²⁹ For the argument linking printing press to the birth of the nation see Anderson (n 23). Anderson has coined the term “print-capitalism” to explain this phenomenon.

³⁰ Hazewinkel (n 4) 289.

of the emergence of the “nation-state”, an idea introduced in Europe by those coming back from these former colonies.³¹

Extending this argument, it could be said that the US and South American states were in fact early examples of self-determination of peoples. The American Revolution is characterized by the transformation of the monarch's sovereignty to the people's or *popular sovereignty*. This is clearly visible in the constitution of the United States which starts with the phrase “We the people”³², as well as from the writings of the founding fathers³³ and in international legal literature on this subject.³⁴ Self-determination was a political ideal, a postulate in the determination of governance. People, not the monarch, “determined” how and by whom they should be governed.

With the French Revolution, the idea of popular sovereignty was strengthened by the concept of *transfer of territory*. It was declared that territorial changes should be in accordance with the will of the people who lived in that territory.³⁵ Although the principle had its flaws and was subsequently abused by the French revolutionaries themselves, “[t]he right devolved implicitly from the profoundly anti-despotic spirit that inspired the French revolutionaries in the years 1789-92. The modern-day right of peoples to external self-determination has its origins in this early principle”.³⁶ Thus, for the first time, peoples were regarded as the denominator for territorial changes. The political ideal of self-determination manifested itself as a principle regarding the fate of the people living in disputed territories. Judge Dillard's famous quotation to the effect that “[i]t is for the people to determine the destiny of the territory and not the territory the destiny of the people”³⁷ aptly illustrates the importance of the principles of the American and French revolutions combined.³⁸

³¹ Anderson (n 23) (especially see Chapter IV of the book; “Creole Pioneers”)

³² Constitution of the United States of America (created on 17 September 1787, ratified on 21 June 1788).

³³ Especially the following quote from Thomas Jefferson's *A Summary View of the Rights of British America* (1774) available at <https://avalon.law.yale.edu/18th_century/jeffsumm.asp> accessed 8 July 2020, is a case in point:

“The fictitious principle that all lands belong originally to the king, they were early persuaded to believe real; and accordingly took grants of their own lands from the crown. (...) It is time, therefore, for us to lay this matter before his majesty, and to declare that he has no right to grant lands of himself. From the nature and purpose of civil institutions, all the lands within the limits which any particular society has circumscribed around itself are assumed by that society, and subject to their allotment only. This may be done by themselves, assembled collectively, or by their legislature, to whom they may have delegated sovereign authority; and if they are allotted in neither of these ways, each individual of the society may appropriate to himself such lands as he finds vacant, and occupancy will give him title.” It should also be noted that Thomas Jefferson was the U.S. Ambassador to France between 1785-1789 (including the first days of the Revolution).

³⁴ “The authors of the Declaration apparently believed that the legitimacy of the new Confederation of American States was not made evident solely by the transfer of power from Britain but also needed to be acknowledged by “mankind.” This we may perceive as a prescient glimpse of the legitimating power of the community of nations.” Thomas M. Franck, ‘The Emerging Right to Democratic Governance’ (1992) 86 (1) AJIL 46, 46. Also see Thornberry (n 5) 105: “American revolutionaries cast off an “external” power and proclaimed popular rule.”

³⁵ Cassese (n 10) 11.

³⁶ *ibid* 13.

³⁷ *Western Sahara* (Advisory Opinion), Separate Opinion of Judge Dillard [1975] ICJ Rep 116, 122.

³⁸ A similar quotation from Woodrow Wilson is as follows: “Peoples should not be “bartered about ... as though they were mere chattels and pawns in a game.”” cited in Manley O. Hudson, ‘The Protection of Minorities and Natives on Transferred Territories’ in Edward Mandell House and Charles Seymour (eds), *What Really Happened at Paris: The Story of the Peace Conference, 1918-1919 by American Delegates* (C. Scribner's Sons 1921) 208, cited in Ana Filipa Vrdoljak, ‘Self-Determination and Cultural Rights’ in Francesco Francioni and Martin Scheinin (eds), *Cultural Human Rights* (Martinus Nijhoff 2008), 44.

Before expanding on the evolution of self-determination in the WWI context, a particular feature of the concept of self-determination in France and Europe at large should be noted for the purposes of this paper: While self-determination (even in the absence of the term) was seen as a democratic principle in the US and by the French Revolutionaries themselves, its application both in France and in the rest of Europe was more a form of nation-building which generally overshadowed – if not fully disregarded – the democratic features of the concept. This is evident, for instance, in the annexations of Avignon and Belgium in revolutionary France and, more specifically, in the claim of France over Alsace, based on the idea that “Alsace was French and ought no longer to be ruled by the German princes who claimed sovereignty over the region under the Treaty of Westphalia.”³⁹ Similarly, self-determination as a political ideal was invoked by the Italian political thinker Giuseppe Mazzini in his efforts for the unification of Italy.⁴⁰ And it is arguably fair to make the same observations for the German Unification⁴¹ as well as the independence of the Balkan states from the Ottoman Empire.⁴²

C. Lenin and Wilson: Internationalization of an Ideal

Vladimir Ilyich Ulyanov (best known as Lenin) is credited for his open defense that the right to self-determination be established “as a general criterion for the liberation of peoples”,⁴³ thus taking the issue to a whole new level. According to Cassese, Lenin’s *Theses on the Socialist Revolution and the Right of Nations to Self-Determination*, published in March 1916, “contains the first compelling enunciation of the principle”.⁴⁴ The study of the Soviet declarations concerning self-determination warrants a conclusion that Lenin and the other Soviet political leaders envisioned self-determination as having three components.⁴⁵ These, with Cassese’s elaboration, are:

“First, it could be invoked by ethnic or national groups intent on deciding their own destiny freely. Second, it was a principle to be applied during the aftermath of military conflicts between sovereign States, for the allocation of territories to one or another power. Third, it was an anti-colonial postulate designed to lead to the liberation of all colonial countries. The second component, which prohibited territorial annexations against the will of the peoples concerned, was, for the most part, a reiteration of the principle of self-determination

³⁹ Cassese (n 10) 12 (referring to Merlin de Douai as citing the Alsatian population’s desire to be joined with France).

⁴⁰ *ibid* 13.

⁴¹ Self-determination in this era was more of a means for national unifications like the German empire or the Italian kingdom as a direct outcome of the nationalism ideas spread by French Revolution. Hazewinkel (n 4) 291.

⁴² It is an interesting anecdote that while Serbia was the first country to revolt against the Ottoman Empire in 1804, it only gained full independence in 1878; whereas Greece revolted in 1821 and gained independence in 1832. This discrepancy regarding the dates had probably more to do with the different degree of support these peoples received for their causes rather than their fighting capabilities.

⁴³ Cassese (n 10) 14.

⁴⁴ *Ibid* 15. See Vladimir Ilyich Lenin, *Selected Works* (Lawrence & Wishart 1969) 157.

⁴⁵ Cassese (n 10) 16.

proclaimed by the French Revolutionaries of the late eighteenth century. The first and third components, in contrast, were to a large extent novel.”⁴⁶

It should be stressed, however, that for Lenin, self-determination was only regarded as a step or instrument in the larger path towards socialism. Lenin makes the analogy between the oppression of the poor in the path towards the abolition of classes and the “emancipation” or self-determination of oppressed nations in the process towards the integration of nations:

“In the same way as mankind can arrive at the abolition of classes only through a transition period of dictatorship of the oppressed class, it can arrive at the inevitable integration of nations only through a transition period of the complete emancipation of all oppressed nations, i.e., their freedom to secede.”⁴⁷

Ultimately, the Soviet Union and other Socialist states ignored the first and second components of their own earlier vision (i.e., the incorporation of the Baltic states into the Soviet Union in 1940). On the other hand, their insistence on the third component, concerning anti-colonialism, “had an enormous influence on the foreign policy of the various States and the corpus of international law.”⁴⁸ Their insistence, in fact, turned the political ideal into a legal principle through the incorporation of the concept into the UN Charter which, as discussed below, subsequently evolved into a legal right for particular peoples.

However, around the time Lenin was championing his notion of self-determination based on socialism and heavily focused on the external characteristic of self-determination, the US president Woodrow Wilson was developing his own version. Contrary to Lenin’s ideals, Wilson’s self-determination with an emphasis on its internal character, was based on Western democratic theory,⁴⁹ the American Revolution⁵⁰ and the American Constitution.⁵¹

Wilson also wrote a draft provision to be included in the Covenant of the League of Nations which “required future territorial redistributions to be made with full appreciation of racial, social and political considerations and ‘pursuant to the principle of self-determination’”.⁵² The fact that the draft article was not, however,

⁴⁶ *ibid*

⁴⁷ Vladimir Ilyich Lenin, ‘Thesis’ in Lenin (n 44) 160.

⁴⁸ Cassese (n 10) 19.

⁴⁹ “Thus, Wilson substantially advocated a *fourth potential formulation* of self-determination not considered by Lenin: that the principle required that peoples of each State be granted the right freely to select State authorities and political leaders. Self-determination meant self-government.” Cited *ibid*. Emphasis in the original.

⁵⁰ “To Wilson, self-determination was almost another word for popular sovereignty ... *vox populi was vox dei*.” Cobban (n 25) 63, n 15; *see also* n 34 and 38 above.

⁵¹ “The principles of self-determination put forward by President Woodrow Wilson (...) also proposed democracy, in the light of Wilson’s belief that any universal instruments would be modelled on the Constitution of the United States.” Thornberry (n 5) 106.

⁵² Robert Lansing, *The Peace Negotiations: A Personal Narrative* (Houghton Mifflin 1921) 283 and David Hunter Miller, *The Drafting of the Covenant* (G.P. Putnam’s Sons 1928), vol. 2, 99, cited in Vrdoljak (n 38) 44.

initially included in the Covenant, delayed the transformation of the political ideal into a legal principle.

D. The Paris Peace Conference and the Case of the Aaland Islands

It is interesting how, in the literature, many authors either misanalyse or ignore the fact that the concept of self-determination was just a political ideal which was neither codified nor extensively practiced at the time of the Paris Peace Conference of 1919. There was not enough collective virtue in international actors to legalize and apply a universal principle which would have direct implications on their national interests. The world had to go through a second and a more destructive World War to be wise enough to put interdependence and collective interests ahead of their own national interests for the first time. It is not a coincidence that where the League of Nations was unsuccessful, the system created through the United Nations was able to prevent another world war or a full-scale destruction. As the then British Prime Minister Lloyd George commented on the proceedings of the Conference:

“The task of the Parisian Treaty-makers was not to decide what in fairness should be given to the liberated nationalities, but what in common honesty should be freed from their clutches when they had overstepped the bounds of self-determination.”⁵³

The fact that the victors of WWI decided which populations (i.e., peoples seceding from defeated empires) got to exercise self-determination and which did not,⁵⁴ *prima facie* shows that no *right* to self-determination existed then.⁵⁵ It is further evident that the new states that gained independence were not required to be ruled through the democratic participation of their respective people.⁵⁶ Ultimately, it may be argued that, even the states that were given independence did not exercise a power akin to a *right* to self-determination.

