Territorial sovereignty conflicts: An international legal perspective.

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Introduction

Territorial sovereignty conflicts, as characterized in the concept paper '*Basis for the writing of a code of good practice in resolving territorial sovereignty conflicts'* (hereinafter the 'concept paper'), arise where a sub-state political community's intention and effort to freely determine its own political and legal status, including the nature of its relationship with the state, clashes with the resolve of the state government to oppose this objective or to unilaterally limit its scope and outcome. These disputes concern claims to a right of free choice by sub-state communities, on the one hand, and claims by existing states to a monopoly on territorial sovereignty and the right to defend and enforce their territorial integrity, on the other. Examples of such conflicts in Europe given in the concept paper include the Basque Country, Catalonia, Scotland, Flanders, Faroe and Greenland cases. Further afield, the unresolved cases of Kurdistan, Kashmir, Tibet, Palestine, Chechnya, Abkhazia, West Papua and Western Sahara stand out.

From an international legal standpoint, these cases are self-determination conflicts. In each case the central question is whether or not the sub-state unit possesses the right to self-determination and, if so, what the scope of that right is. In many cases the question arises whether its exercise may include the choice of political and legal independence, or is limited to forms and degrees of autonomy within the existing state.

The international legal approach is not the only valid one, but it must be considered in order to safeguard the rule of law, one of the core principles set out in the concept paper.

In this paper we identify the foundations of self-determination and what the principle and right of self-determination mean, who possesses the right, and how it is exercised. We demonstrate that the right to self-determination is not limited—as is sometimes contended—to colonial countries and peoples, but is possessed by *all* peoples. Indeed, we show it has been exercised by numerous peoples outside the context of colonialism. We recognize that the principle of territorial integrity of states may limit the ways in which peoples can exercise that right under current international law, but that this is only the case where the state in question enables its constituent population groups to self-determine within the state's framework.

Although state governments often wish to treat self-determination conflicts as their internal affair, regarding them as a challenge to the state's constitutional order and addressing them on that basis only, we show in this paper that international law makes respect for the right and exercise of self-determination an issue of international concern and responsibility.

In the concluding remarks to this paper we point to the potential for a European code of good practice to expand the application of self-determination to embody the European experience and principles and thereby possibly also to impact the course of international law in this regard.

1. Fundaments of self-determination

Self-determination and democracy are grounded in the same fundamental principles.

The core notion that government should rest on the consent of the governed has been in existence for centuries and is a foundational principle of democracy. It entails the principle that the governed have a right to choose by *whom* and *how* they are governed, which is also at the core of self-determination. In some respects self-determination is an even more fundamental expression of this principle of choice, because it can concern the choice of communities of human beings to govern themselves, i.e. to be

governed by members of their own communities in accordance with their own genius and priorities, or to be governed by others, who may not share their interests, needs and priorities.

John Stuart Mill, one of the most influential political philosophers of the nineteenth century, who had a profound effect on democratic thought, expressed the commonality of the notion of choice at the core of the principle of democracy and that of self-determination in his famous essay *On Representative Government* when he wrote:

> "The question of government ought to be decided by the governed…. One hardly knows what any division of the human race should be free to do, if not to determine, with which of the various collective bodies of human beings they choose to associate themselves."[2]

Though already a nascent philosophical concept, the use of self-determination in an international legal context primarily developed during the immediate post-World War I period, with US President Woodrow Wilson stating that:

> "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."[3]

This was more than a mere statement of policy, as self-determination became the basis for rearranging Europe after World War I, so that new states emerged and borders were redrawn mostly on the basis of national identity and through acts of choice, by means of referenda.[4]

Self-determination was not solely a Western liberal philosophical and political principle. It was also incorporated in Marxist thought on national liberation, which took root in the USSR at around the same time. Lenin considered the right to self-determination to be part of socialist ideology. "It would be a betrayal of socialism not to implement the self-determination of nations under socialism" he declared.[5] As Marxism-Leninism reached China, the revolutionary Communist Party "categorically and unconditionally" recognized the "full right of self-determination" of 'minority nationalities' including the right to form their own separate states. Mongolians, Tibetans, Koreans and some others were declared in the Constitution of the [Chinese] Soviet Republic to have the right to join the new Chinese state or form their own state.[6] The combined effect of these ideas and developments was that self-determination became an accepted concept in international relations, paving the way for its incorporation into international law following World War II.

With the adoption of the Charter of the United Nations in 1945, and with the conclusion of the two international human rights Covenants in 1966 (the ICCPR and the ICESCR), self-determination attained the status of both, a founding principle of the UN and a fundamental right of peoples under international law, while also being recognized as an essential condition, or prerequisite, for the enjoyment of individual human rights.

2. A principle and right

Self-determination is today a fundamental principle of international relations and a right under international law, the purpose of which is the empowerment of people, *as a people*.

The founders of the UN cast the principle of self-determination as the foundation of peace and friendly relations among nations, the organization's foremost purpose.[7] As a right, self-determination entails the right of all peoples to determine their own destiny and participate fully in decisions concerning the political, economic, social and cultural rules by which their society operates.[8]

The nature and importance of the principle of self-determination are highlighted by its placement in the very first article of the United Nations Charter. As enshrined in the UN Charter, the principle may initially have been intended to protect states, and to mean that "states and their peoples have the right to independence from foreign domination,"[9] but it quickly evolved to apply to colonies and trust territories, and to all peoples under alien subjugation, domination and exploitation. The human rights dimension of self-determination in particular broadened the meaning of peoples under alien subjugation, domination and exploitation, to cover any form of alien administration that is either similar to colonial domination or is otherwise oppressive.[10]

Self-determination is today not only a fundamental principle, but a human right belonging to groups in international law. As such it is enshrined in the first article common to both International Human Rights Covenants.[11] Indeed, it is considered *a prerequisite* for the enjoyment of individual human rights under international law.[12] This has been stressed by the Human Rights Committee, the treaty body responsible for overseeing implementation of the ICCPR:

> "[T]he right to self-determination is of particular importance because its realization is an *essential condition* for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. It is for that reason that States set forth the right to self-determination in a provision of positive law in both Covenants and placed this provision as article 1 apart from and before all of the other rights in the two Covenants."[13]

The right to self-determination is considered an "essential condition" because when a people is subject to oppression, its members' individual human rights cannot be fully protected. For this reason, the Human Rights Covenants and the foremost General Assembly resolutions dealing with self-determination emphasize that this fundamental right belongs to "all peoples."

Its corollary is the obligation of all States to respect and implement self-determination and to not stand in the way of peoples who seek to exercise it. The UN General Assembly, in Resolutions 1514 (XV) (1960)[14] and 2625 (XXV) (1970),[15] both of which have been held to be declaratory of customary international law,[16] clarify in particular that the "subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle [of equal rights and self-determination of peoples] as well as a denial of fundamental human rights, and is contrary to the Charter,"[17] while Resolution 1514 adds that it also constitutes "an impediment to the promotion of world peace and co-operation."[18] Using language that is very similar to that contained in this Resolution and the Human Rights Covenants, Resolution 2625 goes on to state that, by virtue of the principle of equal rights and self-determination of peoples,

> "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."

Although these Resolutions articulate the right to self-determination in broad terms, they also enunciate the principle that the territorial integrity of states must be protected in certain circumstances, thus signifying a possible limitation on the exercise of the right. We shall return to this in some detail below, as it is important to understanding the parameters for exercising self-determination.

3. The meaning of self-determination

The right to self-determination is defined in the first paragraph of common Article 1 of both the ICCPR and the ICESCR, as the right of "all peoples" to "freely determine their political status and freely pursue their economic, social and cultural development." This definition is largely repeated in all the subsequent international and regional human rights treaties and documents that contain a right to self-determination, and is therefore well established.

The African Charter on Human and Peoples' Rights elaborates on the right to self-determination, providing further clarity as to its scope and application:

> "1. All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.
>
> 2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.
>
> 3. All peoples shall have the right to the assistance of the States parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural."[19]

Although often viewed primarily as a political right, self-determination has its economic, social and cultural components as its definition affirms. This is also dealt with to some degree in Article 55 of the UN Charter, as well as in paragraph 2 of article 1 of the ICCPR and ICESCR, which states:

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

The African Charter on Human and People's Rights is again more explicit in in this regard: stating in:

> "1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.
>
> 2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.
>
> 3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law."[20]

4. Peoples possessing the right to self-determination

There have been many attempts to establish a definition of 'peoples' for the purposes of the right to self-determination.[21] The description of 'a people' most often referred to is that developed by the group of experts convened for that purpose by the UNESCO:[22]

1. A group of individual human beings who enjoy some or all of the following common features:
   (a) a common historical tradition;
   (b) racial or ethnic identity;
   (c) cultural homogeneity;
   (d) linguistic unity;
   (e) religious or ideological affinity;
   (f) territorial connection;
   (g) common economic life.

