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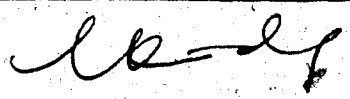

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SELF-DETERMINATION AND THE UNITED NATIONS

by

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A THESIS

SUBMITTED TO THE FACULTY OF GRADUATE STUDIES AND RESEARCH

IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE

OF MASTER OF ARTS

DEPARTMENT OF POLITICAL SCIENCE

EDMONTON, ALBERTA

FALL, 1980

THE UNIVERSITY OF ALBERTA

FACULTY OF GRADUATE STUDIES AND RESEARCH

The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies and Research, for acceptance, a thesis entitled "Self-Determination and the United Nations"

submitted by Lawrence Kaida

in partial fulfilment of the requirements for the degree of Master of Arts

Supervisor

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ABSTRACT

The major purpose of this study is to investigate the meaning and scope of the principle of self-determination as manifested by the practices of states within the context of the United Nations. The approach adopted is an inductive one that seeks to derive the meaning and scope of the principle from several sources, in particular the practice of states; resolutions and decisions of the General Assembly and Security Council; decisions of the International Court of Justice; and writings of authoritative publicists.

The thesis is divided into six Chapters. Chapter I provides an overview of the problem and develops a rationale for the study. Chapter II provides the historical background of the principle of self-determination. Chapter III deals with the practices of selected states and that of the United Nations and tries to evaluate the consistency of such practices in matters relating to self-determination. Chapter IV addresses the issue of secession and its relationship to self-determination. Chapter V surveys juristic and other legal literature in an attempt to determine whether the principle has emerged as a legally binding norm under international law. Finally, the conclusion attempts a definition of the principle, examines its present status in international relations and attempts to predict its future.

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CHAPTER I

INTRODUCTION

The Problem of Definition

The term self-determination is used more frequently and with more passion than most other terms in contemporary international relations. During the last two decades, an enormous amount of literature has been produced on the subject and at least two international judgements have made specific reference to a "right of self-determination."[1]

In addition to the emotions generated by the term itself, its meaning as a word and the meanings of words associated with it are so varied that passion is confounded by semantic confusion. In order to minimize the confusion for this thesis, the following words will have the meanings indicated. Nationality will be used not in the legalistic sense as an equivalent of citizenship, but rather to indicate any group of people who hold shared cultural and social values -- rather than speaking about cultural, ethnic, religious and linguistic homogeneity, the word nationality will be used synonymously with all these. Because some nationalities (in this sense) transcend artificial geographic boundaries, it is not intended that the nationalities should be confined to a specific territorial jurisdiction. The word nation will refer to a group or groups of people who share common sentiments toward their political existence. Nationalism will be used to describe that sense of identification with a particular state (an existing or future state) whether or not it arises from one nationality. To illustrate, there

will be occasion to speak of Canadian nationalism though there are several identifiable nationalities in Canada. On the other hand, we can speak of Somalia nationalism where the nationalism is essentially a result of one nationality.[2]

The claim to a right of self-determination first became important in the 20th century, as the plea of the oppressed nationalities of Eastern and Central Europe for independence. Later in the century, it became the battle-cry of many colonial peoples who were struggling for independence from colonial domination. More recently, self-determination has become the claimed right of many groups of people all over the world, and in such diverse circumstances as Quebec, Northern Ireland, Kashmir and Eritrea. In addition, liberation movements such as the Palestinian Liberation Organization (PLO), South-West Africa Peoples' Organization (SWAPO) and Polisario have equated their struggles for independence with what they consider to be their right of self-determination. In all these cases, the motivation for independence is considered by these groups to be the oppressive nature of the state to which they belong.

Yet in spite of, or perhaps because of, its great significance, self-determination has the doubtful distinction of being one of the most confused and controversial expressions in the lexicon of international relations. Many of the writers who have addressed themselves to this subject have striven to answer basically the same questions. What is the meaning and scope of self-determination? Is it a legal right or mere political jargon? If a legal right, who is entitled to it and in what manner?

Since the period of World War II the principle has gained wide currency in international relations, and a vast amount of literature has emerged that attempts to answer these questions in order to remove some of the confusion surrounding the usage of the term. Unfortunately, most of this literature is constrained by a rather serious methodological problem. With a few exceptions, writers begin their analyses already equipped with their own definitions of the principle of self-determination which are not derived from the practices of states, but deduced a priori from political doctrines.[3] In other words, many writers concern themselves with what self-determination ought to be, rather than what it actually is.[4] As a result, they have only added confusion to the meaning and scope of self-determination so that it has become progressively difficult for anyone to handle effectively claims and counter-claims for a right of self-determination, especially when such claims are being raised within states.

Nor is it wise to suggest that because of its complexity and divisive nature, the term be dropped altogether from the vocabulary of international relations and international law. While it is true that the era of colonialism is coming to an end, it is also true that with the increasing number of plural states, (states with more than one nationality), the incidence of separatism based on the principle of self-determination is also on the increase.[5] Hence it is necessary to establish generally acceptable rules and criteria for a right of self-determination because, while a clear definition of the principle in itself does not solve conflicts, it may be asserted that persistence of confusion of terms considerably lowers the expectation of unambiguous

application of the principle and tends to inhibit inclinations of parties to submit to peaceful settlement.[6] This definition can be derived only from the practices of states for the simple reason that states are generally prepared to be bound by that to which they have accorded acceptance, implicitly or explicitly. It would be misleading to insist on a definition, logical or doctrinal as it might be, that would be inconsistent with such practices.

The Problem for Study

The main purpose of this study is to investigate the meaning and scope of the principle of self-determination as manifested by the practices of states within the context of the United Nations (U.N.). To do this, the following pertinent sub-problems will be addressed. What is the meaning and scope of self-determination as it has evolved historically? What does the principle mean in the context of the U.N.? Are the practices of states consistent with that of the U.N.? What is the relationship between the principles of self-determination and secession and how does the U.N. deal with claims for secession without contradicting some of its cardinal principles, for example those committed to the preservation of the territorial integrity of states?[7] Finally, in the light of answers to these questions, to what extent may the principle be said to have emerged as an internationally binding rule?

The approach adopted in this study is an inductive one that seeks to derive the meaning and scope of self-determination from various sources. Therefore, no propositions or a priori conclusions regarding

the definition of the principle will be provided at this stage of the thesis. An attempt will be made in the following Chapters to isolate and discuss the various meanings of the principle as it has evolved historically.

Evidence for state practice may be found from an analysis of individual acts of states. However, this would be an enormous task and certainly beyond the scope of this thesis. Instead, the U.N. General Assembly -- possibly the "greatest concentration of diplomatic activity in today's world"[8] -- will be the major source for this evidence. While this narrow focus does not allow for an exhaustive comparison of statements made at the U.N. with actual practices of individual states, an attempt will be made to examine the actual practices of a few selected states, outside the U.N. purview, on matters related to self-determination.

Reference will be made throughout this study to "U.N. practice". Obviously, the U.N. does not have its own practice that is separate from, and independent of, the practices of its individual member states. Hence, "U.N. practice" will refer to resolutions, especially those of a general nature which purport to apply to all relevant situations, and recommendations, usually passed by a substantial majority of the member states, and decisions of the Security Council. The relevance of such practice lies in the fact that this may provide evidence of the requisite international practice that is essential for determining the meaning and scope of self-determination. In so far as the U.N. reflects the views and practices of its member states, U.N. practice may be seen to represent a substantial portion of international practice.

Organization of the Thesis

The thesis is divided into six Chapters. This Introduction provides an overview of the problem and develops a rationale for the study. Chapter II provides the historical background of the principle of self-determination and shows how the principle has changed both in meaning and emphasis from the First World War to the present time. Chapter III deals specifically with the practices of selected states and that of the U.N. and tries to evaluate the consistency of such practices in matters relating to self-determination. Chapter IV addresses the complex issue of secession and seeks to demonstrate the relevance and application of self-determination in matters that essentially threaten the stability and territorial integrity of states. The fifth Chapter surveys both juristic and other legal literature on the legality of the principle of self-determination and assesses the extent to which the principle could be deemed an internationally binding rule. Finally, the Conclusion synthesizes material provided in the preceding Chapters, attempts a definition of the principle of self-determination, examines its present status in international relations and attempts to predict its future.

FOOTNOTES

1. See especially, the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), International Court of Justice Reports (hereafter cited as ICJ Rep.), p. 16; and the Advisory Opinion on Western Sahara (1975), ICJ Rep., p. 12. For a discussion of the significance of these cases for a legal right of self-determination, see pp.102-104 below.

2. See pp. 11-12 below for an additional discussion of these words.

3. M. A. Shukri is a victim of this approach. See his The Concept of Self-Determination at the United Nations (Damascus: Al Jadidah Press, 1965).

4. W. Ofuatey Kodgoe attempts a non-doctrinaire approach in his recent book, The Principle of Self-Determination in International Law (New York: Nellen Publishing Co., 1977).

5. See Arnfina Jorgensen-Dahl, "Forces of Fragmentation in the International System: The Case of Ethno-Nationalism," Orbis 19 (1975): 652-674, for an indication of the magnitude of world secessionist threats.

6. Benjamin Rivlin, "Self-Determination and Dependent Areas," International Conciliation 501 (1955): 199-200.

7. See U.N. Charter, Articles 2(4) and 2(7).
Source: Leland M. Goodrich et al., Charter of the United Nations: Commentaries and Documents (New York: Columbia University Press, 1969), pp. 675-699. All future references to the Charter will be from this source.

8. Ofuatey-Kodgoe, p. 1.

CHAPTER II

THE HISTORY OF SELF-DETERMINATION

Pre-World War I Background

The history of self-determination goes back to the beginning of government. All oppressed people have claimed it with differing degrees of success and failure and revolutions have been waged in the name of self-determination leading to the creation and destruction of states. Political philosophers have addressed themselves, directly and indirectly, to issues related to self-determination. Thus, Machiavelli (1469-1527) advocated ruthlessness on the part of the Prince (Monarch) as a means for the attainment of power -- the people were not inherently sovereign nor did they have the ability to determine what was best for themselves. Only the Prince had the wisdom and capability to determine what the people needed. Therefore, for Machiavelli, self-determination was not a right belonging to all people. Such teaching influenced Monarchs to disregard not only the basic rights and interests of people outside their kingdoms, but also the rights of their own subjects.[1]

Like Machiavelli, Jean Bodin (1530-1596) saw sovereignty as conferring upon the king absolute and perpetual power over his subjects.[2] For both philosophers, therefore, self-determination was not an inherent right belonging to all. The exercise of basic rights was dependent upon the whims and wishes of the rulers.

The principle of self-determination did not, however, assume definitive status of a political nature in the West until the American and French Revolutions.

The American Revolution

The American colonists resented domination from across the sea, especially the imposition of taxation without representation. They invoked natural law and natural rights of man and drew inspiration from the writings of John Locke (1632-1704) who taught that political societies were based on a social contract and the consent of the people who composed them, each willingly agreeing to submit to the interests of the majority.[3] Locke also stated that upon entrance into society, individuals retain an inherent right to resist oppressive authority.[4] The ultimate decision of when sovereign power has been unlawfully exceeded, thereby justifying resistance, rests with the people themselves. Locke added, however, that this step would not be taken lightly but only in the wake of "a long train of Abuses, Prevarications, and Artifices."[5]

It was predominantly theories of Locke that influenced the thinking of Thomas Jefferson and through his hand set the tenor of the American Declaration of Independence. In considering the American Revolution as an outstanding example of the principle of self-determination, it is important to point out that Jefferson was not only concerned with overthrowing the British rule but also with ensuring that the government was democratic. Self-determination in the context of the American Revolution, therefore, had two important dimensions: removal of foreign colonial rule, and establishment of a democratic government.

Both dimensions have been used in later debates on the meaning and scope of self-determination. These dimensions will be addressed later in the Chapters dealing with decolonization, secession and human rights.

The French Revolution

The French Revolution was a rejection of the dictatorship of the political doctrine associated with Machiavelli. The raison d'être of the Revolution was that government should be based on the will of the people, not that of the Monarch. Influenced by the writings of philosophers like Montesquieu who stressed the desirability of separating the powers of government in order to prevent tyrannical rule,[6] and Rousseau who denounced inequalities in society and proposed a theory of social contract,[7] those opposed to the monarchy rejected the tyranny of the ancien régime and demanded a commensurate share in government, arguing that their rulers ought to be their agents, not their masters. The Constitution of 1789 and the Declaration of the Rights of Man and Citizen asserted these basic rights of man.[8]

Thus, both the American and French Revolutions tried to put into practice the ideas of freedom and equality. No group of people, whether outsiders (American Revolution) or from within (French Revolution) had any right to oppress others and rule them without their consent. These ideas have been invoked in various claims for self-determinaion, beginning with the claims by nationalist groups in East and Central Europe during the 19th and early 20th centuries.

Nationalism and Self-Determination During World War I

What is nationalism? Nationalism has been described as a state of mind which inspires people to assert that the nation-state is the ideal and only legitimate form of political organization.[9] With the upsurge of nationalism, the nation has become the desired foundation of the state. Inis Claude observed that nationalism has injected, into politics, "the principle that national and state boundaries should coincide -- i.e., that the state should be nationally homogeneous, and the nation should be politically united."[10]

According to the argument above, the equation of a nation and a state would be correct only when the aspirations of nationalism have been fully realized. Unlike a nation, a state is an artificial creation; the word signifies attainment of political independence by a group or groups of people who are territorially-based.[11] A nation, on the other hand represents a more natural group, bound together by certain factors over which its members have no control. These factors are not easily classifiable, since many of them, such as "a feeling of closeness" are too subjective to be distinguished clearly as a characteristic of a national group. Claude has argued convincingly that "nationality is in essence a subjective phenomenon" and adds that:

> A group of people constitute a nation when they feel that they do.... While these feelings may be related, as cause or effect, to observable characteristics of the group, there is no uniform or necessary pattern of objective factors whence national feeling is derived or in which it manifests itself.[12]

Viewing nationalism and nationality from this perspective is useful in that it avoids the pitfall of identifying national groups with

sociological variables like religion, caste, ethnicity, race and language. According to Claude's definition therefore, a nation could encompass more than one ethnic, linguistic or religious group. It is in this sense that struggles against colonialism in Africa, Asia and Latin America may be properly referred to as nationalist struggles in spite of the fact that in most cases, more than one ethnic (in some cases racial) group was involved. It is also in this sense that one can talk of the Canadian or American nationalism.

Nationalism in Eastern and Central Europe

In Eastern and Central Europe the concept of state preceded that of nationhood. Historically, the Renaissance created centralized dynastic states from which sovereign states later arose. The absolute monarchs destroyed the various feudal and local allegiances and thereby made the integration of all loyalties in one center possible. The state, as it was created, centered on the Monarch. Several national groups were placed under the jursidiction of a single Monarch. These national groups -- or national minorities as they were later described -- were easily identifiable as nations on the basis of their cultural, ethnic and linguistic homogeneity. Cobban pointed out that some of these groups, such as the Czechs, Serbs and Poles, were in fact well-organized and politically conscious and had the potential to form their own separate states.[13]

In many parts of Europe, national minorities suffered under the rule of some states. These minorities were generally considered oppressed because they were deprived of rights and privileges enjoyed by

other national groups in the same state and more often suffered actual persecution.[14]

With the growth of nationalist fervor in Europe, the oppressed minorities began organizing for the purpose of liberating themselves from what they considered alien and oppressive rule. The restlessness was felt more in Eastern and Central Europe where the majority of the oppressed minorities were situated. By the beginning of the 20th century, that whole area was "occupied, to the exclusion of almost any other subject, with an unremitting and unrelenting national strife...."[15]

Attempts by these national groups to separate themselves from their parent states and form their own independent states have been described by historians as struggles for national self-determination.[16] The minorities used the same term and by this they meant political independence. The usage of the word national seems to signify the homogeneous character of the national groups struggling for independent status. The aim of the Allied Powers after World War I with respect to the principle of self-determination, was to apply it as understood by these groups -- for the freedom of the minority groups in Eastern and Central Europe. In so doing, the Allies expected the strength and power of their (the Allies') enemies to be drastically reduced.[17]

Wilson and the Allies Versus the Central Powers

Both the Allies and the Central Powers recognized the existence of disaffected minorities within the other's territories and each sought to make whatever political and strategic use they could of this fact. Propaganda campaigns on both sides referred to the rights of small states

and oppressed minorities. The Allies spoke of "the liberation of Italians, of Slavs, of Roumanians and of Czecho-Slovaks from foreign domination; the enfranchisement of populations subject to the bloody tyranny of the Turks."[18] The Central Powers responded by reminding the Allies of their colonial possessions and of the oppression of the Irish and Finnish peoples.[19] Despite such reminders, however, the Allies did not extend the application of the principle of self-determination beyond the territories occupied by the minorities. As will be seen below, not even President Wilson had intended to apply the principle universally.

Although President Wilson is generally credited with popularization of the principle of self-determination,[20] there is doubt whether he meant it to be a universal right applicable to all minority groups. Wilson never defined the term precisely, but his views were implicit in his statement to the effect that "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."[21]

Wilson spoke of self-determination as a right of minority groups to freedom and independence. However, that was as far as his theorizing went, because he clearly stated that such a principle was to be applied only to the territory of the defeated powers, and not to be used "to inquire into ancient wrongs."[22] Wilson's famous Fourteen Points did not refer directly to the principle of self-determination, although they were meant to show how the principle could be used as an operative standard for dividing up the larger Empires of the Hapsburgs and the Ottoman Turks. The accepted boundaries of the ethnographic map of

Europe could be used, it was thought, as a basis for drawing an acceptable political map after the War. Two examples from the Fourteen Points illustrate how this was to be accomplished:

> IX. A readjustment of the frontiers of Italy should be effected along clearly recognizable lines of nationality.
>
> XIII. An independent Polish state should be erected which should include the territories inhabited by indisputably Polish populations....[23]

The other Allies were in general agreement with Wilson's approach toward self-determination. According to one writer, the Allies

> accepted self-determination only insofar as it applied to the disintegration and dissolution of the German, Austro-Hungarian, Turkish, and former Russian Empires. There was no intention of applying the principle to their own colonies and subject peoples.[24]

Buchheit summarized Wilson's contribution by stating that his (Wilson's) major intention was to avoid the potentially divisive effect of the principle of self-determination when applied universally, by restricting it to "those areas that were subject to territorial rearrangement following the defeat of the Central Powers."[25]

The Paris Peace Conference and Minority Treaties

The Paris Peace Conference of 1919 brought to the fore the difficulty of redrawing the demographic map of Europe in strict conformity with the principle of self-determination. There were two immediate obstacles. First, the European Allies had no intention of applying the principle at the expense of their own Empires.[26] Therefore, they supported Wilson in limiting the application of the principle to the

areas under dispute. The second obstacle was that as new states were formed, new minorities emerged. Indeed, the new states constituted by the peace settlement were far from embodying the strict principle of self-determination. For example, the Union of Slovaks and the Czechs represented an aspiration towards national identity, rather than a fact. In the same state, the Ruthenes "were treated practically as a colonial population."[27] In Poland, a large number of Ukrainians and White Russians were included in the state, regardless of their wishes. The New Roumania included millions of Magyars and a large body of Saxon Germans and other non-Roumanian elements.[28] Wilson was aware of this failure to achieve a replanning of the political map of Europe on the lines of the principle of self-determination, but he hoped that the League of Nations would provide machinery to continue the process.