However, it still was not completely disregarded for “other peoples”. For instance, minority rights were introduced as a more acceptable –and limited- substitute to self-determination. In this sense, “[b]y way of a concession, those groups whose exercise of self-determination was thwarted were provided with other, more limited political, social and cultural rights in the form of minority guarantees.”⁵⁷ Although the minority rights system, too, had a very limited and selective scope,⁵⁸ it was later codified into the Covenant of the League of Nations and provided “legal” protection in its time. In

⁵³ David Lloyd George, *The Truth about the Peace Treaties* (Gollancz 1938), vol. 1, 91, cited in Hazewinkel (n 4) 293.

⁵⁴ I.e., Austria wasn't given the right to exercise its self-determination to unite with Germany. Rainer Bauböck, 'Paradoxes of Self-Determination and the Right to Self-Government' in Christopher L. Eisgruber and Andrés Sajó (eds), *Global Justice and The Bulwarks of Localism: Human Rights in Context* (Martinus Nijhoff 2009) 104, n 10.

⁵⁵ Cassese (n 10) 26.

⁵⁶ *ibid*

⁵⁷ Vrdoljak (n 38) 44.

⁵⁸ Cassese (n 10) 26.

the Aaland Islands case,⁵⁹ well-known in the literature due to the report of the League of Nations Committee of Jurists,⁶⁰ it was pointed out clearly that the concept of self-determination was not a positive rule in the realm of international law.⁶¹ Rather surprisingly, however, a second report by the Commission of Rapporteurs alluded to a minority's right to "separation" from the state:

"[W]hile protection of minorities was the only rational and sensible solution for providing safeguards to ethnic and religious groups without disrupting the territorial integrity of States, there might however be cases where minority protection could not be regarded as sufficient. Both bodies [Commission of Rapporteurs and the International Commission of Jurists] asserted that such cases arose when the State at issue manifestly abused its authority to the detriment of the minority, by oppressing or persecuting its members, or else proved to be utterly powerless to implement the safeguards protecting the minority. (...) On the same issue, the Commission of the Rapporteurs (...) stated that, when confronted with the cases at issue, one ought exceptionally to admit the right of "separation" of the minority from the State."⁶²

Although the reports concluded that self-determination was not part of the international legal system yet, it is important that the link between minority rights and self-determination was emphasized in a legal text. Moreover, violation of minority rights, namely "manifest abuse, oppression and persecution" was held as *exceptionally giving a right to separation of the minority from the state*.⁶³ Notwithstanding the different vernacular, it is clear that the essence of what was later affirmed as oppressed peoples' right to self-determination was already acquiring a legal dimension. The next section therefore addresses how self-determination evolved into a legal principle.

III. Self-Determination as A Legal Principle: the UN Charter

As early as 1941, during WWII, the US president Franklin D. Roosevelt and the UK prime minister Winston Churchill issued a "joint declaration" –titled the Atlantic Charter– on the objectives that they thought the post-WWII era should be based on. The second and third points of this eight-point declaration were about self-determination:

SECOND, they desire to see no territorial changes that do not accord with the freely expressed wishes of the people concerned;

⁵⁹ The Islands, which belonged to Finland, were located off the Swedish coast and their inhabitants were Swedish speaking. See Cassese (n 10) 27-31.

⁶⁰ 'Report of the International Committee of the Jurists' (n 13). According to the system under the Covenant of the League of Nations, this report was followed by a second report: *Report presented to the Council of the League by the Commission of Rapporteurs* (16 April 1921), Council Doc. B7/21/68/106.

⁶¹ "Although the principle of self-determination of peoples plays an important part in modern political thought ... it must be pointed out that there is no mention of it in the Covenant of the League of Nations. The recognition of the principle in a certain number of international treaties is not considered as sufficient to put it upon the same footing as a positive rule of the Law of Nations." 'Report of the International Committee of the Jurists' (n 13) 5.

⁶² Cassese (n 10) 31.

⁶³ The argument for separation in this case can be seen as a predecessor of external self-determination of peoples in an existing state.

THIRD, they respect the right of all peoples to choose the form of government under which they live; and they wish to see sovereign rights and self-government restored to those who have been forcibly deprived of them⁶⁴

Clearly, the two points are in line with the Western tradition. “The second point” is taken directly from the French Revolution and “the third point” is taken from Wilson’s version of self-determination with an amendment probably having the Nazi occupations of European territories in mind. There is no mention of colonies, no argument for secession except as a means to restoration of the territory/state. Churchill’s 9 September 1941 speech in the House of Commons also confirms this interpretation.⁶⁵ Nevertheless, when the US, the UK, the USSR, and China gathered to draw sketches for a new world organization, no mention of self-determination (or anything related to the emancipation of oppressed peoples) was to be initially found in the draft Charter.

Another failure -as happened in the Covenant of the League of Nations- was prevented with the insistence of the USSR in the United Nations Conference on International Organization.⁶⁶ After hours of negotiation and amendments it was agreed to express the purpose of the Organization as “to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.”⁶⁷ Although no formulation on the scope and application of the principle was devised, self-determination was at least identified as a major objective of the new world organization.⁶⁸

This confusion with regard to the scope and content of self-determination is visible in the reaction of state representatives in the Conference. The Belgian representative, for example, took the principle solely “as a criterion for protecting *nationalities* or *minorities* but even from this angle he dismissed it.”⁶⁹ Colombia openly voiced its confusion in its formal declaration as:

“If [self-determination] means self-government, the right of a country to provide its own government, yes, we would certainly like to be included; but if it were to be interpreted, on the other hand, as connoting a withdrawal, the right of withdrawal or secession, then we should regard that as tantamount to international anarchy, and we should not desire that it should be included in the text of the Charter.”⁷⁰

⁶⁴ Douglas Brinkley and David R. Facey-Crowther (eds), *The Atlantic Charter* (Palgrave Macmillan 1994) xvii.

⁶⁵ See Cassese (n 10) 37.

⁶⁶ *ibid* 38.

⁶⁷ *United Nations Conference on International Organization* (1945), vol. VI, 296.

⁶⁸ See *The microfilmed minutes (unpublished) of the debates of the First Committee of the First Commission of the San Francisco Conference*, 14-15 May and 1 and 11 June 1945, Library of the Palais de Nations, Geneva [hereinafter *Debates*] cited in Cassese (n 10) 38.

⁶⁹ *ibid* 39. (emphasis in the original)

⁷⁰ *Debates* (n 68).

More concerns were raised.⁷¹ As a result of these concerns, it can be concluded that the international community, mainly composed of recently formed nation-states, was not ready to dwell in the democratic reflections of self-determination which automatically disturb the classical understanding of state sovereignty. Hence, the transformation of the political ideal was limited to its emancipation to legal principle, shy of a fully-fledged right, due to a lack of consensus on the exact connotations of the term. As noted by Cassese, while the final text contemplated the need to respect the free will of peoples as regards a system of governance, “the Wilsonian dream of representative governments for all was not contemplated.”⁷²

As a result, the political ideal of self-determination was put in the Charter of the United Nations without clarity to its content, but certainly as an objective of the post-WWII world and its fate had to be determined in the light of the future events and trends. Article 1(2) of the UN Charter therefore reads as follows:

“To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace”⁷³

Through its inclusion in the UN Charter, self-determination *was transformed into a legal principle*, to be a basis for the discussions and attempts to its further transformation into a legal norm. Subsequent UN General Assembly Declarations and Security Council Resolutions, treaties, and reactions of states, transformed the legal principle of self-determination into a legal norm for “defined” peoples. As Crawford rightly put it, “[t]he notion of a right presupposes identification of the subject of the right”, and in our case, that is the definition of a “people”. In other words, the distinction between a principle and a right regarding self-determination “is the determinacy of that subject”.⁷⁴ Herewith, the first scene of evolution in the quest for self-determination was completed. According to Thornberry, the concept was essential to the Charter’s aim for “universal peace”:

“Articles 1(2) and 55 [of the UN Charter] refer to self-determination, in the context of friendly relations among nations and in conjunction with “equal rights” of peoples. The Charter should be read to underline the contribution of the principle to “universal peace” (Article 1.2), impossible without self-determination: the text outlines a comprehensive concept linking interdependent factors of security, stability and human rights.”⁷⁵

As the world progresses, new principles gain weight, some lose importance and ultimately their relative priority changes. As new situations continue to come into

⁷¹ See Cassese (n 10) 38-44.

⁷² *ibid* 41.

⁷³ See also UN Charter, Art. 55 under Chapter IX: International Economic and Social Co-operation.

⁷⁴ James Crawford, *The Creation of States in International Law* (Clarendon 1979) 88, cited in Knop (n 3) 34.

⁷⁵ Thornberry (n 5) 108. Also: *cf* the reference to “the CSCE’s comprehensive concept of security and stability, which includes human rights, political, military, economic and environmental components,” Prague meeting of the CSCE Council, 30-31 January 1992, Summary of Conclusions <<https://www.osce.org/files/f/documents/7/b/40270.pdf>> accessed 8 July 2020 [6].

existence and develop, new discussions arise and if the instances and the discussions matures sufficiently, a legal principle may lead to a new legal norm or right. When self-determination was put in the UN Charter, the horrors of the two World Wars were still alive and thus stability and security had priority in international law. Therefore, it is only natural for a principle like self-determination, which, as stated above, bears often conflicting fundamental rules of international law, to crystallize in a gradual process. Consequently, it is also only natural that self-determination was perceived, in the immediate aftermath of WWII, as more in line with Lenin's view as external and nationalistic, rather than in line with Wilson's more internal and democratic view of self-determination.