2. The group must be of a certain number who need not be large (e.g. the people of

microstates) but must be more than a mere association of individuals within a State;

3. The group as a whole must have the will to be identified as a people or the consciousness of being a people—allowing that groups or some members of such groups, though sharing the foregoing characteristics, may not have the will or consciousness; and possibly,

4. The group must have institutions or other means of expressing its common characteristics and will for identity.

This definition has objective elements and also the subjective requirement that the group consider itself a people. It is flexible, in that not all the objective elements of commonality need to be met. Self-identification is an essential part of the definition of a people, not least because "nations and peoples, like genetic populations, are recent, contingent and have been formed and reformed constantly throughout history,"[23] often due to the oppression that they have received or to the pursuit of certain ends.[24]

In fact, in many situations it is evident who are the 'peoples' for purposes of the right to self-determination. As will be shown later, there is universal acceptance, for example, that the colonized populations of colonial countries and territories are peoples, as are other population groups under "alien subjugation, domination and exploitation."[25]

There is significant state practice that applies self-determination beyond the colonial context and there is increasing acceptance that indigenous peoples qualify as peoples for this purpose.[26] In addition, consistent oppressive action by those in power over another group may also indicate that the group is a 'people' for purposes of self-determination, not least because the oppression may be a catalyst for the self-identification of the group as a people for these purposes. Recognition in a national constitution, legislation, or practice (e.g. the creation of an autonomous region on the basis of such identification) may constitute evidence of a group as being a people. Recognition by other states may also constitute such evidence. Although external recognition can be very useful for the group, it is not conclusive in determining a group's qualification as a people for the purposes of the right to self-determination. Dependence on the whims of governments for the existence of a right would undermine the very concept of a human right, especially as being, for example, inherent in human dignity.[27]

A people, for purposes of the applicability of the right to self-determination, must therefore be defined broadly and inclusively. It cannot be decided by states alone or imposed on a group, as it must respect the self-identification of a group as a people, and be adaptable to the many circumstances that exist worldwide.[28] Some territorial nexus may be required, yet a people can include just a part of a population in a state and it can include groups that live across state territorial boundaries.

5. Application of the right to self-determination

Although following WWI the principle of self-determination was applied primarily to national groups (often identified as 'national minorities' today) within states in Europe, the focus shifted to colonized peoples and countries following World War II. More recently it has once again been applied to sub-state political entities established on the basis of nationality.

5.1 Application to colonial countries and peoples

An early focus of the UN was the implementation of self-determination to "colonial countries and peoples" in order to "[bring] to a speedy and unconditional end colonialism in all its forms and manifestations".[29] Article 1(3) of the ICCPR and ICESCR, as quoted above, makes express reference to the special responsibility of colonial powers in regard to "non-self-governing territories" concerning the right to self-determination. The term "non-self-governing territories" refers to the UN list of territories designated as colonial territories. While this list was never comprehensive (especially as it was possible for states unilaterally to remove territories

from the list), the term 'non-self-governing territories' was a recognized UN abbreviation for colonial territories[30] or 'countries'[31], where these denote polities and where the right to self-determination belongs to the *peoples* whose territories or countries are colonized.

The International Court of Justice (ICJ) has consistently held that the right to self-determination applies to peoples of all colonial territories. It did so in the *Namibia Opinion*, concerning the illegal presence of South Africa in Namibia, as follows:

> "[T]he subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them…. The ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned."[32]

This position was confirmed by the ICJ in the *Western Sahara Case*, with Judge Dillard stating that "[t]he pronouncements of the Court thus indicate, in my view, that a norm of international law has emerged applicable to the decolonisation of those non-self-governing territories which are under the aegis of the United Nations."[33] Thus the right to self-determination applies to all peoples in colonial territories as a matter of customary international law, at least since 1960.[34] This is confirmed by considering the previous practice of States. Between 1957 and 1960, 22 colonies became independent and the number of member States of the United Nations increased by 20% in just three years.[35] Some writers have concluded that the right to self-determination of colonial peoples is now a matter of *jus cogens,* that is, *"a [peremptory] norm [of general international law] from which no derogation is permitted."*[36]

5.2 Application beyond the colonial context

Application of the self-determination right is not limited to colonial peoples but extends to all peoples subjected to alien subjugation, domination and exploitation. This means that where a people is oppressed, for example under foreign military occupation, or the human rights of its members are violated systematically or over a significant period of time, its right to self-determination applies to the fullest.[37] The ICJ has declared that the right to self-determination is "one of the essential principles of contemporary international law" and has "an *erga omnes* character,"[38] thus recognizing its binding nature and its applicability beyond colonial situations. Having an *erga omnes* character means that there is an obligation on *all states* to protect and respect the right to self-determination in all situations where it applies, not exclusively in colonial situations.

Since 1960 the right to self-determination has not been expressed in any international or regional instruments solely in the context of colonial territories but rather as a right of "all peoples," so that, as a leading expert on the issue expressed it, "self-determination could never be considered an exclusive right of colonial peoples."[39] The forms and manifestations of colonialism relevant to the application of the right to self-determination are about the oppressive *nature* of the administrative power over a people and not simply about the physical distance of the administering colonial power from the colonial territory.[40] In fact, even Resolution 1514 dealt with colonialism "in all its forms and manifestations."[41] Resolution 2625 expressly refers to the "subjection of peoples to alien subjugation, domination and exploitation" as constituting violations of the principle of equal rights and self-determination of peoples, of fundamental human rights, and of the UN Charter[42]—strong and clear language that is not limited to colonial peoples but that applies to all peoples. Therefore, as the plain language of common Article 1 of the Human Rights Covenants and of the said UN Declarations (UNGA Res.1514 and 2625) affirms, the right to self-determination belongs to *any people in any territory* that is subjected to alien subjugation, domination and exploitation.[43]

State practice reinforces this view. It is in this context that the ICJ's view in the *Advisory Opinion on the Wall, which* confirmed the Palestinian people's right to self-determination, must be read.[44] The UN General Assembly has repeatedly recognized the Palestinians' right to self-determination, and in 1974 it granted UN observer status to the Palestinian Liberation Organization (PLO) as the Palestinian people's legitimate representative organization.[45]

The referenda in Eritrea and Southern Sudan in 1993 and 2011 were culminations of long struggles for

self-determination, and were thus viewed as exercises of the right to self-determination by significant numbers of members of the international community on different sides of the issue. The US Assistant Secretary of State, Herman Jay Cohen, for example, commenting on the Eritrean liberation movement's call for a referendum in 1991, stated,

> "If [the Eritreans] want to exercise the right to self-determination, there's nobody who's going to stop them…. The United States isn't going to stop them or allow them."[46]

Thabo Mbeki, the Chairman of the African Union High Level Implementation Panel for Sudan, spoke of the Southern Sudan referendum of January 2011 as "the exercise of the right to self-determination by the Southern Sudanese" and "a fitting culmination to a long period of struggle"[47] in a formal lecture he delivered on the eve of the referendum.

East Timor's self-determination referendum in 1999 has been considered under the rubric of de-colonization (from Portugal), as it had remained on the UN list of non-self-governing territories and technically Portugal continued to be recognized as the Administrative Power by the UN after East Timor's invasion and annexation by Indonesia in 1975. But in substance and form it was an act of self-determination that intended to bring—and *did* bring—to an end twenty-five years of occupation, i.e. alien domination, subjugation and exploitation of East Timor by Indonesia, not by the former colonial power.[48]

Many situations giving rise to claims of self-determination, even the most recent ones, have their roots in former imperial and colonial enterprises, but the claims and exercises of self-determination themselves concern other, modern, forms of alien domination, subjugation and exploitation, often involving occupation and annexation, not by a European colonial power, but by a geographic neighbor. This was the case not only of East Timor, but also of Eritrea (an Italian colony from 1890 to 1947 then part of Ethiopia), Southern Sudan (governed as part of the Anglo-Egyptian condominium of Sudan until the latter's independence in 1956, after which it was part of independent Sudan), and is similarly the case for Tibet (under Qing imperial protection or suzerainty and subject also to British sphere of influence and imperialist machinations and now part of the PRC), Bougainville (colonized by Germany until World War II and now part of Papua New Guinea), West Papua (under Dutch colonial rule until 1962 then part of Indonesia), Western Sahara (under French and Spanish colonial rule and now under Moroccan power) and also Palestine (under British colonial rule until 1948 and now occupied by Israel). These self-determination cases, recognized to varying degrees by the international community, were and are not aimed at liberation from former colonial powers but from domination, subjugation and exploitation by a dominant contiguous state, considered to be alien and oppressive.

