THE UNITED NATIONS AND THE EVOLVING RIGHT TO SELF-DETERMINATION

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THE right of peoples to self-determination is an elusive concept. There is no clear definition of "peoples" or of what the right entails. Instead, there are numerous and at times conflicting interpretations of self-determination.[1] The existence of these various interpretations is not merely of academic or theoretical interest. It can have considerable practical implications.

Problems stem from the different interpretations of "peoples". The term has been used to refer to the population of a State, the population of a colony and to groups of individuals linked by a common language, ethnicity or race whether or not they comprise the entire population of a State or colony. If they are all "peoples" with a right to self-determination, conflicts between competing self-determination claims are inevitable. These conflicts usually occur when the majority of the population of a State claim the right to maintain the territorial integrity of the State while an ethnic, linguistic or religious group within the State claims the right to secede and establish an independent State. Examples of such conflicts abound and are on the increase. They not only generate instability and civil conflict within the State but can also threaten international peace and security.[2]

These conflicts highlight the principal difficulty with the concept of self-determination. Competing claims can be advanced in the name of self-determination due to the ambiguity surrounding the concept. Each State or non-State group can resort to the interpretation which best suits its interests. This situation is compounded by the absence of any institutional

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1. There are at least three broad interpretations of self-determination although several variants exist. Self-determination can refer to the right of the population of a State to determine their international status and to self-government. It can also refer to the similar right of the population of a colonial territory. According to a third interpretation, self-determination refers to the right of "peoples", whether or not they comprise the entire population of a State or colonial territory, to determine their international status and to self-government.

2. Cf. the General Assembly debate on "The effective realisation of the right of self-determination through autonomy" in 1993: A/48/PV.36.

framework or guidelines for the examination of self-determination claims under international law. Consequently, there is little incentive to compromise since each group can take refuge in an appropriate interpretation to assert its overriding "right" to self-determination.

The purpose of this article is to analyse the legal right to self-determination. It will focus on the external dimension to self-determination, which is defined as the right of a people to determine their international status. A distinction will be drawn at the outset between the political and the legal principle of self-determination. This should remove from the discussion one source of confusion, which stems from the fact that the two principles are sometimes regarded as being synonymous notwithstanding the fact that the political principle of self-determination is broader in scope than the legal principle. This difference in scope may be explained by the close relationship between the political principle of self-determination and nationalism. It is hardly surprising that when it came to defining a "people" the political principle should emphasise criteria such as common history, race, ethnicity and language which are commonly associated with the concept of a "nation". Defining "peoples" using such vague criteria enables a wide variety of groups to claim the right to self-determination. In the majority of cases these claims are not recognised in international law.

Undoubtedly, much has already been written on the legal right to self-determination. However, some of the confusion surrounding the right to self-determination stems from the diverse and occasionally conflicting interpretations of the right in the existing literature. There are several reasons for these diverse interpretations. They relate to the range and legal status of the State practice on which the interpretations are based, the significance attached to the historical context in which the principle emerged, and the extent to which writers recognise that the meaning attributed to the principle of self-determination has evolved over time.

This article tries to clarify some of the confusion surrounding the legal principle of self-determination. It does so by examining the development of the principle within the United Nations. It analyses the meaning and legal status of the principle of self-determination in the UN Charter (Part I), during the decolonisation period (Part II) and outside the colonial context (Part III). The reasons for this subdivision are twofold. First, it highlights the evolution which has taken place in respect of the meaning and legal status of the principle of self-determination and avoids the danger of a "retrospective rewriting of history".[3] Second, it highlights the importance to be attached to the particular context in which the principle emerged and avoids the danger of incorrectly extrapolating principles of

3. R. Higgins, *Problems and Process*, p.111, commenting on some of the interpretations of the Charter principle of self-determination.

universal application from State practice during unique historical periods. Throughout the article the interpretations of self-determination advanced by the leading writers in this field are critically evaluated in the light of this State practice. The article concludes by setting out its findings on the meaning and legal status of the principle of self-determination.

I. SELF-DETERMINATION AND THE UNITED NATIONS CHARTER

THE development of the legal right to self-determination is based on the UN Charter. Article 1(2) of the Charter provides that one of the purposes of the United Nations is to "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples". Article 55 provides that the United Nations shall promote a number of goals with a view "to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples". These Articles will be interpreted in accordance with their ordinary meaning, in their context and in the light of the object and purpose of the Charter.[4] Reference will also be made to the *travaux préparatoires* as a supplementary means of interpretation.[5]

Articles 1(2) and 55 refer to the principle of equal rights and self-determination of "peoples". The meaning of the term "peoples" is unclear but it is broad enough to apply to a variety of social arrangements including groups of individuals linked by a common language, religion or ethnicity. A more restrictive interpretation is suggested by the ordinary meaning of the term construed in context. The principle of self-determination is referred to in Articles 1(2) and 55 as a basis for friendly relations between nations. The use of the term "nations" is unclear but it may be due to the fact that some of the original signatories to the Charter were not States.[6] The term seems to refer to States since international relations are normally conducted between States. This suggests that relations between States are to be conducted on the basis of respect for the principle of self-determination. Since the overriding principle governing inter-State relations is the principle of sovereign equality, the reference to equal rights and self-determination may be a reformulation of the principle of sovereign equality of States. This suggests that the term "peoples" refers to States. The references in Articles 1(2) and 55 to the "rights" of peoples would support this interpretation since the general view in 1945 was that

4. Vienna Convention on the Law of Treaties, Art.31.
5. *Idem*, Art.32.
6. Byelorussia, India, Philippines and the Ukraine.

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only States had rights under international law. This interpretation of self-determination is consistent with the object and purpose of the Charter since the maintenance of international peace can be secured through respect for the principle of sovereign equality.

An examination of the references to "peoples" in other provisions of the Charter sheds further light on the meaning of the term. The Preamble opens with the phrase "We the Peoples of the United Nations" and concludes with the statement that "our respective Governments ... have agreed to the present Charter." The reference to "our respective Governments" suggests that the term "peoples" in the Preamble refers to peoples organised as States.

The term "peoples" is used in a different sense in Chapters XI and XII of the Charter. Chapter XI is concerned with Non-Self-Governing Territories ("NSGTs"). Article 73 provides that member States which administer NSGTs will, *inter alia*, "develop self-government, to take due account of the political aspirations of the peoples". Article 73 uses the term "peoples" to refer to the inhabitants of NSGTs. These territories are defined as "territories whose peoples have not yet attained a full measure of self-government". There is no explanation of what is a full measure of self-government. Consequently, there is uncertainty over the identity of the peoples referred to in Article 73.

Chapter XII establishes the International Trusteeship System. Article 76 provides that one of the basic objectives of this system is to "promote the ... progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned". In this context the term refers to the inhabitants of Trust Territories. These territories comprise territories formerly held under mandate, territories detached from enemy States as a result of the Second World War and territories voluntarily placed under the system by the administering powers.[7]

The term "peoples" is used in Chapters XI and XII to refer to the inhabitants of NSGTs and Trust Territories. It is possible that a similar meaning can be attributed to the term in Articles 1(2) and 55. The difficulty with this interpretation is that in 1945 the inhabitants of these territories did not have rights under international law. This problem can be resolved by distinguishing between legal and moral rights and admitting the possibility that the term "rights" in Articles 1(2) and 55 refers to moral rights. The reference to equality in these articles may be regarded not so much as a statement of the legal position of different peoples but a rejec-

7. Art.77.

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tion of the idea of racial superiority. This interpretation of "peoples" is also compatible with the object and purpose of the Charter. By 1945 colonialism was regarded by several States as a source of tension in international relations. Recognising the right of NSGTs and Trust Territories to self-determination would remove this source of tension.

On the basis of the language, context and object and purpose of Articles 1(2) and 55, there are three possible interpretations of the term "peoples". One is that it refers to States, in which case the principle of self-determination means sovereign equality. An alternative is that it refers to the inhabitants of NSGTs. Self-determination in this context means the right to "self-government". A third interpretation is that the term "peoples" refers to the inhabitants of Trust Territories, in which case self-determination means the right to "self-government or independence".

The *travaux préparatoires* provide further guidance on the meaning of the right to self-determination in the Charter. The Dumbarton Oaks Proposals made no reference to self-determination. The principle was first referred to in an amendment to Article 1(2) proposed by the four sponsoring governments.[8] Opinion was divided on whether the amendment should be included in the Charter. During discussions in Committee I/1[9] it was[10]

> strongly emphasized on the one side that the principle corresponded closely to the will ... of peoples everywhere and should be clearly enunciated in the Charter; on the other side, it was stated that the principle conformed to the purposes of the Charter only insofar as it implied the right of self-government ... and not the right of secession.

It is unlikely that the principle would have aroused such controversy if it was merely a reformulation of the principle of sovereign equality. It suggests that the principle of self-determination and the principle of sovereign equality are not synonymous.

Belgian criticism of the amendment indicates that there was considerable uncertainty over its interpretation. It noted that the reference to the equal rights of peoples was confusing since one normally referred to the equal rights of States. It acknowledged that the term "peoples" could refer to "States" but noted that in the draft it meant "national groups which do not identify themselves with the population of a state".[11] To address these ambiguities, it proposed its own amendment which referred to

8. China, the USSR, the UK and the US. The proposed amendment was in identical terms to the text ultimately adopted.

9. This Committee had the task of drafting the Preamble to and the Purposes and Principles of the Charter. On the committee structure at the San Francisco Conference, see L. M. Goodrich and E. Hambro, *Charter of the United Nations: Commentary and Documents*, pp.12–18.

10. *Documents of the UN Conference on International Organisation*, Vol.VI, p.296.

11. *Idem*, p.300.

"the essential rights and equality of the states, and of the peoples' right of self-determination".[12] The Belgian amendment was considered and rejected by a subcommittee of Committee I/1. The Rapporteur noted that one reason for its rejection was that "equality of states was dealt with and accepted under ... Principles, so it was irrelevant here to the point at issue".[13] This suggests that some States drew a distinction between the principle of self-determination in Article 1(2) and the principle of sovereign equality in Article 2(1). Another reason was that "what is intended by paragraph 2 is to proclaim the equal rights of peoples as such ... Equality of rights, therefore, extends in the Charter to states, nations, and peoples."[14] This suggests that several States drew a distinction between States, nations and peoples. The recognition that peoples as distinct from States had rights is significant. It suggests that the term "rights" is not necessarily a reference to legal rights.

The Rapporteur's report provided some tentative guidance on the meaning of self-determination. It noted that "the principle as one whole extends as a basic general conception to a possible amalgamation of nationalities if they so freely choose".[15] The report tends to be vague on the meaning of self-determination. This may be explained by the Raporteur's comment that in drafting the purposes of the United Nations "we cannot in our present situation seek to attain complete amplification, clarification and precision which may lead to undue rigidity".[16] It suggests that the ambiguity surrounding the meaning of certain terms was deliberate to enable the Charter to adapt to changing conditions.