It is stated above that self-determination found its place in the UN Charter due to the insistence of the USSR. The Socialist countries, joined by the Third World countries -and with the momentum of anti-colonialism- formed a pushing force that became the harbinger of the first development in the legal principle of self-determination. The increasing number of freshly independent Third World countries were more active than their Socialist counterparts. "They adopted and developed Lenin's thesis that self-determination should first and foremost be a postulate of anti-colonialism."⁷⁶ As Cassese noted, for Third World countries, self-determination mainly meant:

"(1) the fight against colonialism and racism; (2) the struggle against the domination of any alien oppressor illegally occupying a territory (...); (3) the struggle against all manifestations of neo-colonialism and in particular the exploitation by alien Powers of the natural resources of developing countries."⁷⁷

It is obvious from this interpretation that self-determination is heavily linked with independence, state sovereignty and non-intervention. It is not hard to understand why this is the case. These countries were exploited by Western powers for so long that, they tried to shape the legal principle of self-determination according to their interests of survival. For example, as a natural result, these states ignored that minorities should be given the right to self-determination in an existing state.⁷⁸

Western states, by contrast, first tried to oppose and prevent any formulation of the right to self-determination. They insisted that "Article 1(2) of the Charter merely set out broad guidelines for the Organization as such and therefore did not impose any specific obligation on Member States of the UN."⁷⁹ Nevertheless, when Western states realized that it was impossible for such a crucial principle to stay inactive forever in the realm of international law, they revived Wilsonian principles: "According to the Western States, the principle of self-determination enshrined in

⁷⁶ Cassese (n 10) 44.

⁷⁷ *ibid* 45-46.

⁷⁸ *ibid* 46.

⁷⁹ *ibid*.

the UN Charter contemplated (1) *internal* self-determination and (2) *universality* of application.⁸⁰ Therefore it should reflect these ideals. This position was summarized by the US delegate in his statement of 31 March 1952 in the UN Economic and Social Council (“ECOSOC”). He repeatedly emphasized that self-determination meant the “promotion of self-government” and also stressed that “the problem of self-determination is a universal one – one of significance for all States and not only States administering non-self-governing territories”.⁸¹ The West emphasized that “the principle ought to be interpreted as the right of the peoples of every State freely to choose a system of government that fully meets the aspirations of the people.”⁸² For them, “the principle was conceived as the fundamental criterion for the democratic legitimization of governments”⁸³, an understanding bearing little interest, if any, on the side of the Third World and Socialist bloc at the time.

Finally, before going to the next section, which examines how self-determination was applied as a legal right between the infancy of the Charter and the 1990s, it is useful to briefly look at the other Charter provisions referring to its multiple dimensions. Articles under Chapter XI: Declaration Regarding Non-Self-Governing Territories (Articles 73-74) and articles under Chapter XII: International Trusteeship System (Articles 75-85) are of this kind. “Humanitarian and democratic elements in Chapters XI and XII are of high significance, including the injunction in Article 76(c) ‘to encourage recognition of the interdependence of the peoples of the world’, a point sometimes lost when rights are asserted.”⁸⁴

Trust territories, covered by Chapter XII, were the same territories as the mandate system of the League of Nations, with the exception of the states that gained independence in the time between.⁸⁵ Non-self-governing territories, on the other hand, are covered by Chapter XI. According to Article 73, these territories are “territories whose peoples have not yet attained a full measure of self-government” and at first such territories “were identified by the states responsible for them.”⁸⁶ Nevertheless, Spain and Portugal’s refusal to name any of their colonies as non-self-governing led the UN General Assembly to specify certain criteria for non-self-governing territories under Resolution 1541⁸⁷. According to these criteria more territories were

⁸⁰ *ibid.* (emphasis in the original)

⁸¹ 27 *Dept St Bul* (18 August 1952), 269 and 271, cited in Cassese (n 10) 46, n 30.

⁸² Cassese (n 10) 46.

⁸³ *ibid.* 47.

⁸⁴ Thornberry (n 5) 109.

⁸⁵ “In the case of each trust territory, an authority, which could be one or more states or the United Nations itself, administered the territory pursuant to an individual trusteeship agreement. The United Nations supervised the administration of trust territories through a system of reporting by administering authorities, examination of petitions and periodic visits by UN missions. (UN Charter, c. XIII)”. Knop (n 3) 51-52.

⁸⁶ *ibid.*

⁸⁷ Principles which should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the Information Called for under Article 73 e of the Charter, UNGA Res 1541 (XV) (15 December 1960) UN Doc A/RES/1541 (XV).

specified as non-self-governing.⁸⁸ The Charter, whereas envisaged progress towards self-government for the trust and non-self-governing territories, did not spell out self-determination for them. Nevertheless, subsequent development of international law entitled these territories the legal right to self-determination.⁸⁹

IV. Self-Determination as A Modern Right: From the Charter's Infancy to the 1990s

A. Colonial Peoples

As noted above, it was the Socialist and Third World countries' coalition that pushed for the recognition of self-determination in the international legal system. After a brief reluctance from Western states, they also put forward their own views and consequently an agreement was reached in the United Nations regarding non-self-governing territories that they "should have the opportunity freely to choose their international status and about the manner in which their right to self-determination would be implemented."⁹⁰

Three important General Assembly Resolutions were adopted concerning these agreements: Resolution 1514(XV) of 14 December 1960 on "Declaration Granting Independence to Colonial Countries and Peoples"; Resolution 1541(XV) of 15 December 1960 concerning of member states obligations' vis-à-vis non-self-governing territories; and the well-known Resolution 2625 (XXV) of 24 October 1970, adopting the "Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the UN". The first two of these resolutions were presented as "interpretation[s] of the Charter and [are] usually taken to characterize the Afro-Asian account of self-determination."⁹¹ While Resolution 1514 stressed the importance of self-determination of colonial peoples and the Friendly Relations Declaration was significant in broadening the mandate of the norm, Resolution 1541 was the first to enunciate the exercise of the legal right to self-determination.⁹²

Although Resolution 1514 affirms that "All peoples have the right to self-determination", it should not be concluded that the intended scope was universal.

⁸⁸ Knop (n 3) 52.

⁸⁹ *ibid.* See e.g. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16 [52]-[53]; *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 12 [54]-[59], [61] ff; *East Timor (Portugal v Australia)* [1995] ICJ Rep 90 [29], [31], [37]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 [88], [118], [122], [149], [155], [159]; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep 95 *esp* [144]-[161]

⁹⁰ Cassese (n 10) 71.

⁹¹ Thornberry (n 5) 109.

⁹² Joshua Castellino, 'Order and Justice: National Minorities and the Right to Secession' (1999) 6 *Intl J on Minority & Group Rights* 389, 393.

In fact, the non-universal reach of this right becomes apparent from the general context, the title, object, and purpose of the Resolution.⁹³ The legal principle of self-determination was transformed into a legal right for colonial peoples, and colonial peoples only. In other words, international lawmakers defined only the colonial peoples as the people entitled to a right to self-determination. For other “peoples”, self-determination still existed as a political ideal or a legal principle, which constituted an ethical and/or legal basis for their claims, but not an enforceable right. Moreover, state practice before and after the adoption of the Resolution confirms this narrow interpretation.⁹⁴ Nonetheless, the usage of people in general and the broadening of the scope of Resolution 1514 with the Friendly Relations Declaration, as will be seen below, also meant that the legal principle of self-determination had the capacity to generate a legal right to self-determination for other peoples who were not yet entitled to the right in the realm of international law.

According to Thornberry, with its operative paragraph 2, “the Charter principle has become a right”⁹⁵ in Resolution 1514. On the other hand, Quane states that, the *prima facie* non-binding character of the Resolutions, the abstentions of almost all colonial powers in the vote record and an analysis of the statements made at the time of the adoption warrants the conclusion that it did not have a legally binding character.⁹⁶ Nevertheless, in the *Threat or Use of Nuclear Weapons* Advisory Opinion, the ICJ has stated:

General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character.⁹⁷

In the most recent case concerning self-determination, the Advisory Opinion given by the ICJ on the *Separation of The Chagos*, the court held the view that “there is a clear relationship” of the sort necessitated by the *Threat or Use of Nuclear Weapons* Advisory Opinion between the decolonization process and Resolution 1514, which “clarified the content and scope of the right to self-determination.”⁹⁸ What transformed the legal principle into a right for colonial peoples is the fact that states concerned overwhelmingly complied with the Resolutions⁹⁹ and the ICJ in its Advisory Opinion

⁹³ Quane (n 1) 548 (see also corresponding footnotes).

⁹⁴ *ibid*; Cassese (n 10) 72.

⁹⁵ Thornberry (n 5) 110.

⁹⁶ Quane (n 1) 551.

⁹⁷ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 [70]

⁹⁸ *Separation of the Chagos* (n 89) [150].

⁹⁹ See *ibid* [152] ff

on *Namibia*¹⁰⁰ in 1971 and later in its *Western Sahara* Advisory Opinion¹⁰¹ in 1975 concluded that there is a legal *right* to self-determination for non-self-governing territories which are identified as colonial peoples. To be precise, in *Namibia* Advisory Opinion, the Court only speaks of “principle of self-determination” but recognizes “the subsequent development of international law in regard to non-self-governing territories”¹⁰², clearly meaning the above-mentioned resolutions which speaks of the “right to self-determination”. In the *Western Sahara* Advisory Opinion, the Court uses both terms, and in one very important paragraph together: “The principle of self-determination as a right of peoples”¹⁰³ Moreover, we see that in 1966 Spain had defined self-determination as a right with respect to the concerned territory, *Western Sahara*: “In 1966, ..., Spain expressed itself in favour of ... the exercise by the population of the territory of their right to self-determination”¹⁰⁴

Another example to the topic at hand is the *East Timor* case.¹⁰⁵ When it came to 1995, the ICJ, referring mainly to the same resolutions and cases that are stated above, has no question about or need to discuss the “right”-ness of self-determination.¹⁰⁶ Furthermore, in its decision, the ICJ agreed with Portugal’s assertion that “the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character”¹⁰⁷

The exercise of the legal right as stated in Resolution 1514 and 1541 was confined to the colonial people as a whole and as such all the ICJ cases stated above are related to non-self-governing territories. This means that the colonial peoples were identified with regards to the colonial boundaries drawn by the imperialist powers. Nonetheless, the inviolability of the colonial boundaries was advocated by developing countries, with support from the Socialist bloc and without the opposition from Western states. Developing countries argued that the possibility of the modification of the boundaries could trigger disruption among the new would-be states creating serious disorder and conflict.¹⁰⁸ The principle of *uti possidetis*¹⁰⁹ was upheld as it was a direct production of the principle of effectiveness reflecting the context which state sovereignty, territorial integrity and non-intervention were paramount without any requirements in return. The operative paragraph 6 of Resolution 1514 proves this comment by

¹⁰⁰ *Namibia* (n 89) [52].

¹⁰¹ *Western Sahara* (n 89) [55].

¹⁰² *Namibia* (n 89) [52]-[53]

¹⁰³ *Western Sahara* (n 89) [55]. *See also* [57]-[58]

¹⁰⁴ *ibid* [61].

