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Rethinking Self-Determination

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TEXT:

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Introduction

One method of resolving conflict suggested by a scholar of the Grand Academy of Lagado was to divide the brains of political opponents in half and then transpose the halves. The professor argued that

the two half brains being left to debate the matter between themselves within the space of one skull, would soon come to a good understanding, and produce that moderation as well as regularity of thinking, so much to be wished for in the heads of those ... who imagine they came into the world only to watch and govern its motion: and as to the difference of brains, in quantity or quality, among those who are directors in faction; the doctor [*2] assured us, from his own knowledge, that it was a perfect trifle. ¹

Although this solution, like others of similar modesty proposed by Swift, has not been widely adopted, the plethora of violent communal and ethnic conflicts in the modern world does occasionally lead one to search for radical responses. In contrast to the "compromise" suggested by the good doctor of Lagado, some have proposed separating warring factions through the "liberation" of oppressed peoples or, depending on one's perspective, through the "dismemberment" of states and empires. Of course, just what territory is being "liberated" is not always clear, as evidenced by the "ethnic cleansing" campaign pursued in the former Yugoslavia.

Separation is often justified by invoking the right of self-determination. Indeed, no contemporary norm of international law has been so vigorously promoted or widely accepted - at least in theory - as the right of all peoples to self-determination. Yet the meaning of that right remains as vague and imprecise as when it was enunciated by President Woodrow Wilson and others at Versailles.

Part I of this Article recounts the international norm of self-determination from Wilsonian formulations to the present. After a brief discussion of self-determination during the era of the League of Nations, the role of the United Nations in transforming a political principle into a rule of law is

considered. Particular attention is given to the content of the right of self-determination as evinced by the lengthy debates leading to the adoption of the two international covenants on human rights in 1966.

In part II, the current meaning of the "right of self-determination" and its relationship to the process of decolonization are considered. Part III explores whether the right of self-determination includes the possibility of secession, and part IV discusses the link between human rights and the right of self-determination. The conclusion offers a new approach for dealing with self-determination in the post-colonial era.

I. Historical Development

A. Nationalism, Woodrow Wilson, and the League of Nations

The principle of self-determination by "national" groups developed as a natural corollary to growing ethnic and linguistic political [*3] demands in the eighteenth and nineteenth centuries.ⁿ² Although it is not inherently desirable that a nation be culturally or linguistically homogeneous, by the mid-nineteenth century the equation of a nation with a homogeneous populus had become common. John Stuart Mill's influential *Considerations on Representative Government* argued that "it is in general a necessary condition of free institutions that the boundaries of governments should coincide in the main with those of nationalities."ⁿ³ "National self-determination" became the paradigm for political organization, raising expectations among various minority groups that were doomed to failure in light of the political and economic realities of the time.

"As an agency of destruction the theory of nationalism proved one of the most potent that even modern society has known."ⁿ⁴ Along with the physically destructive power of the machine gun, airplane, and other weapons used on a large scale for the first time, nationalist fervor hastened the disintegration of the Austro-Hungarian and Ottoman empires prior to and during World War I. The territory of the former empires required new sovereigns, and the principle of self-determination as a means of drawing new "nation-state" boundaries became the vehicle for legitimizing the victorious powers' re-division of Europe.

Although President Woodrow Wilson was the most public advocate of "self-determination" as a guiding principle in the post-war period, neither he nor the other Allied leaders believed that the principle was absolute or universal. Indeed, in Wilson's celebrated "Fourteen Points" speech to the United States Congress on January 8, 1918, the phrase "self-determination" is conspicuous by its absence,ⁿ⁵ even though the speech dealt with specific territorial settlements, [*4] including the creation of independent states out of the remnants of the Austro-Hungarian and Ottoman empires.ⁿ⁶

A month later, Wilson addressed the question of self-determination directly:

National aspirations must be respected; peoples may now be dominated and governed only by their own consent. "Self-determination" is not a mere phrase. It is an imperative principle of action, which statesmen will henceforth ignore at their peril.

...

... Peoples and provinces are not to be bartered about from sovereignty to sovereignty as if they were mere chattels and pawns in a game ...

...

... All well-defined national aspirations shall be accorded the utmost satisfaction that can be accorded them without introducing new or perpetuating old elements of discord and antagonism that would be likely in time to break the peace of Europe and consequently of the world.ⁿ⁷

As the final sentence of this excerpt suggests, Wilson carefully balanced realpolitik concerns with the ideals of democracy and the "nation-state."ⁿ⁸ Subsequent history reflected this limit on the principle of self-determination.

The success or failure of assertions of minority rights and self-determination in the early twentieth century depended to a great extent on support from one or more of the Great Powers, particularly during the Paris Peace Conference which re-divided post-war Europe. Many of the territorial

dispositions in the post-1919 period were based on secret agreements reached among the European Allies during the war. Perhaps the most glaring example in Europe was the annexation of the German-speaking South Tyrol by Italy, under the 1919 Treaty of St. Germain.⁹ In the former [*5] Ottoman empire, the 1920 Treaty of Sevres¹⁰ would have created an autonomous Kurdish region which could have become independent after a year, but the treaty was never implemented.

With a few exceptions in the less sensitive frontier regions, no plebiscites or referenda were held to determine the wishes of the people affected by the Versailles map-making.¹¹ The exceptions included a plebiscite in North Schleswig, which had been in dispute between Denmark and Prussia since the mid-nineteenth century;¹² three plebiscites concerned with the Polish-German border (two around Danzig, with a plebiscite area covering nearly 6,000 square miles, and a third in Upper Silesia, an area containing over two million ethnic Germans, Poles, and Slavs);¹³ a plebiscite in the Klagenfurt Basin in 1920;¹⁴ a plebiscite in the small area of Sopron in dispute between Austria and Hungary;¹⁵ and the 1935 plebiscite in the Saar region, which returned the Saar to Germany after fifteen years of French administration.¹⁶

No plebiscite was held in Alsace-Lorraine, which was returned to France, or, with the exception of the 800-square-mile Klagenfurt Basin between Austria and Yugoslavia, in territories such as the South Tyrol, which Austria and Hungary were forced to cede to the Allies.¹⁷ Austria was given the region of West Hungary, but without the plebiscite Austria requested.¹⁸ The Treaty of St. Germain also denied Austria the right to merge with Germany without the approval of the Council of the League of Nations.¹⁹

It is true that the principle of self-determination, dislodged from its preeminence by the secret treaties, economic interests, historic claims, and strategic arguments, was in the end honored, save in the treaty with Germany, more in the breach than in the observance.

... [*6]

It is true that the Allies avoided a plebiscite in every region of first importance save that of Upper Silesia, and that when they resorted to a plebiscite it was as a method of compromise, to escape from a dilemma rather than as a deliberate choice. Nevertheless, the treaties made at Paris gave the principle [of self-determination] far more attention than it had ever before enlisted.²⁰

After the war, the principle of self-determination was addressed indirectly by the League of Nations through the system of mandates created pursuant to article 22 of the League Covenant.²¹ Accepting that the development of colonial peoples formerly under the sovereignty of the defeated powers was "a sacred trust of civilization," various members of the Allies agreed to administer fourteen territories under League supervision.²²

Some national groups not recognized as new states by the peace treaties or designated as mandates received protection under the "minorities treaties" adopted under the auspices of the victorious powers. Although their substantive protections were relatively similar, these treaties may be divided into three categories: treaties imposed on the defeated states of Austria, Hungary, Bulgaria, and Turkey; treaties imposed on newly recognized states or those with new frontiers, including Czechoslovakia, Greece, Poland, Romania, and Yugoslavia; and treaties or agreements creating special internationalized regimes in the Aland Islands, Danzig, the Memel Territory, and Upper Silesia.²³

The minorities treaties were not intended to respond to the principle of self-determination, and they ultimately failed in many respects to protect vulnerable groups.²⁴ Consistent with previous attempts to address issues related to self-determination, the Allied [*7] Powers and the League of Nations imposed obligations only on defeated states or states otherwise beholden to the major powers.

Despite the apparently inconsistent manner in which self-determination claims were decided at the Peace Conference, Wilson proposed incorporating the principle of self-determination within the Covenant of the League of Nations. His draft provided:

The Contracting Parties unite in guaranteeing to each other political independence and territorial integrity but it is understood between them that such territorial adjustments, if any, as may in future

become necessary by reason of changes in present racial and political relationships, pursuant to the principle of self-determination, and also such territorial adjustments as may in the judgement of three-fourths of the delegates be demanded by the welfare and manifest interest of the people concerned, may be effected if agreeable to those peoples; and that territorial changes may in equity involve material compensation. The Contracting Powers accept without reservation the principle that the peace of the world is superior in importance to every question of political jurisdiction or boundary. ⁿ²⁵

Even this modest formulation was dropped before adoption of the Covenant, but the final sentence's focus on peace accurately reflects the priorities of the Peace Conference, even in the mind of self-determination's most public proponent.

Modern commentators often forget the relative nature of Wilson's concept of self-determination. They also have neglected, until very recently, the "internal" aspect of self-determination promoted by Wilson and others: democracy. Indeed, this internal aspect, the conviction that the only legitimate basis for government is the consent of the governed, provided the ultimate justification for decolonization. "Self-determination postulates the right of a people organized in an established territory to determine its collective [*8] political destiny in a democratic fashion and is therefore at the core of the democratic entitlement." ⁿ²⁶

While the equation of self-determination with democracy may have been the philosophical underpinning of Wilsonian principles, the states created in 1919 undertook no specific obligations to ensure a democratic form of government, despite the various minority guarantees that were given. These guarantees generally sought to protect culture and linguistic identity, but they did not offer many meaningful political rights or ensure participation in the processes of government. ⁿ²⁷ As discussed below, the principles of political autonomy and effective participation in government owe their legitimacy at least as much to post-1945 human rights norms as they do to the principle of national self-determination espoused in the preceding century.

The legal scope of the principle of self-determination at the end of the First World War is perhaps best demonstrated by examining the case of the Aland Islands, one of the first controversies not directly related to the war to be addressed by the League of Nations. For centuries the Aland Islands, located in the Baltic Sea between Sweden and Finland, were considered by Sweden and Russia to have prime strategic importance. They were under Swedish control from 1157 to 1809 and retained their Swedish linguistic and cultural heritage thereafter. After Sweden's defeat by Russia in 1809, the Treaty of Frederiksham ceded Finland (including the Aland Islands) to Russia, and Finland became an autonomous Grand Duchy within the Russian empire. Following attempts at the Russification of Finland in the late nineteenth and early twentieth centuries, Finland declared its independence in December 1917, shortly after the March 1917 Russian Revolution. The question presented to the international community was whether the Aland Islands were a part of the new Finnish state or whether they should be permitted to reunite with their cultural motherland, Sweden.

The dispute continued for several years. The Alanders rejected initial Finnish offers of autonomy, and the Finnish government subsequently arrested two of the most prominent pro-Swedish Aland [*9] leaders. Finally, the League of Nations was called upon to determine the islands' status. ⁿ²⁸

The League appointed two bodies of experts to examine the Aland Islands question. ⁿ²⁹ The first, the Commission of Jurists, decided that the matter was indeed one of international concern, and therefore within the League's competence, ⁿ³⁰ because Finland had failed to acquire sovereignty over Aland both during the Russian empire's disintegration and prior to the Alanders' expressed wishes to be reunited with Sweden. ⁿ³¹ The Committee's report went on to note:

Although the principle of self-determination of peoples plays an important part in modern political thought, especially since the Great War, it must be pointed out that there is no mention of it in the Covenant of the League of Nations. The recognition of this principle in a certain number of international treaties cannot be considered as sufficient to put it upon the same footing as a positive rule of the Law of Nations.

... Positive International Law does not recognise the right of national groups, as such, to separate themselves from the State of which they form part by the simple expression of a wish, any more than it recognises the right of other States to claim such a separation. Generally speaking, the grant or refusal of the right to a portion of its population of determining its own political fate by plebiscite or by some

other method, is, exclusively, an attribute of the sovereignty of every State which is definitively constituted.ⁿ³²

The second body of experts, the Commission of Inquiry, considered how to resolve the dispute,ⁿ³³ after having first determined that Finland (including the Aland Islands) became a fully constituted [*10] independent state following its declaration of independence from Russia in 1917.ⁿ³⁴ Despite its recognition that the vast majority of the Aland population would choose union with Sweden if a referendum were held,ⁿ³⁵ the Commission of Inquiry reached a similar conclusion as to the scope of self-determination, describing it as "a principle of justice and of liberty, expressed by a vague and general formula which has given rise to the most varied interpretations and differences of opinion."ⁿ³⁶

Is it possible to admit as an absolute rule that a minority of the population of a State, which is definitely constituted and perfectly capable of fulfilling its duties as such, has the right of separating itself from her in order to be incorporated in another State or to declare its independence? The answer can only be in the negative. To concede to minorities, either of language or religion, or to any fractions of a population the right of withdrawing from the community to which they belong, because it is their wish or their good pleasure, would be to destroy order and stability within States and to inaugurate anarchy in international life; it would be to uphold a theory incompatible with the very idea of the State as a territorial and political unity.ⁿ³⁷

The Commission supported its conclusion - that the Aland Islands' culture should be safeguarded by granting the islands autonomy under Finnish sovereignty - by recourse to admittedly political considerations, including the need to recognize Finland's contribution "in repelling the attacks of Bolshevik Communism," and by reference to the opinion of the non-Aland Swedish population of Finland.ⁿ³⁸ However, the Commission did suggest that under extreme oppression self-determination by Aland citizens might be possible.

The separation of a minority from the State of which it forms a part and its incorporation in another State can only be considered as an altogether exceptional solution, [*11] a last resort when the State lacks either the will or the power to enact and apply just and effective guarantees.ⁿ³⁹

Accordingly, the Commission recommended separation of the islands from Finland, pursuant to a plebescite in the islands, if Finland failed to offer the guarantees deemed necessary.

One may query whether the focus on self-determination and nationalism which characterized the inter-war era made a net contribution to peace in the world or to the protection of either individual or collective human rights. At the very least, subsequent history made it clear that self-determination provided no panacea for Europe's ills.

B. The United Nations and Decolonization

In part because of the inconsistent manner in which it was applied following the First World War, the principle of self-determination was not recognized initially as a fundamental right under the United Nations regime created in 1945. In addition, there was great reluctance to revive a concept used to justify Hitler's attempts to reunify the German "nation."

The "principle" of self-determination is mentioned only twice in the 1945 Charter of the United Nations, both times in the limiting context of developing "friendly relations among nations" and in conjunction with the principle of "equal rights ... of peoples."ⁿ⁴⁰ The reference to "peoples" clearly encompasses a group beyond states and includes at least non-self-governing territories "whose peoples have not yet attained a full measure of self-government."ⁿ⁴¹ Furthermore, the reference to friendly relations among "nations" carried no connotation of ethnicity or culture; it merely reflected the name of an organization, the "United Nations," composed of states. The equation of "nation" and "state" in the Charter is evidenced by paragraph 4 of article 1, which identifies as a purpose of the organization its serving as "a center for harmonizing the actions of nations in the attainment of these common ends."ⁿ⁴² [*12]

Neither self-determination nor minority rights is mentioned in the 1948 Universal Declaration of Human Rights, although the Declaration does contain a preambular reference to developing amicable international relations.ⁿ⁴³ Whatever its political significance, the principle of self-determination had not attained the status of a rule of international law by the time of the drafting of the United Nations Charter or in the early United Nations era.

Under the moral and political imperatives of decolonization, however, the vague "principle" of self-determination soon evolved into the "right" to self-determination. This evolution was most clearly demonstrated by the General Assembly's 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples ("Declaration on Colonial Independence").ⁿ⁴⁴ Premised, inter alia, on the need for stability, peace, and respect for human rights, the Declaration on Colonial Independence "solemnly proclaims the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations."ⁿ⁴⁵ It declares that "all peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."ⁿ⁴⁶ It also maintains that "inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence."ⁿ⁴⁷ The final paragraph reaffirms "the sovereign rights of all peoples and their territorial integrity."ⁿ⁴⁸

Paragraph 6 of the declaration sets forth a fundamental limiting principle, without which one almost never (at least in United Nations forums) finds a reference to self-determination: "Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations."ⁿ⁴⁹

The thrust of the declaration is clear: all colonial territories have the right of independence. However, a closer reading reveals uncertainties arising from varying uses of the terms "peoples," [*13] "territories," and "countries." Although the title of the declaration refers only to "colonial" countries and peoples, operative paragraph 2 refers expansively to the right of "all peoples" to self-determination.ⁿ⁵⁰ Furthermore, operative paragraph 5 calls for the transfer of all sovereign powers to trust and non-self-governing territories "or all other territories which have not yet attained independence."ⁿ⁵¹ Are peoples to be equated with territories, as suggested by the fifth paragraph and the final paragraph? Are there self-governing territories which are nonetheless entitled to independence? Is "alien" subjugation subjugation by non-citizens? foreigners? a group ethnically distinct from the group being "subjugated"? Is subjugation permissible so long as it is not by aliens?

Later United Nations texts offer answers to some of these questions. General Assembly Resolution 1541, adopted the day after the Declaration on Colonial Independence, sets forth a list of principles to guide states in determining whether they should transmit information on "non-self-governing" territories under article 73(e) of the Charter;ⁿ⁵² it thus defines at least one of the categories of peoples entitled to self-determination. The resolution first notes that chapter XI of the Charter is applicable "to territories which were then [in 1945] known as the colonial type" and that the obligation to report continues until "a territory and its peoples attain a full measure of self-government."ⁿ⁵³ There is no mention of the right of self-determination, nor is there any reference to the Declaration on Colonial Independence adopted only a day before.