The amendment was adopted unanimously by Committee I/1.[17] The Committee's understanding of the self-determination principle was in similar terms to that of the subcommittee, with one significant omission: there is no reference to the "possible amalgamation of nationalities".[18]

The draft article was then transmitted to the Co-ordination Committee. The French delegate objected to the use of the term "nations" in apparent differentiation from the term "peoples" since it seemed to introduce the right of secession.[19] While the American delegate explained that the use of the term "nations" was deliberate, since there would be some parties to the Charter which could not be classified as States, he did not explain why it was necessary to refer to both "peoples" and "nations" in the draft.[20] The

12. *Ibid.*
13. *Idem*, p.704.
14. *Ibid.*
15. *Ibid.*
16. *Idem*, p.700.
17. *Idem*, p.324.
18. *Idem*, p.396.
19. *Idem*, Vol.XVII, p.142.
20. *Ibid.*

Committee ultimately decided to ask the Secretariat to prepare a memorandum on the use of the terms "States", "nations" and "peoples" in the Charter.[21]

The Secretariat's memorandum defined "peoples" as "groups of human beings who may, or may not, comprise states or nations".[22] It noted that the term "nations" is used in the texts in a "non-political sense" and is broad enough to include "colonies, mandates, protectorates, and quasi-states as well as states".[23] It is clear from the memorandum that the term "peoples" does not refer solely to States or nations. The possibility exists that it refers to other social arrangements although the memorandum refrains from identifying these arrangements. There was no discussion of this memorandum by the States.

The question of what self-determination entailed was the subject of some discussion in the Coordination Committee. The French delegate asked whether self-determination "meant the right of a state to have its own democratic institutions or the right of secession".[24] The British and Soviet delegates were reluctant to engage in a debate on the issue since they were "not sure that there could be agreement".[25] While it was proposed that the matter could be discussed at a future date,[26] there is no record of any such discussion taking place. This suggests that the divergence of opinion which existed on the meaning of self-determination was not resolved during the drafting of the Charter.

The drafting history of Articles 73 and 76 provides further guidance on the meaning of self-determination. The Soviet delegation wanted to include a reference to the principle of self-determination in Article 76.[27] It was omitted due to the opposition of Britain and France, which felt that it would cause difficulties in Palestine and other territories.[28] Article 76 does refer to the purposes of the United Nations, which may be regarded as an implied reference to the principle of self-determination.

There was also support for extending the principle to the inhabitants of NSGTs. China proposed including a reference to "independence" for NSGTs in Article 73.[29] It was stated that "Nothing in the Charter should contravene the principle of equality of all races; and their right to self-

21. *Ibid.*
22. *Idem*, Vol.XVIII, p.658.
23. *Idem*, p.657.
24. *Idem*, Vol.XVII, p.143.
25. *Ibid.*
26. *Ibid.*
27. *Idem*, Vol.X, p.441.
28. R. B. Russell and J. E. Muther, *A History of the United Nations' Charter*, p.831. The Soviet proposal was dropped in response to a US threat to veto proposals on the composition of the Trusteeship Council.
29. *Documents*, *supra* n.10, at Vol.X, p.453.

determination ... should be recognized".[30] This comment, which was not an isolated one,[31] shows that some States recognised that the principle could be applied to the inhabitants of NSGTs. It also shows that equality was not seen purely in legal terms. Consequently, the phrase "equal rights of peoples" may not necessarily refer to the legal equality of States. Those who opposed the amendment stated that the term "self-government" did not exclude the possibility of independence.[32] There is no record of any objections to the idea that the principle of self-determination applied to NSGTs. The main objection seemed to be to the idea of "putting forward independence as a universal co-equal goal for all territories".[33] The amendment was withdrawn on the understanding that a reference to independence would be included in Article 76.[34] In response to concerns expressed by a number of States about the implications of this withdrawal,[35] it was stated that the Charter envisaged that "dependent peoples could progress from one stage to another until at length, if conditions warranted, they might apply for membership" of the United Nations.[36] This suggests that even though there was some recognition that the principle of self-determination applied to the inhabitants of NSGTs, it was envisaged that it would not be exercised immediately and that it was dependent on certain conditions being satisfied.

The *travaux préparatoires* seem to confirm the interpretation of self-determination arrived at on the basis of the ordinary meaning of the term, construed in context and in the light of the Charter's object and purpose. The term "peoples" can refer to States, in which case self-determination means sovereign equality. To the extent that self-determination refers to sovereign equality it is possible to speak of a legal right to self-determination in the Charter. The term "peoples" can also refer to the inhabitants of NSGTs and Trust Territories. In this context, self-determination refers to the right of self-government or independence. The Charter envisages the progressive development of the territories until self-government or independence is attained. This indicates that in 1945 there was no immediate legal right to self-determination for the inhabitants of these territories. It was a goal to be pursued.

It is useful at this point to turn to the academic literature since there are different interpretations of the right to self-determination in the Charter. One interpretation equates the right to self-determination in the Charter with the right to sovereign equality. Kelsen bases this interpretation on

30. *Ibid.*
31. Cf. *idem*, p.497, Vol.III, p.146 and Vol.X, pp.446, 562.
32. *Idem*, Vol.X, pp.453–454.
33. *Idem*, p.562.
34. *Idem*, p.497.
35. *Ibid.*
36. *Ibid.*

the reference in Article 1(2) to relations between nations, which he interprets as relations between States and concludes that the term "peoples" in connection with equal rights probably also means States since only States had rights under international law.[37] Higgins also bases her interpretation on the context in which the references to self-determination appear in Articles 1(2) and 55 and on the coupling of self-determination with equal rights. She rejects "popular assumptions" that there was a right to self-determination for dependent peoples in the Charter on the grounds that there is no reference to "self-determination" in Articles 73 and 76 and that independence was not seen to be the only proper outcome.[38]

Both the text and the drafting history of the Charter indicate that the principle of self-determination applies to States. It is doubtful whether it applies only to States. Even on a textual reading, one is left with the question why the vague term "peoples" is used rather than the more precise term "States" if what was intended was simply to recognise the self-determination of States. The drafting history tends to undermine the fundamental premises on which this interpretation is based. Rights did not necessarily refer to legal rights. Consequently, there was nothing to preclude non-State entities having rights. Furthermore, the term "nations" could refer to States, to the original signatories of the Charter which were not States and to colonies, mandates and protectorates. This means that the principle of self-determination could be a basis for friendly relations not only between States but also between States and colonies. The omission of any reference to self-determination in Articles 73 and 76 can be seen to be more a result of a political compromise than an indication that the principle was inapplicable to these territories. It will also be remembered that the possibility of independence was not excluded from Article 73 or Article 76. It indicates that the principle of self-determination in the Charter could apply to States and non-State entities.

A second interpretation is that self-determination is used in two senses in the Charter.[39] Self-determination can refer to the sovereign equality of States and to the right of colonial peoples to self-government, including independence. Lachs suggests a variation on this second interpretation.[40] The distinguishing feature of Lachs's approach is his evaluation of the

37. H. Kelsen, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems*, p.53.

38. Higgins, *op. cit. supra* n.3, at p.112.

39. Cf. D. W. Bowett, "Self-Determination and Political Rights in the Developing Countries" (1966) 60 P.A.S.I.L. 129, 134; J. Crawford, *The Creation of States in International Law*, p.91; A. Cristescu, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, *The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments*, p.39; M. Lachs, "The Law in and of the United Nations" (1961) 1 Indian J.I.L. 429, 430–431; and R. Sureda, *The Evolution of the Right to Self-Determination*, p.101.

40. Lachs, *ibid.*

legal status of the principle. He argues that by 1945 the principle of self-determination had become part of the general principles of international law on the basis of its widespread recognition at national level.[41] He does not regard the principle as merely a reformulation of the principle of sovereign equality and consequently does not attribute legal status to the principle on that basis. Lachs recognises that the interpretation and application of the principle were controversial and consequently draws a distinction between Articles 1(2) and 55 and Articles 73 and 76. Whereas Articles 1(2) and 55 are declaratory of customary international law, Articles 73 and 76 are merely an "authentic interpretation of the term 'self-determination'" intended to implement the principle of self-determination.[42] Lachs's distinction between the recognition of the principle and its interpretation and application is problematic since it is questionable whether one can completely divorce the recognition of the principle from its interpretation and implementation.

Lachs's contention that there was a legal right to self-determination in 1945 is out of step with the mainstream literature. The general view is that there was no legal right to self-determination in the Charter.[43] This rules out the possibility that self-determination applies to States since if it did apply to States it could be regarded as a legal right on the basis that it is merely a reformulation of the legal principle of sovereign equality. Implicit in this approach is that the principle of self-determination applies only to colonial peoples. This represents a third interpretation of the Charter principle of self-determination. It is difficult to sustain this narrow interpretation on the basis of the drafting history and language of the Charter.

One final issue concerning the principle of self-determination in the Charter is whether it applies to secessionist groups. Opinion in the literature seems to be overwhelmingly against admitting the possibility of secession. Cassese, for example, argues that the principle of self-determination was accepted only in so far as it implied the right of self-government of peoples and not the right of secession.[44] He bases this argument on

41. *Idem*, p.432.

42. *Idem*, pp.432–433.

43. Y. Z. Blum, "Reflections on the Changing Concept of Self-Determination" (1975) 10 Is.L.R. 509, 511; A. Cassese, "Political Self-Determination—Old Concept and New Developments", in A. Cassese (Ed), *UN Law/Fundamental Rights*, p.138; Y. Dinstein, "Self-Determination and the Middle East Conflict", in Y. Alexander and R. A. Friedlander (Eds), *Self-Determination: National, Regional and Global Dimensions*, p.245; J. E. S. Fawcett, "The Role of the United Nations in the Protection of Human Rights—Is It Misconceived?", in Eide and Schou (Eds), *International Protection of Human Rights*, p.95; L. Gross, "The Right of Self-Determination in International Law", in M. Kilson (Ed.), *New States in the Modern World*, p.139; A. Kiss, "The Peoples' Right to Self-Determination" (1986) 7 H.R.L.J. 165, 173–174; and M. Pomerance, *Self-Determination in Law and Practice*, p.9.