¹⁰⁵ Yet another example that might be given is the Advisory Opinion on *Construction of a Wall* (n 89) as the Court regarded the West Bank akin to non-self-governing territories of the three cases that are examined here. For our present purposes, said 2004 Advisory Opinion repeats the previous jurisprudence of the ICJ.

¹⁰⁶ *East Timor* (n 89) [31], [37]

¹⁰⁷ *ibid* [29]; Reiterated by the Court in *Construction of a Wall* (n 89) [155]-[156]

¹⁰⁸ Cassese (n 10) 72.

¹⁰⁹ *See Frontier Dispute (Burkina Faso/Mali)* [1983] ICJ Rep 554 [20].

noting that “[a]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.” Hence, in the evolution of the right to self-determination the concerns of the international community with regards to the classical understanding of sovereignty and territorial integrity weighed more than the full extent of the free will of the colonial populations regardless of the artificial borders.¹¹⁰ In this sense, territorial integrity of a given non-self-governing territory has been regarded as “a corollary of the right to self-determination.”¹¹¹

Lastly, the right only concerned external self-determination, since Resolution 1541 in its Principle VI put down three options for the exercise of the right: Emergence as a sovereign independent State, free association with an independent State or integration with an independent state.¹¹²

B. People as a Whole

The legal right to self-determination of the whole people living in an existing state was introduced into the realm of international law through the International Covenant on Civil and Political Rights (“ICCPR”) and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) which were adopted by the General Assembly in 1966 and came into force in 1976. They form the treaty law part of the right to self-determination. As of today, 173 states are parties to ICCPR and 171 states to ICESCR. The right to self-determination is set out in the “common article” 1 of each Covenant as follows:

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

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

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

The text of the article uses the same language as Resolution 1514 and the 1970 Friendly Relations Declaration.¹¹³ Article 1(2), however, introduces a novelty as it

¹¹⁰ In *Separation of the Chagos* there seems to be an exception upheld by the Court: “It follows that any detachment by the administering Power of part of a non-self-governing territory, *unless based on the freely expressed and genuine will of the people of the territory concerned*, is contrary to the right to self-determination”. [160] (emphasis added)

¹¹¹ *ibid* (n 89) [160]

¹¹² Resolution 1541 (n 87).

¹¹³ Although the two Covenants were adopted in 1966, they entered into force in 1976, six years after the Friendly Relations Declaration, *see* n 15-16 above.

extends the right over natural wealth and resources. This article was adopted due to the pressure coming from developing countries.¹¹⁴

Although the draft of Article 1, proclaimed, “all peoples *shall have* the right to self-determination”, the final text reads, “all peoples *have* the right to self-determination.” This change was intended “to emphasize the fact that the right referred to is a *permanent one*”¹¹⁵ Thus “[t]he issue of whether the government of a sovereign State is in compliance with Article 1 is a legitimate question, with reference to any State, at any point in time.”¹¹⁶

Moreover, the word *freely* included in Article 1(1) has significance as it refers to freedom from “any manipulation or undue influence from the *domestic* authorities”¹¹⁷ as well as the classical principle of non-intervention. Thus, the Article established the internal self-determination of the whole people, and with the non-intervention principle it obliged the contracting States not to interfere with the independence of other States “in such a manner as to curtail the right of the foreign peoples to self-determination.”¹¹⁸ Hence, in Cassese’s words, “external self-determination was proclaimed in a manner that was markedly different from the traditional approach to this subject” since, previously, it was only understood as concerning the formation of independent statehood.¹¹⁹

Aside from these treaty interpretations, there are two incidents that should be stated in the context of this paper: The first one is the invocation of Article 1 by Western states “as sanctioning a value that should apply to *any State*” regardless of their status as parties to the relevant covenants. This position regarded the provision with “a meaning and a weight which extends far beyond those strictly pertaining to a treaty provision”.¹²⁰ The second one is India’s reservation to Article 1 and the responses it got. The text of the reservation is as follows:

With reference to article 1 of the International Covenant on Economic, Social and Cultural Rights and article 1 of the International Covenant on Civil and Political Rights, the Government of the Republic of India declares that the words ‘the right of self-determination’ appearing in those articles apply only to the peoples under foreign domination and that these words do not apply to sovereign independent States or to a section of a people or nation – which is the essence of national integrity.¹²¹

¹¹⁴ Cassese (n 10) 55-56.

¹¹⁵ *ibid* 54. (emphasis in the original)

¹¹⁶ *ibid* 55.

¹¹⁷ *ibid* 53. (emphasis in the original)

¹¹⁸ *ibid* 66.

¹¹⁹ *ibid*.

¹²⁰ *ibid*. (emphasis added)

¹²¹ India, *Declaration* (10 April 1979) 1132 UNTS 439.

France, the Federal Republic of Germany, the Netherlands, and Pakistan objected to this reservation. Germany, in particular, stated that: “The right of self-determination as enshrined in the Charter of the United Nations and as embodied in the Covenants applies to all peoples and not only to those under foreign domination. All peoples, therefore, have the inalienable right freely to determine their political status and freely to pursue their economic, social and cultural development.”¹²² Cassese argues that the very fact that India entered such a reservation and the responses it received “lend credence to the thesis that peoples living in sovereign States are within its scope.”¹²³

C. Racial Groups (Peoples Being Systematically Discriminated Because of Their Race)

The novelty brought by the Friendly Relations Declaration was the extension of the scope of peoples that have the right to self-determination. The concerning paragraph proclaims that:

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.¹²⁴

As understood from the term “other Non-Self-Governing” territories, not all non-self-governing territories needed to be colonies. People subjected to foreign occupation were also seen as a category that held the right to self-determination.¹²⁵ As stated in the Declaration:

[A]nd bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle [of equal rights and self-determination of peoples], as well as a denial of fundamental human rights, and is contrary to the Charter.¹²⁶

Furthermore, the language, drafting history and states’ reactions confirm that the 1970 Declaration aimed a universal tone unlike the limited –decolonization- focus of Resolution 1514. The text reads that there is a right of “all peoples” to self-determination. The ordinary meaning of these words suggest that the principle is universally applicable.¹²⁷ The drafting committee report, in turn, suggests that it was

¹²² Federal Republic of Germany, *Declaration relating to the declaration made upon accession by India* (15 August 1980) 1197 UNTS 407.

¹²³ Cassese (n 10) 60.

¹²⁴ Friendly Relations Declaration (n 17) (emphases added).

¹²⁵ “This notion, which had already been put forward, albeit in rather vague and ambiguous terms, in the 1960 UN Declaration on the Independence of Colonial Peoples, and then implicitly upheld in Article 1 common to the two UN Covenants on Human Rights of 1966, was spelled out in 1970, in the UN Declaration on Friendly Relations.” Cassese (n 10) 90.

¹²⁶ Friendly Relations Declaration (n 17).

¹²⁷ Quane (n 1) 562.

agreed that the Declaration should contain a general statement of the principle, in order to stress its universality.¹²⁸ Individual States also acknowledged the universal character of the principle.¹²⁹

Although no definition of “people” in the universal sense was made in the Declaration, this paragraph –the so-called “the saving clause”-¹³⁰ sheds some light on the issue:

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.¹³¹

A contrario, if a government fails to be representative, the territorial integrity and sovereignty of that particular state cannot be held as an excuse. For the first time, the balance between the classical Westphalian norms was tipped in the favor of human rights and democracy in a legal text concerning self-determination.¹³² It can be, furthermore, derived that, in spelling out race, creed and colour, there is an implicit acknowledgment of the fact that in any given State there can be different people(s) besides the whole people of that State. Moreover, although the trilogy of “race, creed and colour” has been identified as a loose formulation to sanction a right¹³³, Cassese makes a case for the discrimination based on race and deems it as crystallized by the subsequent UN practice, while acknowledging that, in the Declaration, “the rights of racial and religious groups subjected to discrimination are subordinate to the principle of territorial integrity” and thus “any license to secede must be interpreted very strictly.”¹³⁴

According to Cassese, secession is implicitly authorized by the Declaration and it must be strictly construed, as with all exceptions. He thus suggests “denial of the basic right of representation does not give rise *per se* to the right of secession”,¹³⁵ requiring instead a gross and systematic suppression of a people’s fundamental rights and the denial of a peaceful settlement of existing disputes. Unfortunately, Cassese’s basis for this argument regarding secession is the “implicit authorization of the Declaration”, a reference which is not supported by the *travaux préparatoires* to the

¹²⁸ *ibid* 25.

¹²⁹ *ibid* 562. “Only India ruled out the possibility that it could apply to independent States.” *ibid*, n 139.

¹³⁰ For the origin of the term and the case for racial groups, *see* Cassese (n 10) 116 and 108-120.

¹³¹ Friendly Relations Declaration (n 15) (emphasis added).

¹³² See Section V.B below for a more detailed discussion.

¹³³ Christian Tomuschat, ‘Self-Determination in a Post-Colonial World’ in Tomuschat, *Modern Law of Self-Determination* (n 5) 10.

¹³⁴ Cassese (n 10) 112.

¹³⁵ *ibid* 119-120.

1970 Declaration. Consequently, Cassese's argument for external self-determination (secession) seems to reflect a *lex ferenda* rather than the *lex lata*, a fact which he himself acknowledges by saying that "[it] has not become customary law."¹³⁶

Nevertheless, his argument for "*internal self-determination to racial groups persecuted by central government*" finds support from the UN practice.¹³⁷ According to the author, "it suffices to recall the string of General Assembly resolutions on Southern Rhodesia¹³⁸ and South Africa¹³⁹, as well as a number of significant statements made along the same lines by Western countries."¹⁴⁰ Interestingly, Cassese makes a comparison between the statements of Western states and the statements of developing and Socialist states. Cassese argues –and this paper agrees– that "[t]he weight of [Western states'] statements, as far as proof of the emergence of a customary rule on the matter is concerned, is greater than that of the declarations of developing and socialist countries. With regard to these two classes of States one might contend that [latter class's] stand was primarily motivated by merely political or ideological considerations. *By contrast Western states were politically less unfavourable to Southern Rhodesia and South Africa.*"¹⁴¹

V. Self-Determination as A Post-Modern Right: Beyond the 1990s

The previous sections outlined three categories of peoples who were entitled to the legal right to self-determination: colonial people, people as a whole (internal self-determination) and people under alien domination. Due to the progress made in human rights law and the constantly developing structure of international law, however, two more peoples became candidates for the entitlements of the legal right to self-determination: minorities and indigenous peoples. Although both groups find the legal basis for their claim in the 1966 ICCPR and ICESCR and in the 1970 Friendly Relations Declaration, the symbolic demolition of the Berlin Wall in 1989 and the consequent break-up of the Soviet Union and the Socialist Federal Republic of Yugoslavia served as a catalyst to this development. With the demise of communism, the Western interpretation of self-determination, which found its cradle in self-government, gained the upper hand and the concept of democracy began to evolve from a choice with regard to a system of governance into a human right in itself.¹⁴² In this section, these two groups of people will be analyzed in this context and it will be determined, with reference to the related cases, how these peoples came to be regarded as holders of the right to self-determination under international law.