Minority Treaties. The Peace Treaties did not solve the problem of minorities. As indicated above, the new states that were created did not have homogeneous populations, contrary to the expectations of those advocating a strict application of self-determination. Minorities within the new states were not satisfied with the new arrangements and, therefore, the nationalist strife continued. It has been estimated, for example, that roughly 25-30 million people were left in minority groups within the European states.[29] Czechoslovakia, a state supposedly produced by the principle of self-determination, had minorities amounting to 34.7 percent of its population; Poland, 30.4 percent, and Roumania 25 percent.[30] And so as it turned out, the newly liberated states became oppressors of minorities under their control.[31]

The danger of leaving large minorities at the mercy of states was not unforeseen, and the Peace Conference had endeavoured to guard against it by means of Minority Treaties. In one way or another, every one of the new states undertook, compulsorily or voluntarily, to guarantee certain basic rights of their minorities. Those whose rights were to be guaranteed were designated as "persons belonging to racial, religious or linguistic minorities."[32]

Under the League system, minority rights fell into two categories. In the first, members of all nationalities (including minorities) were entitled to full rights of citizenship, including rights of life, liberty, religious freedom and complete equality of all citizens, with respect to civil, legal and political matters.[33] The second category extended specific protection to minority groups. For example, members of such groups were guaranteed the right to free use of their language in a variety of situations, including before the courts and in their own charitable, educational, religious and social institutions.[34] In addition, children of minority groups were to be instructed in their own language in areas where they formed a considerable proportion of the population.[35]

The Treaty system was designed to prevent possible discrimination against the minorities and also to provide the opportunity for the minorities to enhance their own cultural consciousness.[36] The guarantees met with much opposition from the new states. Although they did not deny the importance of non-discrimination against minorities, they insisted that emphasis on cultural autonomy did not augur well for the stability of these states and that there was a risk of separatism which

posed a threat to the process of assimilating the minorities into the new states.[37]

What was significant about the Treaties, however, was that they demonstrated that the principle of self-determination was shifting its emphasis from insistence on outright independence for the national minorities, to acknowledgement that guaranteed protection of minority rights could fulfill a similar purpose. As early as 1920, the Committee of Jurists appointed to handle the Aaland Islands Case had ruled out the possibility of minority groups separating themselves from the states of which they formed a part.[38]

As a method of securing respect for the rights of minorities, the Minority Treaties had some severe limitations. First, only those states which signed the treaties were under any obligation for the protection of racial, linguistic or national minorities within their borders.[39] Even then, this obligation was vague since there were no expressed provisions for enforcement of the Treaty provisions. With regard to other states, the League could only hope for the universal protection of minorities. The Assembly of the League did this, for example, by a Resolution in 1922:

> The Assembly expressed the hope that the States which are not bound by any legal obligation to the League with respect to Minorities will nevertheless observe in the treatment of their own racial, religious or linguistic minorities at least as high a standard of justice and toleration as is required by any of the Treaties and by the regular action of the Council.[40]

In addition, even the signatory states were bound only within the terms of the Treaties.

What is important to note here is the League's approach in attempting to safeguard minority rights without providing outright recognition for a right to national independence. In many respects, this was a great disappointment to minorities that had staked their hopes on the principle of self-determination. Not only were the minorities now denied autonomy, but in return for the minimal protection provided by the Treaties, they were required to be loyal to whoever was governing them. The Assembly of the League reaffirmed this obligation in 1922, saying:

> While the Assembly recognizes the primary right of Minorities to be protected by the League from oppression, it also emphasizes the duty incumbent upon persons belonging to racial, religious or linguistic minorities to co-operate as loyal fellow-citizens with the nations to which they now belong.[41]

The League obviously hoped that such a process would suppress, in the future, those conditions that gave rise to minority grievances which could legitimize a claim to self-determination. Once this decision was taken, the League had to reject self-determination and particularly secessionist self-determination as a further remedy for minority groups. In fact, the League had already hinted at this in its Covenant, with its guarantee of territorial integrity.[42]

The Aaland Islands Case

One year after the Paris Peace Conference, the League made a formal statement of its understanding of the status of secession within the framework of self-determination and minority rights. Representatives of the Aaland Islands, technically under Finland's jurisdiction, had made

a request at the Paris Peace Conference for annexation to Sweden. This request was based "on the ground of the right of peoples to self-determination as enunciated by President Wilson." The Swedes proposed that the Islanders be given a chance to express their choice by a plebiscite, but the Finns maintained that such an action would constitute interference with their domestic jurisdiction.[43] An International Commission of Jurists was entrusted by the League Council with the task of giving an Advisory Opinion on the legal aspects of the Aaland Islands dispute. That Opinion began by pointing out that the principle of self-determination, despite its significance in modern political thought, was not mentioned in the Covenant of the League. Moreover, the Commission was of the opinion that the principle had not yet (1920) attained the status of a positive rule of international law, although it had been mentioned in a number of international treaties.

> On the contrary, in the absence of express provisions in international treaties, the right of disposing of national territory is essentially an attribute of the sovereignty of every State. Positive International Law does not recognize the right of national groups, as such, to separate themselves from the State of which they form part by the single expression of a wish, any more than it recognizes the right of other States to claim such a separation.[44]

In a later report to the Council of the League of Nations on the Aaland Islands dispute, a Commission of Rapporteurs was even more explicit in its rejection of a legal right to separatist self-determination.

> 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 entity.[45]

In conclusion, the League's decision to employ international guarantees of minority rights, which was a "strict and logical corollary"[46] of the inability of the Wilsonian principle of national self-determination to overcome obstacles of both a cartographic and political nature, coupled with the opinion on the Aaland Islands dispute, demonstrated the reluctance of the world community to accept separatism as a method for vindicating minority rights. Moreover, it was accepted that protection of minority rights was largely dependent on the goodwill of the state concerned. In the final analysis, the sovereignty of a state and preservation of its territorial integrity were more important considerations than provisions for minority rights. The effect of this on the principle of self-determination was that nationalities -- as understood in the Eastern and Central Europe context -- were not entitled to self-determination as of right, if by self-determination it was meant the right to independent statehood. As we will see in a later Chapter, contemporary state practices both within and outside the United Nations seem to follow closely this position in matters related to claims and counter-claims for self-determination within states.

The League and the Mandates System

Another problem that faced the Allied Powers after the War was what to do with colonies that were detached from the defeated enemies. In the first place, the question of delineating the boundaries of these colonies did not arise because the question of boundaries was not at issue.

A second pertinent difficulty was that granting independence to the peoples in the colonies, formerly governed by the defeated Central Powers, seemed unfeasible because, in the view of the Allied Powers, the inhabitants of these territories were incapable of governing themselves.[47] One way to deal with this problem was annexation by the Allies.[48] Wilson, however, insisted that this dilemma did not absolve the Allies from their moral and political responsibility to effect a general application of self-determination. A way had to be worked out to dispose of these territories in accordance with the basic requirements of self-determination. In the words of Wilson, " some institutions must be found to carry out the ideas all had in mind, namely, the development of the country for the benefit of those already in it, and for the advantage of those who will live there later...."[49] The Mandates System was initially established for the purposes of settling a territorial question regarding overseas territories formerly governed by the Central Powers. Wilson's attempts to expand the scope of self-determination to include all oppressed people was impractical and unacceptable to the other Allies. However, it would seem that Article 22 of the Covenant did bear the seeds for the future independence of these colonies.

An analysis of Article 22 of the League Covenant provides some insight regarding the future of the Mandates. According to this Article, the Mandates System applied to some specified "colonies and territories ... which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world," and its purpose was to secure "the well-being and development of such peoples" by placing them under the tutelage of more advanced nations acting as

Mandatories on behalf of the League of Nations (Appendix A). Although self-determination was not specifically included in this Article, it would seem, looking back into the political evolution of these territories and the roles played by various mandatory powers, that the Mandates System had the intent of leading or preparing the territories for independence, and, therefore, for the attainment of self-determination as perceived by Wilson. Quincy Wright has expressed this point thus:

> Article 22, however, seeks not so much to define a status as to guide an evolution. It attempts not merely to provide for the transfer of the territories and for the government of their inhabitants, but for the evolution in them of communities eventually capable of self-determination.[50]

The Mandates System also tacitly rejected any reference to or possibility of annexation of the mandated territories. This issue of annexation has become relevant during the U.N. period especially with regard to South Africa's occupation of Namibia. International lawyers and jurists of the International Court of Justice (ICJ) agreed that no mandatory state could unilaterally annex any of the mandates.[51] In its Advisory Opinion on South West Africa (1950), the ICJ found that the "competence to determine and modify the international status of South West Africa rests with the Union of South Africa acting with the consent of the U.N."[52] The 1966 Judgement also recognized that the intention of the Paris Peace Conference excluded annexation.

> As is well known, the mandates system originated in the decision taken at the Peace Conference following upon the world war of 1914-1918, that the colonial territories over which, by Article 119 of the Treaty of Versailles, Germany renounced "all her rights and titles" in favour of the then Principal Allied and Associated Powers, should

> not be annexed by those Powers or by any country affiliated to them, but should be placed under an international regime, in the application to the peoples of those territories, deemed "not yet able to stand by themselves," of the principle, declared by Article 22 of the League Covenant, that their "well being and development" should form "a sacred trust of civilization".[53]

The Court once again addressed itself to the question of mandates in its Advisory Opinion of 1971.[54] In this Opinion, the Court reviewed its previous decisions on Namibia and confirmed that the Mandates Agreement disallowed annexation, and emphasized that the principle of the well-being and development of peoples living in mandated territories formed "a sacred trust of civilization."[55]

The evidence above suggests that although the principle of self-determination, defined in Wilsonian's terms as the right of oppressed nationalities to independence, was not explicitly written into the League's Covenant, certain facets of it may have been implied in Article 22 of the Covenant and in the subsequent practice of the Mandatories. It would seem, in retrospect, that an important objective of the Mandates System was to steer the mandated territories into independence or associated status. It is important to note that only in the case of Namibia has the mandatory (South Africa) seriously questioned the intent of the Mandates System with regard to the future of the territories. There has been a gradual acceptance of this implied principle of self-determination by the U.N. which has endorsed the right of self-determination for the people of Namibia.[56] There is some evidence, therefore, which suggests that the principle of self-determination may have been one of the goals of the Mandates System.

Conclusion

A survey of the historical evolution of the principle of self-determination indicates that in its early stages, such as during the American and French Revolutions, self-determination was used synonymously with freedom and democracy. In the case of the American Revolution, the principle was actually invoked as a revolutionary slogan. During and after World War I, when it gained more popularity as a result of efforts by Wilson and others, it seemed that the principle was being used by the oppressed nationalities in a manner that endorsed a right of secession. However, when the real test of the application of the principle confronted the Allies, any inferences regarding a right of secession by minority groups was rejected. Instead, an elaborate system of Minority Treaties was adopted, with provisions for the protection of minority groups. Finally, the Mandates System of the League of Nations, especially Article 22 of the Covenant, provides some additional meaning as to the scope of self-determination. Although no precise definition has emerged through this period, it would appear that independence for oppressed peoples was consistent with the implied goals of the principle of self-determination.[57] The U.N. has attempted to define the principle in relatively more concise terms. The next Chapter addresses this problem.

FOOTNOTES

1. Niccolo Machiavelli, The Prince, trans. R. M. Adams (New York: Norton, 1977).

2. Jean Bodin, Six Books of the Commonwealth, trans. M. J. Tooley (Oxford: Basil Blackwell, 1955).

3. John Locke, Two Treatises of Government, ed. P. Laslett (Cambridge, England: Cambridge University Press, 1960).

4. Ibid., p. 135.

5. Ibid., p. 225. For a discussion of Locke's thoughts on the right of rebellion, see generally, John M. Dunn, The Political Thought of John Locke: An Historical Account of the Argument of the "Two Treatises of Government" (Cambridge, England: Cambridge University Press, 1969), pp. 165-186.

6. C. L. Montesquieu, The Political Theory of Montesquieu, trans. M. Richter (Cambridge, New York: Cambridge University Press, 1977).

7. J. J. Rousseau, The Social Contract and Discourses, trans. A. D. H. Cole (London: Dent, 1966).

8. See M. J. Sydenham, The French Revolution (London: Oxford University Press, 1965).

9. Hans Kohn, Nationalism: Its Meaning and History (Princeton: N.J.: D. Van Nostrand, 1955), p. 10.

10. Inis L. Claude, Jr., National Minorities: An International Problem (Cambridge: Harvard University Press, 1955), p. 1.

11. A legal definition of state, provided by J. L. Brierly, in The Law of Nations, 5th ed. (Oxford: Clarendon Press, 1955), p. 129, includes four criteria: defined territory, permanent population, effective government and independence.

12. Claude, p. 2.

13. Alfred Cobban, National Self-Determination, revised ed. (Chicago: University of Chicago Press, 1951), pp. 22-23.

14. W. Ofuatey-Kodgoe, The Principle of Self-Determination in International Law (New York: Nellen Publishing Co., 1977), p. 69. According to Johnson, "a minority whose national aspirations conflict with those of the majority and the state which they represent and control is a national minority." Harold S. Johnson,

Self-Determination Within the Community of Nations (Leyden: A. W. Sijthoff, 1967), p. 24.

15. C. A. MacCartney, National States and National Minorities (London: Oxford University Press, 1934), p. 152.

16. See for example, Cobban, and MacCartney.

17. Cobban, p. 54.

18. James B. Scott, ed., Official Statements of War Aims and Peace Proposals: Dec, 1916 to Nov. 1918 (Washington: Carnegie Endowment for International Peace, 1921), p. 37.

19. Ibid., pp. 42-44.

20. Cobban, p. 12; Rupert Emerson, From Empire to Nation: The Rise to Self-assertion of African and Asian people (Cambridge: Harvard University Press, 1960), p. 295; Sarah Wambaugh, Plebiscites Since the World War, vol. 1 (Washington: Carnegie Endowment for International Peace, 1933), p. 69.

21. Ray S. Baker and W. E. Dodd, eds., The Public Papers of Woodrow Wilson: War and Peace, vol. 1 (New York: Harper and Row, 1927), p. 180.

22. Quoted in H. W. V. Temperly, ed., A History of the Peace Conference of Paris, vol. 4 (London: Oxford University Press, 1921), p. 433.

23. Wilson's Fourteen Points may be found in Baker and Dodd, pp. 159-161.

24. Robert A. Friedlander, "Self-Determination: A Legal-Political Inquiry," Detroit College of Law Review, no. 1 (1975/76): 71.

25. Lee C. Buchheit, Secession: The Legitimacy of Self-Determination (New Haven, Conn.: Yale University Press, 1978), pp. 63-64.

26. Cobban, p. 19.

27. Ibid., p. 27.

28. Ibid.

29. Claude, p. 13.

30. Cobban, p. 35.

31. Ibid., p. 36.

32. A listing of Minorities put under Treaty protection is listed in MacCartney, pp. 510-542. See also Article 8 of the Polish Minorities Treaty in Temperley, vol. X, pp. 437-442.

33. See for example, Treaty with Poland, Article 2, in Temperley, vol. X. The text of this treaty can also be found in The Treaties of Peace, 1919-1923, 2 vols. (New York: Carnegie Endowment for International Peace, 1924), p. 235.

34. Article 7 and 8, The Treaties of Peace, p. 236.

35. Article 9, Ibid., p. 237.

36. Claude, p. 32.

37. Ibid., pp. 32-33.

38. For a full account of the Aaland Islands Case, see The League of Nations Official Journal (hereafter cited as LNOJ), no. 3, Oct. 1920. For a legal discussion of the case, see Norman J. Padelford and Qosta A. Anderson, "The Aaland Islands Question," American Journal of International Law (hereafter cited as AJIL) 33 (1939): 465-487. See also pp. 19-21 below for a brief discussion of the Case.

39. MacCartney, pp. 286-94.
Each Minority treaty required that the provisions be made part of the fundamental law of the state. In case of alleged violation, a procedure was provided by which an appeal could be made to the League Council which was made responsible for seeing that rights conferred were respected. See P. de Azcarate, The League of Nations and National Minorities: An Experiment (Washington: Carnegie Endowment for International Peace, 1945).

40. LNOJ, Special Supplement 9 (1922): 35.

41. Ibid.

42. League Covenant, Article 10. The Covenant may be found in Woodrow Wilson's Case for the League of Nations, compiled by H. Foley (New York: Kennikat Press, 1967), Appendix F, pp. 250-271.

43. For a documentary history of the dispute, see LNOJ, Special Supplement 1, (1920).

44. LNOJ, Special Supplement 3 (1920: 5.

45. The Aaland Islands Question. Report submitted to the Council of the League of Nations by the Commission of Rapporteurs. League Document B. 7. 21/68/106 (1921).

46. Josef L. Kunz, "The Present Status of the International Law for the Protection of Minorities," AJIL 48 (1954): 282.

47. Quincy Wright, Mandates Under the League of Nations (Chicago: University of Chicago Press, 1930), p. 27.

48. Ibid.

49. Excerpt from Wilson's Jan. 27, 1919 speech to the Council of Ten, quoted in Ibid., p. 35.

50. Ibid., p. 499.

51. See Norman Bentwich, The Mandates System (London: Oxford University Press, 1930), p. 4; and Duncan H. Hall, Mandates, Dependencies and Trusteeship (London: Stevens and Sons, 1948), p. 81.

52. ICJ Rep. 1950, p. 143.

53. ICJ Rep. 1966, p. 24.

54. See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970). ICJ Rep., 1971, p. 16. For an additional discussion of this case, see pp. 102-104 below.

55. ICJ Rep., 1971, p. 31.

56. See pp. 44-47 below.

57. The words oppressed and oppression are used in a subjective sense -- i.e., they refer to the feelings of subject peoples toward their rulers.