44. Cassese, *ibid.*

a statement to similar effect in the Rapporteur's report (see *supra*) but it will be remembered that this represented only one view and that opinion was divided on the issue. Similarly, the reference to self-government was in itself ambiguous since it was recognised in the context of Article 73 that it could include the possibility of independence. Other writers are more equivocal on the question of secession.[45]

There was undoubtedly some ambiguity over the question of secession during the drafting of the Charter. This may be explained by the fact that the meaning of the term "secession" has evolved over time. In 1945 secession could refer to two types of situation. It could refer to colonial peoples demanding independence since some States regarded colonial claims for independence as secessionist claims.[46] Since several States supported the colonial peoples' claims for independence it is possible to say that there was some support for a right of secession during the drafting of the Charter. However, secession can also refer to claims by national groups within the continuous boundaries of independent States to break away from these States. This is the meaning usually attributed to secession today. It is difficult to find any references in the drafting history of the Charter which would support this form of secession.

In conclusion, in 1945 the principle of self-determination in the Charter could apply to States and to the inhabitants of Non-Self-Governing Territories and Trust Territories. When the principle applied to States it meant sovereign equality and it was possible to speak of a legal right to self-determination. When the principle applied to the inhabitants of NSGTs and Trust Territories it meant self-government or independence. In this context there was no legal right to self-determination. It was simply a goal to be pursued.

II. DECOLONISATION AND THE RIGHT TO SELF-DETERMINATION

THE legal status and meaning of the self-determination principle evolved during the decolonisation process. The question arises whether the principle which emerged during this unique historical period is a universal one. Did the numerous references during this period to the right of "all peoples" to self-determination really mean that the right was universally applicable or was it in reality intended to apply only to a particular category of people, namely, colonial people? Furthermore, did the tendency to equate self-determination with independence during this period mean that independence must always be offered to a people exercising self-

45. L. C. Buccheit, *Secession: The Legitimacy of Self-Determination*, p.74.

46. P. J. Kuyper and P. J. G. Kapteyn, "A Colonial Power as Champion of Self-determination: Netherlands State Practice in the Period 1945–1975", in H. F. Panhuys (Ed.), *International Law in the Netherlands*, Vol.III, pp.159, 214. France, Portugal and Spain also adopted the position that either some or all of their overseas territories were part of the metropolitan territory and not colonies: 15 G.A.O.R. 1259, 1019.

determination even outside a colonial context? These questions are addressed in this part of the article, which examines State practice during the decolonisation period. It begins by analysing General Assembly Resolution 1514(XV) and then proceeds to examine the United Nations' application of the right to self-determination in a colonial context.

A. General Assembly Resolution 1514(XV): Declaration on the Granting of Independence to Colonial Countries and Peoples

Resolution 1514(XV) is widely regarded as one of the United Nations' most important contributions to the development of the legal right to self-determination.[47] The Resolution affirms that "All peoples have the right to self-determination."[48] It suggests that the right applies universally but this is unlikely. The General Assembly interpreted a similar phrase in an earlier resolution as applying only to the inhabitants of NSGTs and Trust Territories.[49] A similar meaning can be attributed to the phrase in Resolution 1514(XV). Support for this narrow interpretation "peoples" can be found in the overall context,[50] the title and the object and purpose of the Resolution.[51] Furthermore, the overwhelming majority of representatives who spoke during the debate on the Resolution addressed themselves solely to the position of colonial peoples.[52] It has also been confirmed by subsequent practice within the United Nations.[53] This narrow interpretation of "peoples" may be reconciled with the apparent universality of the

47. Cf. Cristescu, *op. cit. supra* n.39, at p.6, and H. Gross Espiell, UN Special Rapporteur, *Implementation of United Nations Resolutions Relating to the Right of Peoples Under Colonial and Alien Domination to Self-Determination*, p.117.

48. Operative para.2.

49. Res.637(VII) refers to the "principle of self-determination of all peoples and nations": 7 G.A.O.R. 26. An American amendment affirming the universality of the principle was rejected by 28 votes to 22, with 5 abstentions: *idem*, p.374.

50. The preamble indicates that the resolution was concerned primarily with colonial peoples: paras.3–7, 9, 10 and 12. Operative paras.3 to 5 of the resolution are concerned solely with the implementation of the self-determination principle in colonial territories.

51. To expedite the process of decolonisation and to reinforce the Charter obligations concerning colonial peoples: cf. 15 G.A.O.R. 1001–1002, 1042, 1060, 1103, 1234, 1074, 1136, 1152 and 1266.

52. The emphasis throughout the debate was on decolonisation: cf. 15 G.A.O.R. 996. Only seven delegations, out of a total of 72 who made statements, referred to a more expansive definition of "peoples": cf. *idem*, pp.1138, 1249, 1136, 1200, 1283, 1104 and 1073.

53. The Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, which was established in 1961 to oversee the implementation of Res.1514(XV), has dealt exclusively with NSGTs, Trust Territories and other dependent territories: cf. Res.1542(XV) and 1747(XVII). This interpretation has also been adopted by the Assembly in a series of resolutions on the implementation of Res.1514(XV): cf. Res.40/56 of 2 Dec. 1985.

provision by adopting the position that self-determination has already been exercised by peoples in existing States and must now be "universalised" to apply to colonial peoples.

The Resolution provides some insight into the meaning of "colonial peoples". It stipulates that immediate steps shall be taken in "Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence" to enable the peoples of these territories to enjoy complete independence.[54] It seems that the inhabitants of these territories were referred to collectively as colonial peoples. The identity of Trust Territories was not problematic as they had already been defined in Article 77 of the Charter. A series of General Assembly resolutions provided guidance on the identity of NSGTs.[55] No guidance was given on the identity of "territories which were not yet independent". The phrase may be taken to refer to territories such as Algeria which the administering State claimed had neither NSG nor Trust status. The reference was a way of preventing an administering power circumventing the Resolution's provisions by claiming that the territories under its jurisdiction were neither NSGTs nor Trust Territories.

Under Resolution 1514(XV) the decisive factor was whether or not the territory had attained independence. The reference to "territories which were not *yet* independent" (emphasis added) amounts to a rejection of the Western thesis that certain territories in Eastern Europe were under a "new form of colonialism" and should have their right to self-determination recognised. It is clear that Resolution 1514(XV) is concerned only with the right to self-determination of colonial peoples. It can be regarded as an attempt to extend the right to self-determination to this particular category of peoples rather than, as is sometimes thought, declaring a right to self-determination for any group claiming to be a "people".

It is clear that the inhabitants of colonial territories can be regarded as peoples, but this is only the first step in understanding what is meant by the term "peoples". The manner in which these inhabitants exercise the right to self-determination sheds further light on the meaning of the term. For example, a territory may be inhabited by three distinct ethnic groups. If the right to self-determination is exercised by the entire population of the territory it suggests that the term "peoples" refers to the entire inhabitants of the territory irrespective of ethnic differences. This suggests a territorial criterion for defining people. Alternatively, if the right is exercised separately by each ethnic group it suggests that the term "peoples" refers

54. Operative para.5.

55. Res.66(I): 1 G.A.O.R. Supp. 20, pp.124–126; Res.567(VI): 6 G.A.O.R. Supp. 20, p.61; Res.648(VII): 7 G.A.O.R. Supp. 17, p.34, Res.742(VIII): 8 G.A.O.R. Supp. 17, p.22; and Res.1541(XV).

to groups of individuals identified by ethnic origins. This suggests that personal criteria such as ethnic origin should be used to define "peoples". The use of personal criteria has considerable implications for the principle of territorial integrity. If each ethnic group decides to form a State it will result in the break up of the territory into three separate States. Consequently, the definition of "peoples" is closely related to the question of territorial integrity.

Resolution 1514(XV) does not state how the inhabitants of colonial territories are to exercise their right to self-determination. However, it does state: "Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with" the Charter.[56] If the principle of territorial integrity must be respected it means that the right to self-determination has to be exercised by the entire inhabitants of the territory irrespective of differences in ethnic origin, religion, etc. It indicates that a territorial criterion should be used to define "peoples".

The question then arises as to how one defines the boundaries of the territorial unit. There are two principal interpretations, each bearing on the definition of peoples. According to one, the Resolution affirms the territorial integrity of colonial countries.[57] On the basis of this interpretation, the term "peoples" refers to the entire population of a colonial country. According to a second interpretation, the Resolution affirms the territorial integrity of pre-colonial entities.[58] This would require the restoration of colonial territory to the unit from which it was originally separated. On the basis of this interpretation, the term "peoples" refers to the entire population of the pre-colonial entity. The conflict between the two interpretations was not resolved during the drafting of the Resolution. Consequently, it is possible that the term "peoples" refers either to the entire inhabitants of a colonial territory or to the entire inhabitants of a pre-colonial entity.

Resolution 1514(XV) defines self-determination as the right of peoples "to freely determine their political status and freely pursue their economic, social and cultural development".[59] Although there is a strong preference for independence, reflected in the drafting of the Resolution[60] and the General Assembly debate,[61] it is evident from the generality of the language used in defining self-determination that it did not preclude other self-determination outcomes.[62]

56. Operative para.6.
57. Cf. 15 G.A.O.R. 1255.
58. Cf. 15 G.A.O.R. 1251, 1153, 1271, 1276, 1277 and 1139.
59. Operative para.2.
60. Operative para.5 and the title of the resolution.
61. Cf. 15 G.A.O.R. 1047, 1102, 993, 1153 and 1042.
62. This is reinforced by Res.1541(XV), Principles VI, VII and IX, which was adopted within 24 hours of Res.1514(XV).

Resolution 1514(XV) is a General Assembly resolution and as such is presumed, *prima facie*, to have no binding effect.[63] General Assembly resolutions may contribute to the development of international law but this depends on a number of factors such as the wording of the text,[64] the voting record,[65] statements made at the time of their adoption[66] and subsequent State practice. Resolution 1514(XV) was adopted by 89 votes to none, with nine abstentions.[67] The abstention of all the colonial powers and their dissent on key provisions undermine suggestions that the resolution proclaimed rules of general international law.[68] It may be argued that the States which voted for the Resolution signified their agreement to be bound by it[69] but one has to avoid attaching too much weight to a positive vote in view of the recommendatory nature of such resolutions. An examination of the statements made at the time Resolution 1514(XV) was adopted suggests that it was not regarded as legally binding. Several States did refer to the fundamental "right" to self-determination but it is unclear whether they were referring to a political or legal right[70] since they did not comment on the legal status of the Resolution. States which did address themselves to this issue, including some of the Resolution's sponsors, stated that it had moral force.[71] It seems that the resolution was not legally binding at the time of its adoption but it did contribute to the subsequent development of international law in this area.