¹³⁶ *ibid* 121.

¹³⁷ *ibid* 120-121.

¹³⁸ *See* n 19 above.

¹³⁹ *See* n 18 above.

¹⁴⁰ Cassese (n 10) 120-121.

¹⁴¹ *ibid* 121 (emphasis added).

¹⁴² *See* generally Franck (n 34).

A. Indigenous Peoples

Unfortunately, there is no internationally accepted definition for indigenous peoples at present. Although several organizations like the International Labour Organization (“ILO”) and the World Bank have adopted their own definitions, the often-referred definition¹⁴³ is the “working definition” proposed by the UN Special Rapporteur on discrimination against indigenous populations, Martínez Cobo:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.¹⁴⁴

Even though this definition, too, has been criticized, it is still regarded as the most authoritative amongst all the proposed definitions regarding indigenous peoples.¹⁴⁵ Two important points need to be emphasized in order to talk about a possible legal right of indigenous peoples to self-determination. The first one touches upon the core of the indigenous discourse which is “to ensure that indigenous peoples have a right over their ancestral territories.”¹⁴⁶ Indigenous peoples have a specific relationship to a defined territory and as such they are occasionally referred to as “territorial minorities”¹⁴⁷. The second point is the transformation of the usage of indigenous “populations” into indigenous “peoples”.¹⁴⁸ As Erica Daes, the Chairperson-Rapporteur of the UN Sub-commission on the Prevention of Discrimination and the Protection of Minorities, put it, “[i]ndigenous peoples are indeed peoples and not minorities or ethnic groups.”¹⁴⁹ Wiessner adds that “[i]f any traditional criteria of “people” exist, indigenous groupings may very well meet them.”¹⁵⁰

¹⁴³ Joshua Castellino and Jeremie Gilbert, ‘Self-Determination, Indigenous Peoples and Minorities’ (2003) 3 *Macquire L.J.* 155, 168.

¹⁴⁴ UN Commission on Human Rights, Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, *Study of the Problem of Discrimination Against Indigenous Populations: Final Report (last part) submitted by the Special Rapporteur, Mr. José R. Martínez Cobo* (30 September 1983) UN Doc E/CN.4/Sub.2/1983/21/Add.8 [379].

¹⁴⁵ For debates on a definition of indigenous peoples, see Benedict Kingsbury, ‘Indigenous Peoples in International Law: A Constructivist Approach to the Asian Controversy’ (1998) 92 *AJIL* 414.

¹⁴⁶ Castellino and Gilbert (n 130) 168.

¹⁴⁷ *ibid.*

¹⁴⁸ *ibid.*

¹⁴⁹ UN Commission on Human Rights, Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, *Standard-setting Activities: Evolution of Standards Concerning the Rights of Indigenous People: Working Paper by the Chairperson-Rapporteur, Mrs. Erica-Irene A. Daes, on the concept of “indigenous people”* (10 June 1996) UN Doc E/CN.4/Sub.2/AC.4/1996/2 [47]. Though, this definition differs in its perception of minorities from this paper.

¹⁵⁰ Sigfried Wiessner, ‘Rights and Status of Indigenous Peoples: A Global Comparative and International Analysis’ (1999) 12 *Harv Hum Rts J.* 57, 119.

Article 3 of the UN Declaration on the Rights of Indigenous Peoples (“2007 Declaration”)¹⁵¹ states that “[i]ndigenous 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.”¹⁵² The declaration was adopted by the General Assembly by a majority of 144 states in favour, 4 against (Australia, Canada, New Zealand and United States) and 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine).¹⁵³ Although General Assembly Resolutions are non-binding instruments, states’ votes in support of them, combined with the fact that opposing states later reversed their position and endorsed or announced to endorse the text, confirms the customary law status of the Resolution. Amongst the 4 votes against -which are very important states for the purposes of indigenous rights since they have a considerable population of them- Australia and New Zealand reversed their positions and endorsed the Declaration. In March 2010, Canada announced that “it would take steps to endorse” the document and, lastly, in April 2010, the United States indicated “that it will also review its position regarding the Declaration.”¹⁵⁴ By the end of 2010, both Canada and the United States have reversed their positions and now endorse the Declaration.¹⁵⁵ This is such an important development considering the fact that the rapid crystallization of Resolution 1514 was due to the high rate of willingness of states to comply with it.

The 2007 Declaration is also important from another angle. Without the Declaration reflecting customary international law, the only internationally binding instrument with regard to the indigenous peoples’ rights is the International Labour Convention No 169. Article 1(3) of the Convention states that, “the use of the term “peoples” in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.”¹⁵⁶ Consequently, in the *status quo*, it is debatable that indigenous peoples qualify as peoples having the right to self-determination, though it is highly probable that the 2007 Declaration could be considered to reflect customary international law, if the history of Resolution 1514 is anything to go by. The repositioning of states with important numbers of indigenous peoples living in them from opposing to endorsing states is a crucial move in this regard.

¹⁵¹ 2007 Declaration (n 20)

¹⁵² *ibid.*

¹⁵³ United Nations Permanent Forum on Indigenous Issues (UNPFII), ‘United Nations Declaration on the Rights of Indigenous Peoples’ <<https://web.archive.org/web/20100815064020/http://www.un.org/esa/socdev/unpfii/en/declaration.html>> accessed 8 July 2020 (captured 15 August 2010).

¹⁵⁴ *ibid.*

¹⁵⁵ UNPFII, ‘United Nations Declaration on the Rights of Indigenous Peoples’ <<https://web.archive.org/web/20110131214644/http://www.un.org/esa/socdev/unpfii/en/declaration.html>> accessed 8 July 2020 (captured 31 January 2011).

¹⁵⁶ Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries (adopted 27 June 1989, entered into force 5 September 1991) 1650 UNTS 383.

A second question that arises is, once established the abstract right of a group to self-determination, what is the scope of this right? As stated above, (the process of) crystallization or enlargement of the definition of the peoples entitled to self-determination is very much related to the evolutionary character of self-determination. This is visible in the text of the 2007 Declaration. As nationalism was the driving force of the codification of self-determination in decolonization times, Resolutions 1514 and 1541 were products of that context. The legal right to self-determination of the colonial peoples was primarily independence. The other options of association with an independent state or integration into an independent state were included in Resolution 1541 with additional requirements.¹⁵⁷ The free and voluntary choice of peoples were limited to referenda and did not extend to the system of governance as such. On the other hand, the post-Berlin Wall developments emphasized democracy and human rights more and more, according the concept of self-determination with a strong democratic character. The 2007 Declaration reflects this evolution. The Declaration favors a right to *internal* self-determination -in many articles it refers to the term “state” as the independent state which the indigenous people live in and it imposes many obligations on that state to be responsible towards its indigenous people(s).¹⁵⁸ Moreover Article 33(1) provides that indigenous peoples’ rights do not “*impair the right of indigenous individuals to obtain citizenship of the States in which they live.*”¹⁵⁹

Other than the inclusion of the independent state which the indigenous people live in and which has obligations towards them thereto, the rights given to indigenous peoples themselves point to a right to internal self-determination. The Declaration extensively laid down various provisions pointing to that effect, yet perhaps the most important and definitive one is Article 4 which states that:

“Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.”

Furthermore Article 46(1) states that:

“Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.”

In various articles between Articles 4 and 46, the Declaration lays down the specific exercises of the right to internal self-determination; some of which are truly

¹⁵⁷ Resolution 1541 (n 87), Principles VII-IX.

¹⁵⁸ Explicit use of the term “state” for the said purpose are in Arts. 11-17, 19, 21-22, 26-27, 29-32, 36-40.

¹⁵⁹ Emphasis added.

far reaching. An example of this kind is Article 34: “Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, *in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.*”¹⁶⁰

Article 34 is also crucial for the purposes of this paper as it imposes an obligation, this time on indigenous peoples themselves, to respect and recognize the international standards of human rights while establishing their institutional structures, etc. This is of crucial importance since it reflects a changing perception of the right to self-determination as a democratic human right. A related example that confirms this trend is Article 46(2), which states that any limitations to the rights enshrined in the declaration must be not only necessary, but also limited to what is necessary to ensure, *inter alia*, the achievement of “*just and most compelling requirements of a democratic society.*”¹⁶¹

To sum up, the crystallization of the 2007 Declaration is crucial to be able to clearly define the legal right to self-determination for a historically important segment of peoples, that is, indigenous peoples. Moreover, as it reflects democratic and human rights ideals as intrinsic to the exercise of self-determination, it is momentous in the evolution of self-determination.

B. Minorities (Peoples Living in Existing States)

As already noted, minority rights were introduced in the post-WWI era as rights “short of self-determination”. In other words, minority rights were the remedy of a relevant people who could not exercise self-determination due to the international political structures of the time. This “remedy” was not only ineffective, but also was used as an ideological tool, especially by Nazi Germany, in the years leading up to WWII. Consequently, when the UN Charter was being drafted, it was not even debated that the territorial integrity of the independent and sovereign states was inviolable. This principle was upheld in every text regarding self-determination. Nevertheless, the competition between the Western states and the Communist Bloc came to an end with the regime changes following the destruction of the Berlin Wall. Although, without any doubt, territorial integrity and sovereign equality are still amongst the leading principles of international law, they are no longer absolute monolithic rules. Instead, these are now nuanced principles, to be interpreted against (and in conformity with) the evolving catalogue of human rights.¹⁶²

¹⁶⁰ Emphasis added.

¹⁶¹ Emphasis added. See also Art. 46(3): “The provisions set forth in this Declaration shall be interpreted in accordance with the principle of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.”

¹⁶² S. James Anaya, ‘The Capacity of International Law to Advance Ethnic or Nationality Rights Claims’ in Will Kymlicka (ed), *The Rights of Minority Cultures* (OUP 1995), 325.

As such, the balance between territorial integrity and self-determination does not always favor the former anymore. The first proof was given in “the saving clause” of the Friendly Relations Declaration. The Declaration, for the first time, put a requirement to uphold the principle. It stated that the territorial integrity or political unity of sovereign and independent states were only protected for the governments “representing the whole people belonging to the territory without distinction as to race, creed or colour”. In the previous section, peoples who are being systematically discriminated based on their race were counted as a category of people having a legal right to self-determination as the argumentation put forward by Cassese was followed. This subsection concerns the legal position of minorities in relation to self-determination whether they are a “racial group” or not.