The remaining principles concern territories; the quotation immediately above clearly implies that a single territory can be home to many peoples.ⁿ⁵⁴ A territory is presumed to be non-self-governing if it is geographically separate and ethnically or culturally distinct.ⁿ⁵⁵ This presumption is reinforced if the territory is arbitrarily subordinated to the metropolitan state.ⁿ⁵⁶ Although these factors might be relevant to a common-sense definition of peoples entitled to self-determination, the requirement of geographical [*14] separatenessⁿ⁵⁷ would eliminate most sub-state secessionist movements from consideration.

Resolution 1541 also defines "self-government." Self-government includes independence, "free association" with an independent state, or integration on a basis of equality with an independent state.ⁿ⁵⁸ The assumption is that independence will be the usual option, with the latter two possibilities subject to greater requirements of informed consent.ⁿ⁵⁹

The questions raised by the Declaration on Colonial Independence were also addressed ten years later by the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations ("Declaration on Friendly Relations").ⁿ⁶⁰ Adopted without a vote by the General Assembly after years of negotiation,ⁿ⁶¹ the Declaration on Friendly Relations may be considered to state existing international law. Its provisions therefore possess unusual significance for a General Assembly resolution.

As its title suggests, the Declaration on Friendly Relations addresses a wide range of issues. The section concerned with equal rights and self-determination of peoples is worth quoting at length:

By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.

Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle, in order: [*15]

(a) To promote friendly relations and co-operation among States; and

(b) To bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned; and bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter.

Every State has the duty to promote through joint and separate action universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter.

The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right to self-determination by that people.

Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.

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 to self-determination in accordance with the Charter, and particularly its purposes and principles.

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 rep [*16] resenting the whole people belonging to the territory without distinction as to race, creed or colour.

Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country. ⁿ⁶²

The resolution also provides:

All States enjoy sovereign equality... In particular, sovereign equality includes the following elements:

...

(d) The territorial integrity and political independence of the State are inviolable;

(e) Each State has the right freely to choose and develop its political, social, economic and cultural systems. ⁿ⁶³

The Legal Adviser to the United States Mission to the United Nations at the time the Declaration on Friendly Relations was drafted concluded that the section on self-determination "contains some tortured phraseology and ... may not be set out in the most logical order, [but] a careful reading of it will show it to be a moderate and workable text." ⁿ⁶⁴ Moderate, perhaps, but its workability in the post-colonial era is uncertain. First, the Declaration on Friendly Relations offers no definition of "peoples." Neither of the two purposes it sets forth suggests that self-determination is intended to provide every ethnically distinct people with its own state. In fact, the particular mention of the "distinct" status of "a colony or other Non-Self-Governing Territory" suggests a limited scope for the right of self-determination. Similarly, the use in the same paragraph of the singular "people" suggests that various minorities within a territory may not enjoy the same right of self-determination as that possessed by the people as a whole.

Following previous United Nations formulations of the principle of self-determination, the Declaration on Friendly Relations places the goal of territorial integrity or political unity as a principle superior to that of self-determination: "Nothing in the foregoing paragraphs" shall be construed to authorize or encourage "any [*17] action" which would limit this principle. ⁿ⁶⁵ However, this restriction applies only to those states which conduct themselves "in compliance with the principle of equal rights and self-determination of peoples as described above and [are] thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour." ⁿ⁶⁶ The requirement of representativeness suggests internal democracy. However, such a requirement does not imply that the only government that can be deemed "representative" is one that explicitly recognizes all of the various ethnic, religious, linguistic, and other communities within a state. Indeed, such a state might itself be considered to violate the requirement that it represent "the whole people . . . without distinction as to race, creed or colour." ⁿ⁶⁷

A more persuasive interpretation, consistent with the concerns of most United Nations members when the declaration was adopted in 1970, is that a state will not be considered to be representative if it formally excludes a particular group from participation in the political process, based on that group's race, creed, or color (such as South Africa or Southern Rhodesia under the Smith regime). At the very least, a state with a democratic, non-discriminatory voting system whose political life is dominated by an ethnic majority would not be unrepresentative within the terms of the Declaration on Friendly Relations. ⁿ⁶⁸

C. The International Covenants on Human Rights

The Declaration on Friendly Relations was adopted within a consciously political context, but it also reflects the promotion of self-determination as a "human right" in other United Nations forums. In 1948, on the same day that it adopted the Universal Declaration of Human Rights, the General Assembly requested that the Commission on Human Rights "continue to give priority in its work to the preparation of a draft Covenant on Human [*18] Rights and draft measures of implementation." ⁿ⁶⁹ This request eventually led to the 1966 adoption of the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights ("ICCPR"), including its Optional Protocol, both of which entered into force in 1976. ⁿ⁷⁰ Each has now been ratified by over 110 countries, and the covenants contain the most definitive legally binding statement of the contemporary right of self-determination.

The initial intention was to draft a single treaty, but disputes over the relative weight of civil-political and economic-social-cultural rights, as well as disagreements over the appropriate implementation procedures to be developed for each set of rights, led to a decision to draft two covenants. This decision, however, did not affect the provision on self-determination; the first article of both covenants is identical:

Article 1

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. ⁿ⁷¹

The relatively straightforward language of the first paragraph in particular is commonly cited as evidence of the universality of the [*19] right to self-determination, although its formulation does little to define the scope of the right. Nevertheless, the reference to "all" peoples and the fact that the article is found in human rights treaties intended to have universal applicability suggest a scope beyond that of decolonization.

As with previous articulations of the right of self-determination, one finds no definition of "peoples." Nothing suggests that "peoples" should be read as equivalent to "state." At the same time, however, substitution of "state" for "peoples" would neither render the article meaningless nor suggest an interpretation contrary to the recognized rights of states. For example, a state certainly has the right to determine freely its political status, pursue economic development, and dispose of its natural wealth and resources.

The covenants were discussed in the Commission on Human Rights from 1949 through 1955, when draft texts of each were forwarded to the Third Committee of the General Assembly. The Third Committee discussed the final wording for another eleven years before the covenants were adopted by the General Assembly and opened for signature and ratification in 1966. Unfortunately, these debates provide little clarification of the essential problem of defining a people and thus determining the scope of the right of self-determination.

Although most of the substantive articles in the covenants emerged from debates within the Commission, the article on self-determination was guided - indeed, directed - by the General Assembly. The General Assembly's early work betrayed its internal divisions concerning the content of self-determination, and its first resolution called upon the Commission only "to study ways and means which would ensure the right of peoples and nations to self-determination, and to prepare recommendations for consideration by the General Assembly" at its next session. ⁿ⁷²

The study requested by the General Assembly was not undertaken at the Commission's 1951 session, and several proposals presented to the Third Committee responded to this lack of action. Over the largely procedural objections of the Western and colonial [*20] powers, the General Assembly responded by directing the inclusion of an article on self-determination in the covenants and even dictating its language. ⁿ⁷³ The General Assembly decided

to include in the International Covenant or Covenants on Human Rights an article on the right of all peoples and nations to self-determination in re-affirmation of the principle enunciated in the Charter of the United Nations. This article shall be drafted in the following terms: "All peoples shall have the right of self-determination", and shall stipulate that all States, including those having responsibility for the administration of Non-Self-Governing Territories, should promote the realization of that right, in conformity with the Purposes and Principles of the United Nations, and that States having responsibility for the administration of Non-Self-Governing Territories should promote the realization of that right in relation to the peoples of such Territories. ⁿ⁷⁴

The Commission responded to this directive and adopted the text of an article on self-determination at its 1952 session. It also proposed a resolution for adoption by the General Assembly, which it submitted via its parent body, the Economic and Social Council. The resolution recommended that states

uphold the principle of self-determination of peoples and nations and respect their independence ... recognize and promote the realization of the right of self-determination of the people of Non-Self-Governing and Trust Territories who are under their administration; and grant this right on a demand for self-government on the part of these people, the popular wish being ascertained in particular through a plebiscite held under the auspices of the United Nations. ⁿ⁷⁵

After debate, the Economic and Social Council forwarded the resolution to the General Assembly without comment. ⁿ⁷⁶ [*21]

In the General Assembly, the Commission resolution was opposed by the colonial powers on various grounds. A number of countries contended that self-determination must be subordinated to world peace, that terms such as "peoples" should be defined, that the resolutions exceeded the scope of the Charter, and that the resolutions were discriminatory in that they imposed obligations only on administering states. ⁿ⁷⁷ The debates focused almost exclusively on non-self-governing territories; the General Assembly rejected, by a vote of 28 to 22, with 5 abstentions, a United States amendment calling for the recognition and promotion of the right of self-determination for the peoples "of all territories," including non-self-governing territories. ⁿ⁷⁸ The final text stated that:

1. The States Members of the United Nations shall uphold the principle of self-determination of all peoples and nations;

2. The States Members of the United Nations shall recognize and promote the realization of the right of self-determination of the peoples of Non-Self-Governing and Trust Territories who are under their administration. ⁿ⁷⁹

A second resolution suggests that the right of self-determination is not limited to the peoples of non-self-governing territories. Under article 73(e) of the Charter, states administering non-self-governing territories must furnish to the United Nations "statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible." ⁿ⁸⁰ The second resolution called upon such states to provide additional information, in order "to facilitate United Nations action to promote respect for the right of self-determination of peoples and nations, in particular with regard to the peoples of Non-Self-Governing Territories." ⁿ⁸¹ Thus, while retaining the focus on dependent territories, the language seems to suggest that "the right of self-determination of peoples" applies to a broader category as well. This is consistent with the broader formulation [*22] adopted several years later in the Declaration on Colonial Independence. ⁿ⁸²

The issue of self-determination remained contentious, and no consensus developed as to its scope or precise meaning. At the 1954 session of the Commission on Human Rights, the Commission adopted, by a vote of 11 to 6, a proposal that the General Assembly establish a ten-state commission. ⁿ⁸³ The ten-state commission could

examine any situation resulting from alleged denial or inadequate realization of the right of self-determination, which falls within the scope of Article 14 of the Charter [concerning Assembly recommendations for the "peaceful adjustment" of situations which might impair the general welfare] and to which the Commission's attention is drawn by any ten Members of the United Nations. ⁿ⁸⁴

The Economic and Social Council subsequently decided by a vote of 10 to 8 not to forward the Commission's recommendation to the General Assembly. ⁿ⁸⁵

The Council's action was criticized by some members during debates in the Third Committee of the General Assembly, ⁿ⁸⁶ and a resolution adopted by the General Assembly requested that the Council forward the Commission's recommendations. ⁿ⁸⁷ However, no action was taken on the substance of the Commission's recommendations at the 1954 or subsequent sessions, although they were resubmitted to the General Assembly in 1955.

After the two draft covenants were finally approved by the Commission on Human Rights in 1955, the General Assembly's Third Committee began a decade-long process of considering each covenant article by article. Article 1 was considered during twenty-six meetings. ⁿ⁸⁸ The text of article 1 adopted by the Third Committee [*23] at the conclusion of its debates in 1955 was essentially identical to that which appears as the final text of the covenants. ⁿ⁸⁹

The travaux préparatoires of any treaty are notoriously unreliable, because vague or imprecise treaty language is often adopted intentionally due to disagreement over the exact meaning of a particular provision. Interpretation is even more difficult in the context of multilateral treaties such as

the covenants. Nevertheless, a careful examination of the legislative history of the covenants leads to the conclusion that a restrictive interpretation of the right of self-determination comports with the views of the majority of the states that supported the right.ⁿ⁹⁰ This conclusion is supported by the Director of the United Nations Division of Human Rights at the time, who was intimately involved in the process of drafting the covenants. He observed that, despite the broad formulation of article 1 of the covenants, self-determination "would be understood in United Nations doctrine as a right belonging only to colonial peoples, which once it had been successfully exercised could not be invoked again, and it would not include a right of secession except for colonies."ⁿ⁹¹

Indeed, most of the delegations supporting a broad interpretation of self-determination, with applicability beyond the context of dependent territories, actually opposed the adoption of any provision in the covenants recognizing a right of self-determination.ⁿ⁹² Colonial powers such as the Netherlands and the United Kingdom sought to undermine arguments for decolonization by warning that the "self-determination of peoples" implied not only the right of [*24] colonies to become independent, but also the right of groups within existing states to secede or separate.ⁿ⁹³

Among those who generally argued that a broad definition of self-determination was inevitable (some viewing this as desirable and others as unfortunate) were Australia,ⁿ⁹⁴ Belgium,ⁿ⁹⁵ China,ⁿ⁹⁶ India,ⁿ⁹⁷ New Zealand,ⁿ⁹⁸ the United Kingdom,ⁿ⁹⁹ and the United States.ⁿ¹⁰⁰ Of these countries, only India subsequently voted for the adoption of article 1.

The differences of opinion as to the meaning of article 1 are illustrated by the somewhat contradictory summary of the debate in the Third Committee's report to the General Assembly.

Much of the discussion on article 1 had related the question of self-determination to the colonial issue, but that was only because the peoples of Non-Self-Governing and Trust Territories had not yet attained independence. The right would be proclaimed in the Covenants as a universal right and for all time. The dangers of including the [*25] article had been exaggerated. It was true that the right could be and had been misused, but that did not invalidate it. It was said that the article was not concerned with minorities or the right of secession, and the terms "peoples" and "nations" [the latter had been included in the Commission's draft] were not intended to cover such questions.ⁿ¹⁰¹

The deep divisions within the Third Committee are reflected by the narrow defeat of Denmark's proposal not to vote on article 1.ⁿ¹⁰² The first paragraph of article 1 was eventually adopted in the Third Committee by a vote of 31 to 9, with 18 abstentions, while the article as a whole was adopted by a vote of 33 to 12, with 13 abstentions.ⁿ¹⁰³

D. Subsequent Interpretation

Both covenants entered into force in 1976. States are required under article 40 of the Covenant on Civil and Political Rights to submit periodic reports to a body of experts, the Human Rights Committee, on the manner in which they have implemented the rights guaranteed in the Covenant.ⁿ¹⁰⁴ These reports and the subsequent discussions between Committee members and government representatives could provide evidence of the interpretation given by the Committee to both the internal and external aspects of self-determination.ⁿ¹⁰⁵ Unfortunately, most countries have not specifically addressed article 1, or have done so in such general terms that little is added to an understanding of its content.

The Indian reservation to article 1 exemplifies the view of many countries that support a restricted interpretation of "self-determination":

With reference to article 1 [of both covenants]... the Government of the Republic of India declares that the words "the right of self-determination" appearing in [*26] [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.ⁿ¹⁰⁶

Three states, each a former colonial power, filed formal objections to the Indian reservation. The Netherlands stated that

the right of self-determination as embodied in the Covenants is conferred upon all peoples... Any attempt to limit the scope of this right or to attach conditions not provided for in the relevant instruments would undermine the concept of self-determination itself and would thereby seriously weaken its universally acceptable character. ⁿ¹⁰⁷

France objected because the Indian reservation "attaches conditions not provided for by the Charter of the United Nations." ⁿ¹⁰⁸ The Federal Republic of Germany "strongly objected" to the Indian reservation, stating:

The right of self-determination ... applies to all peoples and not only to those under foreign domination... The Federal Government cannot consider as valid any interpretation of the right of self-determination which is contrary to the clear language of the provisions in question. It moreover considers that any limitation of their applicability to all nations is incompatible with the object and purpose of the Covenants. ⁿ¹⁰⁹

In a subsequent appearance before the Human Rights Committee, India reaffirmed the position it had adopted upon ratification and stated explicitly that the United Nations Charter as well as article 1 of the Covenant provide that "the right to self-determination in the international context applies only to dependent Territories and peoples." ⁿ¹¹⁰

The Human Rights Committee has also commented on the scope of the article 1 right of self-determination. ⁿ¹¹¹ Under the Optional [*27] Protocol to the Covenant on Civil and Political Rights, individuals may address communications to the Human Rights Committee regarding the violation of rights guaranteed under the Covenant. ⁿ¹¹² Several such individual applications have raised the issue of whether Indian bands in Canada enjoy a right of self-determination. However, the Committee has decided that although individuals who claim that their rights have been violated have standing to raise complaints under the Optional Protocol, article 1 confers a right of self-determination only upon "peoples, as such." ⁿ¹¹³ A similar attempt by residents of the Italian South Tyrol was rejected by the Committee in November 1990. ⁿ¹¹⁴ Although states can raise complaints regarding the violation of the right of a "people" to self-determination under the optional provisions of article 41 of the Covenant, ⁿ¹¹⁵ no such complaint has been filed by any state.