B. Decolonisation 1945-1997

The manner in which the self-determination principle was applied during the decolonisation period provides useful insights into the meaning of the term "peoples" and what self-determination entails for these peoples. The trend during this period was for the entire inhabitants of a colonial terri-

63. On the legal status of G.A. resolutions, see Cheng, "United Nations Resolutions on Outer Space Law: 'Instant' International Customary Law?" (1965) 5 Indian J.I.L. 23; MacGibbon, "Means for the Identification of International Law", in Cheng (Ed.), *International Law: Teaching and Practice*, chap.2; and Mendelson, "The Legal Character of General Assembly Resolutions: Some Considerations of Principle", in Hussain (Ed.), *Legal Aspects of the New International Economic Order*, Vol.I, p.92.

64. Cf. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, Merits, Judgment, I.C.J. Rep.1986, 14, para.193; and *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Rep. 1971, 16, para.114.

65. Cf. *Nicaragua*, *idem*, para.188; and the *TOPCO* case (1978) 17 I.L.M. 3, paras.85–86.

66. Cf. *Nicaragua*, *idem*, para.203; and *TOPCO*, *idem*, paras.87–88.

67. 15 G.A.O.R. 1274.

68. Cf. *North Sea Continental Shelf*, Judgment, I.C.J. Rep. 1969, 3, para.73; and *TOPCO*, *supra* n.65, at paras.85–86.

69. Cf. *Nicaragua*, *supra* n.64, at para.188.

70. Cf. 15 G.A.O.R. 993, 997, 1071 and 1098.

71. 15 G.A.O.R. 1003, 1035, 1059 and 1256.

tory to exercise the right to self-determination. Attempts to exercise self-determination on the basis of ethnic origin, language or religion were generally unsuccessful.[72] This indicates that the United Nations favours a territorial concept of peoples. It provides little support for the contention that any group of individuals bound by a common language or religion can claim to be a people and exercise the right to self-determination.

There were approximately 11 exceptions to the trend mentioned above. They were due to the reunification of a pre-colonial entity,[73] the opposition of the inhabitants to maintaining the colonial entity[74] or to the voluntary union of two separate colonies.[75] This indicates that while the United Nations generally interpreted the term "peoples" to refer to the entire inhabitants of a colonial territory it was prepared occasionally to depart from this interpretation to reflect the wishes of the peoples concerned.[76]

The United Nations has not always recognised a right to self-determination for the inhabitants of a colony. There is no reference to the right in the UN resolutions on Gibraltar and the Falkland Islands (Malvinas) even though these territories are classified as colonies.[77] The reasons for the United Nations' approach are unclear. It may be explained by the existence of territorial claims to these territories. Some of the early resolutions on Gibraltar refer explicitly to paragraph 6 of Resolution 1514(XV),[78] which can be interpreted as affirming the territorial integrity of the pre-colonial entity (see *supra*). In this context the pre-colonial entity would be Spain and Gibraltar. On this view, the granting of a right to self-determination to the inhabitants of Gibraltar would be incompatible with the

72. Cf. the case of Mayotte, which unsuccessfully attempted to exercise the right separately from the rest of the Comoros: G.A.Res. 47/9 adopted by 126 votes in favour, one against and 40 abstaining. See also the General Assembly's approach to the Banabans on Kiribati (Gilbert Islands): *Decolonization*, No.15, p.36. The General Assembly has consistently condemned any attempt aimed at the partial or total disruption of the territorial integrity of colonial territories: cf. resolutions adopted between 1965 and 1974 concerning several small territories in the Caribbean, Atlantic, Indian and Pacific Oceans: *Decolonization*, No.12, p.16.

73. Morocco attained independence after the merger of the French Protectorate, the Spanish Protectorate and the International Zone of Tangier. Somalia attained independence after the merger of the British Somaliland Protectorate and the Italian Trusteeship Territory of Somalia.

74. India, Palestine, Ruanda-Urundi, the British Cameroons, the Trust Territory of the Pacific Islands and the Gilbert and Ellice Islands Colony.

75. British Togoland formed a union with Ghana. French Sudan joined with Senegal to form the Federation of Mali but Sudan subsequently seceded.

76. The Trusteeship Council initially expressed concern about the break up of the Trust Territory of the Pacific Islands but ultimately decided that it was "for the Micronesians themselves to decide upon their future relations with each other": *Decolonization*, No.16, p.41.

77. Cf. G.A.Res.51/430 (Gibraltar) and 46/406 (Falkland Islands).

78. Cf. G.A.Res.2353(XXII).

principle of territorial integrity. The resolutions on the Falkland Islands (Malvinas) do not refer to paragraph 6, possibly reflecting the United Nations' assessment of the strength of Argentina's claim to the islands. However, related to the existence of territorial claims is the need to maintain the peace. The failure to resolve territorial claims can lead to the use of force. The Falklands War is a graphic illustration of this. The maintenance of the peace requires that the decolonisation of these territories should be on a basis broadly acceptable to all the relevant parties. This may explain the emphasis on a negotiated settlement in the recent resolutions on these territories.[79] The UN approach to Gibraltar and the Falkland Islands suggests that it will occasionally interpret the principle of self-determination in the light of wider considerations such as the need to maintain the peace and the existence of territorial claims.

During the decolonisation period self-determination usually meant independence for the overwhelming majority of colonial peoples.[80] However, the United Nations was prepared to accept other self-determination outcomes.[81] This is evident from its acceptance of the integration of 12 territories[82] and the association of seven colonial territories[83] with independent States. In most of these cases the United Nations observed or supervised the act of self-determination which may explain its acceptance of the outcome.[84] It is interesting to note that independence was not always offered to the peoples concerned.[85] The options on offer would appear to have been based on an assessment of what the people wanted.[86]

79. Cf. G.A.Res.51/430, 48/422, 47/411, 46/420 and 43/411 on Gibraltar, which were in identical terms and adopted without a vote, and G.A.Res.46/406 and the resolution adopted by the Committee on Colonial Countries on 29 July 1992 (A/47/23) on the Falkland Islands (Malvinas).

80. At least 42 territories attained independence during this period.

81. Cf. the series of G.A. resolutions calling on the administering powers to foster awareness among peoples of the "*possibilities* open to them in the exercise of their right to self-determination" (emphasis added): Res.43/36–43 of 22 Nov. 1988; 44/91–99 of 11 Dec. 1989 and 45/23, 27–29, 31–32 of 20 Nov. 1990.

82. The Netherlands Antilles and Surinam, Alaska, Hawaii, Tokelau, Wallis and Futuna Islands, British Togoland, the northern part of the British Cameroons, the southern part of the Cameroons, North Borneo and Sarawak, West Irian, the Mariana Islands, and the Cocos (Keeling) Islands.

83. Puerto Rico, Greenland, Cook Islands, Niue, the Marshall Islands, the Federated States of Micronesia and Palau. The UN has recognised these decisions although its position on Puerto Rico has evolved over time: cf. Res.2064(XX) (Cook Islands) and Res.3285(XXIX)(Niue). The UN's acceptance of the Compacts of Free Association with the US entered into by the Marshall Islands, the Federated States of Micronesia and Palau is implicit in its termination of the trusteeship agreement concerning these territories: see *Far East and Australasia*, p.757.

84. Cf. *Decolonization*, Vol.II, No.6, pp.19, 20, 21, 22; and G.A.Res.39/30 of 5 Dec. 1984 concerning the Cocos (Keeling) Islands.

85. It was not offered to the inhabitants of the British Cameroons, British Togoland, the Mariana Islands or Niue.

86. Cf. Res.994(X) (British Togoland): 10 G.A.O.R. Supp. 19, p.24.

This was either ascertained in advance by a UN visiting mission or subsequently confirmed by such a mission during the act of self-determination.[87] These case studies suggest that independence does not have to be offered if there is no popular support for such an option. However, independence must be offered if it is sought by the majority of the population.[88] Once a people opt for integration, it is doubtful whether they can subsequently alter that status since there is no reference to such a right in the relevant General Assembly resolutions.[89] In contrast, it seems that peoples who decide on association retain the right to alter their status in the future.[90]

State practice during the decolonisation period suggests that the term "peoples" refers to the entire inhabitants of a colonial territory and that self-determination means that these peoples can choose independence or any other international status. This is evident from an examination of Resolution 1514(XV) and of the manner in which the self-determination principle was applied during this period. By 1971 this State practice had led to the development of a new rule of customary international law which recognised that colonial peoples had a legal right to self-determination.[91]

It is useful at this point to examine the existing literature in the light of this State practice since there is considerable debate about the scope of the self-determination principle which emerged during the decolonisation period. Opinion is divided on the question whether the principle was intended to be universally applicable or whether it was intended to apply to a particular category of people. Cristescu adopts the former approach on the basis of the language used in Resolution 1514(XV).[92] As previously noted, the context, title and object and purpose of the Resolution as well as the statements made at the time of its adoption undermine this contention since they indicate that the Resolution was intended to apply to colonial peoples only.

Originally, Higgins seemed to adopt a similar position to Cristescu. In her earlier writings, Higgins concluded that, by the 1960s, there was a legal

87. Cf. *Decolonization*, Vol.II, No.6, pp.20, 21.

88. Cf. the 1973 report of a Visiting Mission to the Trust Territory of the Pacific Islands reminding the US "which had refused to discuss independence as a possibility except under prior conditions, that 'it is implicit in the Charter and in the Trusteeship System that the goal is eventual independence unless agreement is reached on some other status acceptable to the people of the Territories through an act of self-determination' ": *Decolonization*, No.16, p.40.

89. Res.1541(XV), principles VIII and IX. See also Res.1608(XV) (British Cameroons); Res.2504(XXIV) (West Irian); Res.39/30 of 5 Dec. 1984 (Cocos (Keeling) Islands); and Res.2163(XLIII) (the Mariana Islands).

90. Res.1541(XV), principle VII. See also Res.2064(XX) (Cook Islands). Recognition of the Marshall Islands' change of status is implicit in Res.46/2 of 17 Sept. 1991 admitting the territory to UN membership.

91. *Namibia* case, *supra* n.64, at para.52.

92. *Op. cit. supra* n.39, at p.39.

right to self-determination which entailed the "right of the majority within a generally accepted political unit to the exercise of power".[93] The abstract nature of the definition suggests that the principle was universally applicable although the State practice relied upon was concerned solely with colonial peoples.[94] In her more recent writings Higgins seems to acknowledge that during the decolonisation period the principle was in reality confined to dependent peoples.[95] This represents the mainstream approach in the literature[96] and it is submitted that this is the correct approach.

