The United Nations and the Evolution of Global Values

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THE SELF-DETERMINATION OF PEOPLES

1 INTRODUCTION

The United Nations is established, *inter alia*, to "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples."[1] This is one of the most ambiguously formulated purposes in the UN Charter. It has served as the constitutional basis for all the UN's work on promoting the value of self-determination of peoples.

Most of this chapter takes that phrase as its starting point, and then discusses General Assembly resolutions and other international legal instruments that describe the principle of equal rights and self-determination of peoples in more detail. The resolutions on the process of decolonization are examined first. This is where the principle has been applied most frequently and most successfully.

Secondly, the application of the right to self-determination to *all* peoples is examined. It is here that the need for philosophical guidance is most urgent, especially with regard to the definition of the word "peoples." Applying the right to self-determination to their own situation, various minorities have claimed "internal" self-determination, *i.e.* a democratic system in which they can play a meaningful role, and "external" self-determination, *i.e.* a right to secede from their State, and begin their own State. Philosophers have followed this trend in international law since the early 1990s, and the controversial issue of secession quickly changed from a "forgotten problem of political philosophy" into one of the more popular topics for philosophers to think about. The same happened to the philosophical thinking about self-determination in general.[2]

The principle of self-determination can also be applied to States, and be used as the basis of the principle of sovereign independence. The claim that the right to self-determination of peoples should be considered as a human right is also discussed.

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[1] Article 1(2), UN Charter. This phrase is repeated in Article 55.

[2] The quote is from Harry Beran, "A liberal theory of secession" (1984), p. 21. See p. 23 for self-determination itself. His article was one of the earlier ones. Most other articles appeared after the dissolution of the Soviet Union and Yugoslavia, in the 1990s. See *e.g.*, Allen E. Buchanan, "Toward a Theory of Secession" (1991), which also noted the lack of philosophical interest in the issue, even by the classical philosophers (see especially p. 323).

2 THE SELF-DETERMINATION OF PEOPLES IN SAN FRANCISCO

2.1 The self-determination of peoples

2.1.1 The Preamble

There is nothing about self-determination, self-government, or independence of peoples in the Preamble. Since Smuts was not only the mastermind behind the Preamble, but also a highly influential politician in South Africa at a time when *apartheid* rule was being introduced, this is not all that surprising.

2.1.2 The Purpose

In the initial Dumbarton Oaks proposals, there was no reference to the self-determination or self-government of all the world's peoples, even though it did appear in earlier documents, most notably in the Atlantic Charter of 1941.[3] None of the smaller States suggested that this should be changed.[4] Nevertheless, at the insistence of the Soviet Union, the revised Dumbarton Oaks proposals contained a reference to the self-determination of peoples in the provision on "friendly relations."[5] It seems that this amendment was not intended to refer to the right to self-determination of peoples as it is currently interpreted.[6]

According to the Soviet amendment, respect for the principle of self-determination of peoples was a means to develop friendly relations among nations. The question arises what self-determination of *peoples* has to do with developing friendly relations among *nations*. As Belgium pointed out, the amendment was based on a confusion between "peoples" and "States."[7] This confusion was not

[3] See also Antonio Cassese, *Self-determination of peoples: a legal reappraisal* (1995), p. 38.

[4] That is surprising, since a few of the States that participated in the conference were not yet considered as independent States, and one might thus expect that they would fight hard to make sure that the right to self-determination was included. Examples of such States were Syria, Lebanon, India, the Ukraine and Belarus. See William C. Johnstone, "The San Francisco Conference" (1945), p. 224.

[5] Amendments Submitted by the United States, the United Kingdom, the Soviet Union and China, UNCIO, vol. 3, p. 622. This exact same phrase was repeated in the article on the socioeconomic purposes. See *idem*, p. 626. This amendment was adopted by the relevant Committee (see Report of the Rapporteur Committee II/3, Approved by Committee II/3, June 8, 1945, UNCIO, vol. 10, p. 270), and ended up in the Charter. See also Grigory I. Tunkin, "The legal nature of the United Nations" (1969), pp. 15-16; Jean-François Dobelle, "Article 1, paragraphe 2" (2005), p. 339.

[6] See also Hans Kelsen, "The Preamble of the Charter - A Critical Analysis" (1946), pp. 150-151.