Under paragraph 4 of article 40 of the ICCPR, the Human Rights Committee has the authority to make "general comments" on state reports submitted to it. ⁿ¹¹⁶ Thus far, the Committee has commented on several provisions of the Covenant, considering both substantive questions and procedural issues related to reporting requirements. ⁿ¹¹⁷ The Committee's general comment on article 1 was not adopted until 1984, and it does nothing to clarify the meaning of "self-determination" or the scope of state obligations under article 1. ⁿ¹¹⁸ The Committee's chairman accurately noted that the right of self-determination is "one of the most awkward to define, since the abuse of that right could jeopardize international peace and security in giving States the impression that their territorial integrity was threatened." ⁿ¹¹⁹ Some Committee members have suggested that the right of self-determination extends beyond the [*28] colonial context, ⁿ¹²⁰ but the Committee as a whole has failed to provide any more precise delineation of the right. ⁿ¹²¹

E. The Conference on Security and Co-Operation in Europe

The Final Act of the Conference on Security and Co-Operation in Europe ("CSCE Final Act" or "Helsinki Final Act"), adopted in 1975 in Helsinki by 35 European states, is a regional, political document rather than a universal, legally binding agreement. ⁿ¹²² Nevertheless, it represents a significant understanding between the Western and Soviet blocs on a variety of issues. The CSCE Final Act addresses security, economic, and humanitarian concerns, and provides for a series of follow-up meetings which have offered an important forum for developing many of the themes in the CSCE Final Act.

Among the "Principles Guiding Relations between Participating States" agreed to in 1975 was respect for the "equal rights and self-determination of peoples." Principle VIII states:

By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development. ⁿ¹²³

[*29]

Some commentators have found the Helsinki language much more expansive than previous international pronouncements regarding self-determination. ⁿ¹²⁴ Indeed, the specific language, providing that "all" peoples "always" have the right to determine their internal and external political status, goes beyond the more terse formulation in the covenants on human rights. However, this formulation must be understood in the context of the principles of the inviolability of frontiers (principle III) and the territorial integrity of states (principle IV) also proclaimed in the Helsinki Final Act. Again, the proper interpretation of the right of self-determination turns on the definition of "peoples." There is no indication that sub-state groups are to determine their political status or pursue political and economic development without reference to the larger population of the state.

A more recent reference to the right of self-determination at a CSCE summit meeting would seem consciously to limit earlier formulations. The November 1990 Charter of Paris "reaffirms the equal rights of peoples and their right to self-determination in conformity with the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States." ⁿ¹²⁵

In the context of Soviet domination of Eastern Europe until the late 1980s, the 1975 Helsinki formulation may be seen merely as a Cold War reaffirmation of the right of the people of a state to be free from external influence in choosing its own form of government. There was no suggestion at Helsinki or in subsequent CSCE meetings that the right of self-determination could justify secession by an oppressed minority. "It seems that the right of self-determination cannot be realized on account of territorial integrity and secure borders, and so it does not imply the right to secession." ⁿ¹²⁶ [*30]

F. The African Charter on Human and Peoples' Rights

Among other major human rights treaties, only the African Charter on Human and Peoples' Rights refers to self-determination. ⁿ¹²⁷ The African Charter mentions the equality of peoples in article 19, including a statement that "nothing shall justify the domination of a people by another." ⁿ¹²⁸ Article 20 sets forth the right of self-determination:

1. All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.

2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.

3. All peoples shall have the right to the assistance of the States Parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural. ⁿ¹²⁹

Nearly all African states, which were among the leaders in developing the post-1945 "right" of self-determination in the context of decolonization, have adopted a very narrow interpretation of the right in the post-colonial context of independence. ⁿ¹³⁰ Because of the extreme ethnic heterogeneity of most African states and the resulting difficulties in developing a sense of statehood in the post-independence period, the principles of territorial integrity and [*31] national unity have been widely felt to be more fundamental than that of self-determination. ⁿ¹³¹

II. The Meaning of Self-Determination

Although it is debatable whether the right of self-determination is *jus cogens*,ⁿ¹³² self-determination has undoubtedly attained the status of a "right" in international law. Formal statements by governments, the adoption by consensus of numerous United Nations resolutions, and the fact that more than half of the world's states have accepted the right of self-determination through their adherence to one or both of the United Nations covenants on human rights would seem to confirm the existence of self-determination as a norm of international law. Finally, governments and scholars from all regional and political perspectives accept the right of peoples to self-determination.ⁿ¹³³ While it seems clear that self-determination has attained the status of a right, the scope of that right must be explored.

One controversial question regarding the right of self-determination is whether the right has been recognized outside the context of decolonization. As noted by a prominent British legal scholar, "the legal right of self-determination clearly applies to non-self-governing territories, trust territories and mandated territories... Whether it also applies to other territories is uncertain."ⁿ¹³⁴ [*32]

The various texts discussed above and the *travaux préparatoires* of the covenants do not establish that the right of self-determination, defined as a unilateral right to independence, was intended to apply outside the context of decolonization. As noted above, self-determination has meant at least decolonization since 1945. However, when addressing self-determination claims based on ethnicity or nationalist sentiment, one must recognize the shift from the territorially based right of self-determination developed by the United Nations in the context of decolonization to the ethnic-linguistic-national principle of self-determination advocated by Wilson and others in 1919. The difference is not only semantic. It reflects a fundamental limit on the definition that self-determination has acquired during the past four decades. The confusion created by these two often contradictory principles of territory and people was noted by the International Court of Justice in the Frontier Dispute caseⁿ¹³⁵ and is also reflected in the EC position on Yugoslavia, discussed below.ⁿ¹³⁶

Despite the apparently absolute formulation in various United Nations resolutions and the two international covenants on human rights, self-determination has never been considered an absolute right to be exercised irrespective of competing claims or rights, except in the limited context of "classic" colonialism. Only in situations where a European power dominated a non-contiguous territory, in which a majority of the population was indigenous or non-metropolitan, has a territory been considered to have an absolute right of self-determination - a right to independence, if that was what the population desired. In such circumstances, any claim by the colonial power that the exercise of self-determination would conflict with the right to territorial integrity has been rejected. [*33]

However, self-determination through independence has been rejected by the international community where this paradigm does not exist. Independence is not necessarily an option in situations in which (1) forcible incorporation of adjacent territory has led to absorption or displacement of the former population, and the resulting exercise of sovereignty has been generally accepted by the international community;ⁿ¹³⁷ or (2) the colony in question is ethnically, historically, or culturally related to a large independent non-European neighbor.ⁿ¹³⁸

In such cases of "problematic" colonialism, where foreign domination has been blurred by the passage of time, demographic shifts, or historical claims, the international community has adopted a pragmatic, balancing approach to claims of a right of self-determination by the purported "colonial" people. Many of the charges of hypocrisy or inconsistency of United Nations practice are based on the false assumption that external self-determination was intended to be an absolute right extended to "all" peoples. A comparison to United States jurisprudence may be helpful. The First Amendment to the United States Constitution contains an absolute injunction: "Congress shall make no Law ... abridging the freedom of speech."ⁿ¹³⁹ Nevertheless, the United States Supreme Court has long held that some speech, such as pornography, libel, and commercial speech, is subject to regulation. Similarly, the grammatically absolute grant of self-determination to all peoples has always been interpreted in a limited manner by the United Nations: all classic colonial peoples are entitled to immediate independence, while those falling outside that paradigm do not possess an absolute right to independence.

This does not mean that other aspects of the right of self-determination are also so limited. The covenants' description of the right of self-determination as a right of "all peoples" and the CSCE reference to "all" peoples "always" having the right of self-determination cannot be ignored. Both the right of a people organized as a state to freedom from external domination and the right of the people of a state to a government that reflects their wishes are essential components of the right of self-determination. These [*34] rights have universal applicability, and the statement that "no State has

accepted the right of all peoples to self-determination" ⁿ¹⁴⁰ is correct only if one equates self-determination exclusively with secession or independence.

States and their peoples have the right of independence from foreign domination. The General Assembly has expressed its concern "at the continuation of acts or threats of foreign military intervention and occupation that are threatening to suppress, or have already suppressed, the right to self-determination of an increasing number of sovereign peoples and nations." ⁿ¹⁴¹ Existing states that have been invaded or are otherwise controlled by a foreign power have a right of self-determination, a right to overthrow the invaders and re-establish true independence. The reference to "sovereign" peoples applies only to states or classic colonies subjected to military occupation, including Palestine, Western Sahara, and East Timor, but not to sub-state groups within recognized states. ⁿ¹⁴²

Self-determination is also relevant to the matrix of human rights law which has developed over the past four decades, including specific rights applicable to minorities and indigenous peoples. ⁿ¹⁴³ Defining self-determination as self-government is consistent with early United Nations formulations, including the Charter, and its implications are only now being fully considered in the context of autonomous and other domestic constitutional arrangements.

Although one may not agree with Professor Franck's conclusion that a right to democratic governance is emerging as a norm of customary international law, his belief that the internal aspect of the right of self-determination is the most important aspect of the right in the late twentieth century seems well placed.

The Covenant [on Civil and Political Rights] clearly intends to make the right of self-determination applicable to the citizens of all nations, entitling them to determine their collective political status through democratic means... [*35]

... When the Covenant came into force, the right of self-determination entered its third phase of enunciation: it ceased to be a rule applicable only to specific territories (at first, the defeated European powers; later, the overseas trust territories and colonies) and became a right of everyone. It also, at least for now, stopped being a principle of exclusion (secession) and became one of inclusion: the right to participate. The right now entitles peoples in all states to free, fair and open participation in the democratic process of governance freely chosen by each state. ⁿ¹⁴⁴

These observations do not dispose of two fundamental issues: defining the "peoples" entitled to self-determination and clarifying the scope of the right of self-determination. As discussed below, the reaction of states and international organizations to the disintegration of Yugoslavia and the Soviet Union has done little to advance our understanding. However, the political positions expressed do support the proposition that self-determination remains a viable principle of contemporary international law.

A. Defining the "Self"

Most discussions of "self-determination" begin with an attempt to break the term into its component parts: the definition of the relevant "self" and the manner in which its fate should be determined. Indeed, defining the "people" or the "self" that possesses the right of self-determination is the key issue in analyzing the scope of the right.

Defining the "self" normally includes subjective and objective components. At a minimum, it is necessary for members of the group concerned to think of themselves as a distinct group. It is also necessary for the group to have certain objectively determinable common characteristics, e.g., ethnicity, language, history, or religion. Of course, everyone belongs to many different groups at the same time. Defining which groups are relevant to the purposes of the right of self-determination is the challenge.

One critical observer of United Nations practice concludes that definitions of the relevant "self" have been hopelessly political and confused, ⁿ¹⁴⁵ yet surely one can arrive at a generally acceptable definition [*36] of "peoples" who possess the right of self-determination. ⁿ¹⁴⁶ One commentator provides a relatively straightforward set of criteria: "a people consists of a community of individuals bound together by mutual loyalties, an identifiable tradition, and a common cultural awareness, with

historic ties to a given territory." ⁿ¹⁴⁷ Other elements are suggested by General Assembly Resolution 1541, which defines a non-self-governing territory as one which is geographically separate, ethnically or culturally distinct, and arbitrarily subordinated to the metropolitan state. ⁿ¹⁴⁸

There are no doubt difficult or marginal cases, but in many instances it is rather easy to decide whether a given community is a "people" as long as one does not immediately attach legal consequences to the appellation. For example, there can be no doubt that Tibetans, Kurds, Tatars, Navajos, Basques, and Yanomami are "a body of persons composing a community, tribe, race, or nation." ⁿ¹⁴⁹ Conversely, it is difficult to identify the common characteristics - apart from citizenship - of Swiss, Indians, Nigerians, Guatemalans, and Americans, yet each of these groups is identified by the international community as a "people." Similar problems arise in describing the "people" of Bosnia-Herzegovina, whose population at the time of its recognition as a state consisted of 43.7% Slavic Muslims, 31.3% Serbs, and 17.3% Croats. ⁿ¹⁵⁰ Of course, there is no requirement that a state be composed of only a single people. Furthermore, a people may exercise its right of self-determination by joining, as well as by separating from, another people.

The impact of "settler" populations in a colonial territory presents even more complicated issues. Where the settlers constitute a dominant minority which practices systematic racial discrimination - as was formerly the situation in Rhodesia and South [37] Africa - the United Nations has had no difficulty in upholding the right of (internal) self-determination of the indigenous majority. Other cases have been less clear: Indian settlers (initially brought by the British) in Fiji were considered to be part of the Fijian people. In contrast, the Ceylonese disenfranchisement of several hundred thousand Indian "estate Tamils" - brought to Ceylon in circumstances that are difficult to distinguish from Fiji - was unchallenged by all but India. Questions have been raised regarding status of British settler populations in Gibraltar and the Falkland (Malvinas) Islands, as well as the status of the ethnic Russian populations in the former Soviet republics.

In 1986, the General Assembly returned New Caledonia to the list of non-self-governing territories. The settlers, who constituted a majority of the population, were seen to be interfering with the right of the indigenous Kanaks to self-determination. Following the Matignon Accord between France and the Kanaks regarding a future referendum, the General Assembly invited all parties "to continue promoting a framework for the peaceful progress of the Territory towards an act of self-determination in which all options are open and which would safeguard the rights of all New Caledonians." ⁿ¹⁵¹

One critical commentator has concluded that

from whichever angle the question of defining the "self" within the new "UN Law of Self-Determination" is approached ... the Wilsonian dilemmas have persisted. Except for the most obvious cases of "decolonization", objective criteria have not been developed or applied for preferring one claim over another or for delimiting which population belongs to which territory. ⁿ¹⁵²

The recent attempt by the European Community (EC) to address these questions in Yugoslavia has been no more successful. ⁿ¹⁵³ If the former Yugoslav republics were exercising their right of self-determination, that right does not appear to have belonged to any objectively identifiable "people," unless "people" is defined simply as those who inhabit a particular administrative territory. As noted above, the population of Bosnia-Herzegovina is very heterogeneous. Similarly, it is difficult to identify the distinctive characteristics of the "people" of Macedonia. ⁿ¹⁵⁴

Rather than defining people in an ethnic sense, the EC adopted a territorially based recognition policy, insisting that the internal administrative borders of Yugoslavia remain as the new international frontiers. ⁿ¹⁵⁵ While this is consistent with the post-1945 emphasis on territory in the context of decolonization, it is difficult to argue that Slovenia, Croatia, Bosnia-Herzegovina, and Macedonia were in a "neo-colonial" relationship with Yugoslavia/Serbia; certainly that argument was not made by the peoples concerned.

In fact, even the territorial approach was applied inconsistently. The EC apparently does not regard the ethnically Albanian province of Kosovo as having a right to secede, even though it was until recently a territorially defined autonomous entity within Yugoslavia. ⁿ¹⁵⁶ Similarly, most governments have refused to recognize demands for self-determination by ethnic groups and nations within the new states which formerly constituted the Soviet Union. ⁿ¹⁵⁷

While the territorial approach has the advantage of simplicity, it fails utterly to deal with new minorities "trapped" by the creation of new states. In Bosnia-Herzegovina, for example, nearly two-thirds of the total eligible voters (99.7% of those who actually voted) approved independence in a referendum;¹⁵⁸ however, the referendum was boycotted by the major Serb party. Thus, independence clearly did not enjoy the support of the second most important ethnic community in the territory. In such circumstances, which "people" should be granted the right of self-determination?

This neo-decolonization territorial approach can have troubling consequences if used to legitimize secession for groups possessing a distinct political status while denying the right of secession to territorially based ethnic communities not formally organized into political units. This seems to be the position taken by the Arbitration Commission established by the International Conference on [*39] Yugoslavia, which has implied that the right to secede varies according to the degree of autonomy recognized by the central government. In its first opinion, the Commission observed that "the existence of the State implies that federal organs represent the components of the Federation and wield effective power."¹⁵⁹ Since the composition and functioning of the essential organs of the Yugoslav Federation no longer satisfied "the requirements of participation and representativeness inherent in a federal State,"¹⁶⁰ the Commission concluded "that the Socialist Federal Republic of Yugoslavia is engaged in a process of dissolution."¹⁶¹

Regrettably, this approach will encourage states to resist granting precisely those political and economic rights which might constitute the most realistic and effective response to claims for self-determination.¹⁶² In effect, a state would be penalized if it addressed ethnic or regional concerns by devolving power to autonomous regions. This is directly contrary to the message that should be sent by the international community to states faced with ethnic or regional conflicts.

B. What Status May the "Self" Determine?

Once the "self" has been identified, full independence is the most common result of the exercise of self-determination. However, while full independence has been the result in all but a handful of cases, there are several ways in which self-determination may be achieved. As noted above, General Assembly Resolution 1541 stated that a non-self-governing territory under chapter XI of the Charter can achieve "a full measure of self-government" through emergence as a sovereign independent state, free association with [*40] an independent state, or integration with an independent state.¹⁶³ The 1970 Declaration on Friendly Relations expanded the available options to "any other political status freely determined by a people."¹⁶⁴

Resolution 1541 imposes detailed requirements on non-self-governing territories that opt for any status short of independence. Free association with another state requires a "free and voluntary choice ... through informed and democratic processes," and must include the right of unilateral modification of the association by the peoples of the territory.¹⁶⁵ Integration must be on the basis of "complete equality" between peoples of the territory and the country they are joining. Also, integration can only come about if the territory has attained "an advanced stage of self-government with free political institutions," and if integration is chosen with "full knowledge" and through democratic processes "impartially conducted and based on universal adult suffrage."¹⁶⁶ By contrast, there are no procedural requirements for a non-self-governing territory to emerge as a sovereign independent state, perhaps because [*41] there is less danger that such an outcome will be inappropriately influenced by the former colonial power.

Assuming that the requisite consent has been demonstrated, there is a wide range of options by which a people may choose to exercise self-determination. Of course, any option short of full independence requires the consent of another state or people - confederation, federation, or autonomy implies the participation of at least two parties. In such a situation, one has to speak of "self"-determination exercised by both sides, because neither can compel the other to accept its preferred solution.