CHAPTER III

THE UNITED NATIONS, SELF-DETERMINATION AND DECOLONIZATION

Background

The era of the League of Nations dawned with two important accomplishments by the Allied Powers. The first was the establishment of an elaborate system of Minority Treaties designed to safeguard the rights of minority groups within newly formed states in Eastern and Central Europe. The second was the establishment of the Mandates System for the purpose of settling a territorial question regarding the future of the overseas territories of the defeated Germans and Turks. With the collapse of the League of Nations in 1939, two main problems arose. The first concerned the future of the Mandates System; the second, and for many a related problem, was concern with the future of colonies. From its creation in 1945, the U.N. has had to deal with these problems within a general context of self-determination.[1] This Chapter will investigate attempts by the U.N. to arrive at some definition of the principle of self-determination. It will also examine the practice of selected states in an attempt to compare the meanings attributed to the principle by the U.N. on the one hand, and by individual states on the other.

The Search for a Meaning of Self-Determination

One way of examining the meaning of self-determination as used in the U.N. Charter is by reference to the travaux préparatoires of the San Francisco Conference. It has been suggested by Russell that it was

the United States which first suggested that the proposed U.N. Charter had to deal specifically with the question of dependent peoples.[2] Thus, the Atlantic Charter signed by President Roosevelt and Prime Minister Churchill in 1941 proclaimed "respect [for] the right of all peoples to choose the form of government under which they will live; and [the] wish to see sovereign rights and self-government restored to those who have been forcibly deprived of them."[3] This provision was, however, interpreted by Churchill as not applying to colonial peoples, though Roosevelt never accepted this view.[4] The attitude of Churchill was expressed when he said that he had not "... become the King's First Minister in order to preside over the liquidation of the British Empire."[5]

During the war period, a great deal of time was spent by the Department of State in the preparation of proposals for an expanded system of trusteeship that would apply to all colonial areas. However, the Proposals that the United States presented to the Dumbarton Oaks Conference in 1944 contained nothing on colonial peoples.[6] Nor did the principle of self-determination receive any mention in the Dumbarton Oaks Proposals.[7] The proposal for the inclusion of the phrase was made at the San Francisco Conference by the four major powers at the behest of the Soviet Union. The Soviet delegate suggested addition of the following statement to the second Purpose of the Organization in Chapter I:

> To develop friendly relations among nations <u>based on respect for the principle of equal rights and self-determination of peoples</u>, and to take other appropriate measures to strengthen universal peace.[8]

The debates in the Drafting Sub-Committee centered upon the significance of the words <u>states</u>, <u>nations</u> and <u>peoples</u>. In explaining

their wording of the phrase "based on respect for the principle of equal rights and self-determination of peoples," the Soviet delegate, Mr. Molotov, stated that to the Soviet Union, the principle of equality and self-determination of peoples was important in that it would draw the attention of the populations of colonies and mandated territories to their right of independence. "We must first of all see to it," he commented, "that dependent countries are enabled as soon as possible to take the path of national independence." This should be promoted by the United Nations, which must act to expedite "the realization of the principles of equality and self-determination of nations."[9] It would appear from these quotations that in the Soviet view, the recipients of the right of self-determination -- the peoples -- were those living in mandated and colonial territories.

The Belgian delegate, Henri Rolin, criticized the Soviet view on the grounds that it confused the equality of states with that of peoples. The delegate then proceeded to narrow the application of the principle to freedom of self-government within the sovereignty of member states, and proposed to eliminate the confusion by amending the text to read: "To strengthen international order on the basis of respect for the essential rights and equality of the states and of the peoples' right of self-determination."[10]

The Sub-Committee rejected the Belgian proposal for reasons ambiguously described in its Report as follows:

> (1) The equality of states was dealt with and accepted under Chapter II, Principles, so that it was irrelevant here to the point at issue.

> (2) What is intended by paragraph 2 is to proclaim the equal rights of peoples as such, consequently their right to self-determination. Equality of rights, therefore, extends in the Charter to states, nations and peoples.

The sponsors' Draft was then recommended unchanged to the full Committee, which adopted it in due course with an interpretation that, however, clarified little:

> ... The Committee understands that the principle of equal rights of peoples and that of self-determination are two complementary parts of one standard of conduct; that the respect of that principle is a basis for the development of friendly relations and is one of the measures to strengthen universal peace; that an essential element of the principle in question is a free and genuine expression of the will of the people....[11]

The Coordinating Committee ultimately approved the sponsors' text without change, as Article 1(2) of the Charter, but only after another unrewarding and unresolved discussion of the difference among nations, states and peoples -- and of the meaning of self-determination.

Thus, reference to the travaux préparatoires alone does not remove the confusion about the meaning of self-determination. However, a careful analysis of the debates would seem to suggest the following:

1) That self-determination as in the proposed Article 1(2) of the Charter was distinct from the concept of the sovereign equality of states contained in Article 2(1).
2) That the principle of self-determination was incompatible with secession.
3) That self-determination was applicable only to peoples in dependent territories.

Other Charter Provisions on Self-Determination

In addition to Article 1(2) which makes specific reference to self-determination of peoples, Article 55 states that the U.N. shall promote certain objectives, "with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples...."

It is also generally accepted that the principle of self-determination is implied in the Charter provisions regarding Non-Self-Governing Territories (Chapter XI).[12] Chapter XII which deals with the Trust territories also implies the principle of self-determination in the sense of granting self-government or independence to those territories. As will be demonstrated subsequently, state practice has shown that the principle of self-determination actually applies to non-self-governing territories, which include both colonial and trust territories.

The provisions for Trusteeship contained in Chapter XII of the Charter are fairly straightforward.[13] The Trusteeship System was meant to be an updated version of the League's Mandates System, especially in providing for more effective machinery for international supervision.[14] Stated briefly, the Trusteeship system is based on the principle of wardship by which a territory is placed under the protection and administration of a state until it has developed the capacity to exercise its right of self-determination.[15] The right of self-determination for Trust territories was to be exercised by achieving "self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed

wishes of the peoples concerned...."[16] The expressions used to describe attainment of self-determination by trust territories have included independence, association or integration with another state.[17] Recipients of self-determination include the whole population resident in a particular territory, irrespective of racial or ethnic origin. Article 77 of the Charter provides a description of territories which were to be covered by the Trusteeship System. [See Appendix C.]

The underlying purpose of Trusteeship, therefore, was to provide the instrument for the transformation of dependent peoples of a specified category to self-governing or independent status. With the exception of South Africa, in the case of Namibia, all the administering powers declared their intention of placing their mandated territories under this system, thereby implicitly accepting the Charter provisions on self-government or independence for these territories.[18]

By 1978, the number of Trust territories had dwindled to one -- the Pacific Islands (Micronesia). On 12 July, 1978, the Trusteeship Council accepted an invitation by the United States, as the administering authority, to observe the referendum on the draft constitution for the Federated States of Micronesia, made up of the Caroline and Marshall Islands.[19] The other Trust territories have emerged into either full independent status, e.g., Tanganyika (1961); associated status, e.g., Western Samoa (associated with New Zealand in 1962); or integrated status, e.g., Italian Somaliland (integrated with the former British Protectorate of Somaliland in 1960 to form the Republic of Somalia). In considering the application of the principle of self-determination, the size of a particular territory was not a major consideration. Thus, in

1968; the 4,000 people of Nauru freely chose to be independent. In spite of their small size and population, they were allowed to determine what was best for them under the circumstances.

On the whole, progress toward independence in Trust territories has been less controversial and smoother than in the colonies per se, for the goal had always been set and assured, thereby removing the substantial threat of annexation or permanent dependent status. U. O. Umozurike is correct in pointing out that "Trusteeship has served as a yardstick for colonial administration and helped to quicken the tempo of colonial emancipation."[20]

Self-Determination and the Practices of Selected States

The rationale for investigating the practices of selected states, in addition to the practice of the U.N. as an institution, is simply based on the assumption that state practice exists both within the U.N. and in general diplomatic activities.[21] In any case, such an exercise is useful in demonstrating whether or not there has been compatibility, in matters relating to self-determination, between the practice of individual states on the one hand, and that of the U.N. as an institution on the other. Green, for example, argued that because of the sheer voting strength of the new states at the U.N., the older western states are forced to make concessions to the newcomers, otherwise no General Assembly recommendations would be adopted. This has been particularly so on matters that appeal to nationalism and self-determination.[22] One of the implications of this argument is that older states, in particular former colonial powers and Mandatories, have not, in their practices

outside the U.N., conceded a right of self-determination for peoples under their jurisdiction. An examination of the actual practices of some of these states would probably clarify this matter.

In any case, an examination of self-determination at the U.N. level alone is inadequate because the actual substantive role played by the U.N. in the decolonization of a great majority of colonies has been small.[23] The direct activities of the General Assembly in this field increased considerably after the passing of Resolution 1514(XV) in 1960, and the establishment of the Committee of Twenty-Four.[24] However, by that time, most of the largest colonies were either independent, or on their way to becoming so. Before 1960, the major processes of decolonization took place outside the purview of the U.N. During this period, the major contribution of the U.N. was in sustaining a climate of opinion favourable to decolonization and in giving the new states its blessings by accepting them as members.[25]

Therefore, it would seem that the practices of former colonial and mandatory states merit special attention because they were the targets against which claims of self-determination were advanced. Their responses to these claims are important as evidence of the meaning of the principle of self-determination.

In discussing the practices of some of these states, only a summary of the gist of their colonial practices will be provided. A detailed account of these practices are beyond the scope of this thesis. Discussion will center around Great Britain, France, the Netherlands, Spain, Belgium, Portugal, the United States and South Africa, which formulated clear policies of self-determination in their dependent

territories. The Soviet Union, though neither a Trustee nor a colonial power within the context of the Charter, has a distinctive outlook on the subject which also deserves consideration. Finally, the practice of the U.N. as an institution, as reflected in its resolutions and recommendations, will be described in an attempt to assess whether there has been compatibility between individual state practice and U.N. practice.

Great Britain

The history of Britain's colonial policy during the latter part of the 19th century indicates a significant movement toward acceptance of self-government as the goal of its colonial procedures.[26] During this period, a series of constitutional devices -- such as Crown Colony and Dominion status -- were developed through which the control exercised over the colonies was gradually diminished until they became self-governing. This process was essentially the vehicle by which Canada, Australia, New Zealand and South Africa became independent Dominions.

By the time World War II began, the idea of developing colonies with the aim of eventual self-government was a well recognized British policy. This policy was expressed in 1938 by Malcolm MacDonald, then Secretary of State for the colonies:

> "It may take generations, or even centuries, for the peoples in some parts of the Colonial Empire to achieve self-government. But it is a major part of our policy, even among the most backward peoples of Africa, to teach them and to encourage them always to be able to stand more on their own two feet."[27]

Although not without political difficulties, this was essentially the policy that saw the British colonies in Asia, Africa and the Caribbean

through to independence. When there were major disagreements on the timing for independence, such as happened in Kenya, bloody confrontations ensued. However, in spite of the difficulties, independence was achieved through a constitutional process that involved meetings and discussions between representatives of the colonies and the British government.

The process by which colonies were gradually being advanced toward self-government was understood to be a proper manifestation of self-determination. This is illustrated by the following statement of British policy in 1941, on the independence of Sudan:

> "Her Majesty's Government is glad to know that the Sudan has for some time been and is now moving rapidly in the direction of self-government. In their view this progress can and should continue on the lines already laid down. Her Majesty's Government will, therefore, give the Governor-General their full support for steps he has taken to bring the Sudanese rapidly to the stage of self-government as a prelude to Self-Determination."[28]

According to British practice, therefore, progress of a colony towards self-government took the form of a constitutional devolution of authority. By implication, the principle of self-determination referred to a prior right of colonies to self-government. According to one publicist, such a right has legal standing in the constitutional law of ex-colonies and is, therefore, evidential of British practice relating to international law.[29]

France

The official ideological justification of French colonialism was that by virtue of her superior culture, France had a mission to civilize her colonial subjects. Thus France also advocated the notion of tutelage,

but unlike the British, repudiated the idea that such tutelage implied eventual independence or self-government for the colonial peoples. This position was stated at a Conference of French Colonial Administrators held at Brazzaville in January, 1946:

> "[T]he aims of the work of civilisation accomplished by France in its colonies exclude all idea of autonomy, all possibility of evolution outside the French bloc of the Empire; the eventual establishment, even in the distant future, of self-governance is to be dismissed."[30]

On the basis of this policy, the Constitution of the Fourth Republic in 1946 was fashioned in such a way that the colonies were placed within one "indivisible" French Union. Article 60 of the Constitution states: "The French Union consists ... of the French Republic, which comprises Metropolitan France, [and] the overseas departments and territories...."[31] The gap between France and her colonies was to be narrowed not by making the colonial peoples independent, but by transforming them from "subjects" into "citizens" of France.[32]

This plan proved to be impossible in the face of a nationalist upsurge in the French colonies. By 1958, France had abandoned this constitutional principle and recognized, although reluctantly, independence as indispensable to colonial peoples, but sometimes using inducements to influence them to choose self-government within the French Empire rather than independence. Her determination not to allow claims for self-determination to put her into conflict with her former colonies was demonstrated by the speed of her withdrawal from Guinea when the latter voted for total independence from France in the 1958 referendum.[33]

Later in Algeria, it took her eight years of bitter fighting to concede independence to the National Liberation Front (FLN) in accordance with the terms of the Evian Agreement which was signed on 18 March 1962.[34]

The Netherlands, Spain and Belgium

The colonial practice of The Netherlands shows the same principles of trusteeship that we have seen in the case of Great Britain. Early in the 20th Century, The Netherlands developed the "Ethical Policy", in which they affirmed the principle of developing their colonies in the East Indies toward self-government.[35]

Spain's attitude toward colonialism was similar to that of France. After becoming a U.N. member in 1955, Spain declared that her overseas possessions were "overseas provinces" of a unitary Spanish state. However, by 1961 Spain had accepted the General Assembly's designation of her possessions as non-self-governing territories in accordance with Resolution 1514 (XV) of 1960, and declared her intention to abide by the principle of self-determination as defined by the U.N.[36] As a result of this radical change of policy, Equatorial Guinea became independent in 1968.

As early as 1946, Belgium accepted designation of the Congo as a non-self-governing territory falling within the purview of Chapter XI of the Charter.[37] However, as in the case of France, the plans that Belgium had for the Congo did not include independence. Rather, the plan was to integrate the Congo into Belgium.[38] These plans were, however, frustrated and Belgium was forced by circumstances to concede independence to the Congo in 1960.

Portugal

Portugal was one of the most adamant colonial powers in retaining its control over its colonies. Its colonial policy was based on a civilizing ideology similar to that of France. In order to civilize, it was important to assimilate the peoples of the colonies into Portugal's citizenship and way of life. The idea of eventual independence was ruled out, because Portugal, according to a Portuguese delegate to the General Assembly in 1957, was not a colonial power, but "is, and has always been, a unitary State, regardless of the relative geographic situation of its various provinces."[39] Thus, Portugal's colonial policy was characterized by the theory that natives could become assimilado after successfully meeting the qualifications established by Portugal.[40]

Faced with the anti-colonial onslaught, Portugal took cover in a spurious constitutional device. In 1961, all her colonial subjects were transformed into Portuguese citizens by laws applied to all people of the Portuguese State, which included people of "our extra-European provinces."[41]

These tactics failed to win the approval of the U.N. General Assembly which believed that the law was at variance with the actual status of the Portuguese subjects in Africa, which was one of dependency. Consequently, the General Assembly passed one resolution after another calling on Portugal to abide by the Resolutions on self-determination.[42] Portugal, however, continued to cling to the colonies until July 17, 1974 when, after a costly colonial war and the demise of the Caetano dictatorship, the Government under General Spinola adopted a new constitution recognizing "the right of self-determination and independence for

all overseas territories under its administration,"[43] thus bringing the Portuguese colonial empire to an end.

The United States of America

The attitude of the U.S. to self-determination for dependent territories has been influenced by its anti-colonial tradition which tends to regard colonialism as evil per se. According to one U.S. government spokesman, the U.S. became independent by invoking the principle of self-determination and, so he argues: "We surely cannot deny to any nation that right whereon our own is founded -- that everyone may govern itself according to whatever form it pleases and change these forms at its own will."[44] It will be recalled that it was on the basis of a similar commitment that Wilson championed the struggles of the national minorities in East and Central Europe for independence, and later spearheaded the system for minority protection.

During the 1950s American support for anti-colonialism became more pragmatic partly because of the Soviet and communist bloc insistence on immediate colonial independence and partly because of the pressure on the U.S. by its Western allies who were major colonial powers. Assistant-Secretary G. V. Allen demonstrated the American dilemma in an address to the American Academy of Political Science in 1956:

> Because of our origins and traditions, we are basically in sympathy with the desire for independence and nationhood of the emerging States, but we are also friends and allies of the Powers who must help to shape this new status. This places us in a position from which we hope and believe our influence can be exerted to make the transformation of Africa a process of orderly evolution and not of violent revolution.[45]

In its co[illegible]olicy, however, the U.S. has recognized the application of t[illegible]e of self-determination to dependent peoples and encouraged th[illegible]oose between various forms of self-government available [illegible] them. [illegible] this basis, U.S. colonies became self-governing by merger w[illegible]h the [illegible].S. (Hawaii and Alaska), by association (Puerto Rico) and by ful[illegible]ndependence (The Philippines).[46] In the U.N., the U.S. has tried wit[illegible] success to widen the scope of the application of the principle to i[illegible]ude the Soviet satellite countries. Speaking to the Sixteenth Sessi[illegible] of the General Assembly, President Kennedy claimed:

> [illegible] tide of self-determination has not reached t[illegible] Communist empire, where a population far l[illegible]ger than that officially termed "dependent" lives under governments installed by foreign troops instead of free institutions....[47]

This view has been consistently expressed by U.S. delegates to the U.N.[48] However, the U.S. [illegible] far has not extended the scope of self-determination, defined as independence, to groups residing within states. The reasons for this will become clear in the next Chapter.

South Africa

South Africa is not a colonial power in the classical sense of having colonies although some writers consider it to be a "prototype of [a] colonial power."[49] This is mostly because of its refusal to withdraw its administration from the formerly mandated territory of South West Africa. Although some writers have attempted to argue that self-determination applies to the peoples of South Africa because of South Africa's apartheid policies, the U.N. has treated apartheid as a

separate issue from that of Namibia. For the purposes of this thesis, apartheid is best dealt with under the heading of human rights.[50] Because of its occupation of Namibia, South Africa has been treated by the U.N. as a state occupying a non-self-governing territory. Thus, the U.N. has contended that self-determination applies to the peoples of Namibia.