Like the absence of a definition for indigenous peoples, an internationally accepted legal definition for minorities failed to come into existence. This notwithstanding, a working definition proposed by the Special Rapporteur for the UN Study on the rights of persons belonging to ethnic, religious and linguistic minorities, Francesco Capotorti, was used in the proceedings. It is generally considered to be the most competent definition of minorities in the realm of international law. According to the Special Rapporteur, a minority is:

“[A] group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members –being nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, religion or language.”¹⁶³

Before the Friendly Relations Declaration, with regard to self-determination, the term “people” was always understood as “people as a whole”. Even in the decolonization context peoples were defined related to the colonial borders drawn by the imperialist powers, with no regard for ethnic, cultural, or linguistic ties. Internal self-determination was only awarded to the whole population of an existing state. The reason lying behind this understanding related to one of the seminal principles of the nation-state: the indivisible unity of the state with its people. The emphasis on indivisibility and the unitary use prevented any legal recognition of distinct peoples within existing states. As a result, the legal instruments that gave rights to minorities preferred the wording “persons belonging to minorities”¹⁶⁴ rather than a clearer term, as the former signified an individual right and not a collective right like the right to self-determination.¹⁶⁵

¹⁶³ UN Commission on Human Rights, Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities by Francesco Capotorti, Special Rapporteur of the Sub-Commission*, UN Doc E/CN.4/Sub.2/384/Rev.1 (1979).

¹⁶⁴ Such as Art. 27 ICCPR (n 15).

¹⁶⁵ According to Asbjørn Eide, there is no disagreement on the fact that the rights of persons belonging to minorities are individual rights, even though they are enjoyed in a group with other members. See UN Commission on Human Rights, Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, *Commentary to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities - Working paper submitted by Asbjørn Eide* (27 April 2000) UN Doc E/CN.4/Sub.2/AC.5/2000/WP.1.

This approach was arguably rational when contextualized against its historical context. The horrors of the two World Wars were still present and the international community was determined to avoid the repetition of any such catastrophes. It is unfair to analyze the past without its proper context¹⁶⁶ and in this context the international community was successful in its cause. Nevertheless, today, it may be argued that there is a relatively more settled system, ever-growing international and regional organizations, and highly interdependent trade ties as sufficient safeguards. In return, it could be argued that it is no longer possible to ignore minority rights as group rights and to not recognize more than one people within an existing state, if need be. According to Tomuschat, such a denial “seems much too harsh as a construction designed to establish a peaceful balance between all the interests at stake.”¹⁶⁷ The definition of self-determination by UNESCO in a statement made to the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities is a case in point: The right to self-determination is “a reminder of the ultimate accountability of every State and every political system to the *peoples* who live under its legal jurisdiction.”¹⁶⁸ As discussed, the addition of the requirement of “a government representative of all population” (not only the majority¹⁶⁹) was the first step. The same phrase was included in the Vienna declaration of 1993:

[The right to self-determination] shall not be constructed as authorizing or encouraging any action which could dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind.¹⁷⁰

The abandonment of the “race, creed or colour” formulation of the Friendly Relations Declaration for the sake of “without distinction of any kind” is a strong indication of a new understanding of yet another variation of the right to self-determination. Truly, the distinctive trait of a people may be, and generally is, a quality other than “race, creed or colour”. Indeed, where one trait is decisive for the existence of a separate people, that same trait may not have any political connotations elsewhere. For example, whereas Bosnian Muslims and Serbs share the

¹⁶⁶ As Judge Cançado Trindade stated in paragraph 88 of his separate opinion attached to the Advisory Opinion on Kosovo's Declaration of Independence (n 8): “Each juridical institution is the product of its time. Social facts tend to come before the norms, and these latter emerge from legal principles, in order to regulate new forms of inter-individual and social relations.”

¹⁶⁷ Tomuschat (n 133) 16.

¹⁶⁸ UN Commission on Human Rights, Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, UNESCO Activities Concerning Prevention of Discrimination and Protection of Minorities: Report (24 July 2007) UN Doc E/CN.4/Sub.2/1992/6 [3(d)], cited in Thornberry (n 5) 101.

¹⁶⁹ C/Higgins, written in 1963: “[Self-determination] refers to the right of a majority within a generally accepted political unit to the exercise of power”: Rosalyn Higgins, *The Development of International Law Through the Political Organs of the United Nations* (OUP 1963) 104-105.

¹⁷⁰ Vienna Declaration and Programme of Action (adopted 25 June 1993) UN Doc A/CONF.157/23 (1993) [2] (emphasis added). The same paragraph also stated that: “The World Conference on Human Rights considers the denial of the right of self-determination as a violation of human rights and underlines the importance of the effective realization of this right.”

same ethnicity and more or less the same language, it is their different religion that makes them different “peoples”. By contrast, the same situation (shared ethnicity, different religions) does not produce the same (legal) effects with regard to Muslims and Christians in Albania.

Ultimately, if any group has a distinct cultural identity with regard to another group, with the consciousness and intention of preservation of its distinctiveness, and a feeling of solidarity within itself, it should be regarded as a people, regardless of the source of its distinctiveness such as language, religion or ethnicity. When such peoples constitute minorities of the population in their respective states, they should be recognized as minorities. International law should not say the contrary when a certain group feels that they are a different people from the majority in that same state.¹⁷¹ What international law could do, however, is to determine under which circumstances these peoples, who constitute minorities in their respective states, have the right to self-determination. In the 1990s, Tomuschat stated that international law could attempt to develop a criterion for the self-determination claims for peoples in an existing state, i.e., minorities, and the scope of the right to self-determination is evolving in this direction. Even though a comprehensive formula for all imaginable situations may not be possible, “the main factual configurations are easily identifiable so that the pros and cons of any legal response can be carefully weighed.”¹⁷²

Unfortunately, it remains in doubt whether minorities *qua* minorities are entitled as peoples that have the right to self-determination under international law. The texts from which support for this position is derived are simply not authoritative enough and arguably do not reflect customary international law. Nevertheless, the literature in the past few years agrees with the view that if minorities remain victims of serious oppression and injustices they would be entitled to self-determination as minorities.

This view finds support from other human rights, especially in the “rightification” of cultural integrity. “An emergent right of cultural survival and flourishing” has been included in key international law instruments such as the UN Charter,¹⁷³ the UN Human Rights Covenants,¹⁷⁴ the Convention against Genocide¹⁷⁵ and the UNESCO Declaration of the Principles of Co-operation.¹⁷⁶

¹⁷¹ See [94] of the separate opinion by Judge Cançado Trindade attached to the Advisory Opinion on Kosovo’s Declaration of Independence (n 8): “If we turn to the *causes*, as we ought to, we identify [the] common purpose [of the UN International Administration of Territories]: to safeguard the “peoples” or “populations” concerned (irrespective of race, ethnic origin, religious affiliation, or any other trait) from exploitation, abuses and cruelty, and to enable them to be masters of their own destiny in a temporal dimension.”

¹⁷² Tomuschat (n 133) 8.

¹⁷³ Arts. 13, 55, 57 and 73 UN Charter.

¹⁷⁴ Art. 27 ICCPR (n 15).

¹⁷⁵ Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277, Art. 2.

¹⁷⁶ Declaration of the Principles of International Cultural Cooperation (4 November 1966) in UNESCO, *Records of the General Conference, 14th session, Paris, 1966, vol. I: Resolutions*, available at <<https://unesdoc.unesco.org/ark:/48223/pf0000114048.page=82>> accessed 8 July 2020, 86. See also Anaya (n 162) 325.

Another support for the view could be found in Crawford's argument that has been put forward as an extension of the scope of non-self-governing territories. Crawford states that when the people belonging to the territories that form distinct political-geographical areas which are arbitrarily excluded from any share in the government, that territory becomes non-self-governing in effect.¹⁷⁷ Judge Wildhaber of the European Court of Human Rights ("ECtHR"), in his Concurring Opinion in *Loizidou v. Turkey*, makes a similar argument, and claims that there is an emergent consensus on the issue:

Until recently in international practice the right to self-determination was in practical terms identical to, and indeed restricted to, a right to decolonization. In recent years a consensus has seemed to emerge that peoples may also exercise a right to self-determination if their human rights are consistently and flagrantly violated or if they are without representation at all or are massively underrepresented in an undemocratic and discriminatory way. If this description is correct, then the right to self-determination is a tool which may be used to re-establish international standards of human rights and democracy.¹⁷⁸

More recently, Judge Cançado Trindade, in his Separate Opinion attached to the Advisory Opinion of the ICJ on the *Accordance with international law of the unilateral declaration of independence in respect of Kosovo* ("*Kosovo Advisory Opinion*"), stated that: "[W]ith the recurrence of oppression as manifested in other forms, and within independent States, the emancipation of peoples came to be inspired by the principle of self-determination, more precisely internal self-determination, so as to oppose tyranny."¹⁷⁹ He continued in the next paragraph:

"The principle of self-determination has survived decolonization, in order to face nowadays new and violent manifestations of systematic oppression of peoples. ... The fact remains that people cannot be targeted for atrocities, cannot live under systematic oppression. The principle of self-determination applies in new situations of systematic oppression, subjugation and tyranny."¹⁸⁰

In light of such statements, it is fair to conclude, although probably not having fully crystallized, a legal right to self-determination exists also for minorities, as a distinct people living in an existing state. Furthermore, as examples stated above indicate, as well as keeping in mind that self-determination is widely interlinked with human rights and democratic governance in the post-Berlin Wall world,¹⁸¹ it is again fair to conclude that the scope of self-determination in this context is the right

¹⁷⁷ Crawford (n 74) 127.

¹⁷⁸ *Loizidou v Turkey* (Merits) App no 15318/89 (ECtHR [GC], 18 December 1996), Concurring Opinion of Judge Wildhaber, joined by Judge Ryssdal.

¹⁷⁹ Separate Opinion by Judge Cançado Trindade (n 8) [174].

¹⁸⁰ *ibid* [175].