Republics of federal states or states that existed prior to involuntary or even voluntary union with others can exercise self-determination in certain situations. The Tibetan people's right to self-determination was recognized by the UN already in 1961.[49] When East and West Germany were united into one state in 1990, after 45 years of Soviet domination of East Germany, it was expressly stated in a treaty signed by four of the five Permanent Members of the UN that this was done as part of the exercise of the right to self-determination by the German people.[50] The right to self-determination was also invoked in the context of the dissolution of the USSR and Yugoslavia, and was recognized in the European Community's Declaration on Yugoslavia and its Declaration on the Guidelines on Recognition of New States in Eastern Europe and the Soviet Union.[51] The Baltic States regained their lost independence, while Georgia, Armenia, and Central Asian republics that were once part of the Soviet Union also gained sovereignty through acts of self-determination.[52] The separation of the Czech and Slovak republics from one another, by agreement, was an expression of self-determination.[53] None of these situations were colonial ones, and although some could be traced historically to earlier imperial enterprises they concerned situations of separation and/or emancipation from alien domination or from unions that no longer functioned and in most cases entailed elements of alien domination, subjugation or exploitation or the potential for them.

It is not only republics of federal states or former states that can claim self-determination in certain situations. The revocation or curtailment of recognized autonomy, especially when accompanied by oppression, also precipitates valid claims to self-determination. Kosovo prevailed in its self-determination struggle and war, which was precipitated by Serbia's curtailment of its autonomous status,[54] after an international intervention to stop violations of human rights led to the 2007 Comprehensive Proposal for the Kosovo Status Settlement.[55] In the case of Chechnya, although the right to self-determination was referenced by Russia and Chechnya in their 1996 agreement on principles for the resolution of the

conflict arrived at with OSCE facilitation, its implementation was ultimately prevented by Russia.[56]

From the above, it is clear that the right to self-determination applies also to peoples and territories that are not a 'saltwater' distance from the dominant state, but exist within a recognized contiguous state.[57]

Many of the cases mentioned here concern the "obtainment or restoration of statehood by a more or less autonomous region or people," mostly leading to the birth or restoration of states.[58] It suggests that not only the prior existence of a state, but also the constitutional recognition of a people's or a territory's autonomous status within a state, which "implies [the latter's] *nolens-volens* acceptance of the specific subjectivity of that group of people and territory,"[59] can be an important (albeit not necessarily a decisive) element of legitimate self-determination claims.[60]

An element of importance to a number of the above-named examples that led to the (re)birth or restoration of states, secession and independence, concerns the violation of international legal norms by the dominant state in regard to the claimant people. It concerned the manner in which the state imposed its domination on the latter—by means of force, occupation, illegal annexation, the imposition of agreements under threat of force, all representing violations of peremptory norms of international law—and/or the oppressive treatment of the claimant people in violation of international human rights law.[61]

6. The exercise of the right to self-determination

General Assembly Resolution 1541—adopted the day after Resolution 1514—establishes how the right to self-determination can be exercised, and makes clear that independence is only one of the options available.[62] Resolution 2625 clarifies this and sets out the principal methods. It provides that:

> "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."

While the vast majority of peoples in colonial territories exercised their right to self-determination by independence, this was not the only method of exercise that was available to them, nor was it the only method used by them and by non-colonial peoples. For example, the British and the Italian Somaliland colonies joined into one state of Somalia, part of the British colony of Cameroon merged with the French colony of Cameroun to form the new state of Cameroon and the remaining part joined with the existing state of Nigeria. The two Yemens, and East and West Germany, also exercised self-determination by merging.

Thus, self-determination can be exercised by the establishment of an independent state or association with another state, but it can also be exercised by *internal* means, i.e. within the framework of the existing state, by effectuating a change in the internal relationships and administration of the state. The Organization of Security and Co-operation in Europe (OSCE), which now comprises all European states and former Soviet states, the USA and Canada, accepted that self-determination could be exercised by external and internal methods, when it declared:

> "By virtue of the principle of equal rights and self-determination of peoples, all peoples have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development."[63]

Outside the context of colonialism and subjection to alien subjugation, domination or exploitation, compliance with the principle of territorial integrity of states *may require* that self-determination be exercised within the framework of the existing state. This would be the case where, in the language of Resolution 2625, the state behaves in accordance with the principle of equal rights and self-determination and is thus possessed of "a government representing the whole people belonging to the territory without distinction as to race, creed or colour."[64]

The Supreme Court of Canada's decision, *In re Secession of Québec*, reflects this position. When

asked to determine whether a unilateral right to secession exists under international law the court stated:

> "a right to secession only arises under the principle of self-determination of people at international law where "a people" is governed as part of a colonial empire; where "a people" is subject to alien subjugation, domination or exploitation; and possibly where "a people" is denied any meaningful exercise of its right to self-determination within the state of which it forms a part. In other circumstances, peoples are expected to achieve self-determination within the framework of their existing state."[65]

This follows, according to the Court, from the principle that,

> "A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its internal arrangements, is entitled to maintain its territorial integrity under international law and to have that territorial integrity recognized by other states."[66]

While independence is often seen as the only option for peoples seeking to exercise their right to self-determination, it is but *one option of many*, and not normally the first option lawfully able to be exercised under international law. The Canadian Court's decision is useful in its articulation of external and internal self-determination:

> "The recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through internal self-determination—a people's pursuit of its political, economic, social and cultural development within a framework of an existing state. A right to external self-determination (which in this case potentially takes the form of the assertion of a right to unilateral secession) arises in only the most extreme of cases and, even then, under carefully defined circumstances."[67]

What the Court is indicating is that, in most instances outside the colonial context and that of alien subjugation, domination or exploitation, unilateral pursuit of independence will not be considered to be the legitimate first step in the exercise of the right to self-determination. However, should other methods of exercise, such as internal self-determination, be made impossible due to the actions of the state, and if there is increased oppression of the group as a group, then it may be argued that, in those limited circumstances, the people could exercise their right to self-determination by seeking independence as a last resort.[68]

Internal self-determination can comprise the full range of forms and degrees of autonomy or "self-government and separateness," territorial or not, and can consist of protection regimes and other arrangements within the state's framework and constitutional order.[69] Examples of special statuses abound in state practice. They range from the extensive territorial autonomy statuses of the Aaland Islands and South Tyrol-Alto Adige (both established by treaty), the autonomies of Greenland and Zanzibar, the variety of special constitutional statuses and regimes of ethnically and historically distinct peoples and polities in India, to the contested autonomies of a number of Republics within the Russian Federation and other former Soviet republics. Examples are also provided by the cross-border autonomy regimes for the Saami in the Nordic States, the devolution of some legislative powers to Scotland and Wales in the UK and to the Basque Country and Catalonia in Spain, control over cultural, linguistic and other matters within the Swiss cantons, and a form of federalism in Bosnia-Herzegovina and Iraq. Other examples include the partially implemented autonomy arrangement in the Chittagong Hill Tracts of Bangladesh, Guna Yala in Panama, the Atlantic Autonomous Regions of Nicaragua, the Cordillera and Mindanao in the Philippines, Aceh in Indonesia, and the northern regions of Mali.[70] Whether these special statuses result from or are otherwise expressions of self-determination depends on the circumstances of their establishment, the nature and manner of their implementation. An example of transitional autonomy is provided by the status of Bougainville, as established by the terms of the 2001 Bougainville Peace Agreement, by which Bougainvilleans were guaranteed a referendum on the territory's status. The referendum took place from 23 November to 3 December 2019, with the overwhelming majority voting for

independence.[71]

The right to self-determination of indigenous peoples is today explicitly recognized in Article 3 of the UN Declaration on the Rights of Indigenous Peoples, adopted by the UN General Assembly in 2007.[72] The Declaration however qualifies it in terms of internal self-determination:

> "Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions."[73]

and further that,

> "Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State."[74]

This recognition of indigenous peoples' right to internal self-determination does not necessarily exclude the right to secede where a people also meets the conditions set out earlier for the full exercise of self-determination, as the Bougainville and Palau examples show as well as the recognition of West Papua's right to self-determination in the 1962 New York Agreement.[75]

7. Procedures for exercising the right to self-determination

Reflective of its democratic foundation, the right to self-determination must be exercised by the relevant peoples themselves by means of their "freely expressed will and desire."[76] Although General Assembly Resolution 1514 makes specific reference to Trust and Non-Self-Governing Territories, this obligation is reflective of customary international law on requirements for a valid exercise of self-determination. The ICJ confirmed this in its *Western Sahara* Opinion, where it stated that "the application of the right of self-determination requires a free and genuine expression of the will of the peoples concerned."[77] The principle of affording a people a fully informed, free and genuine choice—a principle grounded in democratic principle and practice—applies to all exercises of the right to self-determination.