The origin of South Africa's occupation of Namibia goes back to the League period, when, upon Germany's defeat, its former colony of South-West Africa was placed under the Mandates System. The mandate was conferred upon His Britannic Majesty, to be exercised on his behalf by the government of South Africa. During the period of the League, South Africa submitted reports in accordance with the Mandate Agreement[51] although she expressed a desire to incorporate the territory on the basis of its special geographical and cultural relation with her. Any attempts at annexation were, however, rejected by the Permanent Mandate Commission as being contrary to the provisions of the Mandate Agreement.[52]

Upon termination of the League and the subsequent formation of the U.N., former Mandatories were called upon to place their mandates under the U.N.'s Trusteeship System as stipulated by Article 77(1)(a) of the Charter. All obliged, except the Government of South Africa which argued, and still continues to argue, that with the termination of the League and therefore, that of the Mandate Agreement, her obligations were extinguished -- in a letter dated 11 July 1949 she informed the Secretary-General of the U.N. that she would not forward any more reports on the territory. In the meantime she proceeded to integrate the territory with the Union, thereby dimming the hopes for self-determination

inherent in the Mandate Agreement.[53]

Since its foundation, the U.N. has waged a relentless battle through a large number of resolutions and legal moves to extricate Namibia from South Africa's exclusive jurisdiction.[54] These efforts culminated in the adoption of Resolution 2145(XXI) of 27 October 1966 which terminated South Africa's mandate over Namibia and made it a direct responsibility of the U.N.[55]

So far, South Africa has consistently ignored these and other Resolutions, and insisted that the problem in South Africa and Namibia belongs to her internal jurisdiction. However, she has made certain moves aimed at assuaging some of the international condemnation by introducing policies that have a semblance of being consistent with the principles of self-determination. Recently, she has instituted a plan of creating autonomous Bantustans both inside South Africa and in Namibia, with the declared prospect of eventual independence.[56] However, much of the evidence available suggests that the Bantustans are being created not as a result of the expressed wishes of those affected, but as a means to institutionalize the concept of apartheid.[57] The fact that the Bantustans are created in the unproductive and least developed parts of South Africa and Namibia suggests that the aim of such a policy has been to keep the Black people physically away from productive land, and in so doing, ensure continued oppression and exploitation. Richardson sees the intent of the Bantustan policy as follows:

> The Bantustan policy represents a major attempt by the Vorster government to preserve the security and standard of living of South African Whites by maintaining the basic structure of apartheid while keeping enough

> able-bodied Africans conveniently useable as the main source of much needed labor for South Africa's mines, farms and industry.[58]

While the issue of apartheid within South Africa raises the question whether a right of self-determination can be realized within an arguably non-colonial setting, there is no doubt that the refusal of South Africa to submit to the terms of the Mandates System and place Namibia under U.N.'s Trusteeship System is not only a violation of international law, but also seems to go against the current of self-determination for all former mandates and colonies.[59]

The Soviet Union

The Soviet Union has been one of the most vocal champions of the right of self-determination at the U.N. and, because of that, claims to be the leader of the anti-colonial group.[60] While most of its support has been rhetorical and based on its immediate political interests, there is some historical basis for the Soviet Union's stance on self-determination.

Its first Constitutional Act, the November 1917 Declaration of the Rights of the Peoples of Russia, affirmed the principle of equal sovereignty and free self-determination, including the right of secession of all nationalities.[61] It was on the basis of this and other declarations that some parts of the Russian Empire such as the Ukraine, first seceded, gained their independence, and finally concluded federal agreements with the Russian Soviet.[62] The principle, including the right of secession, was also written into the 1923 Soviet Constitution.[63]

Consistent with the Bolshevik definition of self-determination as a right of all oppressed peoples to independence, including a right of

secession, the Soviet Union insisted, during the era of decolonization, that self-determination for colonial peoples was achievable only through complete independence. In line with this argument, the Soviet Union has maintained that the status of Puerto Rico as a Commonwealth in association with the U.S. is merely a trick to obscure its actual colonial status.[64] In 1960, the Soviet Union presented a draft resolution demanding immediate independence of all colonies. However, it was rejected in favour of Resolution 1514(XV).[65]

This view of self-determination has been inconsistent with the Soviet Union's practice both inside and outside her own borders. First, despite the rhetoric, it is clear that a multinational state as large and as disparate as the Soviet Union could not have hoped to survive even as a loose federation if it had permitted an absolute right of secession. Secondly, in the international arena, Soviet response to demands for self-determination has closely followed the interests of Soviet diplomacy in the area concerned. For example, Soviet publicists vehemently disapproved of the dissolution of the Mali Federation, where Russian influence had been waning.[66] The Soviets also offered military support to crush the secessions of Katanga and Biafra but strongly backed the demand of the people of Bangladesh for self-determination. In 1974, the Soviet Union, hitherto a staunch supporter of Somalia's attempts to create a bigger state by occupying parts of Kenya and Ethiopia, and a champion of Eritrea's struggles for independence from Ethiopia, switched sides and became an ally of Ethiopia and President Mengitsu in his campaign to end Somalia's aggression against Ethiopia and Eritrea's attempts at seceding from Ethiopia. In all these instances,

the Soviet attitude was apparently dictated by political interests rather than a principled judgement regarding the legitimacy of the particular claim.

Unlike the other major powers discussed in this Section, the Soviet Union did not have any colonies. Therefore, it is difficult to speculate how she would have dealt with questions of self-determination outside her own borders. What is clear from the brief analysis here, however, is that in practice, the Soviet Union does not include secession as part of self-determination, contrary to all the rhetoric. It appears from her practice that the principle of self-determination applies only to non-self-governing territories. To that extent, her practice does not differ significantly from that of the other states.

The United Nations Practice

The U.N. is not an autononous institution with its own power base. It is rather a representative organ of its member states. Therefore, in matters of international concern, the U.N. has only as much power and influence as its members are prepared to grant it. This ought to be obvious but many critics of the U.N. ignore it when making their recommendations on what the U.N. can or cannot do. It would be absurd, indeed impractical, for the U.N. to advocate an action that would not gain the concurrence of its member states or at least of its more powerful members. This Section proposes to examine the extent to which the practice of the U.N., as manifested in its resolutions, recommendations and conventions, may be seen to reflect the practices of states. In other words, has the practice of the U.N. in matters of self-determination met the concurrence of the international community?[67]

Despite the verbosity of the wording of some of its resolutions on self-determination, the U.N. General Assembly defines the principle as the right of the people in non-self-governing territories to self-government. These territories may be of the colonial type or Trust territories, and self-government may be attained through one of several ways. Resolution 1541(XV), (15 December 1960) of the General Assembly stipulates that self-government may be attained by independence, association or integration, provided this accords with the wishes of the people concerned.[68]

A brief look at some of its Resolutions will indicate how this definition has been arrived at. The process began with General Assembly Resolution 648(VII) of December 10, 1952 which approved the idea that a territory may attain self-government by one of three ways, namely: "The attainment of independence", "the attainment of other separate systems of self-government" and "the free association of a territory with other component parts of the metropolitan or other country." Soon after, by Resolution 637(VII) of December 16, 1952, the General Assembly endorsed incorporation of a right of self-determination into the Draft of the Human Rights Covenants. Such incorporation into what was designed to be legally binding treaties was, of course, an important step in the establishment of self-determination as a binding rule of international law.[69] Incorporation of self-determination into the two Human Rights Covenants was completed in 1953 and the texts of the Covenants were accepted by the General Assembly by Resolution 2200A (XXI) of December 16, 1966.[70]

In 1959, prompted by the refusal of Spain and Portugal to submit information on their overseas possessions in accordance with Article 73(e) of the Charter, the General Assembly created a Special Committee of Six to study the issue (Resolution 1467(XIV)). On the basis of this Committee's report, the General Assembly adopted Resolution 1541(XV) of 15 December, 1960, which remains a most comprehensive statement on both the criteria for identifying what constitutes a dependent territory, and the stage at which the territory is considered to have exercised its right of self-determination. (See Appendix F.)

One day before adopting Resolution 1541(XV), the General Assembly adopted Resolution 1514(XV) of 14 December, 1960, known as the Declaration on the Granting of Independence to Colonial Countries and Peoples-- perhaps one of the most important Resolutions on the subject of colonialism. (Appendix E.) It is also one of the most frequently cited Resolutions of the General Assembly and African and Asian countries regard it as a document only slightly less sacred than the Charter and as stating the law in relation to all colonial situations. Its main features include immediate transfer of power and attainment of full independence for all dependent territories. It also repudiates one of the basic Charter provisions of Trusteeship -- that of preparing the territory for self-government -- and concedes that inadequacy of political, economic, social or educational preparedness was no pretext for delaying independence. Significantly, the Declaration also introduces the concept of "alien subjugation" which is meant to include under the heading of colonialism, those countries where a minority of European settlers maintain a dominant position, based on racial

discrimination. The Assembly has not gone so far as to declare South Africa a colony, although Resolutions on apartheid recall more and more the wording used in Resolutions on colonialism.[71] The same is true of Resolutions adopted on Palestinian refugees who are identified as a colonial people driven away from their homeland and subjected to domination by Israel.[72]

In spite of the popularity of Resolution 1514(XV), Resolution 1541(XV) continued to be the basis of decolonization activity of the General Assembly, especially with regard to Portuguese colonies and Rhodesia.[73] In both cases, the Resolutions did not call for immediate independence as would have been consistent with Resolution 1514(XV). Instead, they insisted on the responsibility of the administering powers -- Portugal and Britain -- to bring these territories under the umbrella of Article 73 of the Charter and to formally adopt responsibility to prepare the peoples of these territories for eventual exercise of self-determination in accordance with the principles enunciated in the Declaration Regarding Non-Self-Governing Territories (Chapter XI of the U.N. Charter. See Appendix B).

In several colonial cases, the General Assembly has endorsed other political solutions short of independence as representing successful attainment of self-determination. The endorsement by the General Assembly in 1953 of Puerto Rico as a Commonwealth in association with the U.S. was satisfactory evidence of the exercise by the peoples of Puerto Rico of their right of self-determination.[74] The exercise of the right of self-determination by the peoples of the Netherlands Antilles and Surinam by free association was also accepted by the General

Assembly,[75] as was Hawaii's and Alaska's association with the U.S.[76] These modes of self-government have also been applied, with considerable success, to the so-called mini-states.[77] In dealing with such cases, the General Assembly has encouraged the peoples of these territories to adopt other forms of self-government, short of independence. For example, the Trust territories of Nauru and Western Samoa were both given the choice which culminated in the independence of Nauru and association of Western Samoa with New Zealand.[78] Also, the acceptance by the General Assembly of the validity of the exercise of self-determination by the people of the Cook Islands to associate with New Zealand is consistent with this general approach.[79] Thus, while the General Assembly continues in its resolutions to affirm "the inalienable right of peoples to self-determination and independence," in considering individual cases there seems to be an increasing awareness that total independence may not be the best alternative for many small territories which may not be able to stand by themselves economically. The decision as to the form of self-government is, however, left for the people to make.

In advocating the right of self-determination for colonial peoples, the U.N. has taken the position that the boundaries of such territories at the time of the granting of independence -- or another form of self-government -- should remain sacrosanct and inviolable. The best illustration of this position is the case of Mauritania. On August 20, 1960, Morocco asked that the question regarding the future of Mauritania be included in the Fifteenth Session of the General Assembly. In a memorandum, Morocco explained that the dispute between

her and Mauritania was territorial in nature and that the latter, within the borders assigned to her by France -- the former colonial power -- had always been an integral part of Moroccan national territory. Accordingly, she demanded restoration to it of the whole territory of Mauritania.[80] The crucial question that faced the General Assembly was whether to respect frontiers drawn by colonial powers or to consider redrawing such boundaries in accordance with the original and more natural territorial limits that took account of such things as ethnic and linguistic distribution of the population. The position taken by the General Assembly was a pragmatic one, that need not surprise any student of international organization. Mauritania became independent on November 28, 1960 and was admitted to the U.N. at its next session. By rejecting Morocco's claims, the General Assembly held that existing colonial boundaries were the legitimate territorial limits of the subjects of self-determination.[81]

From the evidence in this Chapter, two conclusions may be drawn. The first is that with the exception of South Africa, all former colonial powers and former mandatories have conceded self-government (through independence, association or integration) to peoples living in dependent territories. Secondly, although the meaning of the principle within the context of the U.N. has undergone some refinement and clarifications through time, there is consensus, represented by the votes of a majority of states, that self-determination is a right of colonial peoples (and peoples in Trust territories) to be self-governing -- with self-government taking various forms. In order to invoke this right, the peoples must be a territorially based, organized community and be under

alien subjugation. The last stipulation, which is of recent formulation, has been intended to deal with cases of racial discrimination, such as was the case in Rhodesia, and is still the case in South Africa. However, as will be shown in the next Chapter, self-determination in this context is not synonymous with independence but is generally dealt with under the rubric of human-rights.

FOOTNOTES

1. The U.N. Charter entered into force on June 24, 1945 when instruments of ratification had been deposited by the Republic of China, France, the Soviet Union, the United Kingdom and the United States and by the majority of remaining signatories. Leland M. Goodrich et al., Charter of the United Nations: Commentary and Documents, 3rd and revised ed. (New York: Columbia University Press, 1969), p. 9.

2. Ruth B. Russell, A History of the United Nations Charter: The Role of the United States, 1940-1945 (Washington: Brookings Institution, 1958), p. 30.

3. The text of the Atlantic Charter may be found in Ibid., p. 975.

4. Russell, p. 30. See also, Leland M. Goodrich, The United Nations: A Changing World (New York: Columbia University Press, 1974), p. 182.

5. The London Times, Nov. 11, 1942. Quoted in Ibid., p. 182.

6. "U.S. Proposals for an International Trusteeship" -- Presented to Dumbarton Oaks. The text may be found in Russell, Appendix K, pp. 1030-1031.

   According to these Proposals, the Trusteeship system was to apply to

   "(a) territories now held under the mandate;
   (b) territories which may be detached from enemy states as a result of this war; and
   (c) territories voluntarily placed under the system by states responsible for their administration."

   Russell, p. 1030.

7. Text of the Dumbarton Oaks Proposals may be found in Goodrich, Charter of the United Nations, pp. 665-674.

8. Quoted in Russell, p. 811. Emphasis in the original.

9. New York Times, May 8, 1945, p. 15. Quoted in Russell, p. 811.

10. United Nations Conference on International Organization: Documents (hereafter cited as UNCIO Docs.), vol. 6, p. 300. The Belgian memorandum declared that "The peoples' right of self-determination as a basis for friendly relations between the nations would open the door to inadmissible interventions...." Emphasis in original. UNCIO Docs., vol. 6, p. 300.

11. UNCIO Docs., vol. 6, p. 704.

12. See for example, Rupert Emerson, "Self-Determination Revisited in the Era of Decolonisation," Occasional Papers in International Affairs, no. 9 (Dec. 1964); David A. Kay, "The Politics of Decolonisation: The New Nations and the United Nations," International Organization (hereafter cited as IO) 14 (1960): 92-106. See Appendix B for text of Chapter XI of the Charter.

13. See Appendix C for the text of Chapter XII of the Charter.

14. Ernst B. Haas, "The Attempt to Terminate Colonialism: Acceptance of the United Nations Trusteeship System," IO 7 (1953): 6.

15. Emerson, "Self Determination Revisited," p. 309.

16. Article 76 (b) of the U.N. Charter. See Appendix C.

17. See Resolution 1541(XV) in Appendix E. For a discussion of these terms, see pp. 51-53 below.

18. Goodrich, The United Nations: A Changing World, p. 188.

19. U.N. Chronicle, no. 7 (July 1978): 19.

20. Umozurike O. Umozurike, Self-Determination in International Law (Hamden, Conn.: The Shoe String Press, 1972), p. 110.

21. For the practice of the U.N. and the rationale, see pp. 49-54 above.

22. L. C. Green, "The Impact of New States on International Law," Israel Law Review 4 (Jan. 1969): 41-43.

23. Rupert Emerson, "Colonialism, Political Development, and the U.N.," IO 19 (1965): 485.

24. Resolution 1514(XV) was adopted by 89 votes, 0 against and 9 abstentions (Australia, Belgium, Dominican Republic, Great Britain, France, Portugal, South Africa, Spain, and the United States). See Appendix E for the text of the Resolution.

    The Committee of 24 was set up by the General Assembly (Resolution 1654[XVI] of 27 Nov. 1961) to make suggestions and recommendations on the progress and implementation of Resolution 1514(XV).

25. Emerson, "Colonialism, and the U.N.," p. 490.

26. W. Ofuatey-Kodgoe, The Principle of Self-Determination in International Law (New York: Nellen Publishing Co., 1977), p. 130.

27. Hansard, 5th Series, vol. 432, p. 1246, quoted in Kenneth Robinson, "World Opinion and Colonial Status," IO 8 (1954): 468.

28. Excerpt from a speech delivered by Mr. Anthony Eden in the House of Commons, Nov. 15, 1941, quoted in Robinson, p. 468. Emphasis in the original

29. See J. E. S. Fawcett, The British Commonwealth in International Law (London: Stevens and Sons, 1963), p. 144.

30. Quoted in John Hatch, A History of Post-War Africa (London: Andre Deutsch Ltd., 1965), p. 37.

31. Amos J. Peaslee, ed., Constitutions of Nations (Concord, N.H.: Rumford Press, 1950), p. 9.

32. Georges Catroux, The French Union: Concept, Reality and Prospect ([N.P.], 1953), p. 207.

33. For a summary account of this incident, see Thomas Hodgkin and Ruth Schachter, "French-Speaking West Africa in Transition," International Conciliation (hereafter cited as IC) 528 (May 1960): 375-436.

34. For the Evian Agreement, see AJIL 57 (1963): 716-750.

35. Robinson, p. 469. For an examination of The Netherlands colonial policy, see J. S. Bromley and E. H. Kossman, eds., Britain and The Netherlands in Europe and Asia (New York: St. Martin's Press, 1968).

36. U.N. Document A/PB. 1177, (1960), p. 27.

37. The "Belgian Congo" was listed among the original 74 territories which were submitted voluntarily by the administering states. For the full list, see U.N. Document A/74, (October 12, 1946).

38. King Baodouin, for example, stated in 1955 that the Belgian government was committed to establishing in the Congo a EuroAfrican society integrally linked with Belgium which, "... will ensure the perpetuity of a genuine Belgo-Congolese community guaranteeing to all, Black and White, the share due them in the government of their country. Quoted in Waldemar A. Nielsen, The Great Powers and Africa (New York: Praeger Publishers, 1969), p. 132.

39. General Assembly Official Records (hereafter cited as GAOR), 11th Session, 656th Plenary Meeting, February 20, 1957, p. 1149.

40. William Minter, Portuguese Africa and the West (New York: Monthly Review Press, 1972), p. 20.

41. GAOR, 16th Session, 1065th Plenary Meeting, Nov, 27, 1961, p. 859.

42. See for example Resolution 1542(XV) of Dec. 15, 1960.

43. U.N. [redacted] August 6, 1974.

44. Watson Wise, "The Right of Peoples and Nations to Self-Determination," The U.S. Dept. of State Bulletin 40 (1959): 172. For other statements on U.S. commitment to the principle of self-determination, see R. Murphy, "The Principle of Self-Determination in International Relations," The U.S. Dept. of State Bulletin 33 (1955): 889-894.