But can one meaningfully speak of "self-determination" if its exercise depends on the agreement of another party? Does the non-self-governing people have the legal authority to force a state to accept association, integration, or any other status "freely determined by a people"? The answer must be no, so long as the question is phrased in terms of self-determination.

This suggests that while discussions of alternatives to independence are essential when a people is deciding what form its self-determination should take, such discussions are peripheral to the theoretical issue of the scope of the right of true self-determination. As discussed below,¹⁶⁷ other norms, such as

those concerning human rights, democracy, participation, and cultural survival, may impose obligations on states to adjust their domestic constitutional structures to respond to the legitimate demands of a minority. But does the right of self-determination include the ability to claim the only status that a people can determine unilaterally - i.e., independence - if necessary through secession?

III. Secession

Where independence is the goal, acceptance of one group's claim to self-determination necessarily implies denial of another group's competing claim of territorial integrity. When a self-determination claim comes from only a portion of the entire population of a state - the latter having already been recognized by the international community as representing its "people" - denial of self-determination to the group ⁿ¹⁶⁸ can be seen as merely supporting the self-determination of the larger "people." ⁿ¹⁶⁹ [*42]

Secession is not presently recognized as a right under international law, nor does international law prohibit secession.

The express acceptance in ... [relevant United Nations resolutions] of the principles of the national unity and the territorial integrity of the State implies non-recognition of the right of secession. The right of peoples to self-determination, as it emerges from the United Nations, exists for peoples under colonial and alien domination, that is to say, who are not living under the legal form of a State. The right to secession from an existing State Member of the United Nations does not exist as such in the instruments or in the practice followed by the Organization, since to seek to invoke it in order to disrupt the national unity and the territorial integrity of a State would be a misapplication of the principle of self-determination contrary to the purposes of the United Nations Charter. ⁿ¹⁷⁰

Several authors have argued for recognition of a "right to secession" as part of the right of self-determination, ⁿ¹⁷¹ but such a right does not yet exist. Professor Gros Espiell has observed that "if ... beneath the guise of ostensible national unity, colonial and alien domination does in fact exist, whatever legal formula may be used in an attempt to conceal it, the right of the subject people concerned cannot be disregarded without international law being violated." ⁿ¹⁷² However, attempts to assert that a given nation, [*43] minority, or other group is under alien or colonial domination have only been universally accepted when the assertions relate to the internal self-determination of a recognized state under foreign occupation or control.

This conclusion does not answer the question of whether a norm legitimizing secession under certain circumstances should be created. There are at least four principal arguments in favor of the right to secede. ⁿ¹⁷³

The first might be termed the liberal democratic theory. ⁿ¹⁷⁴ This theory holds that, since the legitimacy of any government must rest upon the consent of the governed, the governed have the inalienable right to withdraw that consent whenever they wish. A similar position is espoused by individuals identified by Buchheit as "parochialists," who essentially hold that any genuine "self" has the right to determine its own political destiny. ⁿ¹⁷⁵

This power of withdrawal extends not only to rejection of any particular government, but also to rejection of the state itself. Harry Beran has suggested some limits to this power; for example, the group should possess an awareness of itself as a distinct group, have a certain territorial concentration, and be of sufficient size to be an independent political community. ⁿ¹⁷⁶ The right of self-determination should otherwise be absolute and may be exercised more than once. ⁿ¹⁷⁷ The possible proliferation of "ministates" and secessionist agitation are viewed simply as unavoidable consequences of true democracy and self-determination. Indeed, while fear of the proliferation of ministates was widespread in the 1960s and 1970s, few such concerns have been voiced lately; there were no objections to the recent admission of San Marino, Micronesia, the Marshall Islands, and Andorra to the United Nations. [*44]

While this approach has the appeal of consistency and simplicity, there are the immediately apparent problems of implementation: How is a decision to secede to be reached? Who draws the boundaries? What about enclaves? There are also more substantive questions: Should rich regions be permitted effectively to discard poorer parts of a country? Is a decision to secede irreversible? What are the implications for majority rule if a minority always retains the ability to opt out? These issues, along

with the extreme unlikelihood that such a theory would ever be politically acceptable, suggest that the absolutist philosophical approach might at best serve as a starting point, despite its appealing simplicity and theoretical consistency. ⁿ¹⁷⁸

A second argument, which has attracted a great deal of attention since the 1970s, is founded on humanitarian or human rights concerns.

The right of secession is seen as a variant of the right of self-defense - you defend yourself by seceding from an oppressive system... There can be compelling reasons for secession such as if the physical survival or the cultural autonomy of a nation is threatened, or if a population would feel economically excluded and permanently deprived. ⁿ¹⁷⁹

Onyeonoro Kamanu has suggested that "the ultimate justification of all social institutions, including the state, is the welfare of the individual, not just of some metaphysical entity called "the majority" " and argues that "the question of self-determination should not be divorced from the issues of human rights and the welfare of minorities." ⁿ¹⁸⁰ He further argues that demands for secession may [*45] be justified in extreme situations if there are "definite and substantial grievances" and all other political arrangements have been exhausted or repudiated. ⁿ¹⁸¹ Another commentator, Buchheit, has concluded that

"remedial secession" seems to occupy a status as the *lex lata*... Remedial secession envisions a scheme by which, corresponding to the various degrees of oppression inflicted upon a particular group by its governing State, international law recognizes a continuum of remedies ranging from protection of individual rights, to minority rights, and ending with secession as the ultimate remedy. ⁿ¹⁸²

If a minority's physical existence is threatened, or if there is intense discrimination against a particular segment of society, some reaction against oppression is undoubtedly justified; even the Universal Declaration of Human Rights refers to "rebellion against tyranny and oppression" as a "last resort." ⁿ¹⁸³ However, secession may not be the most appropriate remedy. Overthrowing the oppressive government and restoring human rights would be as philosophically and politically sound as secession. And while secession may end the oppression, the norms of national unity and territorial integrity suggest that a less drastic alternative would be preferable. Finally, as demonstrated in some of the former republics of the Soviet Union and Yugoslavia, there is no guarantee that new states will be any more protective of human rights than those they replace.

There may be a closer connection between human rights violations and secession when rights are being violated on a discriminatory basis. But why should such groups be more deserving of protection than political groups? Should not communists in Indonesia in the 1960s and opponents of the Khmer Rouge in Cambodia in the 1970s enjoy the same right to secession as an ethnically identified minority, provided that such political groups are sufficiently concentrated geographically?

Unfortunately, asserting a right to secede in order to end discrimination becomes somewhat circular, unless one can agree on the scope of the rights allegedly being violated. Do minorities have [*46] the right not only to safeguard their own culture, language, and identity, but also to exercise political and economic authority over their own affairs? Is the fact that a political group finds itself permanently in the minority sufficient to give it the right to secede? One can easily imagine an ethnic community whose culture is secure, but which desires independence in order to exercise the kind of political and economic power over its members that any state exercises over its citizens. It is precisely this principle, however, that was rejected in the post-1945 era of decolonization and openly subordinated to competing political considerations at Versailles in 1919 and in Yugoslavia in 1992.

A more persuasive position would hold that secession can be legally justified only when the very existence of a group is threatened. Genocide is illegal under customary international law; gross violations of human rights are also prohibited. ⁿ¹⁸⁴ However, no society or culture is static, and many groups find their traditional values under pressure from dominant, "modern" societies surrounding them. "Languages [and presumably cultures] are now dying at an alarming rate." ⁿ¹⁸⁵ In the absence of active discrimination or human rights violations, is this sufficient to justify secession?

A more manageable approach would require a deliberate attack on a group before endowing it with a right to secede. The mere desire to insulate one's group from ill-defined pressures from a dominant society cannot suffice to engage international law and obligate the international community either to support the secession or to oppose forceful opposition to the secession. ⁿ¹⁸⁶ Justifying secession by a "nation" or "people" in response to anything less than the most serious human rights violations assumes a principle to which there has never been agreement. It assumes that each ethnic group or culture has the right to exercise power within its own "sovereign" state. International law should recognize a right to secession only in the rare circumstance when the physical exist [*47] ence of a territorially concentrated group is threatened by gross violations of fundamental human rights.

A third, more comprehensive theoretical justification of the right to secession has identified a list of criteria that might be used in specific cases to evaluate secessionist claims. Lee Buchheit's ambitious approach attempts to achieve a "calculation of legitimacy" through a

balancing of the internal merits of the claimants' case [for secession] against the justifiable concerns of the international community expressed in its calculation of the disruptive consequences of the situation. By balancing these two aspects, the community will avoid being forced to articulate a single, immutable standard of legitimacy, to be applied with arithmetical remorselessness against each and every group in the same way. ⁿ¹⁸⁷

Finding that "an irrational commitment to either the form of the sovereign State or the demands of parochial sentiment is unwholesome and unnecessary," Buchheit grounds his balancing act on the "first principle" of the United Nations Charter - in his words, "a maximization of international harmony coupled with a minimization of individual human suffering." ⁿ¹⁸⁸ Where a secessionist claim is made by a group ethnically distinct and capable of viable existence apart from the surrounding state, secession should be approved by the international community if it "promotes general international harmony." ⁿ¹⁸⁹

A similar approach is adopted by Professor Chen, who would consider whether secession

would move the situation closer to goal values of human dignity, considering in particular the aggregate value consequences on the group directly concerned and the larger communities affected. In other words, the basic question is whether separation or unification would best promote security and facilitate effective shaping and sharing of power and of all the other values for most people. ⁿ¹⁹⁰

[*48]

The pragmatic approach of Buchheit and Chen is welcome, but unfortunately the proposed criteria provide no readily manageable norm against which to judge the legitimacy of secessionist claims. ⁿ¹⁹¹ The very flexibility that characterizes pragmatism leaves unanswered the fundamental question of whether ethnic homogeneity is a legitimate criterion for statehood. If ethnicity (or culture or religion) is not a determining factor, then we return to the philosophically absolutist approach of permitting any secession supported by a majority of the seceding people - however that people may be defined. Determining whether a particular secession would promote "general international harmony" or "human dignity" sounds much more like the relativist geopolitical calculations of the victors at Versailles than the absolutist anti-colonial advocacy of the United Nations General Assembly.

The misapplication of such geopolitical principles in Yugoslavia underscores the impossibility of finding an appropriate response in the heat of the moment; more definite criteria must be agreed to in advance. Of course, such criteria should not lead to the "arithmetical remorselessness" rightly decried by Buchheit, but they must be manageable and objective. Indeed, the failure of the international community to articulate acceptable, objective criteria, and the recognition of some post-Yugoslavia entities but not others, may have helped foster the violence that followed recognition of the seceding republics.

Lea Brilmayer offers a fourth method for evaluating secessionist claims. ⁿ¹⁹² After persuasively criticizing theories of self-determination that rely on definitions of "people" or the principle of consent of the governed, ⁿ¹⁹³ Brilmayer proposes a territorially based test incorporating the following criteria: the immediacy and nature of the historical grievance of the secessionist group, the extent to which the group has kept its self-determination claim alive, and the extent to which the disputed territory has

been settled by members of the dominant group. ⁿ¹⁹⁴ Brilmayer concedes that "the oppo [*49] nents of secession are probably correct as a matter of positive law," ⁿ¹⁹⁵ but offers little real guidance as to the weight to be given to her proposed criteria. The rather simplistic conclusion that "whatever conflict exists is not between principles, but over land," ⁿ¹⁹⁶ is of little help.

The fact that most theories concerned with the legitimacy of secession turn out to be geopolitical balancing acts is no surprise; the end result of secession is the recognition of the seceding entity as an independent state. ⁿ¹⁹⁷ While the status of an entity as a state subject to international law may be independent of formal recognition, "recognition, as a public act of state, is an optional and political act and there is no legal duty in this regard." ⁿ¹⁹⁸ Thus, the search for legal criteria for secession that can be counterpoised against geopolitical or strategic concerns would seem to be illusory, as demonstrated only too clearly by the attitude of the European Community and others to Yugoslavia and the Soviet Union. Georgia and Macedonia went unrecognized for a considerable time, not because their "peoples" had no right of self-determination, but because their governments were thought to be either insufficiently democratic (Georgia) or to have chosen a name reflecting secret territorial ambitions (Macedonia).

A brief survey of attitudes towards several post-colonial secessionist attempts provides little support for any but the geopolitical non-theory of secession. The secession of Bangladesh, opposed initially by the vast majority of states, owes more to the Indian army and Soviet political support than to the principle of self-determination.

Bangladesh entered the world system in 1971 unrecognized by most countries and, in effect, unwanted by the United Nations. Despite near unanimous popular con [*50] demnation of the brutal suppression of the East Pakistanis by the Pakistani military, all of the democratic nations of the West voted alongside Pakistan when Pakistan took its case to the Security Council and the General Assembly in December 1970. ⁿ¹⁹⁹

Most states recognized the new state of Bangladesh the following year, but entanglement with the larger Indo-Pakistani conflict delayed Bangladesh's admission to the United Nations until 1974.

It has been suggested that there was no real African consensus opposing the attempted secession by Biafra from Nigeria, ⁿ²⁰⁰ but only five states (Tanzania, Gabon, Ivory Coast, Zambia, and Haiti) formally recognized Biafra's independence. ⁿ²⁰¹ Katanga's attempted secession from the former Belgian Congo at the time of independence led to United Nations intervention in support of the central Congolese government. ⁿ²⁰² Other secessionist attempts, from Bougainville to Kurdistan, from Punjab to Quebec, have similarly failed to gain any significant international support. ⁿ²⁰³

It is perhaps notable that recent assertions by the Turkish population of Cyprus of its right of self-determination rely not on a right to secession, but rather on an interpretation of the creation of the state of Cyprus in 1960 which maintains that the Greek and Turkish communities were equal founding partners with a shared right of self-determination. The Turkish population views the Proclamation of the Turkish Republic of Northern Cyprus in 1983 in this sui generis situation to be a continuation of the original right of the Turkish community to self-determination, not a real secession. ⁿ²⁰⁴ [*51] Somewhat similar arguments were advanced on behalf of Eritrea, ⁿ²⁰⁵ which finally became independent in 1993 with the acquiescence of the new government in Ethiopia.

The dissolution of the Soviet Union and Czechoslovakia resulted from agreement and thus created no precedent for cases of contested secession. The voluntary division or dissolution of a state is certainly within that state's right of internal self-determination, unless the international community views the division as a fraudulent attempt to prevent real self-determination. ⁿ²⁰⁶

The contemporary European attitude towards secession as a component of self-determination is reflected in the response to the dissolution of Yugoslavia adopted by the twelve members of the European Community, an attitude generally followed by other CSCE members. ⁿ²⁰⁷ In the period immediately preceding and following the declarations of independence by the Yugoslav republics of Slovenia and Croatia in June 1991, the United States and the European Community supported Yugoslav unity, although they opposed the use of force by the federal authorities. ⁿ²⁰⁸ A few days after the declarations, German and Austrian government officials began to suggest that the "right of self-determination" of Slovenia and Croatia should be recognized, but neither government recognized the two republics as independent states at that time. ⁿ²⁰⁹

While the initial opposition to recognition may have been grounded in fears of dangerous political instability inside and beyond Yugoslavia (fears which later proved to be fully justified), it was also consistent with restrictive legal formulations of the right of self-determination. The clear implication was that all of the parties considered acceptance of the newly declared independent status of the two republics to be a political rather than a legal question, not one whose response was mandated by international law.

Following armed clashes between federal Yugoslav forces and Slovenian forces, and the seizure of substantial Croatian territory [*52] by Croatian Serbs, the European Community adopted a "common position on the process of recognition" of new states in Eastern Europe and the Soviet Union:

The [European] Community and its Member States confirm their attachment to the principles of the Helsinki Final Act and the Charter of Paris, in particular the principle of self-determination. They affirm their readiness to recognise, subject to the normal standards of international practice and the political realities in each case, those new states which, following the historic changes in the region, have constituted themselves on a democratic basis, have accepted the appropriate international obligations and have committed themselves in good faith to a peaceful process and to negotiations.

Therefore, they adopt a common position on the process of recognition of these new States, which requires:

- respect for the provisions of the Charter of the United Nations and the commitments subscribed to in the Final Act of Helsinki and in the Charter of Paris, especially with regard to the rule of law, democracy and human rights;
- guarantees for the rights of the ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the CSCE;
- respect for the inviolability of all frontiers which can only be changed by peaceful means and by common agreement;
- acceptance of all relevant commitments with regard to disarmament and nuclear non-proliferation as well as to security and regional stability;
- commitment to settle by agreement, including where appropriate by recourse to arbitration, all questions concerning State succession and regional disputes.

The Community and its Member States will not recognise entities which are the result of aggression. They would take account of the effects of recognition on neighbouring states.