Safeguards in this respect are emphasized where a people is presented with a choice of a status that does not amount to full independence. With regard to non-self-governing territories, Resolution 1541 provides for procedural requirements about how, in such situations, the will of the people is to be determined. Principle IX of Resolution 1541 requires that:

> "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."[78]

These strict procedural requirements are in place so that where a non-self-governing territory is divided, integrated or otherwise being dealt with by the colonial power then the risk of continued colonial subjugation is reduced.[79] This is to be distinguished from a situation where the colony declares independence with its territorial integrity intact. The distinct procedural requirements in Resolution 1541 for division or integration reflect the need to ensure that, in the exercise of self-determination, the people must be given a full informed, free and genuine choice before accepting a status less than independence.

In most instances the will of the people can be determined by a popular consultation, such as by referendum or elections, based on universal suffrage, in which the issue of the exercise of self-determination is put to the people. State practice from the 1950s and 1960s attests to the requirement for such plebiscites or elections, by which the people is allowed a free and genuine choice about the division or integration of a non-self-governing territory, and suggests the continued importance of such expression of the people's will.[80]

Consultations can be manipulated. When Indonesia sought to integrate West Papua, which had been

under a separate Dutch colonial administration from the rest of Indonesia, just a few indigenous leaders were asked their views as to whether they would accept Indonesian control.[81] More recent state practice therefore confirms the customary international law requirement that there be a "free and genuine choice", expressed through a democratic vote, impartially conducted, which is free from coercion. [82]

There may be exceptional circumstances where there is no consultation, such as where the position is clear in all the circumstances. For example, during the dissolution of the USSR few referenda were held outside of the Baltic States.[83]

The voters in a referendum are generally considered to be the residents of the territory belonging to or associated with the people possessing the right to self-determination. This was the practice in referenda in the Baltic States, sub-states of the Former Yugoslavia, South Sudan, Bougainville, and so forth. Also in the cases of referenda held in *Québec* and Scotland, it was the entire population of those regions who voted. But deciding who votes may not always be easy. This is seen in the debate over which people to include in a referendum on Western Sahara, being primarily whether those who could vote was limited to those who were living in Western Sahara at the time of the ICJ opinion or if it could include those (mainly Moroccans) who have moved there since. This is part of a concern over population transfer. Population transfer that is contrary to international law is where there is a deliberate policy by a State to transfer (through its direct or indirect policies and actions) its own population from one area to another, often with pressure on the existing inhabitants concerned.[84]

8. Relation to other principles and rights

The right to self-determination has limitations on its exercise and a number of rights, principles and situations potentially affect the ability of peoples to exercise that right fully and legitimately under international law.

8.1 Rights of others

One limitation is in regard to the rights of others. Each of the two International Human Rights Covenants provides:

> "Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant."[85]

This limitation applies to the right to self-determination. Therefore, where there are other peoples with the right to self-determination within the state or region, the right is limited in its exercise in order to take into account their rights. This is done only to the extent to which it enables all rights to be exercised as fully as possible in the circumstances.[86]

8.2 The principle of territorial integrity

Another limitation on the right to self-determination is the principle of territorial integrity of states, a principle most often asserted by governments faced with a claim to self-determination. This limitation was expressed in Resolution 2625:

> "Nothing in the foregoing paragraph [recognizing the right to self-determination] 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."

International law protects the territorial integrity of states and prohibits actions by foreign states as well as by population groups within the state aimed at its breakup. This is a fundamental norm of international law, but, as is true of self-determination, the protection it affords has limits.
Territorial integrity and political unity of states are protected only to the extent that states "[conduct] themselves in compliance with the principle of equal rights and self-determination of peoples."[87] Thus, the protection of a state's territorial integrity is a justifiable limitation only in certain situations, namely when separation from the state (e.g. independence) is being sought, and then only if a state is "possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour." In other words, it can only be a legally justifiable limitation on the exercise of the right of external self-determination when a state is *already* enabling full internal self-determination for the claimant people. Thus the "people" here refers to all the inhabitants of a state (the "whole people" of a state) including the people who are seeking to exercise their right to self-determination.
Thus, *a fortiori* in cases where a state violates a people's right to self-determination by forcefully and illegally annexing its territory, denying a formerly autonomous polity meaningful autonomy, or otherwise oppressing a people and denying it the ability to meaningfully participate in determining its own destiny, it is acting in violation of the principle of equal rights and self-determination and does not merit the continued protection of its territorial integrity. The implementation of the right to self-determination of a people that is under its rule may then include the creation or restoration of an independent state.[88]
Here, it must be noted that the peoples claiming self-determination are also entitled to the protection of *their* territory's integrity under international law. This is evident from the wording of Resolution 1514, which, as seen above in the *Chagos Opinion*, represents customary international law, including its paragraph 6, which provides:

> "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."

The reference to the "territorial integrity of a country" in the resolution is to the integrity of the colonial territory seeking self-determination, not the independent state from which it intends to separate.[89] Hence, it is necessary to be careful in assuming that the only territorial integrity in issue is that of the state asserting it. A colonial territory, and by analogy the territory of peoples under alien subjugation, domination and exploitation, have their own distinct identity and international legal protections.

8.3 Uti Possidetis Juris

The principle of *uti possidetis juris* provides that states emerging from colonial administrative control must accept the pre-existing colonial boundaries. Its purpose is to achieve stability of territorial boundaries and to maintain international peace and security. This was made clear by a Chamber of the ICJ:

> "The maintenance of the territorial *status quo* in Africa is often seen as the wisest course, to preserve what has been achieved by peoples who have struggled for their independence, and to avoid a disruption which would deprive the continent of the gains achieved by much sacrifice. The essential requirement of stability in order to survive, to develop and gradually to consolidate their independence in all fields, induced African states judiciously to consent to the respecting of colonial frontiers."[90]

The principle of *uti possidetis juris* may appear to be a sound one in terms of preserving international peace and security at the time of decolonization and independence. However, it has not prevented many boundary disputes.[91] This is mainly because many of these boundaries were created to preserve the

interests of the colonial states and were not related to natural or cultural boundaries understood by the peoples on the ground.[92] Whether this principle is, or should be, equally applicable today in self-determination situations is debatable.

The ICJ has recognized the problems with the principle when it stated that "*uti possidetis juris* is essentially a retrospective principle, investing as international boundaries administrative limits intended originally for quite other purposes."[93] It could be argued that adoption of the principle today gives legitimacy to political or diplomatic actions purely on the basis that those actions occurred during the imperial and colonial era and were made without taking the views of the people on the territory into account.[94] Therefore, the principle of *uti possidetis juris* is of questionable legitimacy as a limitation on the right to self-determination. It should only apply, if at all, in (the now very few) situations of decolonization or, perhaps, where the states involved in a dispute expressly choose to use a colonial boundary as relevant evidence for a boundary delimitation.[95]

8.4 Competing claims

It is not uncommon for there to be a situation where more than one state asserts sovereignty over a territory where there are claimants to a right to self-determination.

In many instances, a state will assert that an early treaty enables it to (re)gain sovereignty—as did China in relation to Hong Kong and as Spain does in relation to Gibraltar—notwithstanding the wishes of the people of that territory.[96] This situation was considered in the *Western Sahara Case*:

> "[T]he consultation of the people of a territory awaiting decolonization is an inescapable imperative .... Thus even if integration of territory was demanded by an interested State, as in this case, it could not be had without ascertaining the freely expressed will of the people—the very *sine qua non* of all decolonization."[97]

The ICJ recognized this situation also in the *East Timor Case*, where Portugal was the colonial power and Indonesia the occupying power. Here too the court ruled that the right to self-determination should prevail.[98]

8.5 Use of force

International law prohibits the use of force in international relations to achieve political ends and states are prohibited from using force to prevent peoples from exercising their right to self-determination. Resolution 2625 states:

> "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."

This important restriction on the behavior of states does not seem to restrict the claimant peoples themselves from using force to assert their right to self-determination when their efforts are forcefully opposed. Indeed, many peoples have achieved self-determination through armed struggle and Resolution 2625 makes clear that whereas a state cannot use force to prevent the exercise of the right to self-determination, the claimant peoples themselves are entitled to support from other states when they resist such forcible state action.[99] Significantly, when the Protocols to the Geneva Conventions 1949 were agreed in 1977, their protection extended to wars of national liberation, being 'armed conflicts which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination'.[100] Other human rights issues may of course also arise, as the use of force cannot infringe the human rights of others, such as minorities.