Pomerance represents a third view since she accepts neither the universalist interpretation nor the interpretation which would restrict the principle to colonial peoples. Relying on a series of UN documents, she argues that the right to self-determination can be invoked by peoples who are dependent or subject to "alien subjugation, domination and exploitation".[97] This suggests that the right is not confined to dependent/colonial peoples but applies to any peoples subject to alien rule.[98] The subjectivity inherent in assessing whether a particular territory is subject to alien rule leads Pomerance to doubt whether any of the definitions can provide objective criteria by which to identify eligible claimants. One must, however, distinguish between rhetoric and reality in UN practice. While the United Nations undoubtedly uses the term "colonial or alien rule" in resolutions on self-determination, the reality is that it has applied the self-determination principle only to colonial territories which were in existence in 1945.[99] The references to peoples under "alien subjugation, domination and exploitation" can be taken as rather a polemical description of the position in which these peoples found themselves. Consequently, Pomerance's attempts to extrapolate general criteria for identifying "peoples" from these references are futile from the outset. It must be accepted that, contrary to Pomerance's assertions, the principle of self-determination which emerged during the decolonisation period was intended to apply only to colonial peoples.

On the question whether a territorial or a personal criterion is used to define "peoples", there is a consensus in the literature that the United

93. *The Development of International Law through the Political Organs of the United Nations*, pp.104, 106.

94. *Idem*, pp.91–104.

95. *Op. cit. supra* n.3, at p.113.

96. Cf. Sureda, *op. cit. supra* n.39, at pp.105–106; Gross Espiell, *op. cit. supra* n.47, at p.15; R. Emerson, "Self-Determination" (1971) 65 A.J.I.L. 459, 463; and Crawford, *op. cit. supra* n.39, at pp.92, 94.

97. *Op. cit. supra* n.43, at p.14.

98. Pomerance is not alone in adopting a wide definition of peoples based on the references to alien domination. A similarly broad approach is adopted by Gross Espiell, *op. cit. supra* n.47, at p.9, and M. Koskenniemi, "National Self-Determination Today: Problems of Legal Theory and Practice" (1994) 43 I.C.L.Q. 241, 247.

99. The territories listed in Res.66(I). Spanish and Portuguese overseas territories, Rhodesia and New Caledonia.

Nations has adopted a territorial criterion.[100] Variations exist on the question how the United Nations defines the relevant territorial unit. The general consensus seems to be that the territorial unit is the colony.[101] However, Pomerance claims that UN practice on the issue has been inconsistent. She contrasts the division of several territories, such as the British Cameroons, with the UN insistence that the territorial integrity of colonial countries should be upheld[102] and also cites its apparent willingness to allow the absorption within former colonial units of territories never included in the pre-independence boundaries.[103] This leads Pomerance to conclude that the objective territorial criterion still entails a subjective assessment of whether a particular outcome, such as the division or reunification of territory, will have colonial or anti-colonial results. Arguably, Pomerance overestimates the significance of the apparent exceptions. Where the United Nations accepted the division of territory it did so reluctantly and only where it reflected the wishes of the majority of the population. More problematic are the territories cited by Pomerance to show that the United Nations has allowed the absorption of territories within former colonies even though they were not included within the pre-independence borders. On closer inspection, it appears that in two of these territories there was or will be some act of self-determination.[104] The remaining territories escape precise classification[105] though their relatively small number would tend to undermine the contention that the UN approach to the definition of the territorial unit was inherently subjective and inconsistent.

Sureda provides another perspective on the definition of the territorial unit. He agrees that the United Nations generally opted for the boundaries of the colonial countries but notes that it departed from this approach in three circumstances: first, where there was a territorial claim

100. Cf. Higgins, *op. cit. supra* n.93, at p.104; Emerson, *loc. cit. supra* n.96; Pomerance, *op. cit. supra* n.43, at p.18; and Sureda, *op. cit. supra* n.39, at p.216.

101. Cf. Cristescu, *op. cit. supra* n.39, at p.26; Emerson (1966) 60 P.A.S.I.L. 135, 138 and *idem*, p.464; Gross Espiell, *op. cit. supra* n.47, at p.19; and Thornberry, "Self-Determination, Minorities, Human Rights: A Review of International Instruments" (1989) 38 I.C.L.Q. 867, 874–875.

102. *Op. cit. supra* n.43, at p.19.

103. Pomerance, *idem*, p.20, cites the cases of Hyderabad, Kashmir, Goa, West Irian, Ifni and Western Sahara.

104. West Irian and Western Sahara.

105. E.g. the General Assembly affirmed the right to self-determination of the people of Ifni but dispensed with the need to hold a referendum in the territory: Res.2229(XXI), 21 G.A.O.R. Supp. 16, p.73. The territory is listed in a UN document as being "Returned to Morocco": *Decolonization*, Vol.II, No.6, p.49. Goa was invaded by India. No action was taken by the UN although it is now listed in a UN publication as being "Nationally united with India": *ibid.*

to the colony;[106] second, where the territory was a "colonial enclave";[107] and, finally, where there was a need to maintain peace.[108] Sureda's arguments are persuasive. There is evidence to suggest that the strength of territorial claims may influence the UN approach to self-determination claims in particular cases.[109] The thesis about "colonial enclaves" would explain the UN approach to Ifni, Goa and Gibraltar but the General Assembly has consistently stated that the geographical location of the territory should not prevent the application of Resolution 1514(XV).[110] The need to maintain the peace was clearly influential in the UN approach to Ruanda-Urundi and Palestine.[111] Sureda's interpretation, with some support from UN practice, suggests that the territorial criterion will not be applied in a mechanical fashion but will be applied bearing in mind the wishes of the population, the need to preserve the peace and the existence of territorial claims.

On the question of what self-determination means, it is generally accepted in the literature that, while there is a preference for independence within the United Nations, other outcomes are acceptable.[112] Sureda suggests that the General Assembly will accept an outcome other than independence only (1) if independence is one of the available options and (2) if there is an element of UN supervision.[113] An examination of UN practice indicates that the presence of an element of UN supervision was influential in its acceptance of an outcome other than independence. It is questionable, however, whether independence must always be an available option. It would seem that independence does not have to be offered if it does not reflect the wishes of a large segment of the population.

106. *Op. cit. supra* n.39, at p.216. See also M. A. Sanchez, "Self-Determination and the Falkland Islands Dispute" (1983) 21 Col.J.Trans.L. 557, 562–563.

107. Sureda, *idem*, p.355. See also K. N. Blay, "Self-Determination versus Territorial Integrity in Decolonization Revisited" (1985) 25 Indian J.I.L. 386, 405. A colonial enclave is defined as "usually a small territorial unit which is surrounded by an independent State on all frontiers except where it is limited by sea": *ibid.*

108. Sureda, *idem*, p.217.

109. *Supra* text accompanying nn.77–79. Note also, that the issue of the status of the Western Sahara was referred to the ICJ by the UN General Assembly albeit without prejudice to the application of Res.1514(XV): Res.3292(XXIX).

110. Cf. Res.43/35–44 of 22 Nov. 1988.

111. Cf. Res.1743(XVI) (Ruanda-Urundi).

112. Higgins, *op. cit. supra* n.3, at p.114; Pomerance, *op. cit. supra* n.43, at pp.25, 26, 93–94; Sureda, *op. cit. supra* n.39, at pp. 261, 273; Crawford, *op. cit. supra* n.39, at p.102; Dinstein, *op. cit. supra* n.43, at p.251; C. Eagleton, "Excesses of Self-Determination" (October 1952–July 1953) XXXI Foreign Affairs 592, 598; Bowett, *op. cit supra* n.39, at pp.134–135; Cristescu, *op. cit. supra* n.39, at p.49; Emerson, *op. cit. supra* n.96, at p.470; S. M. Finger and G. Singh, "Self-Determination: A United Nations Perspective", in Alexander and Friedlander, *op. cit. supra* n.43, at p.337; Gross, *op. cit. supra* n.43, at p. 136; and Gross Espiell; *op. cit. supra* n.47, at p.65.

113. Sureda, *idem*, p.261.

In conclusion, during the decolonisation period a legal right to self-determination emerged for colonial peoples. For these peoples, self-determination meant the right to independence or any other international status. The development of this legal right to self-determination represents a further stage in the general evolution of the principle. However, attempts to apply this right outside the colonial context are futile. It is clear from State practice during this unique historical period that the right was only ever intended to apply to colonial peoples. Attempts to over-extend the principle simply generate confusion and possibly create or reinforce unrealistic expectations among groups of non-colonial peoples whose claims to self-determination will not be recognised by the United Nations.

III. SELF-DETERMINATION OUTSIDE THE COLONIAL CONTEXT

IT is clear that by the early 1970s there was a legal right to self-determination for colonial peoples and for peoples constituted as States. The question arises whether the right has undergone further development so that other categories of peoples can invoke it. If they cannot it means that the right is confined to States and colonial peoples, and other questions such as whether there is a legal right to secession become redundant. In view of this, this part of the article will focus on who can invoke the right to self-determination. It examines the International Covenants, General Assembly Resolution 2625(XXV) and the international community's response to non-colonial self-determination claims. It examines the international community's response to these claims within regional organisations as well as the United Nations. In this way one can ascertain whether the international community adopts a consistent approach or whether there are regional variations. This will have obvious implications for the significance of this State practice in terms of the development of the right to self-determination under general international law.

A. The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights

The International Covenant on Civil and Political Rights ("ICCPR") and the International Covenant on Economic, Social and Cultural Rights ("ICESCR") were adopted by the General Assembly in 1966. The Covenants are international treaties which have been ratified by the overwhelming majority of UN member States.[114] The right to

114. The ICESCR entered into force on 3 Jan. 1976. By 1992 there were 106 parties to it: M. J. Bowman and D. J. Harris, *Multilateral Treaties: Index and Current Status* (9th Cum. Supp.), p.181. The ICCPR entered into force on 23 Mar. 1976. By 1994 there were 124 parties to it: CCPR/C/2/Rev.4.

self-determination is set out in a common article 1. Article 1(1) provides: "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." Paragraph 2 recognises the right of peoples freely to dispose of their natural wealth and resources. Paragraph 3 provides that the parties to the Covenants, "including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with" the UN Charter.

The ordinary meaning of the phrase "all peoples" suggests that the principle applies universally. Paragraph 2 supports this interpretation. It would be incompatible with the principle of equal rights if only certain categories of peoples had the right to dispose freely of their wealth and natural resources. The reference in paragraph 3 to States "*including* those having responsibility for the administration of Non-Self-Governing and Trust Territories" also suggests that the Article is not confined in its application to colonial territories. Further support for this interpretation may be derived from the overall context. Article 1 is included in Covenants which were intended to apply to all peoples. Whether one adopts the position that self-determination is a human right,[115] or a precondition for the enjoyment of human rights,[116] it is hardly conceivable that it should apply only to certain peoples.

The language, context and object and purpose of the Covenants suggest that the right to self-determination set out in Article 1 is universal. The Covenants do not provide criteria for defining peoples. Presumably the right to self-determination continues to apply to those categories of peoples to which it was applied in the past, namely, peoples organised as States and colonial peoples. However, it is unclear from the drafting of Article 1 whether it applies to other categories of peoples.