The commitment to these principles opens the way to recognition by the Community and its Member States and [*53] to the establishment of diplomatic relations. It could be laid down in agreements. ⁿ²¹⁰

Notably missing in this declaration is any reference to a right of secession or even to the right of "peoples" to self-determination, although that terminology is used in the relevant CSCE documents. The EC declaration is tied to the inherently political issue of recognition, as amply evidenced by the requirements imposed on the potential new states with respect to democracy, human rights, minority rights, nuclear non-proliferation, and arbitration. "This extensive catalog of criteria, far in excess of traditional standards for recognition of statehood, confirms that the Community was not applying general international law in the determination of its position." ⁿ²¹¹

The reference to "normal standards of international practice and the political realities in each case" ⁿ²¹² does not indicate that the former Yugoslav republics had an absolute right of self-determination under international law. The cases of Yugoslavia and the Soviet Union were formally considered both by the new states themselves (perhaps excluding Serbia and Montenegro) and by the international community to be instances of dissolution rather than secession. The question facing the European Community and others was what new sovereigns to recognize on former Yugoslav and Soviet territory. ⁿ²¹³

The recognition of Bosnia-Hercegovina by the CSCE and the United Nations in the spring of 1992 precipitated a civil war, as Bosnian Serbs backed by the Yugoslav government and Bosnian

Croats backed by Croatia sought to partition the former republic along ethnic lines. Despite the imposition of economic sanctions against Serbia by the United Nations Security Council, Serbian forces had seized approximately 70% of the territory of Bosnia- [*54] Hercegovina by August 1992. A publicly announced Serbian campaign of "ethnic cleansing" led to the forced relocation of more than one million people and the siege of Sarajevo and other Bosnian cities. Serbian and Croatian nationalists in Bosnia, and Serbs who seized territory in Croatia, claimed that they were exercising their right to self-determination.

An Arbitration Commission established by the European Community in August 1991 was asked specifically whether the Serbian populations of Bosnia-Hercegovina and Croatia have the right of self-determination. In an opinion which can charitably be described as unclear, the Commission observed that, "whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (*uti possidetis juris*) except where the States concerned agree otherwise." ⁿ²¹⁴ The Commission concluded that Serbs in Bosnia-Hercegovina and Croatia had "the right to recognition of their identity under international law" and "where appropriate, the right to choose their nationality," but not the right to secede. ⁿ²¹⁵ The Commission interpreted the right of self-determination set forth in the two covenants as serving "to safeguard human rights." ⁿ²¹⁶ Without reference to the actual language of the covenants, the Commission observed that "by virtue of that right every individual may choose to belong to whatever ethnic, religious or language community he or she wishes." ⁿ²¹⁷ This non-response seems to confuse an individual's right to choose his or her nationality with the collective right of self-determination, and adds nothing to our understanding of the crucial distinction between minorities and peoples.

In response to another question, the EC Arbitration Commission contended that once a new state is recognized the principle of territorial integrity must be observed. It found that the administrative frontiers of the former Yugoslavia "become frontiers protected by international law," citing, *inter alia*, the principle of *uti possidetis* and the Yugoslav constitution. ⁿ²¹⁸ It quotes the observation of the International Court of Justice chamber in the Frontier Dispute case, where *uti possidetis juris* was identified as "a general principle, [*55] which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles." ⁿ²¹⁹

This opinion is dubious if it purports to identify a rule of international law requiring the maintenance of existing administrative borders outside the colonial context. The Commission's reference to the Frontier Dispute case omits the remainder of the cited sentence: "provoked by the challenging of frontiers following the withdrawal of the administering power." ⁿ²²⁰ The Special Agreement between Burkina Faso and Mali submitting their dispute to a chamber of the Court was explicitly based on "respect for the principle of the intangibility of frontiers inherited from colonization," ⁿ²²¹ and the chamber's dictum is clearly limited to the principle of *uti possidetis juris* as "a firmly established principle of international law where decolonization is concerned." ⁿ²²²

The political value of the Commission's opinion is equally suspect in light of the conflict that subsequently engulfed Bosnia-Hercegovina. As one commentator concludes, "it remains doubtful ... whether the EC policy has contributed to determining the implications of a right of self-determination beyond what is already established by international practice." ⁿ²²³

Europe's approach to the Yugoslav conflict represents a one-time-only reaction to secessionist demands based on no discernable criteria other than the desire of some territorially based population to secede. ⁿ²²⁴ The principle that borders should not be altered except by mutual agreement has been elevated to a hypocritical immutability and contradicted by the very act of recognizing secessionist states. New minorities have been trapped, not by any comprehensible legal principle, but by the historical accident of [*56] administrative borders drawn by an undemocratic government. ⁿ²²⁵ Ethnic issues are ignored despite the fact that both Croatia and Bosnia-Hercegovina suffered greater violence than Slovenia precisely because Slovenia is much more ethnically homogeneous.

Support for secession should be grounded in the desires of a substantial majority of the population, and the opposition of a significant proportion of the population to independence should influence the international response to independence claims. If adherence to the principle of one-person, one-vote is deemed insufficient to validate a central government's maintenance of territorial integrity, then neither should merely winning a plebescite confer legitimacy on the numerical majority of a seceding entity.

It is also unreasonable to maintain the fiction of immutable borders under all circumstances, although the principle that frontiers cannot be changed by force need not be abandoned. Newly

recognized states that base their self-determination claims on ethnic or religious concerns must recognize the legitimacy of similar claims made within the new state. Any border alterations must be based on the results of popular referenda, conducted with respect for human rights, although common-sense limitations of geographical contiguity may be imposed. However, the "price" for recognition of a new state based on ethnic self-determination or the accident of internal administrative borders should be acceptance of the possibility of peaceful changes in those borders: the new state must grant the same right of self-determination to its ethnic communities as it claimed for itself.

In light of the confusing precedents, many analysts have conceded defeat. "The complexity of the factors involved in claims for separation makes it impossible to recommend rules which would automatically determine the applicability of the right of self-determination."ⁿ²²⁶ "It would be uselessly pedantic ... to draw up rules for when secession is right. It is enough to say that no minority is likely to attempt anything like this unless it or a substantial section of it has been driven desperate by events."ⁿ²²⁷ The latter observation may not be entirely accurate; many secessionist movements are driven by power-hungry elites. However, the quest for man [*57] ageable criteria to evaluate secessionist claims, except where the physical existence of a group is threatened by gross violations of fundamental human rights, does seem to be misplaced.

Criteria are even more difficult to identify when there is no consensus on the fundamental issue of whether the homogeneous "nation-state" is the ideal form of government. British India, Rwanda-Urundi, Ethiopia, and the Trust Territory of the Pacific Islands were divided at least in part to achieve ethnically or religiously more homogeneous states. That objective remains the justification for the de facto division of Cyprus. Yet there is certainly as much moral rectitude in preferring a tolerant, multi-cultural state to a state founded on exclusionary ethnicism; this may in part explain the world's apparent preference for a pluralistic Bosnia-Herzegovina. Moreover, the right of the majority to unite deserves as much recognition as the right to separate.

Such fundamental issues cannot be properly addressed in the abstract. Outside the colonial context, however, "self-determination" has remained an abstraction for the past century. A more fruitful course might be, therefore, to examine the goals that the principle of self-determination was designed to promote.

IV. Self-Determination and Human Rights

Theories of self-determination originated in an era when the protection of individual human beings from the inhuman acts of their own states was essentially unknown. As noted above, the "minorities treaties" drafted in the post-World War I era were imposed on new or defeated states for political purposes; the victors did not concede that the principle of minority rights was universal. It was not until the Nuremberg trials and the adoption of the Genocide Convention following World War II that the wholesale destruction of ethnic groups was firmly determined to be a violation of international law. United Nations organs then hid behind the screen of non-intervention in the domestic affairs of states for two decades before they began to address human rights issues more openly in the late 1960s.

Although the development of international human rights norms under the United Nations occurred at roughly the same time that decolonization was acquiring the status of a fundamental legal right, the drafting history of article 1 of the covenants demonstrates that the commitment to self-determination and decolonization preceded adoption of the broad panoply of human rights that exists today. Prior to states' widespread acceptance of the legitimacy of [*58] human rights norms, control over one's own government was seen as a necessary prerequisite to political participation and the protection of one's ethnic or national identity. There were no other internationally accepted means of securing such rights.

But if the content of self-determination is examined more closely, it is apparent that much of it has been subsumed by subsequent developments in human rights law. In particular, the two fundamental rights just mentioned - the right to participate effectively in the political and economic life of one's country and the right to protect one's identity - are likely to become an increasingly important focus of human rights activists and theorists in the future.

The development of international human rights norms since 1945 has been fully discussed by numerous authors and need not be addressed in detail here.ⁿ²²⁸ Human rights treaties have been widely ratified, and the United Nations and other international forums regularly address human rights issues. Most governments that violate human rights attempt to justify their actions through perverted interpretations of international human rights norms rather than by outright rejection of those norms.

Thus, human rights norms may now be the most effective tool for responding to the concerns underlying the right of self-determination.

Article 21 of the Universal Declaration of Human Rights states that "everyone has the right to take part in the government of his country, directly or through freely chosen representatives... The will of the people shall be the basis of the authority of government." ⁿ²²⁹ This grandiose reference to "the will of the people" is further defined in article 25 of the Covenant on Civil and Political Rights:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: [*59]

- a. To take part in the conduct of public affairs, directly or through freely chosen representatives;
- b. To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- c. To have access, on general terms of equality, to public service in his country. ⁿ²³⁰

Other provisions of the Covenant guarantee additional essential components of democracy, such as freedom of opinion, expression, and association. ⁿ²³¹

Similar provisions may be found in regional human rights instruments in force in Europe, the Americas, and Africa. The Helsinki Final Act commits the signatories to "promote and encourage the effective exercise" of human rights. ⁿ²³² The 1990 Copenhagen Document, adopted as part of the CSCE review process and reflecting the dramatic political changes in Eastern Europe since 1989, reaffirms that "democracy is an inherent element of the rule of law" and states that "the will of the people, freely and fairly expressed through periodic and genuine elections, is the basis of the authority and legitimacy of all government." ⁿ²³³

Of course, the mere fact that rights are declared in international agreements does not mean that they will be upheld, any more than adoption of Resolution 1514 by the General Assembly in 1960 led immediately to independence for all colonies. Nevertheless, the present content of international human rights law does include the great majority of what Woodrow Wilson and others viewed as the internal content of self-determination - democracy. Furthermore, many states are subject to international procedures under which individuals can seek to enforce these rights. ⁿ²³⁴ As of March 31, 1993, 67 states had accepted the right of individual petition under the Optional Protocol to the Covenant on Civil and Political Rights, and all 26 parties to the European Convention on Human Rights permitted individual complaints to an international body, as [*60] did the 24 parties to the American Convention on Human Rights. ⁿ²³⁵

Participation in the political life of the country should not be merely a formal exercise. There must be effective and meaningful participation in the formulation of national and local policy choices. ⁿ²³⁶ Although a detailed United Nations study on the topic concluded ten years ago that "the right to popular participation, in its most general terms, does not appear to be expressly established as such by universal instruments having binding legal value," it also observed that "minority groups should have the possibility of making known their diverging opinions, as repression of such views may run counter to the dynamics of society and to desirable change and renewal in national life." ⁿ²³⁷

As significant as such suggestions may be in furthering the democratic aspect of self-determination, the present content of international human rights law may be of only marginal relevance to situations in which democratically elected majorities repress or ignore the interests of the minority. Among the pillars of human rights norms are the twin principles of equality and non-discrimination; the demands of democracy are generally seen to be fulfilled in a democratic system which ensures one-person, one-vote. However, whatever the possibilities for imaginative expansion, these human rights norms were not intended to respond to demands for self-determination that include an ethnic, linguistic, or similar component and arise within an existing state.

Of course, there are limits on the right of even a democratic majority to interfere with the rights of an unpopular political minority. The rights of expression, association, and privacy remain essentially individualistic in their outlook, but they also protect minority views and cultures. The right to vote or run for office is meaningful only when other human rights, such as freedom of expression, association, and assembly, are guaranteed. [*61]

If a minority is prohibited from publishing newspapers in its own language, or if a regional party is forbidden from advocating devolution of power from the central to the regional government, formal democracy becomes a sham. Indeed, most people who claim the right of self-determination have been pushed to that position because of violations of "ordinary" human rights, such as the right to be free from arbitrary arrest or the right to use one's own language. It is when a group's very identity is threatened - by denial of the group's existence, seizure of its lands, or denigration of its culture - that salvation is sought through political and economic self-determination.

Minority rights per se have occupied only a marginal place in international human rights law. There is no reference to the rights of minorities in the Universal Declaration of Human Rights, and article 27 of the Covenant on Civil and Political Rights provides merely that "in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."ⁿ²³⁸ While essential to the preservation of minority cultures, these guarantees obviously are not sufficient to meet the desire for greater political and economic control that is expressed by many minority and indigenous communities and nations today.ⁿ²³⁹

Thus, while the full guarantee of existing human rights norms may adequately redress minority complaints of discrimination, physical violence, or land seizures, these norms are not adequate to respond to economic and political demands. Indeed, aggrieved communities that assert a "right of self-determination" often consciously reject any suggestion that their demands could be satisfied by the guarantee of "normal" human rights.

Fortunately, recent initiatives by the United Nations and within Europe are expanding the substantive and procedural protections [*62] available to minorities.ⁿ²⁴⁰ After more than a decade of deliberations in the United Nations Commission on Human Rights, the United Nations General Assembly adopted a Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities in December 1992.ⁿ²⁴¹ The Conference on Security and Cooperation in Europe addressed the substance of minority rights in the Copenhagen Document adopted in 1990ⁿ²⁴² and agreed in July 1992 to appoint a High Commissioner on National Minorities with broad powers to collect and receive information and warn CSCE members of potential conflict situations.ⁿ²⁴³ A European Charter for Regional or Minority Languages, concluded under the auspices of the Council of Europe, was opened for signature in October 1992.ⁿ²⁴⁴ A draft European Convention for the Protection of Minorities has been submitted to the European Council of Ministers.ⁿ²⁴⁵ Finally, a parallel initiative sets forth in detail the rights of indigenous peoples to control over their land, resources, environment, and government structures, and also recognizes the right of indigenous peoples to self-determination, repeating the language of article 1 of the covenants.ⁿ²⁴⁶

It is these rights, exercised by communities, that are essential to protect the identity of threatened peoples, whether they are classified as minorities, indigenous peoples, or regional or cultural communities. Protection of these rights, combined with the right of effective participation in the political and economic process, is the primary contemporary rationale for the exercise of the right of self-determination.

"Under a human rights approach, the concept of self-determination is capable of embracing much more nuanced interpretations [*63] and applications, particularly in an increasingly interdependent world in which the formal attributes of statehood mean less and less."ⁿ²⁴⁷ This linkage between human rights and self-determination is mandated by the latter's inclusion in the two international covenants on human rights, and it offers a potentially more manageable set of criteria than the conflicting claims of centuries-old historical and territorial exclusivity.

V. Conclusion

The resurgence of ethnic conflicts in Europe in the late 1980s and the attempts to justify secession through assertion of the right of self-determination respond to at least two distinct issues. For both issues, "self-determination," often at least superficially based on ethnicity, religion, or language, is proclaimed as legitimizing resistance to central government authorities. However, the motivating concerns surrounding each issue are in fact quite different.

The first issue, perhaps the one most keenly felt in eastern Europe in the early 1990s, is lack of democracy - occurring most commonly under centralized authoritarian rule that denies real participation in the political process. Although the central authorities may be of a different ethnic or

linguistic group, the primary complaint by ethnic or regional minorities is lack of political power, not discrimination. In Wilsonian terms, the primary need is for internal self-determination.

Such a situation results in human rights violations for all citizens of the state, not just minorities, although ethnic cohesion may provide the most convenient vehicle for organizing opposition to the central government. While there are exceptions, it is striking how few claims in such circumstances initially include a demand for full independence based on ethnic or linguistic criteria. As aptly put by a young Slovenian soldier in the days immediately following Slovenia's declaration of independence in June 1991, "this was a war against the generals in Belgrade, not against the Yugoslav nation."ⁿ²⁴⁸

A second factor triggering ethnic conflict and moves toward secession is the existence of discrimination against or persecution of minorities by the state and its majority population. This persecution leads minorities to fear not only for their physical safety but also for the survival of their culture. Where the majority refuses even to recognize a substantial minority or ethnically distinct nation, and prevents it from sharing in the life of the state, external self-determination or secession may seem like the last hope for those who feel they are treated as aliens in their own country.

As discussed above, the rights of such communities as recognized in contemporary international law extend only to guarantees of non-discrimination and equality, to protection of their physical integrity, and to other "individual" human rights. However, the expansion of rights designed specifically to enable minorities and indigenous peoples to maintain their identity and participate effectively in the political process offers new opportunities for redressing minority grievances without secession.

Responding to authoritarian or discriminatory governments requires the establishment of democratic institutions, real guarantees of non-discrimination, and the assurance that people have a meaningful degree of control over their own affairs. "Self-determination may be understood as a right of cultural groupings to the political institutions necessary to allow them to exist and develop according to their distinctive characteristics. The institutions and degree of autonomy, necessarily, will vary as the circumstances of each case vary."ⁿ²⁴⁹

It is not enough simply to invoke "self-determination" as a code word for ethnic supremacy or the assertion of increasingly vague "sovereignty." A slogan cannot by itself respond to the problems of political powerlessness and economic marginalization. As demonstrated too clearly in the former Yugoslavia and Soviet Union, ethnic self-determination is as likely to lead to new intolerance - intolerance by new majorities for new minorities - as it is to create stability and "naturally" pure ethnic states.