This provision in international law must of course not be interpreted as a license to use force,

especially not outside the context of decolonization. It is mentioned here only to indicate the law's endorsement of of people's pursuit of self-determination where recognized as legitimate, and the obligation on states not to deny its exercise.

9. The responsibility and obligations of states

There is a special obligation on states under international law to respect the right to self-determination.

When a state violates a peremptory norm—a norm which is so fundamental that no derogation from it is permitted—international law imposes obligations on other states as well. States are prohibited from recognizing or abetting violations of peremptory norms, and they are required to take action to undo or resolve the consequences of the breach.

These obligations are set out in the International Law Commission (ILC)'s Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), an authoritative codification of customary and progressive international law on the subject,[101] and in particular in its Articles 40 and 41.[102] The International Court of Justice has affirmed the principles set out in these articles in several cases, most notably in its Advisory Opinion on *Legal Consequences of the Construction of a Wall*.[103]

The Commentaries to Article 40 provide examples of norms that constitute peremptory norms of general customary law and Paragraph 5 of those commentaries places "the obligation to respect the right to self-determination" among those norms, reaffirming the *erga omnes* character of self-determination and the special status of this obligation. [104] Referring to the International Court of Justice's characterization of the principle of self-determination as "one of the essential principles of contemporary international law" in the *East Timor case,*[105] the ILC concludes that self-determination gives rise to an obligation of the international community as a whole to permit and respect its exercise.[106]

There is both a duty to abstain from certain behavior and a positive duty to act.

Article 41(2) stipulates that all states have a duty of non-recognition of situations resulting from breaches of peremptory norms, as well as an obligation not to render aid or assistance in maintaining those unlawful situations.[107] A duty not to render assistance is a logical extension of non-recognition where assistance could be construed as an implicit recognition. But aid and assistance that do not imply recognition are also prohibited, so that this has a separate scope of application as well. This was confirmed in the resolutions of the Security Council prohibiting all aid or assistance in maintaining the illegal apartheid regime in South Africa and Portuguese colonial rule.[108] Just as in the case of the duty of non-recognition, these resolutions express a general idea applicable to all situations created by serious breaches in the sense of Article 40.[109] The more recent European Court decision in relation to Western Sahara confirm its application to cases of denial of the exercise of the right to self-determination. [110]

The obligations of Article 41(2) apply also to "'situations' created by […] the attempted acquisition of sovereignty over territory through the denial of the right of self-determination of peoples." The Commentary to the Article explains:

> "As regards the denial by a State of the right of self-determination of peoples, the advisory opinion of ICJ in the *Namibia case* is […] clear in calling for a non-recognition of the situation [i.e. the continued presence of South Africa in Namibia and it claim to annexation, after its mandate had terminated]. The same obligations are reflected in the resolutions of the Security Council and General Assembly concerning the situation in Rhodesia and the Bantustans in South Africa."[111]

ARSIWA's Article 41 (1) sets out a positive, affirmative duty of states to cooperate to *end* serious breaches of peremptory norms.[112] It gives rise to an obligation of the international community as a whole to "permit and respect" the exercise of self-determination.[113]

Although the duties described here have been specifically affirmed in the colonial and alien domination contexts, it can be argued that, given the fundamental character of the principle and right to self-determination itself, they apply equally to the denial of self-determination outside those specific contexts.

Concluding remarks

We have seen that self-determination is applied in a variety of situations, and is not limited to colonial situations. The international law's recognition of the principle and right to self-determination of peoples, and its rules relating to its application and exercise are salient to the preparation of the proposed European code of good practice. At the same time, the code need not be as restrictive as international law is currently interpreted if designed for application specifically to Europe where democratic and human rights values are deeply engrained and where so many states have come into being precisely because of the application of the principle of self-determination.

The 'Liechtenstein Draft Convention on Self-determination through Self-administration' first presented and discussed in 1994, provides an interesting and useful European perspective, elements of which could find expression in the proposed European Code of Good Practice. It is based on the achievement of self-determination through progressive stages of self-administration.[114]

This European initiative may enable a more normative approach, always guided by the same principles of democracy and human rights that are at the foundation of today's international law on self-determination, but taking account of the European experience in the past, its project of integration, and its current experience of separation by Britain. In time, such a normative example, if set, may impact the approach to self-determination further afield and enrich and modify international law on the subject.

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2 J.S. Mill, *Considerations on Representative Government* (3rd edn, London 1865) p. 297.

3 Woodrow Wilson, War Aims of Germany and Austria (1918), reproduced in Ray S. Baker, William E. Dodd, and Howard L. Leach (eds), *The Public Papers of Woodrow Wilson: War and Peace* (Harper, New York, London, 1927) p. 177 at p. 182. Wilson was supported by the British Prime Minister, Lloyd George, who declared that one reason for the UK entering the First World War had been the 'principle of self-determination' and that future territorial questions should be resolved by respecting 'the consent of the governed': address to the Trade Union Conference, Jan. 5, 1918. *See, The Papers of Woodrow Wilson* (Princeton U. Press, Princeton, 1966-94), Vol. 43, pp. 471-72.

4 Austria, Hungary and Czechoslovakia emerged as separate states; Finland, Estonia, Latvia, Lithuania and Poland became independent states; and Yugoslavia, Greece, and Romania grew in size. The Treaty of Versailles provided for a number of plebiscites, eight of which were held.

5 Vladimir I. Lenin, "Socialism and Self-Determination of Nations," in *Collected Works* (4th Engl. edn, Progress Publishers, Moscow, 1964), Vol. 31, p. 321.

6 Conrad Brandt, Benjamin Schwartz, and John K. Fairbank, *A Documentary History of Chinese Communism* (Atheneum, New York, 1967), pp. 220-224.

[7] Art. 1(2) of the UN Charter proclaims a purpose of the UN to be "to develop friendly relations among nations based on respect for the principles of equal rights and self-determination of peoples and to take other appropriate measures to strengthen universal peace." The prominent inclusion of self-determination in the Charter was at the insistence of the Soviet Union, for whom the principle of self-determination of peoples was a core international principle enshrined in its own constitution as well. See Ruth B. Russel, *A History of the United Nations Charter*, (Brookings Institution, Washington 1958) pp. 62 *et seq*., 810. G. B. Starushenko, *The Principle of National self-Determination in Soviet Foreign Policy* (Foreign Languages Publishing House, Moscow 1963) pp. 142-47. Antonio Cassese, *Self-Determination of Peoples* (Cambridge University Press, Cambridge 1995) pp. 16-19.

[8] This is encapsulated by Judge Dillard in his Separate Opinion in *Western Sahara Advisory Opinion*, International Court of Justice (hereinafter ICJ), ICJ Rep. 1975, p. 122, where he said: "it is for the people to determine the destiny of the territory and not the territory the destiny of the people."

[9] Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination; The Accommodation of Conflicting Rights* (University of Pennsylvania Press, Philadelphia 1990), p. 48. *See also* Rosalyn Higgins, 'Postmodern Tribalism and the Right to Secession' in Catherine Brölmann, René Lefeber, Marjoleine Zieck (eds), *Peoples and Minorities in International Law* (Martinus Nijhoff, Dordrecht, 1992), p. 29. *See also* Cassese, *Self-Determination of Peoples*, *op. cit*., pp. 41-43.

[10] *See* Declaration on the Granting of Independence to Colonial Countries and Peoples, UNGA Res 1514 (XV), 14 December 1960 (hereinafter UNGA Res. 1514).

[11] International Covenant on Civil and Political Rights (ICCPR), New York 1966, and the International Covenant on Economic, Social and Cultural Rights (ICESCR), New York 1966.

[12] ICCPR Art. 1, and ICESCR Art 1.

[13] Human Rights Committee (HRC) CPRC General Comments 12 (21) para 1 (emphasis added). UN Human Rights Committee (HRC), CCPR General Comment No. 12: Article 1, The Right to Self-determination of Peoples, 13 March 1984, para. 1, https://www.refworld.org/docid/453883f822.html, accessed 20 February 2019. *See also*, Arbitration Commission of the Conference for Peace in Yugoslavia (Badinter Commission), Opinion No. 2, para. 3. 31 I.L.M. 1494, 1497 (1992).

[14] UNGA Res. 1514.

[15] Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, GA Resolution 2625 (XXV), 24 October 1970 (hereinafter, "Declaration on Principles of International Law concerning Friendly Relations" or simply UNGA Res. 2625.

[16] *See Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* ('*Chagos Opinion*'), ICJ Rep. 2019, para. 152: "The Court considers that, although resolution 1514 (XV) is formally a recommendation, it has a declaratory character with regard to the right to self-determination as a customary norm, in view of its content and the conditions of its adoption." *See also Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* ('*Namibia Advisory Opinion*'), OCJ Rep. 1971, para. 52.