The *travaux préparatoires* of the ICCPR provide further guidance on the meaning of the term "peoples" There was a consensus that the right was not confined to colonial peoples and could be invoked by all peoples[117] but the definition of "peoples" was problematic. Several proposals were made which defined peoples as "large compact national groups".[118] "a group inhabiting a compact territory, to which [each member] belongs ethnically, culturally, historically or otherwise"[119] and "racial units

115. Cf. Kiss, *op. cit. supra* n.43, at p.174.

116. Cf. Cassese, *op. cit. supra* n.43, at p.142.

117. Cf. the comments cited in M. J. Bossuyt, *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights*, pp.44–45, 32. Some States did claim that the right was confined to colonial peoples: cf. the references in C. Eagleton, "Self-Determination in the United Nations" (1953) 47 A.J.I.L. 88, 90–91; and Cristescu, *op. cit. supra* n.39, at p.8.

118. Indian proposal cited in Bossuyt, *idem*, p.32.

119. Soviet proposal cited in *ibid.*

inhabiting well-defined territories".[120] It was ultimately decided that the term "peoples" should be understood "in its most general sense and that no definition was necessary".[121] This statement and the proposed definitions suggest an expansive concept of peoples. However, caution must be exercised since a considerable number of States, including those which submitted the proposals, noted that there was no right to secede.[122] This is significant since Article 1(1) does not impose any limitations on the options available to peoples. Once a group is recognised as a people, it has the right freely to determine its political status including the right to establish an independent State. Consequently, the blanket denial[123] of a right to secession suggests that groups within States or colonial territories cannot be regarded as peoples for the purposes of Article 1.

In terms of what self-determination entails, Article 1(1) provides that peoples can "freely determine their political status and freely pursue their economic, social and cultural development". The reference to "political status" is broad enough to encompass the right to independence or any other international status. An examination of the *travaux préparatoires* of the ICCPR provides little additional clarification. Suggestions were made during the drafting of Article 1 that self-determination meant the right to "establish an independent State" to "choose its own form of government" or to "secede from or unite with another people".[124] Ultimately it was decided that any list of the elements of the right was likely to be incomplete and that it was preferable to outline the right in an abstract form.[125]

The interpretation of Article 1 has subsequently been raised before the UN Human Rights Committee. The question whether a tribal society[126] or a particular group[127] constituted a people was raised in two cases before the Committee. The Committee did not decide the question, declaring the communications inadmissible on other grounds.[128] The Committee has

120. Yugoslavian proposal cited in *ibid.*

121. Cited in *ibid.*

122. Cf. statements by Saudi Arabia, Belgium, Greece, the Soviet Union, India, France, Afghanistan, Ecuador, Venezuela, Yugoslavia, Syria and New Zealand that the draft article was "not concerned with ... the right of secession": Bossuyt, *idem*, p.27. See also the opposition of the US and Australia to the deletion of the term "nations" from the article on the grounds that it might encourage separatist movements within States: *idem*, p.35. India made a declaration when ratifying the ICCPR that Art.1 does not apply to "sovereign independent States or to a section of a people or nation": CCPR/C/2/Rev.2, p.22. The Federal Republic of Germany, France and the Netherlands objected to the declaration: CCPR/C/2/Rev. 2, pp.37, 38. The Soviet Union has consistently opposed the application of the principle to independent States: cf. Cassese, "The Helsinki Declaration and Self-Determination", in T. Buergenthal and J. R. Hall (Eds), *Human Rights, International Law and the Helsinki Accord*, p.98.

123. The denial of a particular self-determination outcome could possibly be justified in *isolated cases*, e.g. on the grounds of maintaining international peace.

124. Bossuyt, *op. cit. supra* n.117, at p.34

125. *Ibid.*

126. *A D* v. *Canada* (1989) 79 I.L.R. 261.

127. *Kitock* v. *Sweden* CCPR/C/33/D/197/1985.

128. *A D* v. *Canada*, *supra* n.126, at p.265; and *Kitock* v. *Sweden*, *ibid.*

issued a General Comment on Article[129] but it does not address the definition of peoples.

Article 1 of the International Covenants has been the subject of some discussion in the literature.[130] Of particular interest are the views of Cassese concerning the definition of peoples. Cassese argues that Article 1 applies to (1) colonial peoples, (2) the people of a sovereign State and (3) the people of a national component of a multinational State.[131] He derives support for the third category of peoples from the drafting history of the ICCPR, in particular the references by Western States to the right to self-determination of the Soviet republics and by the Soviet Union's statement that the term "peoples" includes nations and ethnic groups.[132] Cassese stipulates two conditions which must be satisfied by groups claiming under category three, namely, that the national group must be a member of a State made up of different national groups of comparable dimensions, and the national group must be recognised constitutionally.[133] Cassese's third category of peoples is problematic for several reasons. First, the Soviet and other proposals which adopted expansive interpretations of "peoples" were not voted upon,[134] which suggests a lack of support for the proposals. Second, the widespread opposition to the right of secession would seem to contradict Cassese's statement that the third category of peoples has a right to self-determination including the right to independence.[135] Finally, it is questionable whether any group will be able to satisfy the conditions laid down by Cassese.[136] It is doubtful whether a State will constitutionally recognise national groups within its borders knowing that in doing so it may sanction the break up of the State. It is unlikely that Article 1 was intended to apply to groups within independent States or colonies.

All that one can state with certainty is that Article 1 applies to peoples organised as States and colonial peoples. This suggests that the International Covenants did not represent any development of the scope or meaning of the legal right to self-determination. It also suggests that questions concerning the existence of a legal right to secession in the

129. CCPR/C/21/Add.3 dated 5 Oct. 1984.

130. Cf. A. Cassese, in L. Henkin (Ed), *The International Bill of Rights*, at pp.94–95; Higgins, *op. cit. supra* n.3, at pp.114–121; Crawford, "Outside the Colonial Context" in W.J.A. Macartney (Ed), *Self-Determination in the Commonwealth*, pp.3–6; and B. Kingsbury, "Claims by Non-State Groups In International Law" (1992) 25 Cornell I.L.J. 481.

131. Cassese, *ibid.*

132. *Ibid.*

133. *Idem*, p.95.

134. Bossuyt, *op. cit. supra* n.117, at pp.32, 34.

135. *Op. cit. supra* n.130, at p.101.

136. Cassese does not cite any State practice in support of these conditions and there is no reference to these conditions in many of the records of the drafting history of the ICCPR: cf. Bossuyt, *op. cit. supra* n.117 and Cristescu, *op. cit. supra* n.39.

Covenants are largely irrelevant if the right to self-determination can be invoked only by peoples organised as States and colonial peoples.

B. *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations: Resolution 2625(XXV)*

The Declaration was adopted by the General Assembly on the 25th anniversary of the UN Charter. It recognises the right of "all peoples" to self-determination. The ordinary meaning of these words suggests that the principle is universally applicable. The inclusion of the principle in a declaration which was intended to regulate the conduct of all States supports this interpretation. Further support can be found in the drafting history of the Declaration.[137] According to the report of the drafting committee, it "was agreed that [the Declaration] ... should contain a general statement of the principle, stressing its universality".[138] Individual States also stressed the universal character of the principle.[139] On the basis of the language, context and drafting history of the Declaration, the principle of self-determination seems to apply to all peoples.[140]

The Declaration does not attempt to define "peoples", but some indirect guidance on the question can be found in paragraph 7. This paragraph affirms the territorial integrity of "States conducting themselves in compliance with the principle of equal rights and self-determination of peoples ... and *thus* possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour" (emphasis added). Respect for the territorial integrity of a State is dependent on the State possessing a government representing the whole people. It suggests that there is a right to secede if the State fails to comply with this requirement. The right to secede, by definition, is exercised by only one segment of the population of a State. Consequently, paragraph 7 opens up the possibility that a group which is not synonymous with the entire population of a State can exercise the right to self-determination and be regarded as a people.

Paragraph 7 suggests two criteria for identifying the relevant groups. The reference to the "whole people belonging to the territory" suggests a

137. Res.2625(XXV) is somewhat unusual in that a Special Committee on Principles of International Law Concerning Friendly Relations and Cooperation among States was established to draft the declaration. For a history of the drafting of the declaration, see 25 G.A.O.R. Supp. No.18.

138. *Idem*, p.41.

139. Cf. *idem*, pp.91 (France), 88 (Italy), 104 (Australia), 122 (US), XXV G.A.O.R. A/C.6/SR.1182 and Corr.1, para.4 (Portugal), para.28 (Spain), and XXV G.A.O.R. A/PV.1860, 5–6 (representative of the "African Group"). Only one State ruled out the possibility that it could apply to independent States: 25 G.A.O.R. Supp. No.18, p.110 (India).

140. Cf. R. Rosenstock, "The Declaration of Principles of International Law Concerning Friendly Relations: A Survey" (1971) 65 A.J.I.L. 713, 731, in support of this proposition. Cf. Cassese, *op. cit. supra* n.43, at p.144, who questions this interpretation.

territorial concept of people, but the inclusion of the phrase "race, creed or colour" highlights the relevance of personal criteria. The mere existence of groups of different race, creed or colour will be insufficient to enable them to invoke the right to self-determination. These groups must satisfy a further criterion. To invoke paragraph 7 the group must show that there is no representative government. Consequently, paragraph 7 suggests a dual test for defining peoples. The test would clearly be satisfied by the type of situation which occurred in Southern Rhodesia and South Africa where the majority of the population were excluded from government on the grounds of their race. Although paragraph 7 was not confined in its application to these two territories,[141] in reality it may be difficult to invoke it unless the situation is analogous to that which existed in these territories.

The Declaration also provides some guidance on what is meant by self-determination. Paragraph 4 states 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 to self-determination.". This confirms that self-determination can result in a variety of outcomes. On the question whether independence must always be offered to a people requesting it, the wording of paragraph 4 suggests that it must and this perception is reinforced by the reference to the result being "freely determined" by the peoples concerned.

The Declaration was annexed to General Assembly Resolution 2625(XXV), which was adopted without a vote. While the Declaration itself was not legally binding the general view was that the principles set out in it were part of customary international law.[142] The Declaration was seen as a significant step in the codification and progressive development of these principles.[143] To the extent that the Declaration recognised a right to self-determination for colonial peoples and peoples organised as States it can be regarded as a codification of the principle. It is unlikely that paragraph 7, which has considerable implications for the definition of peoples, represents a codification of the principle. The drafting committee noted that not all delegates were in favour of including the clause.[144] It would

141. States which set out their understanding of para.7 did so in general terms: *cf.* 25 G.A.O.R. Supp. 18, p.100 (Poland), p.103 (Czechoslovakia) and Buccheit, *op. cit. supra* n.45, at p.82 (Ireland). There was no express reference to Southern Rhodesia and South Africa in connection with para.7.