Accomplishing the goals of self-determination may, in some cases, require the creation of separate states. In the great majority of cases, however, creative intra-state solutions that recognize the value of diversity without mandating or encouraging division are more likely to achieve the desired results. No single constitutional structure can serve as a model for all situations, but there are many examples of relatively successful forms of decentralization, autonomy, or federalism adopted in the past twenty years by countries as diverse as Belgium, Nicaragua, and Spain.ⁿ²⁵⁰

As self-determination is expressed in increasingly diverse relationships between central and sub-state entities, the relevance of international frontiers to the lives of most people will continue to diminish. The state is not about to disappear, but self-determination in the sense of independent statehood means little in the context of a Europe with a single European Community passport and a focus on regional rather than national concerns. The emphasis on relatively inconsequential borders may have been responsible in part for the slaughter in Bosnia-Herzegovina and Croatia. This is tragically ironic in light of the undoubted desire of the various components of the former Yugoslavia to join a Europe in which borders are becoming less relevant.

As the psychological and legal borders of the state become increasingly permeable, the international community is more willing to look beyond frontier posts and judge the legitimacy of states and governments. In the near future, formal diplomatic recognition of a state or government is unlikely to depend on a government's human rights record. But the existence of serious human rights violations will increasingly undermine the efforts of states to improve their international reputation or to conclude desired economic or security agreements. Where the denial of rights is wholesale and endemic to an undemocratic system, governments may even be equated with unrepresentative states and thus be deprived of international legitimacy.ⁿ²⁵¹ The humanitarian intervention in Somalia approved by the United Nations in December 1992ⁿ²⁵² is an extreme measure unlikely to be repeated in

the near future, but it represents a significant chink in the armor of "domestic jurisdiction" that may serve as a precedent for other, less intrusive, international actions. [*66]

The standard of legitimacy in the post-colonial era is not observance of the norm of self-determination,ⁿ²⁵³ but rather adherence by the government of a state to widely accepted international human rights norms. As these norms expand to include rights of particular importance to ethnic, religious, linguistic, and cultural communities, self-determination loses some of its attraction as a means of protection. As human rights norms expand to include political participation and protection of identity (within a larger context of continuing protection for the individual members of both minorities and majorities), self-determination can be more meaningfully and readily exercised through options short of secession.

If self-determination is viewed as an end in itself reflecting a preference for homogeneous, independent, often small "nation-states," it is incapable of universal application without massive disruption. It runs counter to simultaneous trends towards greater regional economic and political cooperation and integration among states, and it will lead to intensified problems of minority rights and border-drawing.

However, if self-determination is viewed as a means to an end - that end being a democratic, participatory political and economic system in which the rights of individuals and the identity of minority communities are protected - its continuing validity is more easily perceived. In most instances, self-determination should come to mean not statehood or independence, but the exercise of what might be termed "functional sovereignty." This functional sovereignty will assign to sub-state groups the powers necessary to control political and economic matters of direct relevance to them, while bearing in mind the legitimate concerns of other segments of the population and the state itself. In some respects, functional sovereignty reflects the "principle of subsidiarity" developed within the European Community and the old injunction that "that government governs best which governs least."

The content of self-determination, like international law, is in constant evolution. This evolution is sometimes marked by the adoption of new terminology; at other times, definitions may change. For example, this author has suggested that a "right to autonomy" may now be developing "in the interstices of contemporary definitions of sovereignty, self-determination, and the [*67] human rights of individuals and groups."ⁿ²⁵⁴ While such new terminology might be clearer, redefining "self-determination" may be more politically acceptable than attempting to bury it.

The proposition that the internationally recognized right of self-determination does not now include the right of independent statehood or the right of secession, except in the most extreme circumstances, reflects the fact that we are entering a third stage in the evolution of the concept. The first, Wilsonian phase was avowedly political: while lip service was given to satisfying "national" aspirations and promoting democracy, there was no meaningful recognition of the "right" of all peoples to be free from external domination or to live in their own democratic "nation-state." The second, decolonization phase ultimately did come to express a relatively precise legal norm - the illegitimacy of colonialism and the right of territories colonized by distant Western powers to become independent states. The second phase did not address nationalism in the Wilsonian sense of that term.

The post-colonial era is the third stage, in which international law guarantees to individuals and non-colonial peoples a much broader range of human rights, including meaningful self-determination but generally excluding a right to independent statehood. Self-determination is no longer only a shield to be used against foreign forces and empiresⁿ²⁵⁵ or to prevent the "bartering about" of peoples condemned by Wilson, nor is it the only vehicle through which the values of democracy and representative government can be promoted. Instead, self-determination should have wider application as it becomes infused with related human rights norms developed in the last half of the twentieth century.

The post-colonial norm of self-determination includes the right to be different and to enjoy a meaningful degree of control over one's own life, individually and collectively, as well as the right to participate in the affairs of the larger state. It operates in the context of an international order in which, paradoxically, the state's physical boundaries may be more secure than at any time in the last four centuries, while the actual power of the state is being sub [*68] stantially reduced. This reduced sovereignty results in part from the increasing interdependence of a world in which real political or economic independence is impossible. It also results from conscious choices made by states to link their fates through countless international agreements on trade, human rights, culture, the environment, health, telecommunications, and other matters.

Human rights norms do not yet encompass all of the values represented by self-determination, even if one excludes independent statehood from the latter concept. Thus, the "pull" of self-determination must be combined with the "push" of human rights and the rule of law to develop new rights that will protect minorities, indigenous peoples, and other groups often bypassed in the process of economic, social, and political modernization. At the same time, raising the floor of minority protections suggests a ceiling as well: secession will not be actively supported by the international community except in the most compelling circumstances.

Denial of the right to secede to minority or indigenous peoples may be seen as an overly statist position, but the reverse is true if such denial is accompanied by an affirmation of minority and human rights. The progressive development of rights to identity and effective participation certainly intrude on classic notions of a state's sovereign powers, even though they do not dictate any particular form of government. Thus, the norm of self-determination in the post-colonial era is both a shield that protects a state (in most cases) from secession and a spear that pierces the governmental veil of sovereignty behind which undemocratic or discriminatory regimes attempt to hide.

No state has an inherent right to continue to exist in its present form, but outside actors should neither encourage or discourage dissolution. Given the inability of the international community to agree that the paradigmatic "nation-state" is indeed desirable and the impossibility of ever equating every "nation" or "people" with its own state, external forces have no right to attempt to impose their own preferences as to the existence or non-existence of a particular state (unless the challenge to a state's existence is clearly due to external aggression).

Outside intervention may be appropriate to prevent massive violations of human rights or to provide humanitarian assistance where a government is either unable or unwilling to do so, but the legitimacy of the use of force in such situations does not depend on whether a civil war is secessionist or only revolutionary. In fact, clearer separation of the political issues of secession and the various proposals for the constitutional restructuring of Bosnia-Herzegovina, for example, from the humanitarian concern to prevent gross violations of human rights norms and the laws of war, might have made it easier for the international community to address the latter more effectively.

Desires for independence will not disappear, and they should not necessarily be opposed. Indeed, a state in which human rights are protected is much more likely to respond favorably to proposals for constitutional restructuring. Democratic governments in Belgium, Spain, Canada, and Czechoslovakia have been willing to devolve substantial powers to ethnic regions or communities and, in the last case, even to agree to peaceful dissolution. Undemocratic or weak regimes find it much more difficult to "lose" power to a regional or ethnic movement.

Organized communities concentrated within a certain territory have the right to develop their identity and may be gaining the right to influence or even control governmental acts of particular concern to them, but the "right" of an ethnically distinct community to acquire its own independent state remains as imaginary in the late twentieth century as it was in the nineteenth. Independence, as a purported expression of the right of self-determination, is only one among many political options that should be determined through democratic processes; it is not an absolute "right" the existence of which precludes rational debate or necessary compromise.

Once the rights to community identity and effective participation - along with other fundamental human rights - are guaranteed, the decision of political, ethnic, religious, or national communities to unite or to separate should not be dictated by international law. The state is merely a vehicle which will be retained by its citizens as long as it achieves progress towards substantive goals, such as preserving peace, ensuring the rule of law, and promoting economic and political development. The ultimate purpose served by the right of all peoples to self-determination is to ensure that progress towards those goals occurs.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Types of Contracts Covenants International Law Sovereign States & Individuals Human Rights General Overview

FOOTNOTES:

n1. Jonathan Swift, *Gulliver's Travels* 202 (E.P. Dutton & Co., Inc. 1946) (1726).

n2. Numerous scholars have described these developments, and the present work will not attempt to retrace their steps. See, e.g., Benedict Anderson, *Imagined Communities* (1983); John Breuilly, *Nationalism and the State* (1982); Alfred Cobban, *The Nation State and National Self-Determination* (rev. ed. 1969); Ernest Gellner, *Nations and Nationalism* (1983); E.J. Hobsbawm, *Nations and Nationalism Since 1780* (2d ed. 1992); Oscar I. Janowsky, *Nationalities and National Minorities* (1945); Hans Kohn, *Nationalism: Its Meaning and History* (rev. ed. 1965); C.A. Macartney, *National States and National Minorities* (1934); Hugh Seton-Watson, *Nations and States* (1977).

n3. John Stuart Mill, *On Liberty and Considerations on Representative Government* 294 (R.B. McCallum ed., 1947) (1861).

n4. Cobban, *supra* note 2, at 36.

n5. Woodrow Wilson, *The Fourteen Points Speech* (Jan. 8, 1918), in 3 *The Public Papers of Woodrow Wilson: War and Peace* 155, 155-62 (Ray Stannard Baker & William E. Dodd eds., 1927) [collected work hereinafter *Public Papers*].

n6. *Id.* at 160-61.

n7. Woodrow Wilson, *War Aims of Germany and Austria* (Feb. 11, 1918), in *Public Papers*, *supra* note 5, at 177, 182-83 (emphasis added).

n8. An excellent, brief description of the development of the principle of self-determination by Wilson and the Allies at the Paris Peace Conference may be found in 1 Sarah Wambaugh, *Plebiscites Since the World War* 3-14 (1933).

n9. *Treaty of St. Germain-en-Laye*, Sept. 10, 1919, *Allied Powers-Aus.*, 226 *Consol. T.S.* 8.

n10. *Treaty of Sevres*, Aug. 10, 1920, *Allied Powers-Turk.*, 3 *Major Peace Treaties of Modern History* 2055 (Fred L. Israel ed., 1967).

n11. The classic works on plebiscites are Sarah Wambaugh, *A Monograph on Plebiscites* (1920), and Sarah Wambaugh, *Plebiscites Since the World War*, *supra* note 8.

n12. See Wambaugh, *supra* note 8, at 46-98.

n13. *Id.* at 99-141, 206-70.

n14. *Id.* at 163-205.

n15. *Id.* at 271-97.

n16. *Id.* at 411-41.

n17. *Id.* at 17-18, 179-80, 545-46.

n18. *Id.* at 280.

n19. *Id.* at 24-25.

n20. *Id.* at 41, 42.

n21. See generally Quincy Wright, *Mandates under the League of Nations* (1930); R.N. Chowdhuri, *International Mandates and Trusteeship Systems: A Comparative Study* (1955).

n22. The fourteen territories included Iraq (administered by Great Britain); Palestine and Transjordan (G.B.); Syria and the Lebanon (France); Tanganyika (G.B.); Ruanda-Urundi (Belgium); British Cameroons (G.B.); British Togo (G.B.); French Cameroons (France); French Togo (France); Nauru (G.B.); New Guinea (Australia); Western Samoa (New Zealand); South West Africa (South Africa); and the North Pacific Islands (Japan). See Wright, *supra* note 21, at 593-620.

n23. See *id.* at 101-03.

n24. See generally Inis L. Claude, Jr., *National Minorities* (1955); Janowsky, *supra* note 2; Macartney, *supra* note 2; Raymond Pearson, *National Minorities in Eastern Europe 1848-1945* (1983); Louis B. Sohn & Thomas Buergenthal, *International Protection of Human Rights* 213-302 (1973). A convenient compilation of relevant texts is found in *Treaties and International Instruments Concerning the Protection of Minorities 1919-1959*, U.N. Doc. E/CN.4/Sub.2/133 (1951) [hereinafter *Treaties Concerning the Protection of Minorities*].

n25. Karl Josef Partsch, *Fundamental Principles of Human Rights: Self-Determination, Equality and Non-Discrimination*, in 1 Karel Vasak & Philip Alston, *The International Dimensions of Human Rights* 63 (1982) (quoting Woodrow Wilson).

n26. Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 *Am. J. Int'l L.* 46, 52 (1992).

n27. See *Treaties Concerning the Protection of Minorities*, *supra* note 24, at paras. 72-88, 57-71, 29-42 (discussing cultural, linguistic, and political rights).

n28. See generally James Barros, *The Aland Islands Question: Its Settlement by the League of Nations* (1968) (describing the history of the Aland Islands and the League of Nations' activities regarding their status).

n29. See generally *id.* at 268-333 (describing the League's involvement in the Aland Islands dispute).

n30. *Id.* at 293.

n31. See *id.* at 282-93.

n32. Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question, League of Nations O.J. Spec. Supp. 3, at 5 (1920).

n33. See Barros, *supra* note 28, at 295-96.

n34. *Id.* at 314.

n35. *Id.* at 316.

n36. The Aaland Islands Question, at 27, League of Nations Doc. B7.21/68/106 (1921) (English version) (Report Submitted to the Council of the League of Nations by the Commission of Rapporteurs).

n37. *Id.* at 28.

n38. *Id.* at 29-31.

n39. *Id.* at 28. For a more comprehensive discussion of the issue of secession, see *infra* part III, Secession.

n40. U.N. Charter arts. 1(2), 55. Curiously, however, the French text of the Charter does refer to respect for the "right" of self-determination, the "principe de l'egalite de droits des peuples et leur droit a disposer d'eux-memes" (literally, the "principle of equality of the rights of peoples and their right to dispose of themselves"). La Charte des Nations Unies [U.N. Charter] art. 1(2).

n41. *Id.* art. 73.

n42. *Id.* art. 1(4).

n43. G.A. Res. 217, U.N. Doc. A/810, pmb. (1948) [hereinafter Universal Declaration].

n44. G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, 67, U.N. Doc. A/L.323 and Add.1-6 (1960).

n45. *Id.* at 67.

n46. *Id.*

n47. *Id.*

n48. *Id.*

n49. Id.

n50. Id.

n51. Id.

n52. G.A. Res. 1541, U.N. GAOR, 15th Sess., Supp. No. 16, at 29, U.N. Doc. A/4651 (1960).

n53. Id., Annex, princs. I, II.

n54. See text accompanying note 53.

n55. G.A. Res. 1541, supra note 52, Annex, princ. IV.

n56. Id. princ. V.

n57. Id. princ. IV. This is the so-called "salt water" test, which limited decolonization to territories administered by European states.

n58. Id. princ. VI.

n59. Id. princs. VII, VIII.

n60. G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1970).

n61. See 1970 U.N.Y.B. 787, U.N. Sales No. E.72.I.1.

n62. G.A. Res. 2625, supra note 60, at 123-24.

n63. Id. at 124.

n64. Robert Rosenstock, *The Declaration on Principles of International Law Concerning Friendly Relations: A Survey*, 65 Am. J. Int'l L. 713, 733 (1971).

n65. G.A. Res. 2625, supra note 60, at 121.

n66. *Id.* (emphasis added).

n67. *Id.* (emphasis added).

n68. It might be noted that the Indo-Pakistani war leading to the independence of Bangladesh broke out only two months after the adoption of the Declaration on Friendly Relations. The vast majority of U.N. members rejected East Pakistan's secession, thus implicitly finding that Pakistan's actions did not fall within the proscriptions of the cited paragraph. "When the moment came to stand up and be counted in the UN, the majority of states supported Pakistan against secessionism." Alexis Heraclides, *The Self-Determination of Minorities in International Politics* 156 (1991).

n69. G.A. Res. 217E, U.N. Doc. A/810, at 79 (1948).

n70. International Covenant on Economic, Social and Cultural Rights, adopted Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]; International Covenant on Civil and Political Rights, adopted Dec. 19, 1966, - U.S.T. - , 999 U.N.T.S. 171 [hereinafter ICCPR]; Optional Protocol to the International Covenant on Civil and Political Rights, opened for signature Dec. 19, 1966, 999 U.N.T.S. 302 [hereinafter Optional Protocol].

n71. ICESCR, *supra* note 70; ICCPR, *supra* note 70.

n72. G.A. Res. 421D, U.N. GAOR, 5th Sess., Supp. No. 20, at 35, U.N. Doc. A/1775 (1950). The Third Committee, which initially considered various proposed texts concerning the covenants, rejected drafts by the United States that would have included reference to the right to participate in the government of one's own country, along with the right of "national self-determination." See 1950 U.N.Y.B. 528, U.N. Sales No. 1951.I.24.

n73. 1951 U.N.Y.B. 485-87, U.N. Sales No. 1952.I.30.

n74. G.A. Res. 545, U.N. GAOR, 6th Sess., Supp. No. 20, at 36, U.N. Doc. A/2119 (1952). It might be noted that Res. 545 began rather expansively by noting that the General Assembly had already "recognized the right of peoples and nations to self-determination as a fundamental human right," citing G.A. Res. 421D, *supra* note 72.

n75. Report of the Commission on Human Rights, U.N. ESCOR, 14th Sess., Supp. No. 4, at 64, U.N. Doc. E/2256 (1952).

n76. 1952 U.N.Y.B. 441, U.N. Sales No. 1953.I.30.

n77. *Id.* at 441-43.

n78. See *id.* at 444.