¹⁸¹ "State practice, the practice of international human rights organs, and legal doctrine, seem to be moving towards the notion of internal self-determination. Such a development is in line with a general trend in today's world to downplay State sovereignty, in favour of human rights, popular sovereignty and a democratic system of government." Allan Rosas, 'Internal Self Determination' in Tomuschat, *Modern Law of Self-Determination* (n 5) 229. See also Franck (n 34).

to internal self-determination. For minorities, the right to internal self-determination should be achieved “by establishing constitutional mechanisms that allow the entity in question to pursue its political, economic, social and cultural development within the framework of an existing state.”¹⁸²

External self-determination, in other words secession, is restricted to a very narrow interpretation and still rejected by many authors. Although, as Thornberry rightfully points, “every secession creates fresh complexities and oppositions, new minorities, and has the potential to produce new forms of illiberalism”¹⁸³, it is problematic to prohibit secession when the oppression and injustice towards a minority is so grave and living together becomes virtually impossible. Moreover, this right, which is to be exercised as a last resort, can be subjected to the recognition and implementation of democratic and human rights instruments in the would-be state.¹⁸⁴ In order to be able to exercise external self-determination, there has to be no other realistic solution for the claimant people. Thus, in the literature this is called “remedial secession”.¹⁸⁵

Remedial secession found its way into state practice in *re Secession of Quebec*, the Advisory Opinion issued by the Supreme Court of Canada concerning the legal ramifications of a possible secession of Quebec. The Court concluded that “[a] right to external self-determination (which in this case potentially takes the form of the assertion of a right to unilateral secession) arises only in the most extreme cases and, even then, under carefully defined circumstances”.¹⁸⁶

The example this paper takes as a case study to analyze in this regard is the secession of Kosovo from Serbia. In 1989, Kosovo’s autonomy within Serbian Republic of SFRY was revoked and an increase in human rights abuses followed.¹⁸⁷ In 1992, a small Conference on Security and Cooperation in Europe (CSCE) mission which was operative in Kosovo under a Memorandum of Understanding had to withdraw as a result of a refusal to allow the continuation of the CSCE mission in Kosovo.¹⁸⁸ In 1997 Serbian police and military forces intensified fighting and began detaining known opponents in Kosovo and as a response the Kosovo Liberation Army (KLA) started to attack Serbian forces the same year. Violence escalated throughout 1998.¹⁸⁹

¹⁸² Robert Muharremi, ‘Kosovo’s Declaration of Independence: Self-Determination and Sovereignty Revisited’ (2008) 33 *Rev Central & East Eur L* 401, 416.

¹⁸³ Thornberry (n 5) 104.

¹⁸⁴ See Jean Salmon, ‘Internal Aspects of the Right to Self-Determination’ in Tomuschat, *Modern Law of Self-Determination* (n 5) 279.

¹⁸⁵ Muharremi (n 182) 417.

¹⁸⁶ *Re Secession of Quebec* (n 21) 123.

¹⁸⁷ Independent International Commission on Kosovo, *Kosovo Report* (OUP 2002), 33-49.

¹⁸⁸ UNSC Res 855 (9 August 1993) UN Doc S/RES/855 [2].

¹⁸⁹ Per Sevastik, ‘Secession, Self-determination of “Peoples” and Recognition –The Case of Kosovo’s Declaration of Independence and International Law’ in Ula Engdahl and Pål Wrangé (eds), *Law at War: The Law as It Was and the Law as It Should Be – Liber Amicorum Ove Brिंग* (Martinus Nijhoff 2008) 238-239; see also Muharremi (n 182), 405-414.

The same year the UN Security Council adopted Resolution 1160 and “call[ed] upon the authorities in Belgrade and the leadership of the Kosovar Albanian community urgently to enter without preconditions into a meaningful dialogue on political status issues” and further expressed “its support for an enhanced status for Kosovo which would include a substantially greater degree of autonomy and meaningful self-administration”.¹⁹⁰ In 1999, NATO-initiated Rambouillet Accords¹⁹¹ failed to go through and form a peace agreement as expected as the then Federal Republic of Yugoslavia (FRY) rejected the provision for NATO peacekeeping.¹⁹² This led to the non-authorized bombing campaign against the FRY by NATO. UN Security Council Resolution 1244, passed on 10 June 1999, reaffirmed “the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia” and also reaffirmed “the call in previous resolutions for substantial autonomy and meaningful self-administration for Kosovo”.¹⁹³ The Resolution also established an international and security presence in Kosovo known collectively as the United Nations Interim Administration Mission in Kosovo (“UNMIK”). The military apparatus known as the KFOR was deployed on 12 June 1999 after the withdrawal of the FRY forces from Kosovo.¹⁹⁴

Besides administration, UNMIK also participated in negotiations between the parties for 9 years, which proved inconclusive. In March 2007, the former President of Finland, Martti Ahtisaari, in his capacity as Special Envoy for Kosovo, penned the “Comprehensive Proposal for the Kosovo Status Settlement”, known as the “Ahtisaari Plan”.¹⁹⁵ It concluded that the reintegration of Kosovo to Serbia was not viable and the UNMIK was not sustainable. The only realistic solution was independence under international supervision.¹⁹⁶

Even then, a final attempt of the continuation of negotiations was made by the EU-US-Russia troika.¹⁹⁷ The attempt failed after 4 months and Kosovo was declared an independent state on 17 February 2008. The UN General Assembly requested the ICJ to render an Advisory Opinion on Kosovo’s Declaration of Independence on 8 October 2008.¹⁹⁸ Since the question was posed as “[i]s the unilateral declaration

¹⁹⁰ UNSC Res 1160 (31 March 1998) UN Doc S/RES/1160 [4]-[5].

¹⁹¹ Rambouillet Accords: Interim Agreement for Peace and Self-Government in Kosovo (7 June 1999) UN Doc S/1999/648, Annex.

¹⁹² Sevastik (n 189) 239.

¹⁹³ UNSC Res 1244 (10 June 1999) UN Doc S/RES/1244.

¹⁹⁴ *Report of The Secretary-General Pursuant to Paragraph 10 of Security Council Resolution 1244 (1999)* (12 June 1999) UN Doc S/1999/672.

¹⁹⁵ *Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council* (26 March 2007) UN Doc S/2007/168 and *Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council – Addendum: Comprehensive Proposal for the Kosovo Status Settlement* (26 March 2007) UN Doc S/2007/168/Add.1.

¹⁹⁶ UN Doc S/2007/168 (n 195) [10]-[14].

¹⁹⁷ Sevastik (n 189) 240.

¹⁹⁸ *Kosovo Advisory Opinion* (n 22) [1].

of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?”¹⁹⁹ the Court refrained to make comments on whether Kosovo (or in general any minority people that lives in an existing state) had the legal right to (external or internal) self-determination.

The Court delivered its Advisory Opinion on 22 July 2010.²⁰⁰ By a 10/4 split vote, the Court ruled in favour of the legality of Kosovo’s declaration of independence:

The adoption of the declaration of independence of 17 February 2008 did not violate general international law, Security Council Resolution 1244 (1999) or the Constitutional Framework. Consequently, the adoption of that declaration did not violate any applicable rule of international law.²⁰¹

The discussion of Resolution 1244 is worth some attention. It is argued that both in the literature and in the Court, in so far as Resolution 1244 guaranteed the sovereignty and territorial integrity of the FRY (and of its successor, Serbia), the only possible exercise of the right to self-determination was an internal one, rendering secession illegal.²⁰² Nevertheless, the Court considered that Resolution 1244 did not place any reservations on the final determination of the situation of Kosovo and “remained silent on the conditions for the final status of Kosovo.”²⁰³ It further added that “[t]here is no indication, in the text of Security Council resolution 1244 (1999), that the Security Council intended to impose, beyond that, a specific obligation to act or a prohibition from acting, addressed to such actors.”²⁰⁴ The Court concluded that, in this regard, the Resolution’s language was “at best ambiguous” and it should be “understood in its context and considering its object and purpose.”²⁰⁵

Another point worth mentioning is the Court’s decision not to enter into a discussion on self-determination. Although the Court’s obligation was only to render an Advisory Opinion on the question, “the purpose of the advisory jurisdiction is to enable organs of the United Nations and other authorized bodies to obtain opinions from the Court which will assist them in the future exercise of their functions”²⁰⁶. Even though recognition is not a prerequisite for statehood and the act of recognition is a political one, the purpose of any declaration of independence is to seek recognition by the international community. Declarations of independence by entities exercising external self-determination seek recognition far more than any other kind of entities, since recognition is practically essential for the proper exercise of self-determination.

¹⁹⁹ *ibid.*

²⁰⁰ *ibid.*

²⁰¹ *ibid* [122].

²⁰² Muharremi (n 169) 418-419; *Kosovo Advisory Opinion* (n 22) [111].

²⁰³ *Kosovo Advisory Opinion* (n 22) [114].

²⁰⁴ *ibid* [115].

²⁰⁵ *ibid* [118].

²⁰⁶ *ibid* [44].

Dealing with the “declaration of independence” as isolated from “recognition” and Kosovar people’s “right to external self-determination” is arguably an exceedingly “legalistic” or even futile approach. While the Court’s narrow interpretation of the question is perhaps not wrong, it is certainly disappointing. Namely, as observed throughout this paper, the UN and the ICJ could be particularly helpful in dissipating the clouds over the legal right to self-determination in the post-Berlin Wall world; since the former has been the home base for the codification of self-determination, and the latter is the principal judicial organ of the UN.

Nevertheless, the case of Kosovo serves as an example, as it shows that a minority people oppressed in a particular state have the right to exercise self-determination under certain conditions. As stated above, the ICJ did not comment on this point. As a result, although it could be argued that the atrocities were not of a severity justifying remedial secession or that the government of Serbia was willing to yield to the exercise of internal self-determination by the people of Kosovo, the exercise of external self-determination was regarded as the only viable option for the people of Kosovo according to the Athisaari Plan and to the states that followed the arguments of the proposal. From this point of view, therefore, this case still amounts to a valid and important recognition of the right to remedial secession. This said, it is hard to say whether this was the execution of a principle or a rule (i.e., legal right). As argued in this paper, a principle can serve as a guideline and may generate the necessary sympathy of the international community, or some states therein, and thus assist oppressed peoples in reaching their goal of liberation. The undesirability of this, however, is that it requires the attention and willingness of other states and it will not be found every time it is needed. The transformation of the principle into a legal right would ensure that support, as a matter of law, not of comity, as it would be binding on all the states.

VI. Conclusion

Self-Determination is a dynamic concept that constantly evolves. It attaches different legal meanings to different categories of people in accordance with the needs of the international community and the trends in the international system. This paper has shown that self-determination exists in a dual form. It is both a principle and a right. The principle serves as a basis for interpretation and further development.

The principle was very much influenced by nationalism during and in the immediate aftermath of the both World Wars. The world as shaped by the values spread by the French Revolution created a legal norm based on independence, state sovereignty, non-intervention, and territorial integrity. The trend exhibited itself under the principle of effectiveness to ignore the demands of other peoples, namely minorities and indigenous peoples.

Yet, the reaction against racist regimes and, although small and loose, the change of the language towards the above-mentioned concepts proved that there was capacity for further development.