142. Cf. 25 G.A.O.R. Supp.18, p.73 (Chile); 25 G.A.O.R. A/C.6/SR.1182 and Corr.1, para.60 (Kenya); A/C.6/SR.1178, para.20 (Yugoslavia), para.42 (Lebanon); A/C.6/SR.1180, para.6 (Iraq); A/C.6/SR.1181, para.31 (Greece); and A/C.6/SR.1182 and Corr.1, para.40 (Turkey).

143. Cf. the statements made at the time of its adoption by the representatives of the East European Group, 25 G.A.O.R. Supp.18, p.6; Asia Group, *idem*, p.9; and Africa Group, *idem*, p.8.

144. *Idem*, p.51.

seem that paragraph 7 was regarded as contributing to the progressive development of the principle. Its current legal status depends on the extent to which subsequent State practice complies with the provision. In the light of State practice to date, it is unlikely that it has developed into a rule of customary international law.

C. *Non-Colonial Self-Determination Claims*

Non-colonial self-determination claims are not homogeneous. Some of the claims challenge the territorial concept of people while others can be accommodated within the existing framework of international law. This is why the international community's response to non-colonial self-determination claims can vary.

There are at least three broad categories of non-colonial self-determination claims. The first category includes Czechoslovakia, Eritrea and the former Soviet Union. In each case groups identified by a common ethnicity, language and/or religion within independent States claimed the right to self-determination.[145] The distinguishing feature of all these cases is the presence of consent, since the self-determination claims were accepted by the majority of the population in each State.[146]

The existence of consent undoubtedly influenced the international community's response to these claims. The UN involvement in the referendum process in Eritrea was based on the fact that the Eritreans' right to determine their political status had already been recognised by the Conference on Peace and Democracy, which "assembled all the political parties and social actors in Ethiopia".[147] The implication is that it was by virtue of the wishes of the entire population of Ethiopia that the Eritreans could

145. The Czech and Slovak populations in Czechoslovakia, the Eritreans in Ethiopia, and the Russians, Ukrainians and other nationalities within the former Soviet Union.

146. The Federal Assembly of the Czech and Slovak Federal Republic voted to dissolve Czechoslovakia with effect from 31 Dec. 1992. Czechoslovakia ceased to exist on 1 Jan. 1993 and was replaced by the Czech and Slovak Republics.

The Conference on Peace and Democracy which assembled all the relevant political and social actors in Ethiopia recognised the right of the inhabitants of Eritrea to determine their political status: see (1993) U.N. Yearbook 265.

In the former Soviet Union, the constituent republics agreed to dissolve the Soviet State and form separate independent States: Agreement establishing the Commonwealth of Independent States concluded on 8 Dec. 1991 by the Republic of Belarus, the RSFSR, and the Ukraine, and the Protocol to the Agreement establishing the Commonwealth of Independent States concluded on 21 Dec. 1991 by the Republics of Azerbaijan, Armenia, Belarus, Kazakhstan, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan, Uzbekistan, the RSFSR and the Ukraine. The remaining republics, Georgia, Estonia, Latvia and Lithuania, had previously declared their independence but did not join the CIS. For a different interpretation of events in the former Soviet Union, see A. Cassese, "Self-Determination of Peoples and the Recent Break-up of USSR and Yugoslavia", in R. St. J. Macdonald (Ed.), *Essays in Honour of Wang Tieya* (1994), pp.131, 133–134.

147. The Secretary-General's Report on the "Request to the United Nations to observe the referendum process in Eritrea": A/47/544. See also letter dated 11 June 1992 from the Secretary-General to the President of the General Assembly: A/C.3/47/5.

hold a referendum and become an independent State. The fact that the United Nations did not accede to Eritrean requests for such a referendum during the course of the 30-year civil war[148] seems to support this interpretation.

The formation of the Czech and Slovak States was uncontroversial. Within days of their establishment they were admitted to UN membership.[149] There appears to have been no discussion at the international level of the legality of their creation. The implication is that it was consistent with international law including the right to self-determination. Again, this seems to confirm a territorial concept of people. The population of Czechoslovakia had a right to determine their international status and form two separate States.

The international community's response to the break up of the Soviet Union was more complex. This was probably due to concerns about the implications of the break up for stability in the region and the Soviet Union's commitments on nuclear weapons and disarmament. These concerns are very much to the fore in the European Community's Declaration on the "Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union".[150] Recognition is made conditional not only on the new States satisfying the traditional requirements of Statehood[151] but also on their willingness to respect the principles in the UN Charter and the Helsinki Final Act, minority rights, the inviolability of frontiers and commitments on nuclear weapons and disarmament.[152] These additional conditions are unusual but they are not without precedent. Similar conditions concerning minority rights and the inviolability of frontiers were attached to the exercise of self-determination[153] in Central and Eastern Europe after the First World War. On that occasion they were justified by the need to maintain international peace and security[154] and by the "public law of Europe".[155] It is open to question whether the EC

148. Secretary-General's Report, *ibid.*

149. Both States were admitted to membership of the UN on 26 Jan. 1993: G.A.Res.47/221 and 47/222 adopted by acclamation.

150. Reproduced in (1992) 31 I.L.M. 1486.

151. The State should possess a permanent population, a defined territory, government and capacity to enter into relations with other States: Montevideo Convention on Rights and Duties of States 1933, Art.1.

152. For a complete list of these conditions see paras.3 and 4 of the Declaration.

153. Albeit the political principle of self-determination.

154. Cf. President Wilson's speech at the Supreme Council of Principal Allied and Associated Powers, 31 May 1919, reproduced in *Papers relating to the Foreign Relations of the United States* (US Government Printing Office, 1942), Vol.I, pp.405–408.

155. According to President Clemenceau, it was a principle of "public law of Europe" that when a State was created or concessions of territory made, joint and formal recognition should be accompanied with the requirement that the State should comply with certain principles of government: letter dated 24 June 1919 from President Clemenceau on behalf of the Supreme Council to the Polish leader, M. Paderewski, reproduced in H. W. V. Temperley, *A History of the Peace Conference of Paris* (1921), Vol.IV, pp.432–437.

Declaration marks a revival of this public law of Europe, but it does suggest that the international response to the exercise of the right to self-determination will occasionally depend on wider political and security considerations. It is possible that at least at a regional and political level[156] the exercise of the right to self-determination may be conditioned by the need to maintain international peace and security.

Within weeks of the Soviet republics agreeing to the dissolution of the Soviet Union, some of them applied for and were admitted to UN membership.[157] The relevant UN resolutions did not refer to the type of conditions outlined in the EC Declaration which may suggest that they reflect a purely regional approach. The timing of the admissions may be important as it suggests that the United Nations will accept the break up of one of its member States provided it is with the consent of the majority of its inhabitants. The United Nations' subsequent rejection of self-determination claims by ethnic groups within the new States[158] tends to support this view since in each case the self-determination claims were opposed by the majority of the State's population.

In all the above cases self-determination claims were advanced by groups within independent States. The success of these claims does not imply that these groups had a legal right to self-determination. The presence of consent was decisive.[159] It indicates that the right to self-determination was in fact exercised by the entire population of these States rather than by ethnic, linguistic or religious groups within them. Consequently, the international community's response to these claims simply reaffirms the right of a people organised as a State to self-determination.

The second category comprises those instances where the self-determination claim was advanced by the entire population of the State rather than by a particular group within it. These claims are uncontroversial since they simply reflect the right of a people organised as a State to determine their international status. The reunification of Germany is one example. The German Democratic Republic integrated with the Federal Republic of Germany to form a single German State.[160] It reflected the right to self-

156. The essentially political and discretionary character of recognition as well as the limited geographical scope of the Declaration tend to undermine its legal significance.

157. The majority of the republics were admitted to the UN in Jan. and Feb. 1992: cf. Security Council Res. recommending their admission: 732(1992), 742(1992) (Azerbaijan), 741 (1992) (Turkmenistan), 739(1992) (Moldova), 738(1992) (Tajikistan), 737(1992) (Uzbekistan), 736(1992) (Kyrgyzstan), 735(1992) (Armenia), 732(1992) (Kazakhstan) and 763(1992) (Georgia). The Russian Federation succeeded to the seat formerly held by the Soviet Union and the Ukraine and Byelorussia were original UN members.

158. Cf. Security Council Res.1036 (1996) on Georgia, preamble, para.3.

159. See, *contra*, R. Mullerson, "Self-Determination of Peoples and the Dissolution of the USSR", in Macdonald, *op. cit. supra* n.146, at pp.567, 570–573, who argues that the international response to the independence of the Soviet republics was based on the colonial character of the Soviet Union and the willingness of the new States to adopt a democratic system of government and respect human rights.

160. Treaty of Unification concluded by the GDR and the FRG on 31 Aug. 1990. The

determination of the population of each State. It was consistent with existing international law and was welcomed by the international community.[161]

The Baltic Republics straddle the second and third categories. Lithuania, Estonia and Latvia were independent States until 1940 when they were integrated into the Soviet Union. They declared their independence in 1990 and 1991. The declarations were rejected by the Soviet Union and initially provoked a cautious response from the international community.[162] Once the *de facto* dissolution of the Soviet Union was under way[163] the Baltic Republics were recognised by a large number of States.[164]

The delay in recognising the Baltic Republics might suggest that their inhabitants did not have a legal right to self-determination. This implies that they were not peoples but simply ethnic groups within the Soviet Union. This would mean that the entire population of the Soviet Union had the right to self determination and could maintain its territorial integrity by rejecting the declarations of independence. The international community's apparent support for the territorial integrity of the Soviet Union at least until its *de facto* dissolution may support this interpretation, according to which the declarations of independence were secessionist claims resisted by the State. The international response to the declarations suggests that such claims will not be accepted unless the State is dissolving and no longer able or willing to prevent the secessions.

An alternative interpretation is that, legally, the Baltic Republics did not cease to be States due to the illegality of their integration into the Soviet Union.[165] This would mean that their inhabitants continued to be a people with a right to self-determination although Soviet control over the Republics meant that in practice this right could not be exercised until 1991. The references in UN documents to the "restoration" of independence to the Baltic Republics may support this interpretation.[166] Similar phrases were used in the UN resolutions on the Iraqi invasion of Kuwait[167]

Treaty on the Final Settlement with Respect to Germany was concluded by the GDR and the FRG with the four powers (the US, the UK, the Soviet Union and France) on 12 Sept. 1990. The Treaty of Unification entered into force on 23 Sept. 1990 following its approval by the GDR and FRG Parliaments.