n79. G.A. Res. 637A, U.N. GAOR, 7th Sess., Supp. No. 20, at 26, U.N. Doc. A/236 (1952).

n80. U.N. Charter art. 73(e).

n81. G.A. Res. 637B, U.N. GAOR, 7th Sess., Supp. No. 20, at 26, U.N. Doc. A/2361 (1952) (emphasis added).

n82. See *supra* text accompanying notes 44-51.

n83. 1954 U.N.Y.B. 209, U.N. Sales No. 1955.I.25.

n84. Recommendations Concerning International Respect for the Right of Peoples and Nations to Self-Determination, U.N. ESCOR Comm'n on Hum. Rts., 18th Sess., Supp. No. 7, Annex IV, Draft Resolution F, U.N. Doc E/CN.4/705 (1954).

n85. 1954 U.N.Y.B. 210, U.N. Sales No. 1955.I.25.

n86. *Id.*

n87. G.A. Res. 837, U.N. GAOR, 9th Sess., Supp. No. 21, at 21, U.N. Doc. A/2890 (1954).

n88. The summary records of the debates are contained in the records of Third Committee, U.N. Docs. A/C.3/SR.641-56, 667-77 (1955).

n89. The only changes between the Third Committee's text and the final text were the substitution of the word "All" for "The" at the beginning of paragraph 2 and a change in the first clause of paragraph 3 from "All the States Parties to the Covenant" to "The States Parties to the present Covenant." The final text of article 1 is set forth *supra* in the text accompanying note 71.

n90. The most important documentation of this history includes the summary records of the debates in the Commission and Third Committee, *supra* note 88; Annotations on the Text of the Draft International Covenants on Human Rights (Prepared by the Secretary-General), U.N. GAOR, 10th Sess., Annexes, Agenda Item 28, pt. 2, U.N. Doc. A/2929 (1955); Observations by Governments, U.N. GAOR, 10th Sess., Annexes, Agenda Item 28, pt. 1, at 3, U.N. Docs. A/2910 and A/2910/Add.1-6 (1955); Report of the Third Committee, U.N. GAOR, 10th Sess., Annexes, Agenda Item 28, pt. 1, at 30, U.N. Doc. A/3077 (1955).

n91. John P. Humphrey, *Human Rights and the United Nations: A Great Adventure* 129 (1984).

n92. See, e.g., Observations by Governments, U.N. GAOR, 10th Sess., Annexes, Agenda Item 28, pt.1, at 4-5, 11, 14, U.N. Docs. A/2910/Add.1-3 (1955) (observations of the United Kingdom, Australia, and the Netherlands, all of which suggested deleting article 1 from the covenants).

n93. See *id.*, U.N. Doc. A/2910/Add.1 (The assertion of self-determination as "an unqualified right ... would have the most far-reaching political consequences for many States and not merely for those administering Non-Self-Governing Territories."); *id.*, U.N. Doc. A/2910/Add.3 ("There is no general agreement as to ... what groups are to benefit from the principle.").

n94. See U.N. GAOR 3d Comm., 10th Sess., 647th mtg., Agenda Item 23, para. 23, U.N. Doc. A/C.3/SR.647 (1955) (Article 1 would allow minorities to determine freely their own status).

n95. See U.N. GAOR 3d Comm., 10th Sess., 643d mtg., Agenda Item 28, para. 10, U.N. Doc. A/C.3/SR.643 (1955) ("As it stood, the article was tantamount to an incitement to insurrection and separatism.").

n96. See U.N. GAOR 3d Comm., 9th Sess., 570th mtg., Agenda Item 58, para. 16, U.N. Doc. A/C.3/SR.570 (1954) ("The two problems [of self-determination and minorities] were distinct and required different solutions. Furthermore the concept of secession should not be allowed to enter into the consideration of the question.").

n97. See U.N. GAOR 3d Comm., 6th Sess., 399th mtg., Agenda Item 29, para. 4, U.N. Doc. A/C.3/SR.399 (1952)(supporting United States amendment to make explicit that self-determination applied to all countries and not just to non-self-governing territories). But compare India's reservation to the covenants, adopting the opposite view, *infra* note 106 and accompanying text.

n98. See U.N. GAOR 3d Comm., 10th Sess., 649th mtg., Agenda Item 28, paras. 9, 15, U.N. Doc. A/C.3/SR.649 (1955) (If self-determination is formulated as a right, it "should be commensurate with the principle [of self-determination] and should include the right of secession.").

n99. See U.N. GAOR 3d Comm., 10th Sess., 652d mtg., Agenda Item 28, para. 19, U.N. Doc. A/C.3/SR.652 (1955) (asserting that there are minorities that could legitimately claim to be a people and therefore have the right of self-determination).

n100. See U.N. GAOR 3d Comm., 6th Sess., 397th mtg., para. 2, U.N. Doc. A/C.3/SR.397 (1952) (stating that self-determination applied to all states, not just to the administering powers).

n101. Report of the Third Committee, *supra* note 90, para. 39 (emphasis added).

n102. The proposal was defeated by a vote of only 25 to 28, with 5 abstentions. U.N. GAOR 3d Comm., 10th Sess., 676th mtg., Agenda Item 28, para. 14, U.N. Doc. A/C.3/SR.676 (1955).

n103. *Id.* paras. 21, 27.

n104. ICCPR, *supra* note 70, art. 40.

n105. The external aspects of self-determination include the right of a nation to be free from external influence, and potentially the right to secession. The internal aspects of self-determination include the right to democracy, *i.e.*, the right to participate in one's own government.

n106. Centre for Human Rights, Human Rights - Status of International Instruments 9 (1987), U.N. Sales No. E.87.XIV.2.

n107. *Id.* at 19.

n108. *Id.* at 50.

n109. *Id.* at 18-19.

n110. Human Rights Committee, Summary Record of the 498th Meeting, para. 6, U.N. Doc. CCPR/C/SR.498 (1984) (summary of remarks of the Indian representative, Mr. Parasaran).

n111. See generally Dominic McGoldrick, *The Human Rights Committee* 247-68 (1994).

n112. Optional Protocol, *supra* note 70, art. 1.

n113. See Report of the Human Rights Committee, U.N. GAOR, 42d Sess., Supp. No. 40, at 106, U.N. Doc. A/42/40 (1987).

n114. Communication No. 413/1990, *A.B. v. Italy*, Report of the Human Rights Committee, U.N. GAOR, 46th Sess., Supp. No. 40, at 320, U.N. Doc. A/46/40 (1991) (decision on admissibility of Nov. 2, 1990).

n115. ICCPR, *supra* note 70, art. 41.

n116. ICCPR, *supra* note 70, art. 40, para. 4.

n117. See *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, 1-34, U.N. Doc. HRI/GEN/1 (1992).

n118. Report of the Human Rights Committee, U.N. GAOR, 39th Sess., Supp. No. 40, at 142-43, U.N. Doc. A/39/40 (1984); see also various summary records of the Human Rights Committee, U.N. GAOR, Hum. Rts. Comm., U.N. Docs. CCPR/C/SR.476, 478, 503, 504, 513, 514, 516 (1984).

n119. Human Rights Committee, Summary Record of the 503d Meeting, U.N. GAOR, Hum. Rts. Comm., para. 32, U.N. Doc. CCPR/C/SR.503 (1984).

n120. See, e.g., Human Rights Committee, Summary Record of the 478th Meeting, U.N. GAOR, Hum. Rts. Comm., at 2, 6, U.N. Doc. CCPR/C/SR.478 (1983) (remarks of Mr. Tomuschat); *id.* at 5 (Mr. Ermacora); *id.* at 7 (Mr. Aguilar); *id.* at 8 (the Chairman); Human Rights Committee, Summary Record of the 503d Meeting, U.N. GAOR, Hum. Rts. Comm., at 5, U.N. Doc. CCPR/C/SR.503 (1984) (Sir Vincent Evans); *id.* at 8 (Mr. Dimitrijevic).

n121. After long deliberation, the Committee finally agreed in April 1994 on the text of a general comment on article 27 (concerning minority rights). The Committee merely observed that "the Covenant draws a distinction between the right to self-determination and the rights protected under article 27" and that only the latter are cognizable under communications submitted under the Optional Protocol. Human Rights Committee, General Comment No. 23(50) (art. 27), U.N. GAOR, Hum. Rts. Comm., para. 3.1, U.N. Doc. CCPR/C/21/Rev.1/Add.5 (1994). No attempt is made to distinguish the "minorities" referred to in article 27 from the "peoples" in article 1.

n122. The parties included Canada and the United States but did not include Albania. Conference on Security and Co-Operation in Europe: Final Act, Aug. 1, 1975, 14 I.L.M. 1292.

n123. *Id.* at 1295. This language was repeated in principle 4 of the Conference on Security and Co-Operation in Europe: Concluding Document from the Vienna Meeting, Jan. 17, 1989, 28 I.L.M. 527, 532.

n124. See, e.g., Antonio Cassese, *Political Self-Determination - Old Concepts and New Developments*, in U.N. *Law/Fundamental Rights: Two Topics in International Law* 137, 152 (Antonio Cassese ed., 1979) (contending that "the Declaration gives a definition of self-determination that breaks new ground").

n125. Conference for Security and Co-Operation in Europe: Charter of Paris for a New Europe, Nov. 21, 1990, 30 I.L.M. 190, 197 (adopted at the meeting of the heads of government of the participating States of the CSCE).

n126. Vojislav Stanovcic, *Legal Safeguards for Human and Political Rights*, in *The Helsinki Process and the Future of Europe* 156, 167 (Samuel F. Wells, Jr. ed., 1990).

n127. African Charter on Human and Peoples' Rights, adopted June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 Rev. 5 [hereinafter African Charter]; cf. [European] Convention for Protection of Human Rights and Fundamental Freedoms, opened for signature Nov. 4, 1950, 213 U.N.T.S. 221; American Convention on Human Rights, opened for signature Nov. 22, 1969, 1144 U.N.T.S. 123.

n128. African Charter, *supra* note 127, art. 19.

n129. *Id.* art. 20.

n130. Issa G. Shivji, *The Concept of Human Rights in Africa* 77 (1989) ("Existing state practice in Africa ... has isolated one element in the principle [of self-determination], the element of anti-colonialism, and absolutised it. It has also raised the derivative elements, state sovereignty and territorial integrity ... to the level of the main principle.").

n131. See Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* 46-47 (1990) [hereinafter Hannum, *Autonomy*].

n132. Among those who assert that self-determination has achieved the status of *jus cogens*, one might cite Ian Brownlie, *Principles of Public International Law* 515 (4th ed. 1990), and *The Right to Self-Determination, Implementation of United Nations Resolutions*, para. 50, U.N. Doc. E/CN.4/Sub.2/405/Rev.1 (1980) (Hector Gros Espiell, special rapporteur) [hereinafter Gros Espiell]. But compare the conflicting conclusion of another United Nations Rapporteur, *The Right to Self-Determination, Historical and Current Developments on the Basis of United Nations Instruments*, para. 154, U.N. Sales No. E.80.XIV.3 (1981) (Aurelieu Cristescu, special rapporteur) [hereinafter Cristescu] ("No United Nations instrument confers such an imperative character [as that of *jus cogens*] to the right of peoples to self-determination."); and I J.H.W. Verzijl, *International Law in Historical Perspective* 325 (1968) (Self-determination is even "unworthy of the appellation of a rule of law.").

n133. Among the many sources which could be cited are Hanna Bokor-Szego, *New States and International Law* 11-30 (1970); Brownlie, *supra* note 132, at 515; James Crawford, *The Creation of States in International Law* 101 (1979); Gros Espiell, *supra* note 132, at 13; Branimir M. Jankovic, *Public International Law* 220 (1984); I Oppenheim's *International Law* 285 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992); and Partsch, *supra* note 25, at 66.

n134. Michael Akehurst, *A Modern Introduction to International Law* 296 (5th ed. 1984).

n135. *Frontier Dispute (Burkina Faso v. Mali)*, 1986 I.C.J. 554, 567 (Dec. 22).

At first sight this principle [of *uti possidetis juris*] conflicts outright with another one, the right of peoples to self-determination. In fact, however, the maintenance of the territorial status quo in Africa is often seen as the wisest course, to preserve what has been achieved by peoples who have struggled for their independence, and to avoid a disruption which would deprive the continent of the gains achieved by much sacrifice. The essential requirement of stability in order to survive, to develop and gradually to consolidate their independence in all fields, has induced African States

judiciously to consent to the respecting of colonial frontiers, and to take account of it in the interpretation of the principle of self-determination of peoples.

Id.

n136. See *infra* text accompanying notes 153-62.

n137. Examples of this situation include territorial settlements imposed at the end of the two world wars, Soviet expansionism during the creation of the Soviet Union in the 1920s, and the assumption of political control over indigenous peoples by states in the Western Hemisphere in the nineteenth century.

n138. Examples include Goa-India and Hong Kong-China.

n139. U.S. Const. amend. I.

n140. Michla Pomerance, *Self-Determination in Law and Practice* 68 (1982).

n141. *Universal Realization of the Right of Peoples to Self-Determination*, G.A. Res. 44/80, U.N. GAOR, 44th Sess., Supp. No. 49, at 203, U.N. Doc. No. A/44/717 (1989).

n142. Resolution 44/80 does nonetheless reaffirm in somewhat broader terms "the universal realization of the right of all peoples, including those under colonial, foreign and alien domination, to self-determination." *Id.*

n143. See Hannum, *Autonomy*, *supra* note 131, at 50-118 (discussing minority rights and human rights); see also *infra* part IV discussing the same.

n144. Franck, *supra* note 26, at 58-59.

n145. See Pomerance, *supra* note 140, at 18-23.

n146. Of course, a state also can be considered to have the right of self-determination in the sense of its right to determine its political and economic status free from external influence. However, this right perhaps flows more directly from the principle of the sovereign equality of states than from self-determination of peoples. See U.N. Charter art. 2(1), (4).

n147. Robert A. Friedlander, *Proposed Criteria For Testing The Validity of Self-Determination As It Applies To Disaffected Minorities*, 25 *Chitty's L.J.* 335, 336 (1977).

n148. G.A. Res. 1541, *supra* note 52, Annex, princs. IV, V.

n149. 2 *Oxford English Dictionary* 661 (compact ed. 1971); cf. *The American Heritage College Dictionary* 919 (2d college ed. 1982) ("a body of persons sharing a common religion, culture, language, or inherited condition of life").

n150. These figures are taken from *Voters in Bosnia Choose Independence over Federation*, CSCE Dig., Mar. 1992, at 3.

n151. G.A. Res. 45/22, U.N. GAOR, 45th Sess., Supp. No. 49A, at 302, U.N. Doc. A/45/49 (1990).

n152. Pomerance, *supra* note 140, at 23.

n153. See *infra* text accompanying notes 208-25.

n154. See Ian Black, *EU States Forge Macedonian Ties*, *The Guardian*, Dec. 17, 1993, at 24 (describing the domestic turmoil within Macedonia and the problems of international recognition).

n155. The text of the EC declaration is set forth *infra* in the text accompanying note 210.

n156. However, Kosovo was not a full-fledged republic.

n157. See *infra* note 203 and accompanying text.

n158. *Voters in Bosnia Choose Independence over Federation*, CSCE Dig., Mar. 1992, at 3.

n159. Conference on Yugoslavia Arbitration Commission, Opinion No. 1, Dec. 7, 1991, reprinted in 31 I.L.M. 1494, 1495.

n160. *Id.* at 1496.

n161. *Id.* at 1497. The Commission appears to have significantly narrowed the implications of this opinion in a later opinion, in which it observed that "the existence of a federal State, which is made up of a number of separate entities, is seriously compromised when a majority of these entities, embracing a greater part of the territory and population, constitute themselves as sovereign states with the result that federal authority may no longer be effectively exercised." Conference on Yugoslavia Arbitration Commission, Opinion No. 8, July 4, 1992, reprinted in 31 I.L.M. 1521, 1522.

n162. Cf. Marc Weller, *The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia*, 86 Am. J. Int'l L. 569, 606 n.215 (citing actions by the government of Mali). See generally Hannum, *Autonomy*, *supra* note 131 (discussing the accommodation of competing claims of self-determination); Donald L. Horowitz, *Ethnic Groups in Conflict* 563-684 (1985) (discussing strategies to ameliorate ethnic conflicts).

n163. G.A. Res. 1541, *supra* note 52, Annex, princ. VI.

n164. G.A. Res. 2625, *supra* note 60. One hundred five territories have been designated by the General Assembly as non-self-governing, and eighteen remained in that category as of late 1993. A brief description of the eighteen remaining non-self-governing territories - American Samoa, Anguilla, Bermuda, British Virgin Islands, Cayman Islands, East Timor, Falkland Islands, Gibraltar, Guam, Montserrat, New Caledonia, Pitcairn, St. Helena, Tokelau, Turks and Caicos Islands, United States Virgin Islands, and Western Sahara - may be found in U.N. Dep't of Pub. Info., *Decolonization, the Task Ahead*, U.N. Doc. DPI/1109 (1991). One of the four component parts of the Trust Territory of the Pacific Islands, Palau, is also considered by the United Nations to be non-self-governing. *Id.* Of the 87 territories to

have achieved self-government, only ten attained a status of less than full independence. The ten are Goa and other Portuguese dependencies in India, which were incorporated into India in 1961; Sao Joao Batista de Ajuda, incorporated into Dahomey in 1961; the Netherlands New Guinea (West Irian), incorporated into Indonesia in 1963; North Borneo, Sarawak, and Singapore, federated with Malaya to form the new state of Malaysia in 1963; the Cook Islands, which entered into free association with New Zealand in 1965; Ifni, ceded to Morocco by Spain in 1969; Macao and Hong Kong, which were removed from the list at the request of China, on the grounds that they were integral parts of the Chinese state illegally occupied by Portugal and the United Kingdom, respectively; Niue Island, which entered into free association with New Zealand in 1974; and the Northern Marianas Islands, which entered into a commonwealth relationship with the United States and with respect to which the trusteeship agreement was terminated by the Security Council in 1990. Hannum, *Autonomy*, supra note 131, at 40 n.128, 36 n.111.