[7] Belgian Delegation Amendment to Paragraph 2 of Chapter I, UNCIO, vol. 6, p. 300. Belgium explains: "Surely one could use the word 'peoples' as an equivalent for the word 'state', but in the expression 'the peoples' right of self-determination' the word 'peoples' means the national groups which do not identify themselves with the population of a state." See also Antonio Cassese, *Self-*

purely academic, because the promotion of a peoples' right to self-determination could lead to unwanted interference in the domestic affairs of States, and would therefore not necessarily help develop friendly relations between States. To avoid such confusion, Belgium suggested changing the phrase to "to strengthen international order on the basis of respect for the essential rights and equality of the States, and of the peoples' right of self-determination."[8] The Belgian suggestion was rejected, and the Soviet provision was eventually adopted.[9]

The provision does not clearly state that it is one of the general purposes of the Organization to promote the self-determination of peoples. Nor does it explain what rights and duties can be derived from the right to self-determination of peoples.[10] In the relevant Committee in San Francisco there was some disagreement on this question. During one of the Committee's meetings, "it was strongly emphasized on the one side that this principle [of self-determination] corresponded closely to the will and desires of peoples everywhere and should be clearly enunciated in the Chapter [but] 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 of peoples and not the right of secession."[11] In the end, the Committee concluded that "the principle of equal rights of peoples and that of self-determination were two complementary parts of one standard of conduct," and that "an essential element of the principle in question [was] a free and genuine expression of the will of the people, which avoid[ed] cases of the alleged expression of the popular will, such as those used for their own ends by Germany and Italy in later years."[12] This explanation raised more questions than it answered. Even after this statement was made, a member of the Coordination Committee still wondered whether the right of self-determination meant "the right *of a state* to have its own democratic institutions" or whether it meant that all peoples had "the right of secession."[13] The Coordination Committee suggested that the Committee that came

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determination of peoples: a legal reappraisal (1995), pp. 38-39; Satpal Kaur, "Self-determination in international law" (1970), pp. 484-485.

[8] *Idem.*

[9] See Report of Rapporteur, Subcommittee I/1/A, to Committee I/1, June 1, 1945, UNCIO, vol. 6, p. 704; Text of Chapter I, as Agreed upon by the Drafting Committee, UNCIO, vol. 6, p. 684. See also Second Meeting of Commission I, June 15, 1945, UNCIO, vol. 6, p. 65.

[10] See also Antonio Cassese, *Self-determination of peoples: a legal reappraisal* (1995), pp. 38-43.

[11] Sixth Meeting of Committee I/1, May 14, 1945, UNCIO, vol. 6, p. 296. See also Antonio Cassese, *Self-determination of peoples: a legal reappraisal* (1995), p. 40.

[12] Report of Rapporteur of Committee 1 to Commission I, June 13, 1945, UNCIO, vol. 6, p. 455.

[13] Twenty-Second Meeting, June 15, 1945, UNCIO, vol. 17, p. 143. Another member wondered "whether self-determination might mean the capacity of peoples to govern themselves, and secondly whether the phrase suggested the right of secession on the part of peoples, within a state." Twenty-Second Meeting, June 15, 1945, UNCIO, vol. 17, p. 143. Yet another member believed that "the right of self-determination meant that a people may establish any regime which they may favour." Summary Report of Twenty-Fourth Meeting, June 16, 1945, UNCIO, vol. 17, p. 163.

up with the provision should provide the necessary clarification, but this never happened.[14]

The chapter on the international trusteeship system should also be examined here.[15] This chapter is unusual in that the Organization can promote the purposes listed there only with regard to the trust territories, of which there were no more than eleven.[16] The Dumbarton Oaks proposals did not have a chapter on trusteeships, and therefore all the drafting and negotiating took place in San Francisco, more or less at the end of the conference.[17] All of the sponsors – as well as France and Australia – came up with their own draft chapter on trusteeships.[18] According to an American draft which was used as the basis for discussion in San Francisco, one of the "basic objectives of the trusteeship" was "to promote the political, economic, and social advancement of the trust territories and their inhabitants and their progressive development toward self-government in forms appropriate to the varying circumstances of each territory."[19] The most important debate was whether a reference to independence should be included here. In the UK's opinion, "[w]hat the dependent peoples wanted was an increasing measure of self-government" and that "independence would come, if at all, by natural development."[20] In response, the delegate from the Soviet Union reminded the other superpowers that they had already included the "self-determination of peoples" among the general purposes of the Organization, and that therefore it "could hardly be omitted from the trusteeship chapter."[21] In response to these objections, the US