161. Cf. the statement by the President of the General Assembly on 12 Oct. 1990: A/45/PV.18 (provisional record).

162. Initially only Denmark and Iceland recognised Lithuanian independence.

163. This process began with the failure of the coup in Aug. 1991 and concluded with the formal dissolution of the Soviet Union by its constituent republics in Dec. 1991.

164. Between 25 Aug. and 2 Sept. 1991 the Baltic States were recognised by Norway, Argentina, Sweden, Finland, the EC member States, Australia and the US.

165. Cf. statements by the Latvian and US representatives in the General Assembly in Dec. 1992: A/47/PV.72 (provisional record). On the legality of the integration, see further, S. Blay, "Self-Determination: A Reassessment in the Post-Communist Era" (1994) 22 Denv. J. Int'l Law & Pol'y 275, at pp.292–293; and Cassese, *op. cit. supra* n.146, at pp.133–134.

166. Cf. G.A.Res. 48/18 of 15 Nov. 1993, preamble, para.7, adopted without a vote.

167. Cf. Security Council Res.661(1990), preamble, para.3.

and it is commonly accepted that Kuwait continued to be a State notwithstanding its illegal occupation by Iraq. The fact that many States never recognised *de jure* Soviet control over the Baltic States may also support this interpretation. The delay in recognising the Baltic States may be less a denial of their legal right to self-determination than a reflection of the international community's concern with the political and security implications of any break up of the Soviet Union.[168] At most it may suggest that the actual exercise of the right to self-determination may be conditioned by the need to maintain international peace and security.[169] On this view, the Baltic States fall within category two since they reaffirm that peoples organised as States have a right to self-determination.

The third category comprises those instances where self-determination claims advanced by ethnic, linguistic or religious groups are rejected by the State. Biafra, East Pakistan and the former Yugoslavia fall within this category. Biafra's attempt to secede from Nigeria was unsuccessful and received little support from the international community.[170] The conflict was dealt with at a regional level by the OAU, which supported Nigeria's claim to maintain its territorial integrity.[171] The United Nations did not consider events in Nigeria but the Secretary-General, when questioned about the Biafrans' right to self-determination, stated that it "never accepted ... the principle of secession of a part of its Member States".[172] By upholding the territorial integrity of Nigeria, the international community was effectively denying a separate right to self-determination for an ethnic group within the State and affirming that the right to self-determination had to be exercised by the entire population of the State.

East Pakistan seceded from Pakistan with the assistance of the Indian army and became the independent State of Bangladesh in 1971. Within 11 months 47 States recognised Bangladesh[173] and it was subsequently admitted to UN membership. The reasons for the international community's response are unclear. According to one view, this was a situation where a "distinct political-geographical [entity] subject to a carence de souveraineté"[174] was entitled to self-determination.[175] This implies that

168. Cf. the statement on the Baltic Republics issued on 26 Apr. 1990 by President Mitterrand and Chancellor Kohl, discussed in Cassese, *op. cit. supra* n.146, at pp.136–137.

169. See further *supra* text accompanying nn.150–156.

170. Only Tanzania, Gabon, the Ivory Coast, Zambia and Haiti recognised Biafra.

171. Buccheit, *op. cit. supra* n.45, at pp.169–170.

172. (1970) 7 UN Monthly Chronicle 36.

173. Alexander and Friedlander, *op. cit.* n.43, 318.

174. The idea of a *carence de souveraineté* was alluded to by India in debates within the UN. It stated that as a matter of international law conditions are suitable for independence when the "mother State has irrevocably lost the allegiance of such a large section of its people ... and cannot bring them under its sway": cited in Buccheit, *op. cit. supra* n.45, at p.210. Pakistan expressed puzzlement over this theory: *ibid.*

175. Cf. Crawford, *The Concept of Statehood*, p.116, and Kingsbury, *op. cit. supra* n.130, at p.487.

the inhabitants of these entities have a legal right to self-determination and that the international community's response to East Pakistan's secession recognised this fact. This would broaden the meaning of "people" considerably and would be one of the most significant developments of the legal right to self-determination. It is difficult to sustain this interpretation in view of the very limited State practice on the subject. Furthermore, the international community's response to East Pakistan's secession can be attributed more to a configuration of political and humanitarian considerations[176] than to international law. Arguably, it represented an *ad hoc* approach to a conflict[177] rather than any development of the legal right to self-determination. The fact that, until recently, East Pakistan was the only example of a successful secession tends to support this view.

The most recent example of a successful secession occurred in the former Socialist Federal Republic of Yugoslavia.[178] Yugoslavia rejected declarations of independence by four of its constituent republics and used force to prevent them seceding. The escalation in fighting and the widespread human rights violations led to the involvement of the international community first at a regional level and then at an international level. The international community's overriding objective was to broker a peaceful settlement of the conflict and this seems to have dictated its response to the declarations of independence.

Initially, the international community favoured a negotiated settlement which would maintain Yugoslavia's territorial integrity.[179] When this was not possible, it indicated its willingness to recognise the republics but only within the framework of an overall settlement.[180] When this was unsuccessful, the European Community indicated its willingness to recognise the republics provided they satisfied the "Guidelines for the Recognition

176. Buccheit, *op. cit. supra* n.45, at pp.127, 208–209, 213, refers to a range of factors which influenced the international community, notably the diplomatic relations between the parties, political expediency and the violation of human rights in East Pakistan. The fact that East Pakistan was able to secede physically, albeit with Indian assistance, was also undoubtedly a factor.

177. This is reinforced by the fact that the international community rejected Biafra's secession even though one could argue that Biafra was a distinct geographical/political unit subject to a *carence de souveraineté*. The requirement of a *carence de souveraineté* was arguably satisfied by the killing of 10,000 Ibos by government forces between May and Sept. 1966: see S. K. Panter-Brick, "The Right to Self-Determination: Its Application to Nigeria" (1968) 44 International Affairs 254, 262.

178. For a detailed discussion of events in the former Yugoslavia, see M. Weller, "The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia" (1992) 86 A.J.I.L. 569.

179. Cf. statements made within the UN Security Council: S/PV.3009 (provisional record). See also Weller, *idem*, p.570.

180. Cf. the paper presented by the Chairman of the EC Conference on Yugoslavia at its meeting on 18 Oct. 1991: (1991) U.N. Yearbook 216; and the Declaration of the European Community on 8 Nov. 1991: UN S/23203, annex, p.3 (provisional record).

of New States in Eastern Europe and the former Soviet Union". As previously noted,[181] these Guidelines required a State seeking recognition to undertake a range of commitments designed to maintain peace and protect human rights. Once the republics gave the necessary undertakings they were recognised by the Community and subsequently by a large number of States. The recognition of these new States might be interpreted as broadening the concept of people to include the population of the highest constituent units of federal States[182] in the process of dissolution. This is questionable since the international community's response to the declarations of independence was dictated largely by political and humanitarian considerations.[183] It is possible that State practice in this area will contribute to the formation of a new rule of customary international law but this will depend on the international response to similar claims in the future.

An alternative interpretation is suggested by the Arbitration Commission of the EC Conference on Yugoslavia.[184] The Commission expressed the opinion that Yugoslavia was in the process of dissolution[185] and that its internal borders had become external borders.[186] This implies that once Yugoslavia began to dissolve the republics automatically became States and their inhabitants had a right to self-determination by virtue of being organised as States. There are problems with this interpretation. State practice on the effect of the dissolution of a State on the right to self-determination is limited and inconsistent. Arguably, no rules of customary international law currently exist on the matter. Second, there are problems with the reasoning of the Commission, notably its reliance on the *uti possedetis* principle developed during the decolonisation period and of questionable application outside the colonial context.[187]

In conclusion, the international community adheres to a purely territorial concept of people. It has consistently rejected a legal right to self-determination for ethnic, linguistic and religious groups within States. In the non-colonial context, the term "people" refers to the entire inhabitants of a State. While events in the former Yugoslavia might suggest that

181. *Supra* text accompanying nn.150–156.

182. On the basis that the republics but not the autonomous regions in former Yugoslavia were recognised as States.

183. Cf. discussions within the UN Security Council on 25 Sept. 1991: S/PV.3009 (provisional record).

184. On the formation and functions of the Commission see (1992) 31 I.L.M. 1488 and Weller, *op. cit. supra* n.178, at p.589.

185. Opinion No.1 (1992) 31 I.L.M. 1494. In Opinion No.8 it stated that the dissolution of the former Yugoslavia was complete: *idem*, p.1521.

186. Opinion No.3: *idem*, p.1499.

187. For a more detailed critique of the Commission's reasoning, see H. Hannum, "Rethinking Self-Determination" (1993) 34 Va.J.I.L. 1, 54–55.

the term also applies to the highest constituent units of a federal State in the process of dissolution, this is unlikely given the limited and equivocal nature of the state practice on the subject. State practice in a non-colonial context reveals that a people can choose any form of international status. They can choose to become separate independent States or integrate with existing States. However, there are suggestions, particularly at a regional level, that the exercise of self-determination may be conditioned by wider considerations such as the need to maintain international peace and security.

IV. CONCLUSION

CONSIDERABLE confusion surrounds the legal principle of self-determination. This confusion is due, in part, to a failure to appreciate the particular context in which the principle emerged. State practice during the decolonisation period consistently affirmed the right of peoples everywhere to self-determination. This led to the mistaken belief that the principle was intended to be universally applicable. When groups in non-colonial States unsuccessfully invoked the right, the international community was accused of double standards and the existence of a legal right to self-determination was denied on the grounds of this perceived inconsistency. However, when many States affirmed the right of peoples everywhere to self-determination they did not intend to affirm the universality of the right as commonly understood. For them, peoples in independent States had already exercised the right to self-determination. By affirming the universality of the right, they were seeking to extend its application to peoples who had not yet exercised it.

At present, international law adopts a purely territorial concept of people. The term "people" refers to the entire inhabitants of a State or colony. Recent events in Eastern Europe might suggest that it also applies to the highest constituent units of federal States in the process of dissolution but this is unlikely given the very limited and equivocal nature of State practice on this issue. Attempts to define people on the basis of personal criteria such as ethnicity or language have been unsuccessful and the international community has consistently denied a legal right to self-determination for ethnic, linguistic and religious groups within States. The refusal to extend the right to self-determination to these groups has been counterbalanced to a certain extent by the adoption of international instruments on minority rights.[188] This reflects the international community's preference for resolving inter-communal conflicts within a human rights framework rather than within the framework of self-determination.

188. Cf. the Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities adopted by the UN General Assembly in 1992.

In terms of the meaning of self-determination, it can be formulated in abstract terms as the right of a people to determine its international status. A people can choose to form separate States or to integrate or associate with independent States. However, there are suggestions, particularly at a regional level, that the exercise of the right to self-determination may be conditioned by wider considerations such as the need to maintain international peace and security.