n165. G.A. Res. 1541, supra note 52, Annex, princ. VII. For an excellent discussion of the evolution of the concept of free association, see Roger S. Clark, *Self-Determination and Free Association - Should the United Nations Terminate The Pacific Islands Trust?* 21 *Harv. Int'l L.J.* 1, 38-66 (1980).

n166. G.A. Res. 1541, supra note 52, Annex, princs. VIII, IX.

n167. See *infra* text accompanying notes 179-86.

n168. For example, the Katangese, Biafrans, or Croats.

n169. For example, the Congolese, Nigerians, or Yugoslavs.

n170. Gros Espiell, supra note 132, para. 90 (citation omitted). Cristescu, supra note 132, para. 279, arrives at a similar conclusion, citing G.A. Res. 2625.

n171. The most comprehensive treatise is Lee C. Buchheit, *Secession* (1978); cf. Cassese, supra note 124, at 157 (arguing that the denial of self-determination violates the rights of the people and of the international community); James Crawford, supra note 133, at 247-70 (contending that secession is neither legal nor illegal, but that its effects may have legal consequences); Ved P. Nanda, *Self-Determination Outside the Colonial Context: The Birth of Bangladesh in Retrospect*, in *Self-Determination: National, Regional, and Global Dimensions* 193 (Yonah Alexander & Robert A. Friedlander eds., 1980) (arguing that the right of self-determination should be extended to subjugated peoples); Pomerance, supra note 140 (discussing modern international law's responses to the evolution and complexity of the question of self-determination); Klingenthal Symposium: *Peoples' Rights and Human Rights*, 7 *Hum. Rts. L.J.* 410, 410-12, 421-22 (1986) (summary of discussions of various aspects of self-determination). Various Marxist writers also support the right of secession in theory, but none has offered any specific example of when such a right might exist in a non-colonial context. See, e.g., Bokor-Szego, supra note 133, at 34-35 (discussing the right of minority groups to secede).

n172. Gros Espiell, supra note 132, para. 60 (citation omitted); see Oppenheim's *International Law*, supra note 133, at 290 n.31 ("The travaux preparatoires of the [United Nations] Charter and the subsequent practice of states suggest that the principle of self-determination is primarily applicable to colonial situations rather than to cases involving secession from a state (in which context, however, it may be noted that international law does not make civil war illegal).").

n173. See Buchheit, supra note 171, at 131-36, for a summary of the opinions of major legal commentators.

n174. One of the most cogent and consistent exponents of this view is Harry Beran. See, e.g., Harry Beran, *The Consent Theory of Political Obligation* (1987) (arguing that political obligation and authority must rest on the actual personal consent of the citizens); Harry Beran, *Self-Determination: A Philosophical Perspective*, in *Self-Determination in the Commonwealth* (W.J. Allan Macartney ed., 1988) (arguing for the formulation of a normative theory of secession); Harry Beran, *A Liberal Theory of Secession*, 32 *Pol. Stud.* 21 (1984) (discussing a moral rather than legal right of self-determination).

n175. Buchheit, *supra* note 171, at 223-24.

n176. Beran, *Self-Determination: A Philosophical Perspective*, *supra* note 174, at 28.

n177. *Id.*

n178. A similar but more nuanced moral-philosophical case for secession is set forth in a recent book by Allen Buchanan. Allen Buchanan, *Secession* (1991). Buchanan suggests that arguments for secession based on escaping discriminatory redistribution, preserving cultures, self-defense, and redressing past injustice are morally persuasive. See *id.* at 38-45, 52-64, 64-67, 67-70. However, he concedes that "any proposal for a general set of substantive and nontrivial criteria for picking out all and only those groups to which a right to secede can properly be ascribed is doomed to failure," because there are simply too many possibilities to consider. *Id.* at 142. Nevertheless, he does offer some thoughtful arguments in favor of adding various minority protections to domestic constitutions, including the right of group veto and the power to nullify certain categories of legislation, in addition to the right of secession. See *id.* at 127-49.

n179. Benjamin Neuberger, *National Self-Determination in Postcolonial Africa* 71 (1986).

n180. Onyeonoro Kamanu, *Secession and the Right to Self-Determination: An OAU Dilemma*, 12 *J. Mod. Afr. Stud.* 355, 359, 362 (1974).

n181. *Id.* at 361.

n182. Buchheit, *supra* note 171, at 222.

n183. *Universal Declaration*, *supra* note 43, pmb1.

n184. See, e.g., 2 *Restatement (Third) of the Foreign Relations Law of the United States* 702 (Am. Law Inst. 1987).

n185. Terence O'Brien, *Economic Support for Minority Languages*, in *The Future of Cultural Minorities* 82, 84 (Antony E. Alcock et al. eds., 1979).

n186. This observation does not imply that there may not be persuasive reasons for a central government to grant the right of secession where that option enjoys widespread support and is demonstrated non-violently. Here, on the other hand, the issue is whether secession should be sanctioned by international law, with all the related obligations (such as those concerning the use of force) which such sanctioning would imply.

n187. Buchheit, *supra* note 171, at 238.

n188. *Id.* at 225, 227.

n189. *Id.* at 231.

n190. Lung-Chu Chen, *Self-Determination as a Human Right*, in *Toward World Order and Human Dignity* 198, 210 (W. Michael Reisman & Burns H. Weston eds., 1976).

n191. A somewhat similar, but also disappointing, attempt to develop criteria for dealing with self-determination claims is Morton H. Halperin & David J. Scheffer, with Patricia L. Small, *Self-Determination in the New World Order* (1992); cf. Hurst Hannum, *Book Review*, 33 Va. J. Int'l L. 467 (1993) (finding that the pragmatic approach of *Self-Determination in the New World Order* serves only to "plant the seeds" for a new approach to self-determination. *Id.* at 471).

n192. Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 *Yale J. Int'l L.* 177 (1991).

n193. *Id.* at 198-99.

n194. *Id.* at 199-201.

n195. *Id.* at 178 n.5.

n196. *Id.* at 202.

n197. Of course, a seceding entity could choose integration with a neighboring state or some other status instead of full independence, but the option of independence must logically be available when secession occurs.

n198. Brownlie, *supra* note 132, at 92; see also Crawford, *supra* note 133, at 23 ("Recognition is increasingly intended and taken as an act, if not of political approval, at least of political accommodation."); Jankovic, *supra* note 133, at 100 ("Recognition is basically a political act."); Restatement, *supra* note 184, 202 reporters' note 2 ("The grant or denial of formal recognition is a political act within the discretion of governments."); Joseph M. Sweeney et al., *Cases and Materials on the International Legal System* 894 (3d ed. 1988) ("Recognition is a political act, taken by a government of a state in reference to the existence of an entity as a state or a regime as a government.").

n199. Craig Baxter, *Bangladesh: A New Nation in an Old Setting* 97 (1984). Only Soviet vetoes prevented Security Council action. *Id.*

n200. See Neuberger, *supra* note 179, at 78-81.

n201. Heraclides, *supra* note 68, at 95, 103. Another source cites only Tanzania and Gabon as having "officially" recognized Biafra's independence. Edmund Jan Osmanczyk, *The Encyclopedia of the United Nations and International Agreements* 96 (2d ed. 1990).

n202. See Georges Abi-Saab, *The United Nations Operation in the Congo, 1960-1964* (1978).

n203. No state recognized the independence of Latvia, Lithuania, or Estonia until after the August 1991 coup attempt in the Soviet Union and after their independence had been recognized by the Russian Republic. The Soviet Union formally recognized the independence of the three states on Sept. 6, 1991. See Henry Kamm, *Yeltsin, Repaying a Favor, Formally Recognizes Estonian and Latvian Independence*, *N.Y. Times*, Aug. 25, 1991, at A17; Henry Kamm, *Soviets' Rush Toward Disunion Spreads; Europe Embracing Baltic Independence: 3 Nordic Lands Act*, *N.Y. Times*,

Aug. 26, 1991, at A1; Serge Schemann, Soviets Recognize Baltic Independence, Ending 51-Year Occupation of 3 Nations: New Council Meets, N.Y. Times, Sept. 7, 1991, at A1.

n204. Zaim M. Necatigil, *The Cyprus Question and the Turkish Position in International Law* 190 (1989).

n205. See Bereket Habte Selassie, *Eritrea and the United Nations and Other Essays* 73-97 (1989).

n206. This was the case with respect to the South African bantustans.

n207. See generally Hurst Hannum, *Self-Determination, Yugoslavia, and Europe: Old Wine in New Bottles?*, 3 *Transnat'l L. & Contemp. Probs.* 57 (1993) (criticizing the European response to the Yugoslav crisis).

n208. A useful chronology of EC, CSCE, and U.N. actions concerning Yugoslavia may be found in Weller, *supra* note 162.

n209. David Binder, *Some Western Nations Split Off on Yugoslavia*, N.Y. Times, July 3, 1991, at A6.

n210. Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union, adopted by the Council of the European Community on Dec. 16, 1991, reprinted in 31 *I.L.M.* 1486.

n211. Weller, *supra* note 162, at 588.

n212. Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union, *supra* note 210, at 1487.

n213. The EC's decision to suspend trade relations with Yugoslavia was explicitly based on a finding that "the Yugoslav Federal Republic no longer functions and the Federation itself, since 8 October [1991], has been in the process of dissolution." Weller, *supra* note 162, at 582-83 (quoting Decision relative a la suspension de l'application des accords entre la Communaute europeenne, ses Etats membres et la Yougoslavie (1991)). An identical conclusion was reached by the Conference on Yugoslavia Arbitration Commission, *supra* note 161.

n214. Conference on Yugoslavia Arbitration Commission, Opinion No. 2, Jan. 11, 1992, reprinted in 31 *I.L.M.* 1497, 1498.

n215. *Id.* at 1498, 1499.

n216. *Id.* at 1498.

n217. *Id.*

n218. Conference on Yugoslavia Arbitration Commission, Opinion No. 3, Jan. 11, 1992, reprinted in 31 *I.L.M.* 1499, 1500.

- n219. *Id.* at 1500 (quoting *Frontier Dispute (Burkina Faso v. Mali)*, 1986 I.C.J. 554, 565 (Dec. 22)).
- n220. *Frontier Dispute (Burkina Faso v. Mali)*, 1986 I.C.J. 554, 565 (Dec. 22).
- n221. *Id.* at 557 (emphasis added) (quoting the Special Agreement of Sept. 16, 1983, between Upper Volta and Mali).
- n222. *Id.* at 565.
- n223. Roland Bieber, *European Community Recognition of Eastern European States: A New Perspective for International Law?*, 86 *Proc. Am. Soc'y Int'l L.* 374, 377 (1992).
- n224. This observation relates only to the period that preceded the outbreak of hostilities. The war crimes and crimes against humanity reportedly committed at least by Serbian and Croatian forces cannot be cited in an *ex post facto* manner to justify the earlier secessions.
- n225. This is very different from the nearly universal acceptance of *uti possidetis juris*, in post-colonial Latin America and Africa, as essential to assure even minimal stability.
- n226. Eisuke Suzuki, *Self-Determination and World Public Order: Community Response to Territorial Separation*, 16 *Va. J. Int'l L.* 779, 861 (1976).
- n227. Conor C. O'Brien, *Preface to 1 World Minorities* at xv (Georgina Ashworth ed., 1977).
- n228. See, e.g., John Carey, *U.N. Protection of Civil and Political Rights* (1970); Center for the Study of Human Rights, *Human Rights: A Topical Bibliography* (1983); Guide to International Human Rights Practice (Hurst Hannum ed., 2d ed. 1992) [hereinafter Hannum, *Guide*]; *The International Bill of Rights, The Covenant on Civil and Political Rights* (Louis Henkin ed., 1981); Richard B. Lillich, *International Human Rights: Problems of Law, Policy, and Practice* (2d ed. 1991); Frank C. Newman & David Weissbrodt, *International Human Rights* (1990); Paul Sieghart, *The International Law of Human Rights* (1983); Sohn & Buergenthal, *supra* note 24.
- n229. Universal Declaration, *supra* note 43, art. 21.
- n230. ICCPR, *supra* note 70, art. 25.
- n231. *Id.* art. 19, paras. 1-2, art. 21.
- n232. Conference on Security and Co-Operation in Europe: Final Act, *supra* note 122, art. VII.
- n233. Conference on Security and Co-Operation in Europe: Document of the Copenhagen Meeting of the Conference on the Human Dimension (June 29, 1990), reprinted in 29 *I.L.M.* 1305, 1308, 1309.
- n234. See Hannum, *Guide*, *supra* note 228.

n235. UNESCO, *Human Rights: Major International Instruments* 20, 25, 31 (n.d.) (status as of Mar. 31, 1993).

n236. For a detailed examination of some of the ramifications of the right to participate in government, see Gregory H. Fox, *The Right to Political Participation in International Law*, 17 *Yale J. Int'l L.* 539 (1992); Henry Steiner, *Political Participation as a Human Right*, 1 *Harv. Hum. Rts. Y.B.* 77 (1988).

n237. *Popular Participation in Its Various Forms as an Important Factor in Development and in the Full Realization of Human Rights*, Study by the Secretary-General, at 36, 18, U.N. Doc. E/CN.4/1985/10 (1984) (citation omitted).

n238. ICCPR, *supra* note 70, art. 27.

n239. However, the Human Rights Committee recently gave a fairly expansive reading to article 27, stating that it applies to all persons within a state's jurisdiction (even migrant workers and visitors) and stressing that it requires positive measures by states to ensure that the rights recognized therein are guaranteed in practice. See Human Rights Committee, *General Comment No. 23(50)*, *supra* note 121, paras. 5.2, 6.1. "Positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practice their religion, in community with the other members of the group." *Id.* para. 6.2.

n240. See Hurst Hannum, *Contemporary Developments in the International Protection of the Rights of Minorities*, 66 *Notre Dame L. Rev.* 1431 (1991).

n241. G.A. Res. 47/135, U.N. GAOR, 47th Sess., Supp. No. 49, at 210, U.N. Doc. A/47/49 (1992).

n242. See *supra* note 233.

n243. See U.S. Commission on Security and Cooperation in Europe, *CSCE Helsinki Document 1992, The Challenges of Change* 24, 31 (1992).

n244. *European Charter for Regional or Minority Languages*, opened for signature Oct. 2, 1992, reprinted in *Documents on Autonomy and Minority Rights* 86-101 (Hurst Hannum ed., 1993) [hereinafter *Hannum, Documents*].

n245. *Proposal for a European Convention for the Protection of Minorities*, adopted Feb. 8, 1991, reprinted in *Hannum, Documents*, *supra* note 244, at 66-77.

n246. See *Report of the Working Group on Indigenous Populations on Its Eleventh Session*, U.N. ESCOR, *Comm'n on Hum. Rts.*, 45th Sess., Agenda Item 14, Annex I, U.N. Doc. E/CN.4/Sub.2/1993/29 (1993) (Draft Declaration as Agreed upon by the Members of the Working Group).

n247. S. James Anaya, *The Capacity of International Law to Advance Ethnic or Nationality Rights Claims*, 75 *Iowa L. Rev.* 837, 842 (1990).

n248. Chuck Sudetic, *Conflict in Yugoslavia; Amateur Soldiers Enjoy Respite of a Fragile Truce*, *N.Y. Times*, July 5, 1991, at A6.

n249. Anaya, *supra* note 247, at 842.

n250. See Hannum, *Autonomy*, *supra* note 131, at 123-448 (discussing a variety of autonomous arrangements).

n251. This was the case with Southern Rhodesia. See S.C. Res. 277, U.N. SCOR, 25th Sess., U.N. Doc. S/INF/25 (1970). Also, in a remarkable resolution adopted on June 23, 1979, the General Assembly of the Organization of American States called for the "immediate and definitive replacement of the Somoza regime" and "installation in Nicaraguan territory of a democratic government ... which reflects the free will of the people of Nicaragua." Hannum, *Autonomy*, *supra* note 131, at 470 n.1226 (citing OAS Resolution of June 23, 1979).

n252. See S.C. Res. 751, U.N. SCOR, 47th Sess., 3069th mtg., U.N. Doc. S/RES/751 (1992) (authorizing humanitarian intervention in Somalia).

n253. Unless a majority of the population within a state is denied the right to participate in the political process by a racist or foreign regime.

n254. Hannum, *Autonomy*, *supra* note 131, at 473.

n255. Of course, the right of external self-determination and the principle of the sovereign equality of states retain their importance in ensuring that states are free from illegitimate foreign pressures or influence. The international response to the 1990 Iraqi invasion of Kuwait, while obviously guided in large part by geopolitical concerns, nevertheless also reinforced these traditional components of the right of self-determination.