As the world evolved, so did self-determination. Peoples who based their claims on the principle started to gain attention and sympathy as human rights and democracy grew to have stronger implications in the realm of international law in the aftermath of the fall of the Berlin Wall.

The post-Berlin Wall world, however, is not one that welcomes external self-determination (remedial secession). This reflects the current trends since this right's development has been supported on the human rights movement and the concept of democratic governance. In the same line of thought, however, an absolute rejection of a right for external self-determination would be contrary to human rights. Indeed, if the exercise of internal self-determination is not possible or not an actual solution, then as an extension of the human rights ideals (not as related to the ideals of nation-state), a right to external self-determination should be deemed viable. This is also the conclusion of respected international lawyers, as authors and judges.

Of course, especially for minorities and indigenous peoples, the law should be clearer. As shown, the non-binding declarations could lead to the crystallization of the principle into a right. This is owed to great state compliance. Although of course the states themselves are the oppressors of their respective "other peoples", as the evolution process of self-determination proved with colonial peoples and is still proving with indigenous peoples, it could be argued that no state can ultimately stand against the changing system of the international community. The appeal of self-determination not to the individual states as such, but to a greater community, a greater ideal, ensures the transformation of the principle into a legal rule. This is the pattern of the evolution of self-determination. Perhaps in the future, as new trends develop, the principle of self-determination will manifest itself as a different right that goes beyond the presently possible projections, but it is likely that it will continue to serve and constantly get stronger, for the peoples everywhere to ensure their collective human rights, including that to live under a decent governance.

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Bibliography

I. Literature

- Anaya SJ, 'The Capacity of International Law to Advance Ethnic or Nationality Rights Claims' in Will Kymlicka (ed), *The Rights of Minority Cultures* (OUP 1995)
- Anderson B, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Verso 1991)
- Bauböck R, 'Paradoxes of Self-Determination and the Right to Self-Government' in Christopher L. Eisgruber and András Sajó (eds), *Global Justice and The Bulwarks of Localism: Human Rights in Context* (Martinus Nijhoff 2009)
- Borgen CJ, 'States and International Law: The Problems of Self-Determination, Secession, and Recognition' in Başak Çalı (ed), *International Law for International Relations* (OUP 2010)
- Brinkley D and Facey-Crowther DR (eds), *The Atlantic Charter* (Palgrave Macmillan 1994)
- Cassese A, *Self-Determination of Peoples: A Legal Reappraisal* (CUP 1995)
- Castellino J, 'Order and Justice: National Minorities and the Right to Secession' (1999) 6 *Intl J on Minority & Group Rights* 389-415
- Castellino J and Gilbert J, 'Self-Determination, Indigenous Peoples and Minorities' (2003) 3 *Macquire L J* 155-178
- Cheng B, *General Principles of Law as Applied by International Courts and Tribunals* (CUP 1987)
- Cobban A, *The Nation-State and National Self-Determination* (Collins 1969)
- Crawford J, *The Creation of States in International Law* (Clarendon 1979)
- Dworkin R, *Taking Rights Seriously* (HUP 1978)
- Franck TF, 'The Emerging Right to Democratic Governance' (1992) 86 (1) *AJIL* 46-91
- Hazewinkel H, 'Self-determination, territorial integrity and the OSCE' (2007) 18 (4) *Helsinki Monitor: Security and Human Rights* 289-302
- Higgins R, *The Development of International Law Through the Political Organs of the United Nations* (OUP 1963)
- Jefferson T *A Summary View of the Rights of British America* (1774) available at <https://avalon.law.yale.edu/18th_century/jeffsumm.asp>
- Kingsbury B, 'Indigenous Peoples in International Law: A Constructivist Approach to the Asian Controversy' (1998) 92 *AJIL* 414-457
- Knop K, *Diversity and Self-Determination in International Law* (CUP 2002)
- Lenin VI, *Selected Works* (Lawrence & Wishart 1969)
- Luther M, 'Disputation of Doctor Martin Luther on the Power and Efficacy of Indulgences' in Adolph Spaeth et al. (trs and eds), *Works of Martin Luther*, vol. 1 (A. J. Holman 1915), available at <<http://www.projectwittenberg.org/pub/resources/text/wittenberg/luther/web/ninetyfive.html>>
- Muharremi R, 'Kosovo's Declaration of Independence: Self-Determination and Sovereignty Revisited' (2008) 33 *Rev Central & East Eur L* 401-435
- Quane H, 'The United Nations and The Evolving Right to Self-Determination' (1998) 47 (3) *Int'l & Comp L Q* 537-572
- Rosas A, 'Internal Self Determination' in Christian Tomuschat (ed), *Modern Law of Self-Determination* (Martinus Nijhoff Publishers 1993)
- Ryan A, *On Politics: A History of Political Thought from Herodotus to the Present* (Penguin Books 2012)

- Salmon J, 'Internal Aspects of the Right to Self-Determination' in Christian Tomuschat (ed), *Modern Law of Self-Determination* (Martinus Nijhoff Publishers 1993)
- Sevastik P, 'Secession, Self-determination of "Peoples" and Recognition –The Case of Kosovo's Declaration of Independence and International Law' in Ula Engdahl and Pål Wrange (eds), *Law at War: The Law as It Was and the Law as It Should Be – Liber Amicorum Ove Bring* (Martinus Nijhoff 2008)
- Thornberry P, 'The Democratic or Internal Aspect of Self-Determination' in Christian Tomuschat (ed), *Modern Law of Self-Determination* (Martinus Nijhoff Publishers 1993)
- Tomuschat C, 'Self-Determination in a Post-Colonial World' in Christian Tomuschat (ed), *Modern Law of Self-Determination* (Martinus Nijhoff Publishers 1993)
- Vrdoljak AF, 'Self-Determination and Cultural Rights' in Francesco Francioni and Martin Scheinin (eds), *Cultural Human Rights* (Martinus Nijhoff 2008)
- Wiessner S, 'Rights and Status of Indigenous Peoples: A Global Comparative and International Analysis' (1999) 12 *Harv Hum Rts J* 57-128.

II. Official Documents & Jurisprudence

- Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2008] ICJ Rep 403
- Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion), Separate Opinion of Judge Cançado Trindade [2008] ICJ Rep 523
- Charter of the United Nations [1945] 1 UNTS XVI
- Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries (adopted 27 June 1989, entered into force 5 September 1991) 1650 UNTS 383
- Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277
- Declaration on the Granting of Independence to Colonial Countries and Peoples, UNGA Res 1514 (XV) (14 December 1960) UN Doc A/RES/1514 (XV)
- Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) (24 October 1970), UN Doc A/RES/2625 (XXV)
- Declaration of the Principles of International Cultural Cooperation (4 November 1966) in UNESCO, *Records of the General Conference, 14th session, Paris, 1966, vol. 1: Resolutions*
- East Timor (Portugal v Australia)* [1995] ICJ Rep 90
- Federal Republic of Germany, *Declaration relating to the declaration made upon accession by India* (15 August 1980) 1197 UNTS 407
- Frontier Dispute (Burkina Faso/Mali)* [1983] ICJ Rep 554
- Gentini Case (Italy v. Venezuela) M. C. C.* (1903) X UNRIAA 556
- Independent International Commission on Kosovo, *Kosovo Report* (OUP 2002)
- India, *Declaration* (10 April 1979) 1132 UNTS 439
- International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171
- International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976), 993 UNTS 3

- Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16
- Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136
- Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep 95
- Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226
- Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council* (26 March 2007) UN Doc S/2007/168 and *Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council – Addendum: Comprehensive Proposal for the Kosovo Status Settlement* (26 March 2007) UN Doc S/2007/168/Add.1
- Loizidou v Turkey* (Merits) App no 15318/89 (ECtHR [GC], 18 December 1996), Concurring Opinion of Judge Wildhaber, joined by Judge Ryssdal
- Rambouillet Accords: Interim Agreement for Peace and Self-Government in Kosovo (7 June 1999) UN Doc S/1999/648, Annex
- Re Secession of Quebec* [1998] 2 SCR 217 (Canada)
- 'Report of the International Committee of the Jurists entrusted by the Council of the League of Nations with the task of giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question' (1920) League of Nations Official Journal Spec Supp 3
- Report of The Secretary-General Pursuant to Paragraph 10 of Security Council Resolution 1244 (1999)* (12 June 1999) UN Doc S/1999/672
- Report presented to the Council of the League by the Commission of Rapporteurs* (16 April 1921), Council Doc. B7/21/68/106
- Prague meeting of the CSCE Council, 30-31 January 1992, Summary of Conclusions
- UN Commission on Human Rights, Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, *Standard-setting Activities: Evolution of Standards Concerning the Rights of Indigenous People: Working Paper by the Chairperson-Rapporteur, Mrs. Erica-Irene A. Daes, on the concept of "indigenous people"* (10 June 1996) UN Doc E/CN.4/Sub.2/AC.4/1996/2
- UN Commission on Human Rights, Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, *Study of the Problem of Discrimination Against Indigenous Populations: Final Report (last part) submitted by the Special Rapporteur, Mr. José R. Martínez Cobo* (30 September 1983) UN Doc E/CN.4/Sub.2/1983/21/Add.8
- UNGA Res 31/154 A (20 December 1976) UN Doc A/RES/31/154A
- UNGA Res 1541 (XV) (15 December 1960) UN Doc A/RES/1541 (XV)
- UN Commission on Human Rights, Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, *Commentary to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities - Working paper submitted by Asbjørn Eide* (27 April 2000) UN Doc E/CN.4/Sub.2/AC.5/2000/WP.1
- UN Commission on Human Rights, Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities by Francesco Capotorti, Special Rapporteur of the Sub-Commission*, UN Doc E/CN.4/Sub.2/384/Rev.1 (1979)
- United Nations Conference on International Organization* (1945), vol. VI

United Nations Declaration on the Rights of Indigenous Peoples, UNGA Res 61/295 (2 October 2007) UN Doc A/RES/61/295.

United Nations Permanent Forum on Indigenous Issues (UNPFII), 'United Nations Declaration on the Rights of Indigenous Peoples'

UNSC Res 417 (31 October 1977) UN Doc S/RES/417

UNSC Res 855 (9 August 1993) UN Doc S/RES/855

UNSC Res 1160 (31 March 1998) UN Doc S/RES/1160

UNSC Res 1244 (10 June 1999) UN Doc S/RES/1244

Vienna Declaration and Programme of Action (adopted 25 June 1993) UN Doc A/CONF.157/23 (1993)

Western Sahara (Advisory Opinion) [1975] ICJ Rep 12

Western Sahara (Advisory Opinion), Separate Opinion of Judge Dillard [1975] ICJ Rep 116