45. The U.S. Dept. of State Bulletin, 30 April 1956.

46. Nielsen, pp. 245-334. See, however, pp.64-65 below for a different perspective on the U.S.'s role in matters involving secession.

47. The speech is reproduced in The U.S. Dept. of State Bulletin 45 (July/Dec. 1961): 619-625.

48. See for example, Wise, p. 174; and Murphy, p. 894.

49. See for example, Emile J. Sady, "The United Nations and Dependent Peoples," in Robert E. Asher et al., The United Nations and Promotion of the General Welfare (Washington: Brookings Institution, 1957), p. 822; and Edward T. Rowe, "The Emerging Anti-Colonial Consensus in the United Nations," Journal of Conflict Resolution 8 (1964): 220.

50. See pp. 78-79 below for a brief discussion of apartheid.

51. The Mandate Agreement for German South-West Africa is reproduced in Umozurike, Appendix B, pp. 277-279.

52. United Nations, Apartheid in South Africa (New York: United Nations Office of Public Information, 1966), p. 11.

53. On the legal disputes involving South Africa and Namibia, see L. C. Green, "The United Nations, South West Africa, and the World Court," Indian Journal of International Law 7 (1967): 491-525.

54. See for example, Resolutions 2145(XXI) of 27 Oct. 1966; 2325(XXIII) of 16 Dec., 1967; 2403(XXII) of 16 Nov., 1968 and Security Council Resolutions 264 of 20 March, 1969 and 269 of 12 Aug., 1969.

55. See United Nations Yearbook (1966), pp. 605-606.

56. For a more complete discussion of the concept of Bantustans vis-a-vis self-determination, see Henry J. Richardson III, "Self-Determination, International Law and the South African Bantustan Policy," Columbia Journal of Transnational Law 17 (1978): 185-219.

57. See references cited by Richardson.

58. Ibid., p. 189.

59. The ICJ has dealt with this subject in the three cases on South-West Africa (1950; 1966 and 1971). For a brief discussion of these cases, see pp. 102-103 below.

60. Elliot R. Goodman, "The Cry of National Liberation: Recent Soviet Attitudes Toward National Self-Determination," IO 14 (1960): 92-94.

61. Max M. Laserson, "The Development of Soviet Foreign Policy in Europe, 1917-1942: A Selection of Documents," IC 386 (Jan. 1943): 11.

62. Goodman, p. 93.

63. Cited by Umozurike, p. 195.

64. Ibid., p. 157.

65. U.N. Document A/4, p. 519. See Appendix E for the text of Resolution 1514(XV).

66. See Robert Legvold, Soviet Policy in West Africa (Cambridge: Harvard University Press, 1970), p. 91.

67. According to Article 18 of the Charter, "Decisions of the General Assembly on important questions shall be made by a two-thirds majority of the members present and voting." Many of the resolutions on self-determination have been adopted with such majorities. Therefore, they may be seen as reflecting opinions of a majority of states.

68. See Appendix F, especially principles VII-IX for a definition of these terms.

69. William Korey, "The Key to Human Rights Implementation," IC 570 (Nov. 1968): 58.

70. Article 1 in both Covenants provides that "All peoples have a right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

71. See for example, Res. 2307(XXII) of Dec. 13, 1967; Res. 2396(XXIII) of Dec. 2, 1968; Res. 2647A(XXIV) of Dec. 11, 1969); Res. 2671(XXV) of Dec. 8, 1970, and Res. 2671-F(XXV) of Dec. 8, 1970.

72. See especially Res. 2535-B(XXIV) of Dec. 10, 1969 and 2672-C(XXV) of Dec. 8, 1970.

73. See Res. 1542(XV) of Dec. 15, 1960 on Portuguese colonies; Res. 1747(XVI) of June 28, 1962 on Rhodesia.

74. Res. 748(VII) of Nov. 27, 1953.

75. Res. 945(X) of Dec. 5, 1955.

76. Res. 1469(XIV) of Dec. 12, 1959.

77. See Res. 1569(XV) of Dec. 18, 1969. For a general discussion of the mini-state problem, see Patricia W. Blair, The Mini-State Dilemma, revised ed. (New York: Carnegie Endowment for International Peace, 1968). For Oceania, see Phillip M. Allen, "Self-Determination in the Western Indian Ocean," IC 560 (Nov. 1966): 5-74.

78. Allen, pp. 390-392.

79. Ibid.

80. For details of this dispute, see A. Rigo Sureda, The Evolution of the Right of Self-Determination (Leyden: A. W. Sijthoff, 1973), pp. 168-;69.

81. Ibid.

CHAPTER IV

SELF-DETERMINATION AND SECESSION

Introduction

The preceding Chapter discussed selected examples of both U.N. and state practices on matters concerning self-determination and concluded that the major concern was with dependent or subject peoples, in particular those living under colonial and Trust regimes. To say this, however, is not to imply that issues relating to self-determination are confined exclusively to colonial peoples, because if self-determination is a universally accepted right (see Chapter V below), surely its scope must extent beyond the narrow confines of colonialism. The pertinent question then is what form self-determination would take in non-colonial settings.

This Chapter will explore the reasons for the U.N.'s narrow confinement of the application of self-determination to colonial and Trust territories. In addition, it will address the question of the future of the principle. Perhaps ironically, claims for a right of self-determination have been on the increase as a result of the demise of traditional colonialism which has produced a multitude of pluralistic states. What will the principle mean for the U.N. in the future? Are certain groups of people such as the Quebecois of Canada, the Kurds of Iran and Iraq, the Nagas of India, the Basques of Spain and the Eritreans of Ethiopia who are parts of unified states but consider themselves oppressed, entitled to a right of self-determination that includes their right to secede? If not, in what ways may the principle

be applied to them?

Does Self-Determination Include a Right of Secession?

As we saw in our discussion of the League of Nations and President Wilson's contribution to the principle of self-determination (Chapter II), the Allied Powers did not endorse a right of secession. Sarah Wambaugh has interpreted Wilson's repeated refusals to favour the petitions from subject nationalities which flooded him toward the end of World War I as evidence that the President's words to the effect that "all nations had a right to self-determination," did not endorse a right of secession.[1] In any case, the task of redrawing the demographic map of Europe in strict conformity with the principle of self-determination was quite impossible. This difficulty was expressed by Webster in the following words:

> If Poland were to have that ethnographical frontier and access to the sea promised her in President Wilson's Fourteen Points, numbers of intensely patriotic Germans must be included within her borders; if Czechoslovakia were to have a frontier that corresponded with any intelligible reality, millions of Germans, Magyars, and Ruthenes must be left in the new state; the transfer of Transylvania to Roumania involved also the transfer of Magyars, Saxons, and Szecklers; throughout Europe were scattered groups of the ubiquitous Jews, secular objects of persecution. Briefly, the solution of one set of minority problems might involve the creation of another set, with the dismal prospect of the commencement of a fresh cycle of conflict, revolt and war.[2]

Thus, it was feared that any strict enforcement of self-determination would lead to the creation of a multitude of states ad absurdum. To avoid such a possibility, the League endorsed a position that would

safeguard the rights of minorities, without seeming to encourage their separation from the newly constituted states of which they formed a part. The formal statement of the League, as we have seen, regarding the question of self-determination vis-a-vis secession, was expressed in the Aaland Islands Case.[3]

During the period of the U.N., conflicting views have been expressed by publicists and spokesmen of states on the status of secession in relation to the principle of self-determination. In general, those who argue that self-determination is a universal right, applicable to all peoples, also maintain that secession is a right. Soviet publicists and spokesmen maintain this view. As we have seen above, however, this is a minority view -- and even in the case of the Soviet Union, her practice does not endorse a right of secession.[4]

A different view, held by a majority of states and individual publicists, holds self-determination to be a right limited to colonial and Trust territories. (See Chapter III above.) Accordingly, proponents of this view reject a right of secessionist self-determination. The American view of self-determination, for example, has never recognized a general legitimacy of secession by groups within unified, independent states. This view was made clear in 1952 by Eleanor Roosevelt, then American representative to the U.N. General Assembly. In an article entitled, interestingly, "The Universal Validity of Man's Right to Self-Determination," Mrs. Roosevelt claimed that the universal validity of the principle excluded secession.

> Does self-determination mean the right of secession? Does self-determination constitute a right of fragmentation or a justification for

> the fragmentation of nations? Does self-determination mean the right of people to sever association with another power regardless of the economic effect upon both parties, regardless of the effect upon their internal stability and their external security, regardless of the effect upon their neighbours or their international community? Obviously not.[5]

The refusal of the United States to accord any measure of legitimacy to secessionist movements within independent states has been invoked on several occasions as the theoretical justification for American behaviour in the world arena. After the United States supported the action to suppress the secession of Katanga from the Congo, for instance, a State Department spokesman, asked whether this violated traditional U.S. support for the principle of self-determination, replied in the negative. His explanation began with a denial of any absolute right of self-determination: "We fought a civil war to deny it. We have recognized both at home and abroad the danger of Balkanization."[6] Similarly, the U.S. viewed with disfavour the attempted separation of Biafra from Nigeria and the secession of Bangladesh from Pakistan. Even in instances when she is alleged to have covertly supported a separatist movement such as in Tibet[7] and more recently in the Kurdish revolt,[8] the actions appear to have been motivated by immediate political interests rather than a perceived obligation arising from the demands of self-determination.[9]

Higgins adopts a restrictive view of secession that resembles that of the U.S. Although she accepts self-determination as a legal right, she nevertheless thought in 1969 that at the present stage of international law, "self-determination refers to the right of a majority within

a generally accepted political unit to the exercise of power. In other words, it is necessary to start with stable boundaries and to permit political change within them."[10] This approach leads her to conclude that "there can be no such thing as self-determination for the Nagas."[11] Thus, she contends that self-determination and secession are two separate issues.

Some publicists examine specific instances of secession and on the basis of factual information arrive at their own conclusions on the legitimacy of secession. Umozurike, for instance, argues that secession can be legitimated in some cases, primarily as a method of redress for the violation of human rights.

> There is no rule of international law that condemns all secessions under all circumstances. The principle of fundamental human rights is as important, or perhaps more so, as that of territorial integrity. Neither a majority nor a minority has a right to secede, without more, since secession may jeopardize the legitimate interests of the other part.... [In cases of human rights violations] it is submitted that the oppressed party ... may have the right of self-determination up to the point of secession.[12]

On the basis of this reasoning, he concludes that the Somalis in Kenya, the Nagas, the Kashmirs and the Biafrans are entitled to self-determination even if this means secession.[13] Interestingly enough, however, he maintains that the problem of Quebec remains an internal affair of Canada since "the French Canadians are comparatively a privileged minority."[14] Vep. P. Nanda adopts a similar approach to that of Umozurike, in arguing that the secession of Bangladesh from Pakistan was a legitimate exercise of self-determination.[15]

There is certainly no dearth of writers who articulate the views described above. What is interesting, however, is that those who argue that self-determination includes a right of secession point out that the exercise of such a right is dependent upon the particular circumstances of the seceding group. Some states share this view. However, as suggested above and elaborated below, their attitude toward secession is primarily determined by immediate political interests rather than an absolute commitment to a right of secession.

The Afro-Asian States and Secession

The most unyielding opposition to secessionist self-determination has not come from the erstwhile colonial Western powers, but rather from those states that have themselves only recently emerged from the process of colonial self-determination. The newly acquired independence of these states has often been jealously guarded against internal disintegration resulting from separatist claims. The argument supporting this inflexible stand against secession is quite plausible. In many cases the boundaries bequeathed to the new states at the end of the colonial period were not the result of any communal sentiments of the populations but were determined simply by the limits of the energy of the colonial power. Thus, large populations of the same ethnic origin were at times scattered in two or more states.[16] In view of these circumstances, the argument goes, even the slightest recognition of secession by these states would be disastrous to the existence of each one of them. Such fears have dictated the reaction of the Afro-Asian states to secession as reflected in both internal state structures

which place emphasis on nation-building and unity, and in policies advocated before international forums.

The position of the African countries on the issue of secession is perhaps best reflected in a 1964 Resolution of the Organisation of African Unity (O.A.U.) which:

> (i) Solemnly reaffirms the strict respect by all Member States of the Organisation for the principles laid down in Paragraph 3 of Article III of the Organisation of African Unity Charter [which deals with respect for the territorial integrity and independent existence of states];
>
> (ii) Solemnly declares that all Member States pledge themselves to respect the borders existing on their achievement of national independence.[17]

On the basis of these principles, Katangan and Biafran claims to self-determination were rejected. The case of Biafra is particularly instructive because even Somalia, which previously claimed the same right, rejected Biafra's claims and argued that "the international community on its part should refrain from any action detrimental to the peace and unity and territorial integrity of Nigeria."[18]

Confronted by monumental problems of nation-building in the face of real dangers of secession, these states have an interest in preserving their present borders, as indeed does any other state, maintaining that self-determination only applies to dependent colonial peoples, not to sections of a state wishing to secede.

Despite this widespread condemnation of secession, it appears that in cases where a state stands to benefit from a general recognition of secession either by gaining an ally in the new state that emerges

from secession or by weakening an old enemy, it may well adopt a more tolerant view of the scope of self-determination. This tendency can occasionally result in embarrassingly inconsistent pronouncements by the same state.

Consider, for example, the position adopted by India and Pakistan during their long-standing dispute over the fate of Kashmir. Pakistan argued that the principle of self-determination should be applied to the people of Kashmir, thereby allowing them to decide for themselves their future political affiliation.[19] For its part, India argued strongly against the suggestion that a constituent part of its territory had a right of self-determination. The Indian representative at the Security Council in 1964 insisted that "the principle of self-determination cannot and must not be applied to bring about the fragmentation of a country or its people," and went on to point out the dangers of a wide interpretation of the principle for the "innumerable countries in Africa and Asia with dissident minorities."[20]

By 1971, the positions of the parties had been reversed under the stimulus of Bangladesh's secession from Pakistan. Pakistan inveighed against India's support of the secession,[21] while the Indian representative argued that Pakistan had failed in its duty to protect the Bengalis, and as a result international law recognized that conditions were suitable for Bangladesh to become a separate state.[22]

It seems probable that a survey of international opinion would reveal lack of support for the legitimacy of secession, both in terms of the number of states willing to concede any such legitimacy, and in the intensity of feeling over the issue. One lesson to be derived

from a study of state practice, however, is that a state's response to a particular situation will often be dictated by its own immediate political interests. Thus, a state's reaction to a secessionist attempt in an area which does not directly affect its interests will tend to be critical of the secession lest it be used as a precedent for disaffected groups within its own borders. If a state is itself a victim of a secessionist attempt, it is likely to be even more critical of secessionist attempts elsewhere. Finally, in cases where a state is apt to benefit from a secession, it may be more supportive of the group wishing to secede.

The United Nations and Secession

Since its foundation, the U.N. has consistently maintained the position that self-determination and secession were two completely separate issues, and that the application of one did not imply application of the other. At the San Francisco Conference, it was emphasized by the Drafting Committee that "the principle [of self-determination] conformed to the purposes of the U.N. Charter only insofar as it implied the right of self-government of peoples and not the right of secession."[23] The U.N. has not wavered from this position even in cases involving massive human sufferings and allegations of genocide such as in Biafra and Bangladesh. In advocating this stance, the U.N. has given more prominence to the principle of the territorial integrity of states that is provided in Articles 2(4) and 2(7) of the Charter and confirmed by Resolution 1514(XV) of 1960 (Appendix E, paragraph 6).

By adopting the stance that secession poses a threat to the territorial integrity of states, and is, therefore, inconsistent with the principle of self-determination, the U.N. basically reflects the concerns of the Afro-Asian states toward their national independence and a broad acceptance of their existing boundaries. As we have seen above, it is evident that a threat of secession hangs over a great many of the new states and that they regard it as a matter of paramount importance to strengthen the existing boundaries, leaving no room for the separatist groups to achieve their goal. This sentiment was expressed twice by U Thant, the former Secretary-General of the U.N. At a press conference on January 9, 1970 in Dakar, the Secretary-General was asked whether there was a deep contradiction between a people's right of self-determination and the attitude of the Nigerian Federal Government toward Biafra. He replied in the following manner:

> You will recall that the United Nations spent over $500 million in the Congo primarily to prevent the secession of Katanga from the Congo. So, as far as the question of secession of a particular section of a Member State is concerned, the United Nations' attitude is unequivocable [sic]. As an international organization, the United Nations has never accepted, and does not accept and I do not believe it will ever accept the principle of secession of a part of a Member State.[24]

Shortly thereafter, at a press conference in Accra, U Thant reiterated his view on the scope of self-determination:

> Regarding ... the question of self-determination, I think this concept is not properly understood in many parts of the world. Self-determination of the peoples does not imply self-determination of a sector of a population of a particular Member State....

> What is relevant for the consideration of the United Nations is the simple basic principles of the Charter.
>
> When a State applies to be a Member of the United Nations, and when the United Nations accepts that Member, then the implication is that the rest of the membership of the United Nations recognizes the territorial integrity, independence and sovereignty of this particular Member State.[25]

Consistent with this view of the Secretary-General, the U.N. General Assembly did not debate the Nigerian-Biafra conflict. The Secretary-General explained the reason for this as follows:

> The question is that the issues must be brought to the attention of the United Nations. So far, not one single Member State out of 126 has brought the question of the civil conflict to the ... attention of the Security Council or the General Assembly.[26]

Instead, the Secretary-General requested the OAU to deal with the matter. The OAU promptly condemned Biafra's secession as a violation of the territorial integrity of Nigeria, and recognized that the situation was an internal affair, the solution of which was primarily the responsibility of the Nigerians themselves.[27]

It seems, therefore, that in the practice of the U.N. the principle of self-determination is not interpreted in a manner that may include a right of secession, especially when the latter conflicts with the principle of the territorial integrity of states. Thus, in the final analysis, the success or failure of secession is not determined by the rightness or wrongness of the application of self-determination, but by the power of the group seeking secession. Bangladesh won its independence not by a general recognition of its right of self-determination, but by its own determination and the military support given by its

ally, India.[28] Likewise, Biafra failed in its attempt to secede from the rest of Nigeria because it lacked enough military strength and sufficient outside support to withstand the onslaught from the federal forces. In this context, Higgins seems correct when she commented that: "[I]f a people wish strongly enough to form a separate political community, the matter is one to be resolved between them and the larger unit of which they form a part."[29]

The U.N. has treated matters involving decolonization differently. Unlike secession, decolonization is seen as restoration of a territory to its rightful inhabitants.[30] Colonialism is viewed by many states as a palpable evil and unlike acts of secession, its demise does not pose a threat to the existence of any state. In fact, as stated by Emerson, by creating new sovereign states from the old colonial territories, the process of decolonization is seen as auguring well for a lasting international peace and security.[31] As for secession which basically threatens to break up a state, there is hardly any population in any state which is so homogeneous that its leaders may openly embrace the breakup of another state without some lingering uneasiness about the existence of their own state. Nor could the U.N. -- whose membership is limited to states -- realistically be expected to advocate a principle that may operate to dismember the territories of its member states. Hence the equation of self-determination with decolonization.