[17] UNGA Res. 2625, 'Principle of equal rights and self-determination of peoples.'

[18] UNGA Res. 1514, para. 1.

[19] African Charter on Human and Peoples' Rights, adopted 27 June 1981, 1520 U.N.T.S. 217 (1988), Art. 20.

[20] African Charter on Human and Peoples' Rights, Arti. 21. Art. 22 further states:
"All peoples shall have the right to their economic, cultural and social development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind."

[21] For example, Richard N. Kiwanuka, 'The Meaning of "People" in the African Charter of Human and Peoples' Rights' (1988) 82 *AJIL* 80. *See also* Art. 6, Charter of the Unrepresented Nations and Peoples Organization (UNPO)

(an organization whose membership over the years has been highly representative of claimants to the right to self-determination), and discussion in Michael C. van Walt van Praag, 'The Position of UNPO in the International Legal Order,' in Brölmann et al. (eds), *Peoples and Minorities in International Law*, *op. cit*, pp. 313-329, at pp. 321-22, 327.

[22] Final Report and Recommendations of an International Meeting of Experts on the Further Study of the Concept of the Rights of Peoples, UNESCO, SNS–89/CONF.602/7 (22 February 1990).

[23] E. Kamenka, 'Human Rights, Peoples' Rights' in James Crawford (ed.), *The Rights of Peoples* (Clarendon Press, Oxford 1988) p. 127 at p. 133. *See also* Philip Allott, 'The Nation as Mind Politic' (1992) 24 *NYU J IL&P* p. 1361.

[24] An objective definition is impossible - and is likely to reinforce a developed-world, colonial, male construct of a 'people.' *See* Hilary Charlesworth, Christine Chinkin, and Shelley Wright, 'Feminist Approaches to International Law' (1991) 85 *AJIL* p. 613; Rolando Gaete, 'Postmodernism and Human Rights: Some Insidious Questions' [1991] 2 *Law and Critique* No. 2, p. 149. Christine Chinkin and Shelley Wright, 'Hunger Trap: Women, Food and Self-Determination' (1993) 14 *Michigan JIL* p. 262, at p. 306, propose that 'food, shelter, clean water, a healthy environment, peace and a stable existence must be the first priorities in how we define or "determine" the "self" of both individuals and groups, instead of the present definitions, which are based on masculinist goals of political and economic aggrandizement and aggressive territoriality'.

[25] UNGA Res. 1514, para. 1; UNGA Res. 2625, 'Principle of equal rights and self-determination of peoples.'

[26] The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) was adopted by the General Assembly on 13 Sep. 2007, by a majority of 144 states in favor, 4 votes against, and 11 abstentions. UNDRIP Art. 3 expressly recognizes the right of indigenous peoples to self-determination.

[27] See Samantha Besson, 'Justifications' in Moeckli et al. (eds), *International Human Rights Law*, *op. cit*., p. 22.

[28] See Robert McCorquodale, 'Self-Determination: A Human Rights Approach' (1994) 43 *International and Comparative Law Quarterly* p. 857.

[29] UNGA Res 1514, Preamble.

[30] *See* Robert McCorquodale, 'The Right of Self-Determination' in David Harris and Sarah Joseph (eds), *The International Covenant on Civil and Political Rights and United Kingdom Law* (Clarendon Press, Oxford 1996), p. 91.

[31] As in the 'Declaration on Granting Independence to Colonial Countries and Peoples.'

[32] *Namibia Advisory Opinion,* ICJ Rep. 1971, para 52.

[33] *Western Sahara Advisory Opinion* per Judge Dillard, ICJ Rep. 1975, at p. 121, and see Majority Opinion at paras 54-55.

[34] The ICJ in the *Chagos Opinion*, para. 152, determined that the right to self-determination became a part of customary international law with the General Assembly Declaration on Colonial Countries and People in 1960.

[35] *See* Growth in UN Membership, http://www.un.org/en/sections/member-states/growth-united-nations-membership-1945-present/index.html, accessed April 15, 2019. The ICJ in its Advisory Opinion on Western Sahara referred to Resolution 1514 as providing "the basis for the process of decolonization which has resulted since 1960 in the creation of many States which are today Members of the United Nations." *Western Sahara Advisory Opinion,* ICJ Rep. 1975, para. 57. Rosalyn Higgins, a former President of the ICJ, stated in 1963 that UNGA Resolution 1514, "taken together with seventeen years of evolving practice by United Nations organs, provides ample evidence that there now exists a legal right of self-determination." Rosalyn Higgins, *The Development of International Law* (Oxford University Press, Oxford 1963), p. 104. *See also* David Raic, *Statehood and the Law of Self-Determination* (Kluwer Law International, the Hague 2002), p. 21.

[36] Art 53 Vienna Convention on the Law of Treaties. For a discussion of *jus cogens* see Mahmoud Cherif Bassiouni, 'International Crimes: Jus Cogens and Obligation Erga Omnes,' 59 *Law and Contemporary Problems* pp. 63-74 (Fall 1996). Supporters of the view that the right of self-determination (at least for colonial peoples) is a matter of *jus cogens* include Cassese, *Self-Determination of Peoples, op. cit., p.* 140; James Crawford,

The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries (Cambridge U. Press, Cambridge 2002) in relation to Art 41; and Matthew Saul, 'The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?' (2011) 11 *Human Rights Law Rev.* pp. 609-644.

[37] *In the Matter of a Reference by the Governor in Council concerning certain questions relating to the secession of Québec from Canada, as set out in Order in Council PC. 1996-1947, dated the 30th day of September 1996.* 1998 Can. Sup. Ct. LEXIS 39 (hereinafter '*In re Secession of Québec*'), para. 138.

[38] *Case Concerning East Timor* (Portugal v. Australia), ICJ Rep. 1995, para. 29.

[39] Christian Tomuschat, 'Self-Determination in a Post-Colonial World' in Christian Tomuschat (ed.), *Modern Law of Self-Determination* (Martinus Nijhoff, Dordrecht 1993) p. 2.

[40] *See* McCorquodale, "Self-Determination: A Human Rights Approach," *op. cit*.

[41] UNGA Res. 1514, Preamble.

[42] UNGA Res. 2625, 'Principle of equal rights and self-determination of peoples.'

[43] UNGA Res. 1514, states in its first two articles:

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.

[44] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* ('*Legal Consequences of the Construction of a Wall*'), ICJ Rep. 2004, paras 118 and 122.

[45] The UN General Assembly recognized the PLO as the "sole legitimate representative of the Palestinian people" and granted the PLO observer status in Resolution 3237 (XXIX) (1974).

[46] Doyle McManus, 'U.S. Won't Block Ethiopian Province's Secession,' *Los Angeles Times*, June 1, 1991.

[47] 'Lecture by Thabo Mbeki, Chairperson of the AUHIP, for the University of Juba and Justice Africa' Nyakuron Cultural Centre, Juba. Jan. 7, 2011. (reproduced in *African Arguments* Jan. 7, 2011, https://africanarguments.org/2011/01/07/southern-sudan-on-the-eve-of-self-determination/.

[48] The Constitution of Timor Leste (2002), in its Preamble and in Art. 1, declares 28 November 1975 as the day of its independence from Portugal. The struggle for self-determination after the 1975 Indonesian invasion is therefore considered to be a struggle against Indonesia's alien domination (invasion and occupation) and not an anti-colonial struggle. *See also International Law and the Question of East Timor* (Catholic Institute for International Relations / International Platform of Jurists for East Timor, London 1995).

[49] UNGA Res. 1723 XX (1961).

[50] Treaty on the Final Settlement with Respect to Germany (1990) 29 *ILM* p. 1186.

[51] Declaration on Yugoslavia and Declaration on the Guidelines on Recognition of New States in Eastern Europe and the Soviet Union (16 December 1991), (1992) 31 *ILM* p. 1486.

[52] In the case of the Baltic States of Lithuania, Latvia and Estonia, their claims were based on forcible and illegal annexation by the Soviet Union in 1940. The independence movements in these states articulated their case in terms of self-determination and the restoration of the de jure continuity of their states under Soviet occupation. *See* Constitution of the Republic of Estonia (1992), Preamble, and the Constitution of the Republic of Lithuania (1992), Preamble. All three used referenda to determine the will of the people on the issue of independence: see Jure Vidmar, *Democratic Statehood in International Law; The Emergence of New Sates in Post-Cold War Practice* (Hart, Oxford 2013).

[53] Constitution of the Slovak Republic, (1992), Preamble.