It must be clarified here that the outright rejection of secession is based on the assumption that the secessionists actually aim at destroying an existing state by forming their own separate state(s). When secessionist demands fall short of this, international concern

including U.N. involvement, has come to play through various means designed to put pressure on the states concerned to give heed to, and acquiesce in some of these demands. Generally speaking, these pressures have been subsumed under the human rights system of the U.N. In the cases of Biafra and Bangladesh for example, the U.N. confined its involvement to giving humanitarian aid to those affected by the civil wars.

The most common method of dealing with secession is through the exercise of force -- as in the cases of Katanga and Biafra. When minority claims do not pose very serious threats to the existence of states, states have responded through increased decentralization of power to the restless regions or through a system of federalism such as the one operating in Canada. In some cases, states have passed legal provisions guaranteeing certain rights of minority groups.[32]

Demands for self-determination could, therefore, conceivably be satisfied by the establishment of a more or less strict federalism or by granting some of the demands of the secessionists, such as complete freedom of conscience where the cause of irritation is religious intolerance, or as in the General Assembly's ill-fated plan for Palestine, in which it recommended political separation of Palestine from Israel but with an economic union between the two.[33] In making such a suggestion, there has been tacit agreement amongst U.N.'s member states that any decision to grant special rights to groups within a certain state, and increased decentralization of powers to regions, remains the exclusive responsibility of an individual state. The U.N. and the international

community in general can only exert moral and political pressure to influence the way a particular state runs its affairs. It should be clear from the discussion of decolonization that self-determination in independent states is significantly different from self-determination in colonial and Trust territories.

The United Nations and Human Rights

As we have already seen, the League of Nations attempted to deal with claims of self-determination for minorities in Eastern and Central Europe through an elaborate system of Minority Treaties and hence provided at least temporarily, an answer to claims for self-government which did not endorse a right of secession.[34] The U.N.'s system of human rights has not culminated in any formal treaties similar to the Minority Treaties of the early 20th century although the aims of the two appear to be similar. By seeking to influence the manner in which a state treats its citizens through its human rights, the U.N. General Assembly hopes to reduce circumstances that would normally spark restlessness on the part of groups of people who consider themselves oppressed and therefore, qualified for self-determination. An assessment of the effectiveness of the human rights system in curbing incidences of secession is beyond the scope of this thesis. However, a brief historical account is in order to indicate where the system stands at the present time in relation to the principle of self-determination.

At its first session in February 1946, the Economic and Social Council (ECOSOC) established the Commission on Human Rights which set about preparing a draft Declaration of Human Rights. In spite of

difficulties in getting general agreement on the definition of basic human rights, the Commission completed its work by June 10, 1948 and the draft was subsequently adopted by the General Assembly without a negative vote.[35]

Since the Declaration was not a treaty and was not intended to impose legal obligations, it was not necessary to submit it to the members for ratification. Despite this limitation, Goodrich has suggested that the Declaration was bound to have a substantial effect on the subsequent discussions of the U.N., and to be invoked as setting standards that states should respect.[36]

It is significant that the first extended discussion concerning the meaning and scope of an alleged right of self-determination took place during the initial debates on the Human Rights Covenants. In 1950, the General Assembly called on the Economic and Social Council and the Commission on Human Rights "to study ways and means which would ensure the right of peoples and nations to self-determination, and to prepare recommendations for its consideration by the General Assembly at its Sixth Session."[37] The Commission spent a good part of its 1952 session discussing the matter, and after a heated debate in which the familiar definitional problems of self-determination were expressed, adopted a resolution to insert in the draft Covenants on Human Rights the following article:

> 1. All peoples and all nations shall have the right of self-determination namely, the right freely to determine their political, economic, social and cultural status.
>
> 2. All states, including those having responsibility for the administration of

> Non-Self-Governing and Trust Territories and those controlling in whatsoever manner the exercise of that right by another people, shall promote the realization of that right in all their territories, and shall respect the maintenance of that right in other states, or in conformity with the provisions of the United Nations Charter.[38]

In addition, the question of the nebulous relationship between self-determination and minority rights was discussed. Very little progress had been made in this area since the Paris Peace Conference of 1919. Some delegates insisted that the two concepts were separate; that minorities came under the jurisdiction of their respective states while self-determination applied only to national majorities living within their own territories. Others argued that the right of self-determination could not logically exclude the rights of minorities.[39] The difficulty was how to determine what these rights were and the extent to which they could be granted.

The majority of members, however, suggested that the right meant that people, especially those of non-self-governing territories, were to decide their own future status.[40] Thus, a right of secession was rejected. As they were finally adopted by the General Assembly in 1966, both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights contain the following wording in Article 1: "All peoples have the right of self-determination. By virtue of the right they freely determine their political status and freely pursue their economic, social and cultural development."[41]

It would be a mistake to assume that the presence of this Article in both Covenants can be interpreted as a general acceptance of the more radical views heard during the debates to the effect that secession was legitimate. According to M. Moskowitz, who has followed this matter closely, the debates "made it clear that the principle of self-determination could be invoked only for the liberation of colonial peoples and territories. It was not to be construed as implying the right of individuals within nations to express their special ethnic, cultural or religious characteristics or the exercise of the democratic method in internal affairs."[42] This interpretation generally agrees with the finding in Chapter III that a right of self-determination, generally understood as a right of peoples to their own independent status, applies to colonies and Trust territories.

The usage of the word self-determination in connection with human rights cannot, therefore, be construed in the same sense as colonial self-determination. Because of the domestic jurisdiction provision in the Charter, the human rights system cannot be used to justify the dismemberment of an existing state. Instead, such rights, generally associated with the term democracy, are to be manifested in equality before the law, free and fair elections, and equality of opportunity, regardless of sex, colour, religion, creed or nationality.[43]

One example of the application of human rights within a sovereign state is South Africa. Since the official enactment of the policy of apartheid in the early 1950s, the South African government has made no secret of the fact that its main purpose was to keep the Black people of South Africa in a state of perpetual subjugation. The following

statement made by Prime Minister Verwoerd in 1963 is an example of a constantly reiterated theme, and also provides South Africa's rationale for the policy of apartheid:

> "Reduced to its simplest form, the problem is nothing else than this: We want to keep South Africa White.... 'Keeping it White' can only mean one thing, namely, White domination, not 'leadership', not 'guidance', but 'control', 'supremacy'. If we are agreed that it is the desire of the people that the White man should be able to continue to protect himself by retaining White domination ... we say that it can be achieved by separate development."[44]

The apartheid policy has been severely attacked in the U.N. as a violation of self-determination provisions in the Human Rights Covenants and numerous resolutions have been passed to this effect.[45] South Africa has, however, refused to recognize any obligation on her part to discontinue apartheid, as well as any competence of the U.N. to be involved in a matter that she claims, belongs to her domestic jurisdiction. A majority of U.N. members have adopted a contrary view to the effect that South Africa is violating its international obligations under the Charter.[46] South Africa's refusal to comply with this view indicates the magnitude of the difficulty involved in applying human rights provisions to independent states.

It is true that international law did not concern itself, until recently, with the way a state ran its own affairs or the way it treated its citizens. However, in the continually changing and interdependent world, this view is gradually changing. There is growing awareness, for example, that any state activity that deprives a segment of its population of its most basic human rights is a matter

of international concern.[47] One implication of the human rights system is that states may be under legal obligation to protect its minorities, although this has been a very controversial matter in international practice. The next Section tries to assess the extent to which minorities are accorded any special rights in contemporary practices of states.

Minority Protection in the Twentieth Century

The general view regarding the question of minority protection is that minorities do not have a right of self-determination. The U.N. Charter makes no specific reference to minority protection. However, the International Covenant on Civil and Political Rights offers, in Article 27, some protections to minority groups residing within the boundaries of established states. However, these protections do not imply a right of secession. Article 27 reads:

> 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 practice their own religion, or to use their own language.[48]

In practice, however, states prefer not to accord minorities any special treatment lest this act as a deterrent to the process of building a common national sentiment and identity from a number of different groups -- a process usually referred to as nation-building. It is believed that if the wishes of the minorities were granted, this would lead to disintegration of an existing state. As we have seen, many states have refused to acknowledge the existence of minorities in the

states, preferring to treat them like any other citizen, all with equal rights. For example, many Latin American countries have polyglot populations which include ethnic and cultural groups that may be called minorities. But the governments of Latin America have been reluctant to characterize them as such. The Brazilian representative in the Third Committee of the General Assembly explained this outlook in 1961:

> For a minority to exist, a group of people must have been transferred en bloc, without a chance to express their will freely, to a State with a population most of whom differed from them in race, language or religion. Thus groups which had been gradually and deliberately formed by immigrants within a country could not be considered minorities, or claim the international protection accorded to minorities. That was why Brazil and the other American States, which gave immigrants the same legal status as aliens and the same fundamental rights as their own nationals, did not recognize the existence of minorities on the American continent.[49]

In addition to denying the suggestion that their populations include minorities, many governments since World War II have emphasized the idea of integration and assimilation, on the basis of pledges of equal and non-discriminatory treatment for all its citizens. In fact, when the Universal Declaration of Human Rights was being drafted, the view of the United States was that provision for the rights of the individual made any reference to the rights of minorities superfluous.[50] It seems therefore, that in the contemporary practice of most states, minorities are not accorded any special status vis-a-vis the rest of the population. The practice of the United Nations in this matter has been consistent with this proposition.

A notable test in the U.N. toward protection of minorities occurred in 1960 when Austria brought a complaint against Italy in connection with Italy's treatment of the German-speaking inhabitants of South Tyrol.[51] The complaint was based on a 1946 agreement between Austria and Italy, with one of the provisions guaranteeing the exercise of "autonomous legislative and executive regional power" for the populations of the Bolzano Province. Italy, in fact, enacted an Autonomy Statute, but it included so many Italians in the region involved that the German-speaking element became a minority of one-third. Austria claimed that this was a violation of the spirit of the Agreement and reiterated its demand for autonomy for the Province of Bolzano where the German-speaking people constituted the majority population. Italy rejected any claims for autonomy of one of its provinces. In Italy's view,

> the notion that every minority has the right to self-government is one which is foreign to the Charter and incompatible with the whole philosophy of the United Nations. In fact it was quite clear that rights granted to a minority should not be such as to form separate communities within a State which might impair its national unity or security.[52]

The U.N. General Assembly endorsed Italy's argument. The principle that minorities should have some kind of international protection was held to be obsolete. However, the Assembly held that members of minorities were entitled to equal and non-discriminatory treatment as individuals, but minorities, as collective entities, had no right to special status.[53]

Conclusion

It is evident from the discussion presented in this Chapter that the application of self-determination has been confined to territories which are essentially of the colonial type. Independence is one of the major goals of self-determination. Therefore, independent states are to be considered as having attained self-determination, whether or not there are minorities, regions or provinces within them that still demand their right of self-determination.

During the contemporary era of the U.N., self-determination has assumed a new dimension that is essentially concerned with human rights. The system of human rights has, as one of its objectives, the eradication of circumstances that usually provoke demands for secession. The U.N. has outrightly rejected secession as being incompatible with self-determination.

The ineffectiveness of the U.N. human rights system testifies to the inability of the U.N., as an organization, to interfere in the internal affairs of states. Therefore, it seems that in the final analysis, each state will rule its citizens and run its affairs in a manner it deems appropriate. The U.N. may exert moral and at times economic and political pressure, but even an offender like South Africa has so far managed to ignore the international pressures aimed against its apartheid policies.

Finally, the success of a secession will be determined, not by any idealistic right of self-determination, but by the strength of the group seeking secession and the support it gets from its allies. Once secession succeeds and the new territory satisfies the requirements of

statehood, then it becomes a state in reality and the international community is then under obligation to enhance this reality by extending recognition. On this, Lauterpacht has written:

> [A]lthough rebellion is treason in the eyes of Municipal Law, it results, when followed by the establishment of an effective government wielding power over the entity of national territory, with the consent or acquiescence of the people (for a reasonable period of time) in a duty of other states to recognize the change and treat the new government as representing the State in internal sphere.[54]

It was under such circumstances that Bangladesh joined the rest of the international community as an independent state.

FOOTNOTES

1. Sarah Wambaugh, Plebiscites Since the World War, vol. 1 (Washington: Carnegie Endowment for International Peace, 1933), p. 4. For a discussion of Wilson's contribution to the principle of self-determination, see pp. 13-15 above.

2. C. K. Webster, The League of Nations in Theory and Practice (London: George Allen and Unwin, 1933), p. 206.

3. For a discussion of the Aaland Islands Case, see pp. 19-21 above.

4. See pp. 47-49 above for a discussion of the Soviet Union's practice in matters involving self-determination and secession.

5. The U.S. Department of State Bulletin 27 (1952): 917.

6. The U.S. Department of State Bulletin 48 (1963): 477.

7. See for example, Victor Marchetti and John D. Marks, The CIA and Cult of Intelligence (New York: A. A. Knopf, 1974), pp. 143-146.

8. The Sunday Times (London, February 15, 1976), p. 6.

9. Lee C. Buccheit, Secession: The Legitimacy of Self-Determination (New Haven, Conn.: Yale University Press. 1978), p. 119. For the practice of the U.S. generally, see pp. 43-44 above.

10. Rosalyn Higgins, The Development of International Law Through the Political Organs of the United Nations (London: Oxford University Press, 1963), p. 104.

11. Ibid., p. 105.

12. Umozurike O. Umozurike, Self-Determination in International Law (Hamden, Conn.: The Shoe String Press, 1972), p. 199.

13. See Ibid., Chapter X, pp. 225-270.

14. Ibid., p. 259.

15. See Vep P. Nanda, "Self-Determination in International Law: The Tragic Tale of Two Cities - Islamabad (West Pakistan) and Dacca (East Pakistan)," AJIL 66 (1972): 321-336.

16. One of the best illustrations of this problem is the Republic of Somalia, whose ethnic population is scattered in Kenya and Ethiopia. The border wars between Somalia and Kenya and Ethiopia have been fought mostly on the basis of Somalia's claims for reunification of all her ethnic populations. See Umozurike, pp. 226-236.

17. Quoted in Zdenek Cervenka, The Organisation of African Unity and Its Charter (New York: Praeger Publishers, 1969), p. 94.

18. U.N., General Assembly Verbatim Records, 23rd Session, September 1968.

19. See U.N., Security Council Official Records (SCOR), 1089th Meeting (1964), p. 2, para. 7.

20. Ibid., 1088th Meeting, p. 27, para. 70 and 71.

21. U.N., SCOR, 161st Meeting (1971), p. 21, para. 192.

22. Ibid., p. 13, para. 124.

UNCIO Documents, vol. 6, p. 296. For a discussion of the travaux préparatoires of the San Francisco Conference, see pp. 30-33 above.

24. U.N. Monthly Chronicle 7 (February 1970): 36.

25. Ibid., p. 39.

26. Ibid., p. 40.

27. See the Resolution passed by Heads of the OAU Meeting held in Kinshasa on September 11-14, 1967; reprinted in International Legal Materials 6 (1967): 1243.

28. See Nanda, generally,

29. Rosalyn Higgins, "International Law and Civil Conflict," in The International Regulation of Civil Wars, ed. Evan Luard (London: Thames and Hudson, 1972), p. 175.

30. Michael M. Gunter, "Self-Determination in the Recent Practice of the United Nations," World Affairs 137 (1974/75): 153.

31. Rupert Emerson, "Self-Determination Revisited in the Era of Decolonisation," Occasional Papers in International Affairs, no. 9 (December 1964). A discussion of the validity of this assertion is beyond the scope of this thesis.

32. Prime Minister Trudeau's efforts to have language rights entrenched in a proposed new Constitution for Canada, may be an example of such provisions.

33. See for example, General Assembly Res. 181 (1947).

34. For a discussion of Minority Treaties, see pp. 16-19 above.

35. General Assembly Res. 217(III) of December 10, 1948.

36. Leland M. Goodrich, The United Nations In a Changing World (New York: Columbia University Press, 1974), p. 167.

37. General Assembly Res. 421 (1950).

38. U.N. Economic and Social Council Supplement 4, p. 8, para. 69. U.N. Document E/2256 (1952).

39. See the debates, summarized by Buccheit, pp. 79-83.

40. Ibid., p. 83.

41. General Assembly Res. 2200A(XXI) of December 16, 1966. For a discussion of the legal significance of the Covenants, see p. 101. below.

42. Moses Moskowitz, The Politics and Dynamics of Human Rights (Dobbs Ferry, New York: Oceana Publications, 1968), pp. 160-161.

43. These rights are usually expressed in individual state Constitutions and Bills of Human Rights. See M. Glenn Abernathy, Civil Liberties under the Constitution, 3rd ed. (New York: Harper and Row, 1971).

44. Quoted in Apartheid in South Africa (New York: United Nations Office of Public Information, 1963), p. 11.

45. See for example, General Assembly Resolutions 1761 of November 6, 1962; 2145 (XXI) of October 27, 1966; and Security Council Res. 269 of August 12, 1969.

46. Goodrich, p. 175.

47. H. Lauterpacht, International Law and Human Rights (Hamden, Conn.: Archon Books, 1950), p. 178; Elihu Lauterpacht, "Some Concepts of Human Rights," Howard Law Journal 11 (1965): 264-274; Myres S. McDougal et al., "The Protection of Respect and Human Rights: Freedom of Choice and World Public Order," American University Law Review 24 (1974/75): pp. 919-1039.

48. General Assembly Res. 2200A (XXI) of December 16, 1966.

49. GAOR, 3rd Committee, 1103rd Meeting, November 14, 1961, p. 213-214, para. 12.

50. GAOR, 3rd Committee, 161st Meeting, November 27, 1948, p. 726.

51. Much of the following historical information is from Vernon Van Dyke, "Self-Determination and Minority Rights," International Studies Quarterly 13 (1969): 249-251.

52. Quoted in Ibid., p. 250.

53. Ibid.

54. H. Lauterpacht, Recognition in International Law (Cambridge, England: Cambridge University Press, 1947), p. 409.

CHAPTER V

SELF-DETERMINATION AND INTERNATIONAL LAW

After considering the meaning and scope of the principle of self-determination, it is necessary to examine systematically whether the principle is a legal right under international law. This exercise is deemed to be crucial for our understanding of self-determination in view of the conflicting opinions about the status of the principle within international law and international relations. Thus, a group of writers and spokesmen for individual states have argued that self-determination is a political principle with no legally binding effect on states. Similarly, many other writers and spokesmen have maintained that the principle is a legal right. This Chapter attempts to provide an assessment of the two views. Evidence will be adduced from judicial opinions, writings of well-known publicists, and resolutions and declarations of the U.N. General Assembly.

To say that self-determination is a political principle implies that states are under no legal obligation to accede to claims for self-determination although they may choose to recognize it within their internal jurisdictions. The international community can, however, use the presence of its opinions to move states in the direction suggested by the principle. To say that peoples have a right of self-determination, however, seems to invest them with a legal right independent of their governing states, which can indeed be exercised in opposition to those states.[1]

Emergence of a Rule of International Law

Generally, it is accepted that a right which is claimed to be grounded in international law must be a product of a law-creating process. The classical law-creating agencies, that is, the formal sources, are treaties (conventions) and custom. Article 38 of the Statute of the International Court of Justice (ICJ) adds "general principles of law recognized by civilized nations." (See Appendix D.)

Since the evolution of the principle of self-determination has occurred principally within the context of the U.N. General Assembly, its legal nature will depend on the competence or authority of the U.N. and its associated organs to create such a right. One way of arguing for such competence is to begin from the premise that the Charter is a legally binding instrument. Therefore, the provisions for self-determination within the Charter could translate into binding rules. Similarly, resolutions related to the principle would be considered as authoritatively interpreting the Charter and would also logically appear to have a binding effect. Another approach would be to consider U.N. resolutions per se and determine the extent to which they may create legal obligations by themselves. Both approaches have been adopted by publicists. This Chapter will review these approaches to establish whether the principle of self-determination has emerged as a binding rule of international law.

Traditional Customary Law and Self-Determination

Custom and international law. Some writers hold the view that self-determination is now part of customary international law.[2] This

Section will discuss briefly what constitutes custom under international law, and then demonstrate the extent to which self-determination falls under the aegis of custom.

As mentioned above, Article 38(b) of the ICJ Statute mentions "international custom, as evidence of a general practice accepted as law." According to J. L. Brierly, custom is a "usage felt by those who follow it to be an obligatory one."[3] The principal source of custom is state practice. A general practice results from repetition of the same or similar conduct by states. Obviously, it is not necessary that there should be no dissident state, otherwise a single state or a group of them could stall the development of customary law. Moreover, no particular time is essential for the development of such law although usage over a long period provides good evidence.[4] Thus, in order to constitute a rule of customary international law, two elements must be shown to be present: general practice, and acceptance of such practice as law.[5] The first element is ascertainable from official pronouncements of states in so far as such pronouncements consistently reflect on state practice. The practice of states on matters involving self-determination as described earlier in Chapter III may be considered evidential of general practice. As for the second element, it would be necessary to establish that states have accepted in their own practices regarding self-determination that they regard the rule as legally binding upon themselves. While this second element is more difficult to ascertain, a review of the literature may indicate the extent to which the principle has emerged as a customary rule of international law.

Traditional customary international law did not recognize any legal right of self-determination.[6] Colonial territories were regarded as belonging to the state that governed their affairs, while the inhabitants, irrespective of their desires, were considered to have acquired the citizenship of the colonial power.[7] Before the era of the Charter of the U.N., according to C. G. Fenwick, there was no "accepted rule of international law by which the right of a colony to self-determination might be judged."[8] Furthermore, any support for, or recognition of, a state that was formed through revolutionary means was treated by the parent state as interference with its legal right to retain control over its subjects. Thus, it has been suggested that recognition by France of the U.S.A. in 1778 was one of the reasons that led to a declaration of war by Britain against France.[9]

During the Paris Peace Conference of 1919, it is difficult to conclude that states accepted the principle of self-determination as legally binding; however, during the peace settlement the principle was to have "a dispositive and normative effect greater than that of many long accepted rules of law."[10] The Aaland Islands Case is often cited as authority on the contentious nature of a legal right of self-determination.[11] This situation has changed drastically since the creation of the U.N., so that today, according to Brownlie, it is "increasingly difficult to deny the legal content of the right of self-determination."[12] The opinions of international lawyers on this matter are, however, sharply divided. The next Section reviews some of these opinions.

Arguments Against a Legal Right of Self-Determination

One group of writers, of whom Hans Kelsen is perhaps the most authoritative, has interpreted the Charter provisions on self-determination to mean that it is synonymous with the sovereign equality of states. Basing his argument on Article 1(2), Kelsen holds that since that Article refers to relations among states, then the word peoples in connection with equal rights refers to states because only states have equal rights under general (customary) international law. Hence, Kelsen argues that the principle of self-determination as used in the Charter means the sovereign equality of states. On this basis, he concludes that the principle has no legal validity because the concept of sovereign equality "... means that everybody has the rights and duties which the law confers upon him, or that everybody shall be treated as the law provides which is an empty tautology."[13] In making this interpretation, Kelsen's main concern was that such an interpretation be consistent with other principles of international law, in particular the domestic jurisdiction provision in Article 2(7) of the Charter.

Clyde Eagleton's discussion of self-determination resembles that of Kelsen. Eagleton argues that self-determination refers to the right of peoples to political independence and then raises the question whether such a right exists in international law -- and his answer is a firm negative:

> The textbooks of international law do not recognize any legal right of self-determination, nor do they know any standards for determining which groups are entitled to independence; on the contrary, international law holds that a

> state which intervenes to aid a rebellious group to break away from another state is itself committing an illegal act.[14]

Eagleton then asks whether the U.N. has any authority to institute a right of self-determination by virtue of powers acquired under its Charter. He concludes that the U.N. cannot establish rules or criteria which are binding on any state:

> The United Nations has no authority in the matter, in a legal or constitutional sense; it is not authorized to issue a ukase freeing a people from a state and setting up a group as independent; it cannot establish rules or criteria for self-determination which are legally binding on anyone.[15]

However, he is quick to add that considerable international pressure may be brought to bear so that the result may be the same as if there were a right.[16]

Writing in 1960, Emerson indicated that self-determination was incapable of any constitutional formulation and "[was] essentially miscast in the role of a legal right which can be made an operative part of either domestic or international systems."[17] Elsewhere, Emerson concludes that "what emerges beyond dispute is that all peoples do not have the right of self-determination. They have never had it, and they will never have it."[18]

Some publicists have tried to dismiss the entire problem by simply asserting that the term is so vague that it is devoid of any legal effect. B. V. A. Roling, in 1960, suggested:

> The principle of self-determination, in particular, is so vague with regard to both the subject that can appeal to it and the circumstances under which it can become a claimable right, that there is little question of any positive legal content.[19]

G. Schwarzenberger, in 1967, held the view that "the principle of national self-determination is a formative principle of great potency, but not yet part and parcel of international customary law."[20] L. C. Green had argued earlier that self-determination is not a legal right. "It is not a right under international law. Customary international law certainly does not recognize such a right, and, as yet, there are but few treaties that concede it."[21]

Among students of international law who analyze self-determination from the perspective of the U.N. is Leo Gross. According to Gross, nowhere in the Charter has the right of self-determination in the legal sense been established. While conceding the moral and political weight of the resolutions of the General Assembly on the subject of self-determination and the fact that many peoples have gained political independence on that basis, Gross argues that it is not possible to supply the missing element necessary for evolution of customary international law, namely, that practice was based on a sense of legal obligation.

> On the contrary, the practice of decolonization is a perfect illustration of a usage dictated by political expediency or necessity or sheer convenience. And moreover, it is neither constant nor uniform.[22]

Gross concludes that the practice of states, especially the colonial powers, as distinguished from the practice of the U.N. organs, has not been sufficiently consistent and widespread to support a conclusion that the principle of self-determination can be regarded as a legal right. In addition, he argues

> ... the Charter does not establish a right to self-determination; the principle of self-

> determination and the articles of human rights in the Charter cannot be interpreted as having been transformed into legal rights with corresponding legal obligation as a result of subsequent practice, and they cannot be construed as having been modified by subsequent practice.[23]

J. H. W. Verzijl, one of the most intractable opponents of a right of self-determination, argued in 1968 that the "right of self-determination, has ... always been the sport of national or international politics and has never been recognized as a genuine positive right of "peoples" of universal and impartial application, and it never will, nor can be so recognized in the future."[24] Finally, and the list is by no means exhaustive, S. P. Sinha who has written extensively on the subject, argued that U.N. resolutions are binding only on "house-matters" (such as on the budget and administrative appointments) but have no effect on the legal nature of self-determination. He concludes that "[t]he principle is ... one of political expediency which states may or may not use, rather than one of international law which the states are obliged to follow."[25]

Arguments For a Legal Right of Self-Determination

A growing number of publicists have accepted the status of self-determination as a right under international law. Three lines of thought are clearly descernible in their arguments. One group of writers, particularly those from the Soviet Union, maintain that self-determination had attained a legal status in pre-Charter customary international law;[26] others consider the legality of the principle to have been the intended purpose of Article 1(2) of the Charter, and they

quote various Resolutions of the General Assembly and Human Rights Covenants as evidence of this interpretation. Finally, another group considers the principle to have evolved into modern customary international law. Some of the arguments of writers who adopt these views will be examined below.

Quincy Wright, for example, holds the view that the legal nature of self-determination arises from the fact that the U.N. Charter is a legally binding instrument. Wright examined the travaux préparatoires of the San Francisco conference and concluded that: "It seems clear that Members of the United Nations by ratifying the Charter have undertaken legal obligations in respect to the self-determination of peoples within their territory."[27] With reference to Article 73 (see Appendix B) in particular, he points out that it is also clearly an obligation.

> The question whether the "salt-water" theory was intended to apply to this article is a matter of interpretation.... Clearly, determination of what are the non-self-governing territories with respect to which obligations are undertaken is not a matter within the domestic jurisdiction of any state.[28]

Brownlie also argues that the U.N. Charter is a binding international instrument and concludes that once the Charter was in force, it was to be increasingly difficult to deny the legal content of the principle of self-determination.[29] As early as 1951, M. Korowicz

> [found] little reason to doubt that the principle of self-determination is recognized by the Charter as a principle of international law, all the more since it is combined with equal rights of the peoples, and the principle of equal rights of States and nations certainly is a principle of international law affirmed as such in many multilateral treaties, and in the writings of publicists.

In his view, therefore, Articles 1(2) and 55 of the Charter make the principle "an integral part of positive international law."[30]

It is inevitable that those who consider the role of the U.N. in the development of international law must pay a certain amount of attention to the value of resolutions of the General Assembly and Security Council. In fact, some of the writers who have concluded that self-determination is now a legal right have done so on the basis of the strength of such resolutions. On the question of the legal value of resolutions, Emerson has pointed out that while it would be naive to assert that resolutions automatically create law, it would be equally naive to deny the usefulness of resolutions in influencing the development of international law. What is necessary, as in the development of customary international law, is to show evidence to justify the proposition that a norm has achieved a consensus of the international community.[31] Again, Higgins provided a useful frame of reference by insisting that the key issue is not the non-binding nature of General Assembly resolutions, but the cumulative effect of such resolutions taken as an indication of the emergence of new rules of general customary law. As she has written:

> What is required is an examination of whether resolutions with similar content, repeated through time, voted for by overwhelming majorities, giving rise to a general opinio juris, have created the norm in question.[32]

Applying her own criteria, she finds that self-determination has emerged as an international legal right.

Obed Asamoah adopts a similar approach to that of Higgins and argues that what is important in determining the legal worth of the

resolutions of the General Assembly is to consider them as "collective acts of states."[33] Such resolutions, repeated consistently over a long period of time can, and do give rise to customary international law. In his opinion, resolutions on self-determination have survived the important test of custom. Hence, he concludes that the principle has become a legal right.

What effect, then, do resolutions of the General Assembly have on the emergence of the principle of self-determination as a rule of customary international law? First, activity in the General Assembly is one form of state practice, and it certainly cannot be dismissed as irrelevant evidence. The question of determining the legal status of self-determination as developed by General Assembly resolutions invites a consideration of two related issues: Is the practice of the U.N. General Assembly a source of international law? Secondly, do the resolutions of the General Assembly create obligations under international law?

As pointed out above, it is generally agreed that, with the exception of certain specific provisions relating to procedural and house-policies (for example, Articles 15 and 97 of the Charter), resolutions of the General Assembly are only recommendations and are not legally binding.[34] However, as formal statements of the principal organ of the U.N., member states are under obligation to treat them with the degree of respect appropriate to a resolution of the General Assembly.[35]

It is commonplace that Resolutions 1514(XV), 1541(XV), both passed in 1960, and other similar resolutions do not create, qua

Assembly resolutions without more, legal obligations on the member states. Such a conclusion, however, does not fully describe the law-formation competence of the General Assembly in this and similar situations. Accordingly, an inquiry as to the legal authority of such resolutions requires their examination in the context of state practice in general. As we have seen, the practice of states with respect to colonialism is evidential of the fact that Resolution 1514(XV) has evolved into a general principle of international law proscribing colonialism.[36] This Resolution may also be seen to represent an authoritative interpretation of Article 1(2) of the Charter and is thereby legally binding as an interpretation of a previously ratified treaty.[37] Finally, the Resolution is one of the most frequently cited resolutions in the U.N. history. As such, its substance progressively emerges as a principle of customary international law because of constant recitation in the Assembly and elsewhere. Hence, there is sufficient evidence of the requisite opinio juris of states.[38]

Other important resolutions such as Resolution 2625(XXV) of 1970 on "Principles of International Law Concerning Friendly Relations" (Appendix G) which specifies that self-determination is a legal right, may similarly be considered binding. The first suggestion of the legal impact of Resolution 2625(XXV) was given by the International Commission of Jurists in its 1972 study entitled The Events in East Pakistan, 1971.[39] Their Report characterized the 1970 Declaration as "the most authoritative statement of the principles of international law relevant to the questions of self-determination and territorial integrity."[40] Although they perceived some contradiction between self-determination and

territorial integrity, the Commission chose to interpret paragraph 7 of the Declaration in the light of what they felt was a "widely held view" among international lawyers, namely that self-determination is a right that can be exercised only once:

> According to this view, [they said], if a people or their representatives have once chosen to join with others within either a unitary or a federal state, that choice is a final exercise of their right to self-determination; they cannot afterwards claim the right to secede under the principle of the right to self-determination.[41]

Finally, it is arguable that inclusion of the principle of self-determination in certain international instruments such as the Human Rights Covenants[42] and the 1977 Geneva Protocol on Laws of Armed Conflict[43] gives it some binding force. Differences of opinion exist among publicists on whether the Covenants create legal obligations for member states with respect to human rights. Some writers, such as Lauterpacht, hold the view that the international legality of human rights is derived from the fact that they feature prominently in statements of the purposes of the U.N., and that members are under obligation to act in accordance with these obligations.[44] Kelsen, on the other hand, is of the opinion that provisions for human rights do not constitute legal norms under positive law.[45] The debate on this matter is inconclusive. However, once the Covenants and the Geneva Protocol receive sufficient ratifications to bring them into effect, then the provisions on self-determination will be elevated into legally binding rules although even then these rules will apply only to states which ratify the instruments.[46]

Judicial Opinions of the ICJ

Judicial pronouncements on both the legal value of the General Assembly resolutions and on the legal status of the principle of self-determination have been few, but consistent. Two of the most relevant of these decisions in so far as they relate to self-determination are the South West African cases and the recent decision on Western (Spanish) Sahara. These decisions are discussed below.

The South West African cases dealt with the principle of self-determination indirectly by clarifying the law of the Mandates and its application to South West Africa.[47] In the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) [1971], the ICJ reviewed previous decisions and restated the law of the Mandates. First, it reaffirmed the 1950 Opinion that "two principles were considered to be of paramount importance: the principle of non-annexation and the principle that the well-being and development of such peoples form a 'sacred trust of civilization'."[48] Therefore, any control or tutelage over mandated territory was to be of a very temporary nature.

In denying South Africa's contention that the Mandate Agreement allowed annexation, the Court also found that "the subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them [mandated, trust and non-self-governing territories]." In the opinion of the Court, the ultimate objective of the sacred trust was

"the self-determination and independence" of the peoples concerned.[49]

In addition, the Court considered obiter dicta, the legality of the General Assembly Resolution 2145(XXI) of 27 October 1966 which terminated South Africa's Mandate over Namibia, and argued that the Resolution was consistent with provisions of the Mandate Agreement and the Charter of the U.N., both of which South Africa had violated. Hence, it concluded that the right of termination was properly conducted, thereby elevating a General Assembly resolution into a binding status. The Court also considered the legal effect of Security Council Resolutions 264 (1969), 269 (1969) and 276 (1970). The first called on South Africa to withdraw its administration from Namibia immediately. The second set October 4, 1969 as the deadline for the withdrawal. The third declared that the continued presence of South Africa in Namibia was illegal. The Court held that the Security Council acted within the powers granted to it by the Charter (Article 24) and that member states were bound under Article 25 to carry out its decisions. The Court, therefore, confirmed the view that U.N. decisions on topics related to self-determination may have legally binding effects.

In its Advisory Opinion on Western Sahara [1975], the Court decided to address itself to the question of decolonization in order to answer the question posed by Spain: How important in the final act of decolonization is historic title as compared to the right of self-determination?[50]

The Court found that, at least during the past 50 years, self-determination has become the rule; that independence, free association or integration all constitute legitimate forms of decolonization. With

reference to the question of historic title, the Court ruled that neither Morocco nor Mauritania had any valid claim to the Sahara but that even if they did, contemporary international law accords priority to peoples' (the Sahwaris) right of self-determination. The Court also found that in spite of certain legal ties with Morocco and Mauritania, the ties were not of a nature to affect the application of Resolution 1514(XV) in the decolonization of Western Sahara, "[and,] in particular, of the principle of self-determination through the free and genuine expression of the will of the peoples of the territory...."[51]

This Advisory Opinion is significant in several ways. First, it rules out historic claims as justification for territorial occupation. Secondly, it underscores the right of the oppressed peoples -- in this case the Sahwaris of Western Sahara -- to independence. Finally, it provides additional evidence for the proposition that self-determination defined as self-government or independence from colonial occupation, is a legal right.

An Assessment and Conclusion

A careful examination of the views expressed above seems to suggest that the meanings writers attribute to self-determination determine, to a certain extent, their opinions regarding its juridical nature. For example, Kelsen, Roling and Eagleton claim that self-determination is such a broad concept, encompassing words like states, nations and equality, that it cannot possibly be a legal right. In the other camp, writers like Higgins, Wright and Brownlie examine self-determination as a principle whose application is restricted to non-

self-governing territories. Viewing it from this perspective, they conclude that it is a legal right.

The evidence adduced earlier on state practice (Chapter III above), as well as decisions of the ICJ, seem to justify the latter view, namely that self-determination in the context of decolonization has emerged as a binding rule of international law.[52] Nowhere has the Court, or any state, made reference to a universal application of self-determination.