[54] Peter Radan, *The Break-up of Yugoslavia and International Law* (T.M.C. Asser Press, The Hague 2002), pp.

196-97; Crawford, *The Creation of States in International Law*, *op. cit.,* p. 557.

55 See Negotiations process and Kosovo status proposal, Assembly Support Initiative (ASI) / OSCE Mission in Kosovo, Newsletter May 2007, No. 27. UN Special Envoy Martti Ahtisaari concluded in the Comprehensive Proposal that "the only viable option for Kosovo is independence," referring to systematic discrimination against Kosovo's Albanian majority population, the armed resistance and the "reinforced and brutal repression" by Federal Republic of Yugoslavia authorities. United Nations Office of the Special Envoy for Kosovo, Report of the Special Envoy of the Secretary General on Kosovo's Future Status, U.N. Doc. S/2007/168 (mar. 26, 2007), para. 5.

56 For the agreement, see Khasavyurt Joint Declaration and Principles for Mutual Relations, 31 August 1996, witnessed by the OSCE facilitator. The attempt of Abkhazians to exercise their self-determination following the breakup of the USSR was opposed by Georgia, leading to armed conflict in 1992-94, the defeat of Georgian armed forces, and unsuccessful protracted negotiations under UN mediation. Abkhazia's declaration of independence has been recognized by five states, including Russia.

57 Rob Dickinson, 'Twenty-First Century Self-Determination: Implications of the Kosovo Status Settlement for Tibet" 6 *Arizona Journal of International & Comparative Law* 3, pp. 559-60, observes that it could be argued that "of the newly emergent states outside the colonial context, none achieved independence through unilateral secession." It would be a stretch, however, to consider that Bangladesh, East Timor, Eritrea, South Sudan, Kosovo, Bougainville (which held a referendum in 2019), for example, achieved their objectives by voluntary agreement with the dominant state, as they fought bloody wars and conducted international campaigns to force the issue.

58 Igor Grazin, 'International Recognition of National Rights: The Baltic States' Case,' 66 *Notre Dame L. Rev*. 1431 (1991), p.1395.

59 *Idem*, p. 1396.

60 Martti Ahtisaari's Comprehensive Proposal for the Kosovo Status Settlement, which was mandated to be compliant with international law, suggests that the exercise of self-determination, including secession, by an autonomous region is potentially legitimate. In this sense, the Settlement Proposal extends the meaning of a "people" for purposes of self-determination to the population of an autonomous entity. Dickinson, 'Twenty-First Century Self-Determination', *op. cit*., pp. 572-73.

61 There is a strong view that self-determination, with its exercise by secession as a remedy of last resort, is legitimate if it is necessary to remedy a prior injustice:

> "[I]njustices capable of generating a right to secede consist of persistent violations of human rights, including the right to participate in democratic governance, and the unjust taking of the territory in question, if that territory previously was a legitimate state or a portion of one (in which case secession is simply the taking back of what was unjustly taken).

Allen Buchanan, 'Democracy and Secession,' in Margaret Moore (ed.), *National Self-Determination and Secession,* (Oxford University Press, Oxford 1998), p. 25. Tomuscat holds that in situations of "grave and massive violation of the human rights of a specific group in a discriminatory fashion" and the forceful incorporation of territory, a people's right to self-determination may include the remedy of separation from the state, unless grievances and injustices can be addressed in a less extreme way, that is, without disrupting the territorial integrity of the existing state. Christian Tomuscat, 'Secession and Self-Determination, in *National Self-Determination and Secession, op. cit.,* pp. 35-42. He gives the establishment of Bangladesh and Kosovo as examples. *See also* Hannum, *Autonomy, Sovereignty and Self-Determination*, *op. cit.*, pp. 48-49, 470-72; Dickinson, 'Twenty-First Century Self-determination' *op. cit.,* p. 554.

62 UNGA Res. 1541 (VX) 15 Dec. 1960, Annex, Principle VI.

63 Conference on Security and Cooperation in Europe, Helsinki Final Act, 1 Aug. 1975, Principle VIII.

64 UNGA Res. 2626

65 *In re Secession of Québec*, para. 154.

66 *Id.*

67 *Id.*, para. 126.

68 *See Aaland Islands Opinion*, International Committee of Jurists (1920) LNOJ Spec Supp 3; *Loizidou v*

Turkey (1997) 23 EHRR 513, per Judges Wildhaber and Ryssdal.

[69] See Henry J. Steiner And Philip Alston, *International Human Rights in Context: Law, Politics, Morals: Text and Materials* (2d edn Oxford University Press, Oxford 2000) p. 1249. See in this respect also The Badinter Commission, which stated in its Opinion 2 that within existing state borders "Where there are one or more groups within a state constituting one or more ethnic, religious or language communities, they have the right to recognition of their identity under international law." Arbitration Commission of the Conference for Peace in Yugoslavia, Opinion No. 2, paras 2, 3. 31 I.L.M. (1992), p. 1494 at p. 1497.

[70] For details of some of these and other forms of autonomy, see M. Weller, 'Settling Self-Determination Conflicts: Recent Developments' (2009) 20 *EJIL* 111. See also Yash Ghai and Sophia Woodman (eds), *Practicing Self-Government; A Comparative Study of Autonomous Regions* (Cambridge U. Press, Cambridge 2013); Thomas Benedikter, *The World's Working Regional Autonomies: An Introduction and Comparative* Analysis (Anthem Press, New Delhi, 2007).

[71] Bougainville Peace Agreement, Arawa 30 August 2001.

[72] UN Declaration on the Rights of Indigenous Peoples, UNGA Res. 295 (LXI) 13 Sep. 2007. 144 states voted in favor, 4 against and 11 abstained.

[73] *Id.,* Art 4.

[74] *Id.,* Art 5.

[75] Palau exercised its full right to self-determination in 1994 and became a sovereign and independent state, but entered into a free association agreement with the U.S., by which its defense is controlled by the latter until 2044. For Bougainville, see endnote 554 above. The New York Agreement concluded between the Netherlands and Indonesia on 15 August 1962 under the aegis of the UN (437 UNTS 6311) provided in Article XVIII for the right of West Papuans to choose independence as an outcome of their exercise of self-determination.

[76] UNGA Res. 1514, para. 5 provides:
> 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. (emphasis added).

[77] *Western Sahara Advisory Opinion*, ICJ Rep. 1975, para. 55. Judge Nagendra Singh stated in his Declaration "ascertaining the freely expressed will of the people [is] the very sine qua non of all decolonization." *Id*., p. 81.

[78] UNGA Res. 1541(XV), Principle IX: "Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter." See also Principle VII which requires that free association "should be the result of a free and voluntary choice...expressed through informed and democratic processes."

[79] This was confirmed by the ICJ in the *Chagos Opinion*, ICJ Rep. 2019, para. 160.

[80] For example, plebiscites or elections were held in British Togoland Trust Territory (1956), French Togoland (1958), British Northern Cameroons (1959), British Southern Cameroons (1961), Rwanda-Urundi (1961), Western Samoa (1962), the Cook Islands (1965), Equatorial Guinea (1968), Papua New Guinea (1972), Niue (1974), the Ellice Islands (1974), the Northern Marianas (1975) and French Comoros (1974, 1976). See Cassese, *Self-Determination of Peoples*, *op. cit.,* pp. 76-79.

[81] Report by the Representative of the Secretary-General in West Irian submitted under article XXI, paragraph 1, of the Agreement between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian) (6 November 1969).

[82] In East Timor, the Baltic States, South Sudan, New Caledonia and most recently Bougainville, the outcome of referenda, mostly conducted under international scrutiny, were considered determinative. For requirements regarding voting majorities, see McCorquodale, 'Self-Determination: A Human Rights Approach,' *op. cit.* The practice during the dissolution of Yugoslavia varied considerably. In Bosnia-Herzegovina, it was assumed that 50% plus one was sufficient and a boycott by the Serbian population (who comprised over 30% of the population) did not affect the

result, with over 60% of all those eligible to vote casting their votes in favor of independence. In Montenegro the EU stated that there had to be a majority of 55% of votes cast and there had to be a participation of at least 50% plus one of those eligible to vote. The 2011 referendum on South Sudan's secession, required that at least 60% of registered voters cast their vote (if this was not achieved, then the referendum was to be repeated) and that the outcome received 50% plus 1 of the total number of votes cast. In fact, significantly more than 60% of voters cast their vote, with over 95% voting for independence.

[83] *See* Vidmar, *Democratic Statehood in International Law; op. cit.,* for these examples. Referenda by autonomous entities such as Tatarstan, Chuvash, Chechnya, and Abkhazia were mostly not honored by the Russian and Georgian authorities, respectively.

[84] *See* Catriona Drew, 'Self-determination, Population Transfer and the Middle East Peace Accords' in Stephen Bowen (ed.), *Human Rights, Self-determination and Political Change in the Palestinian Occupied Territories* (Martinus Nijhof, the Hague 1997), p. 119. Unrepresented Nations and Peoples Organization (UNPO), *Report of the UNPO Conference on Population Transfer*, Tallin, 1992, https://unpo.org/images/reports/population-transfer-1992.pdf, accessed May 3, 2020.

[85] ICESCR and ICCPR, Art 5(1).

[86] An example of the operation of this limitation is found in the decision of the Canadian Supreme Court concerning the potential secession (through the exercise of the right to self-determination) of the people of the province of Québec. The Court noted that the rights of the indigenous ("aboriginal") peoples in the province would be affected in the event of Québec's unilateral secession. Since if found that Québec had no such unilateral right under the constitution or international law, the Court noted that if there had been a clear majority of the people of Québec who wished to secede, they could not do so without negotiations with the other parts of Canada "in which aboriginal interests would be taken into account." *In re Secession of Québec*, para 139. However, this does not necessarily give a permanent veto power to the other parts of Canada, as the internal right to self-determination of the people of Québec must not be so restricted.

[87] UNGA Res 2625.

[88] *See* in this sense Lee Buchheit, *Secession: The Legitimacy of Self-Determination* (Yale University Press, New Haven 1978) p. 223.

[89] *See Chagos Opinion*, ICJ Rep. 2019, para. 6. The Res 1514 language is similar to that used in the later Resolution 2625, given above. However, the two provisions are very different. Resolution 1514 provides that it is the "territorial integrity of a country" that is in issue. The evidence that paragraph 6 of Resolution 1514 concerns the territorial integrity of a colonial territory rather than of an independent State is three-fold. First, the use of the non-State terminology of a 'country' aims at distinguishing between territorial integrity applicable to a State and the territorial integrity of non-self-governing territories. This follows from the context of Resolution 1514, which deals with decolonization. Second, the title given to Resolution 1514 is the Declaration on the Granting of Independence to Colonial Countries and Peoples. Hence it is the "colonial countries" which are the subject of the words set out in paragraph 6. Third, the French text of the Declaration uses the word "pays" rather than "état", when referring to the territorial integrity of countries, making it clear that it is not a State's territorial integrity in issue. Accordingly, the people who had a right to self-determination under Resolution 1514 were territorially defined as being within the territorial unit in which they lived. It was this colonial territory that has territorial integrity.

[90] *Frontier Dispute Case (*Burkina Faso v Mali*)* ICJ Rep.1986, 554 (Chamber of the ICJ), para. 25.

[91] *See* Matthew Craven, *The Decolonization of International Law* (Oxford University Press, Oxford 2007). To illustrate with a recent example, while Sudan accepted the secession of South Sudan, there were still disputes over the territorial boundary: see Jure Vidmar, 'South Sudan and the International Legal Framework Governing the Emergence and Delimitation of New States,' 47 *Texas International Law Journal* (2012) p. 541, and Solomon Dersso, 'International law and Self determination in South Sudan' Institute for Security Studies (ISS) Paper No 231' (2012).

[92] Lord Salisbury, the British Prime Minister and Foreign Secretary who presided over a vast expansion of the British Empire, and who was one of the architects of these boundary determinations, remarked in 1890:

> We have been engaged . . . in drawing lines upon maps where no white man's feet have ever trod; we have been giving away mountains and rivers and lakes to each other, but we have only been hindered by the small impediment that we never knew exactly where those mountains and rivers and lakes were.

Lord Salisbury, as quoted in the Separate Opinion of Judge Ajibola, in *Territorial Dispute* (*Libya v Chad*), ICJ Rep. 1994, 6, p. 53.

[93] *Land, Island and Maritime Dispute* (El Salvador v Honduras*)* ICJ Rep. 1992, 355, p. 388.

[94] *See Frontier Dispute* (Burkina Faso v Niger) ICJ Rep. 2013, Declaration of Judge Bennouna.

[95] *Frontier Dispute* (Burkina Faso v Niger*)*, Judgment, para. 63.

[96] See McCorquodale 'The Right of Self-Determination' in The International Covenant on Civil and Political Rights and United Kingdom Law, op. cit.. In respect to the handover of Hong Kong to the PRC by the UK, the people of Hong Kong were not afforded the right to exercise self-determination. See Robert McCorquodale, 'Negotiating Sovereignty: The Practice of the United Kingdom in Regard to the Right of Self-Determination' (1996) 66 *British Yearbook of International Law* p. 283.

[97] *Western Sahara Advisory Opinion,* ICJ Rep. 1975, per Judge Nagendra Singh, p. 81.

[98] *Case Concerning East Timor*, ICJ Rep. 1995, para. 32.

[99] UNGA Res. 2625 states: "In their actions against and resistance to such forcible action [by states and] 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 of the United Nations." As that support must be in accordance with the purpose and principles of the UN Charter, occupation by one state to 'support' a people's right to self-determination in another state would not be lawful. This was one of the criticisms of the Russian actions to support Abkhazia and South Ossetia against Georgia, as well as Russia's role in the Crimea in 2014. Report of the Independent International Fact-Finding Mission on the Conflict in Georgia (30 Sep. 2009): https://www.scribd.com/document/76109274/Independent-International-Fact-Finding-Mission-2, accessed April 10, 2019.

[100] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Art 1(4).

[101] International Law Commission (ILC), 'Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA)' with commentary, adopted at its 53rd session (2001), *Yearbook of the International Law Commission, 2001,* Vol. 2 (Part Two).

[102] ARSIWA Commentaries to Art. 40, Paras 7, 8, dealing with 'serious' breaches, meaning gross or systematic. James Crawford, as ILC Rapporteur on the ARSIWA, notes that since "peremptory norms are among the most serious prohibitions in international law, …the mere fact of breach is ordinarily sufficient to warrant the label of 'serious'." James Crawford, *State Responsibility: The General Part* (Cambridge University Press, Cambridge 2013), p. 381.

[103] *Legal Consequences of the Construction of a Wall,* ICJ Rep. 2004, paras 155-156, 159.

[104] ARSIWA Commentaries to Art. 40, Para. 5. ICJ, *Legal Consequences of the Construction of a Wall,* ICJ Rep. 2004, para 156. The Court recalled its decision in the *Case Concerning East Timor*, where it described as "irreproachable" the assertion that "the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character" (I.C.J. Rep. 1995, p. 102, para. 29). The Court also cited General Assembly resolution 2625 (XXV).

[105] *Case Concerning East Timor*, ICJ Rep. 1995, p. 102, para. 29. *See* Declaration of Principles of International Law Concerning Friendly Relations, UNGA Res. 2625 (XXV), annex, fifth principle.

[106] *See Legal Consequences of the Construction of a Wall,* ICJ Rep. 2004, paras 156, 159.

[107] This is confirmed by the ICJ in its Advisory Opinion on *Legal Consequences of the Construction of a Wall,* ICJ Rep. 2004, para 159. *See also Namibia Advisory Opinion,* ICJ Rep. 1971, paras 118-126.

[108] *See*, e.g., UNSC Res. 218 (1965) on the Portuguese colonies, as well as UNSC Res. 418 (1977) and UNSC Res. 569 (1985) on South Africa.

[109] ARSIWA Commentaries to Article 41, para. 12.

[110] *Council of the European Union v. Front Polisario*, Court of Justice of the European Union, Case 104/16P

(2016).
[111] *Id.*, paras. 5, 8. *See, Namibia Advisory Opinion,* ICJ Rep. 1971, para. 119.

[112] *See Namibia Advisory Opinion,* ICJ Rep. 1971, para. 117. In respect to this duty, the ILC Commentaries elaborate:

> "What is called for in the face of serious breaches is a joint and coordinated effort by all States to counteract the effects of these breaches. It may be open to question whether general international law at present prescribes a positive duty of cooperation, and paragraph 1 in that respect may reflect the progressive development of international law. But in fact such cooperation, especially in the framework of international organizations, is carried out already in response to the gravest breaches of international law and it is often the only way of providing an effective remedy." ARSIWA Commentaries to Art. 41, para. 3.

[113] *See Legal Consequences of the Construction of a Wall,* ICJ Rep. 2004, paras 156, 159.

[114] *See* Wolfgang Danspeckgruber (ed.), *Self-determination of Peoples: Community, Nation and State in an Interdependent World*, Appendix B, text of the Draft Convention on Self-Determination through Self-Administration and commentary by Sir Arthur Watts (Lynne Rienner Publishers, Boulder/London 2002) pp. 365-392.