The practice of the U.N. in this respect has been significant, for claims of self-determination have mostly been advanced within the context of the U.N. which has provided moral, political and at times, material support to dependent peoples. Its Resolutions on self-determination, in so far as they reflect the practices of states, have significantly added to the process of the evolution of this right.

FOOTNOTES

1. This distinction is made by Lee C. Buccheit. See his book, Secession: The Legitimacy of Self-Determination (New Haven, Conn.: Yale University Press, 1978), p. 128. For a similar distinction, see also M. A. Shukri, The Concept of Self-Determination at the United Nations (Damascus: Al Jadidah Press, 1965), p. 6.

2. See, for example, Manfred Lachs, "The Law in and of the United Nations," Indian Journal of International Law 1 (1961): 429-442; and Rosalyn Higgins, The Development of International Law Through the Political Organs of the United Nations (London: Oxford University Press, 1963), pp. 90-106.

3. J. L. Brierly, The Law of Nations (London: Oxford University Press, 1963), p. 60.

4. Umozurike O. Umozurike, Self-Determination in International Law (Hamden, Conn.: The Shoe String Press, 1972), pp. 189-190.

5. International Courts pronouncements on this are few, but consistent. See for example, Lotus, Permanent Court of International Justice (PCIJ), Serial A, no. 10, p. 28; and Asylum Case, ICJ Rep. 1950,

6. Herbert W. Briggs, The Law of Nations: Cases, Documents and Notes, 2nd ed. (New York: Appleton-Century-Crofts, 1952), p. 65; G. Schwarzenberger, A Manual of International Law, 5th ed. (London: Oxford University Press, 1967), p. 67.

7. L. C. Green, "The Impact of New States on International Law," Israeli Law Review 4 (Jan. 1969): 39.

8. Charles G. Fenwick, International Law, 3rd ed. (New York: Appleton-Century-Crofts, 1951), p. 140.

9. Ibid.

10. Ian Brownlie, "An Essay in the History of the Principle of Self-Determination," in Grotian Society Papers: Studies in the History of Nations (The Hague: Martinus Nijhoff, 1970), p. 94.

11. LNOJ Special Supplement 3 (October 1970), p. 5. For a discussion of this case, see pp. 19-21 above.

12. Brownlie, "An Essay in the History of Self-Determination," p. 98.

13. Hans Kelsen, The Law of the United Nations: A Critical Analysis of Its Fundamental Problems (New York: Praeger Publishers, 1950), pp. 50-52.

14. Clyde Eagleton, "Excesses of Self-Determination," Foreign Affairs 31 (1952/53): 593.

15. Ibid., p. 594.

16. Ibid.

17. Rupert Emerson, From Empire to Nation: The Rise to Self-assertion of African and Asian People (Cambridge: Harvard University Press, 1960), p. 307.

18. Rupert Emerson, "Self-Determination Revisited in the Era of Decolonisation," Occasional Papers in International Affairs, no. 9 (Dec. 1964), p. 64. Emphasis in the original.

19. B. V. A. Roling, International Law in an Expanded World (Amsterdam: Djambatan, 1960), p. 78.

20. Schwarzenberger, p. 74.

21. L. C. Green's comments are printed in the International Association Report, 47th Conference (1956).

22. Leo Gross, "The Right of Self-Determination in International Law," in New States in the Modern World, ed. Martin Kilson (Cambridge: Harvard University Press, 1975), p. 144.

23. Ibid., pp. 142-143.

24. J. H. W. Verzjil, International Law in Historical Perspective, vol. 1 (Leyden: A. W. Sijthoff, 1968), p. 324.

25. S. Prakash Sinha, "Is Self-Determination Passe?" Columbia Journal of Transnational Law 12 (1973): 271.

26. See for example, D. B. Levin, "The Principle of Self-Determination of Nations," Soviet Yearbook of International Law (1962).

27. Quincy Wright, "Recognition and Self-Determination," Proceedings of the American Society of International Law (1954): 30.

28. Ibid., p. 30.
The "salt-water" theory required a body of salt water separating the governing power from the governed colony.

29. Ian Brownlie, Principles of Public International Law (Oxford: Clarendon Press, 1966), pp. 482-485.

30. Marek S. Korowicz, Introduction to International Law: Present Conceptions of International Law in Theory and Practice (The Hague: Martinus Nijhoff, 1959), p. 285.

31. Rupert Emerson, "Self-Determination," AJIL 65 (1971): 460.

32. Rosalyn Higgins, "The U.N. and Law-making: The Political Organs," Proceedings of the American Society of International Law 64 (1970): 43.

33. Obed Y. Asamoah, The Legal Significance of the Declarations of the General Assembly of the United Nations (The Hague: Martinus Nijhoff, 1966), p. 7.

34. F. B. Sloan, "The Binding Force of a Recommendation of the General Assembly of the United Nations," The British Yearbook of International Law 25 (1948): 1-33; and S. Rosenne, "Recognition of States by the United Nations," The British Yearbook of International Law 26 (1949): 437-447.

35. See for example, Judge H. Lauterpacht's statement in ICJ Rep., 1955, pp. 120-122.

36. Samuel A. Bleicher, "The Legal Significance of Re-citation of General Assembly Resolutions," AJIL 63 (1969): 474-475.

37. Higgins, The Development of International Law, p. 304.

38. Bleicher, pp. 477-478.

39. The Events in East Pakistan, 1971 (Amsterdam: Secretariat of the International Commission of Jurists, 1972).

40. Ibid., p. 67.

41. Ibid., p. 69.

42. Covenant on Economic, Social and Cultural Rights; and Covenant on Civil and Political Rights. Both annexed to General Assembly Res. 2200(XXI) of 1966.

43. "Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict: Protocols I and II of the Geneva Conventions," International Legal Materials 16 (1978): 1391-1459. Paragraph 4 of Protocol I provides for a "right of self-determination as enshrined in the Charter of the U.N. and the Declaration on the Principles of International Law..." for peoples fighting against "colonial domination and alien occupation."

44. H. Lauterpacht, International Law and Human Rights (Hamden, Conn.: Archon Books, 1950), pp. 145-148.

45. Kelsen, pp. 29-33. For a similar view, see Pieter N. Drost, Human Rights as Legal Rights (Leyden: A. W. Sijthoff, 1965), pp. 28-29.

46. On the question of the ratification of the Covenants, see Leland M. Goodrich, The United Nations in Changing World (New York: Columbia University Press, 1974), p. 170.

47. For a discussion of the legal disputes over South West Africa, see L. C. Green, "The United Nations, South West Africa, and the World Court," Indian Journal of International Law 7 (1967): 491-525.

48. ICJ Rep., 1971, p. 31.

49. Ibid.

50. ICJ Rep., 1975, p. 12.
On the significance of Advisory Opinions, see Rosalyn Higgins, "International Law and the U.N. System," in The Study of International Affairs, ed. Roger Morgan (London: Oxford University Press, 1972), pp. 169-186.

51. ICJ Rep., 1975, p. 37.

52. One implication of a legal right of self-determination is that the U.N. can impose sanctions against a state that violates that right. Accordingly, the U.N. has imposed economic sanctions against South Africa for violating the right of the peoples of Namibia to self-determination. States are under legal obligation to abide by such an action. See, Green; and also p. 111 below.

CHAPTER VI

CONCLUSION

A survey of the historical evolution of the principle of self-determination from the League period through the developing law of the United Nations reveals at least four variations in the usage of the term: national self-determination, colonial self-determination, secessionist self-determination, and self-determination as part of the human rights complex.

During the contemporary era of the U.N., self-determination has been accepted as a legal right only for colonial peoples and those in Trust (and formerly mandated) territories. This right is attainable primarily through independence although there has been a demonstrable willingness on the part of states to accept association or integration as satisfactory modes of exercising self-determination. These options have been introduced to guard against a proliferation of mini-states, and the problems their vulnerability might generate for the international community. Evidence for this conclusion has been adduced from a number of sources, in particular the practice of states; U.N. Resolutions and decisions; decisions of the ICJ -- in particular those relating to South West Africa; and writings of authoritative publicists.

This evidence also suggests that the beneficiaries of a right of self-determination need not be limited to those historically characterized as nationalities. In the cases of colonies and Trust territories, these beneficiaries are defined territorially, so that a multiplicity of nationalities is considered a people (or peoples), for

the purposes of self-determination.

Acceptance of a legal right of self-determination has a number of implications for the international community. For example, General Assembly resolutions on colonial issues would carry much weight in influencing colonial policies and practices. Decisions of the Security Council would similarly be significant and in addition, they would be legally binding on member states. Another related implication is that member states would be under legal obligation to abide by sanctions that are instituted by the U.N. against violations of a right of self-determination. International law is generally weak in the area of enforcement of its norms. However, the U.N. has taken a remarkable lead in instituting sanctions against South Africa for denying the people of Namibia of their right of self-determination.

A second conclusion emerging from this study is that self-determination has been rejected as justification for secessionist attempts by oppressed nationalities in existing states. The distinction between self-determination and secession may be partially explained by reference to the immediate political interests of states. From the perspective of the U.N. and that of a great number of states, however, the principle of the territorial integrity of states and domestic jurisdiction provisions that are so well articulated in the Charter and other U.N. documents, are given precedence over secessionist claims. There is tacit agreement among the U.N. member states that violation of these cardinal principles would likely open a Pandora's box to confusion and anarchy, since hardly any state is so homogeneous that it would embrace a right of secession in another state without some

lingering uneasiness about its own existence. Thus, in approving Resolution 2625(XXV) of 1970 (Appendix G), Canada, India and France all of which were faced by serious separatist movements, expressed the opinion that the injunction against impairment of the territorial integrity of a state was the "key" to the principle of self-determination.

Thus the U.N. has successfully avoided getting involved in secessionist claims. Instead, it has preferred to deal with the problems raised by various nationalities through its developing approach to human rights. Efforts by nationalities to justify secession on the grounds of human rights have, however, failed because states insist on individual human rights rather than special rights for groups seeking secession. Therefore, it seems that as in the past, secession is likely to succeed only as a result of insurrection, civil war and intervention by other states -- as the case of Bangladesh demonstrated so well.

The demise of traditional colonialism will not, hopefully, signal the end of self-determination. Demands of nationalities for minority rights including claims for a right to secede are on the increase. Neither the General Assembly nor the Security Council has addressed itself specifically to the form that self-determination may take in these circumstances. However, reference has been made to a right of self-determination in connection with resolutions on apartheid and other related issues of human rights. It would appear that the future of self-determination lies in this area of human rights.

Granted the reluctance of states to succumb to secessionist claims, it is unlikely that nationalities will find international

support in their claims for independent status. One hopes that the application of the Human Rights Covenants -- once ratified -- will reduce the number of separatist claims. However, nationalities committed to their separatist claims will continue to evoke self-determination as a right, applicable to their situation. The success of secession will not depend on whether self-determination becomes a legal right applicable to nationalities, but rather on the support the seceding group is able to muster from its allies. Given the conservatism of a majority of states with respect to preservation of existing borders, the U.N. will have a negligible role to play in this process.

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APPENDICES

APPENDIX A

Article 22 of the Covenant of the League of Nations

MANDATORY SYSTEM

1. To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization and that securities for the performance of this trust should be embodied in this Covenant.

2. The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League.

3. The character of the mandate must differ according to the stage of the development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances.

4. Certain communities formerly belonging to the Turkish Empire have reached a state of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory.

5. Other peoples, especially those of Central Africa, are at such a stage that the Mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals, the prohibition of abuses such as the slave trade, the arms traffic and the liquor traffic, and the prevention of the establishment of fortifications of military and naval bases and of military training of the natives for other than police purposes and the defense of territory, and will also secure equal opportunities for the trade and commerce of other Members of the League.

6. There are territories, such as Southwest Africa and certain of the South Pacific islands, which, owing to the sparseness of their population, or their small size, or their remoteness from the centers of civilization, or their geographical contiguity to the territory of the Mandatory, and other circumstances, can be best administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population.

7. In every case of mandate, the Mandatory shall render to the Council an annual report in reference to the territory committed to its charge.

8. The degree of authority, control or administration to be exercised by the Mandatory shall, if not previously agreed upon by the Members of the League, be explicitly defined in each case by the Council.

9. A permanent Commission shall be constituted to receive and examine the annual reports of the Mandatories and to advise the Council on all matters relating to the observance of the mandates.

Source: Leland M. Goodrich, et al., Charter of the United Nations: Commentary and Documents, 3rd and revised ed. (New York: Columbia University Press, 1969), pp. 660-661.

APPENDIX B

Declaration Regarding Non-Self-Governing Territories Chapter XI of the U.N. Charter

Article 73

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

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

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

c. to further international peace and security;

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

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

Article 74

Members of the United Nations also agree that their policy in respect of the territories to which this Chapter applies, no less than in respect of their metropolitan areas, must be based on the general principle of good-neighbourliness, due account being taken of the interests and well-being of the rest of the world, in social, economic, and commercial matters.

Source: Goodrich, pp. 690-691.

APPENDIX C

International Trusteeship System
(Chapter XII of the U.N. Charter)

Article 75

The United Nations shall establish under its authority an international trusteeship system for the administration and supervision of such territories as may be placed thereunder by subsequent individual agreements. These territories are hereinafter referred to as trust territories.

Article 76

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

a. to further international peace and security;

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

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

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

Article 77

1. The trusteeship system shall apply to such territories in the following categories as may be placed thereunder by means of trusteeship agreements:

a. territories now held under mandate;

b. territories which may be detached from enemy states as a result of the Second World War; and

c. territories voluntarily placed under the system by states responsible for their administration.

2. It will be a matter for subsequent agreement as to which territories in the foregoing categories will be brought under the trusteeship system and upon what terms.

Article 78

The trusteeship system shall not apply to territories which have become Members of the United Nations, relationship among which shall be based on respect for the principle of sovereign equality.

Article 79

The terms of trusteeship for each territory to be placed under the trusteeship system, including any alteration or amendment, shall be agreed upon by the states directly concerned, including the mandatory power in the case of territories held under mandate by a Member of the United Nations, and shall be approved as provided for in Articles 83 and 85.

Article 80

1. Except as may be agreed upon in individual trusteeship agreements, made under Articles 77, 79, and 81, placing each territory under the trusteeship system, and until such agreements have been concluded, nothing in this Chapter shall be construed in or of itself to alter in any manner the rights whatsoever of any states or any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties.

2. Paragraph 1 of this Article shall not be interpreted as giving grounds for delay or postponement of the negotiation and conclusion of agreements for placing mandated and other territories under the trusteeship system as provided for in Article 77.

Article 81

The trusteeship agreement shall in each case include the terms under which the trust territory will be administered and designate the authority which will exercise the administration of the trust territory. Such authority, hereinafter called the administering authority, may be one or more states or the Organization itself.

Article 82

There may be designated, in any trusteeship agreement, a strategic area or areas which may include part or all of the trust territory to which the agreement applies, without prejudice to any special agreement or agreements under Article 43.

Article 83

1. All functions of the United Nations relating to strategic areas, including the approval of the terms of the trusteeship agreements and of

their alteration or amendment, shall be exercised by the Security Council.

2. The basic objectives set forth in Article 76 shall be applicable to the people of each strategic area.

3. The Security Council shall, subject to the provisions of the trusteeship agreements and without prejudice to security considerations, avail itself of the assistance of the Trusteeship Council to perform those functions of the United Nations under the trusteeship system relating to political, economic, social, and educational matters in the strategic areas.

Article 84

It shall be the duty of the administering authority to ensure that the trust territory shall play its part in the maintenance of international peace and security. To this end the administering authority may make use of volunteer forces, facilities, and assistance from the trust territory in carrying out the obligations towards the Security Council undertaken in this regard by the administering authority, as well as for local defense and the maintenance of law and order within the trust territory.

Article 85

1. The functions of the United Nations with regard to trusteeship agreements for all areas not designated as strategic, including the approval of the terms of the trusteeship agreements and of their alteration or amendment, shall be exercised by the General Assembly.

2. The Trusteeship Council, operating under the authority of the General Assembly, shall assist the General Assembly in carrying out these functions.

Source: Goodrich, pp. 691-693.

APPENDIX D

Article 38 and 59 of the ICJ Statute

Article 38

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision does not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree to.

Article 59

The decision of the Court has no binding force except between the parties and in respect of that particular case

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Source: Goodrich, pp. 707-708 and 710.

APPENDIX E

Declaration on the Granting of Independence to Colonial Countries and Peoples (General Assembly Res. 1514[XV] of 14 December 1960)

The General Assembly declares that:

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

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

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

4. All armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected.

5. Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.

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

7. All States shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights and the present Declaration on the basis of equality, non-interference in the internal affairs of all States, and respect for the sovereign rights of all peoples and their territorial integrity.

Source: United Nations Resolutions, vol. 8, compiled and ed. by Dusan J. Djonovich (Dobbs Ferry, New York: Oceana Publishers, 1974).

APPENDIX F

Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for in Article 73 e of the Charter of the United Nations (General Assembly Res. 1541[XV] of 15 December 1960)

Principle I

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

Principle II

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

Principle III

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

Principle IV

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

Principle V

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

Principle VI

A Non-Self-Governing Territory can be said to have reached a full measure of self-government by:

(a) Emergence as a sovereign independent State;
(b) Free association with an independent State; or
(c) Integration with an independent State.

Principle VII

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

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

Principle VIII

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

Principle IX

Integration should have come about in the following circumstances:

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

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

Principle X

The transmission of information in respect of Non-Self-Governing Territories under Article 73 e of the Charter is subject to such limitation as security and constitutional considerations may require. This means that the extent of the information may be limited in certain circumstances, but the limitation in Article 73 e cannot relieve a Member State of the obligation of Chapter XI. The "limitation" can relate only to the quantum of information of economic, social and educational nature to be transmitted.

Principle XI

The only constitutional considerations to which Article 73 e of the Charter refers are those arising from constitutional relations of

the territory with the Administering Member. They refer to a situation in which the constitution of the territory gives it self-government in economic, social and educational matters through freely elected institutions. Nevertheless, the responsibility for transmitting information under Article 73 e continues, unless these constitutional relations preclude the Government or parliament of the Administering Member from receiving statistical and other information of a technical nature relating to economic, social and educational conditions in the territory.

Principle XII

Security considerations have not been invoked in the past. Only in very exceptional circumstances can information on economic, social and educational conditions have any security aspect. In other circumstances, therefore, there should be no necessity to limit the transmission of information on security grounds.

Source: United Nations Resolutions, vol. 8 (1974).

APPENDIX G

Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly Res. 2625[XXV] of 24 October 1970)

The General Assembly, having considered the principles of international law relating to friendly relations and co-operation among States, solemnly proclaims the following:

The principle of equal rights and self-determination of peoples

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:

(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 of 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 of 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 representing 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.

Source: United Nations Resolutions, vol. 13 (1976).