[14] Twenty-Second Meeting, June 15, 1945, UNCIO, vol. 17, p. 143.
[15] For an overview of the *travaux préparatoires* of the chapter on the trusteeship system, see also James N. Murray, *The United Nations trusteeship system* (1957), pp. 23-45.
[16] Ten of those territories were former League of Nations mandates, and one was a former colony of Italy (Somaliland). All of those territories have since become independent, so that the list of purposes currently applies to no territory at all. See Ralph Wilde, "Trusteeship Council" (2007), p. 151.
[17] James B. Reston, "Conference Turns to Final Problems," in *New York Times* of May 17, 1945. See also George Thullen, *Problems of the trusteeship system: a study of political behavior in the United Nations* (1964), pp. 40-51; Huntington Gilchrist, "Colonial Questions at the San Francisco Conference" (1945), p. 983.
[18] For the ultimate purpose of that system, which differed per Major Power, see Amendments Submitted by France, UNCIO, vol. 3, pp. 604-605; USA, *idem*, p. 607; China, *idem*, p. 615; Soviet Union, *idem*, p. 618; and the UK, *idem*, p. 609. See also Australia, *idem*, p. 548; Mexico, *idem*, p. 172. The drafts suggested some prior consultations. Austriala's draft was very similar to that of the UK; and the Chinese, French and American drafts were also similar. See Charmian Edwards Toussaint, *The trusteeship system of the United Nations* (1956), p. 18-35; ; Huntington Gilchrist, "Colonial Questions at the San Francisco Conference" (1945), p. 985.
[19] Proposed Working Paper for Chapter on Dependent Territories and Arrangements for International Trusteeship, UNCIO, vol. 10, p. 678.
[20] Fourth Meeting of Committee II/4, May 14, 1945, UNCIO, vol. 10, p. 440. The Mexican delegate suggested that 'self-government was a desirable goal," but that "independence should be conceded whenever a self-governing people had unmistakably expressed its wish for complete liberation." Fifth Meeting of Committee II/4, May 15, 1945, UNCIO, vol. 10, p. 446.
[21] *Idem*, p. 441.

suggested an amendment which was unanimously adopted, that referred to the "progressive development toward self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided in the trusteeship arrangement."[22]

2.1.3 The Principle

No principle was ever added to the Charter obliging all States to promote and respect the right to self-determination of all the world's peoples. Reference can be made here to Chapter XI, which comes closest to this, and contains the Declaration Regarding Non-Self-Governing Territories. This declaration was essentially based on a suggestion made by the UK. As an amendment, the UK suggested that "States Members of the United Nations which have responsibilities for the administration of dependent territories inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world" would have the duty "to promote to the utmost the well-being of the inhabitants of these territories within the world community." [23] This emphasis on the interests of the inhabitants themselves was later referred to by the executive officer of the relevant Commission as "the most enlightened thinking on the subject."[24] In any case, this duty, or "sacred trust of civilization" - the term used by the UK - included "the development of self-government in forms appropriate to the varying circumstances of each territory."[25] This duty applied to all colonial powers, and was thus much more broadly applicable than the purposes promoted through the trusteeship system. This more general application made it a unique declaration. As Evatt pointed out, it was "the first joint declaration in history by the major colonial Powers of principles applicable to all their non-self-governing territories."[26]

The relevant Subcommittee made a few changes to the UK draft. First of all, the UK´s reference to the dependent territories, which was reminiscent of the League of Nations Covenant, was replaced by a more modern version.[27] Then the

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[22] Thirteenth Meeting of Committee II/4, June 8, 1945, UNCIO, vol. 10, pp. 513-514. See also the Working Paper for Chapter on Dependent Territories and Arrangements for International Trusteeship, as of June 9, 1945 (as Approved Provisionally, with Amendments), UNCIO, vol. 10, p. 526. China also actively promoted this compromise. See Charmian Edwards Toussaint, *The trusteeship system of the United Nations* (1956), pp. 33 and 57.

[23] Amendments Submitted by United Kingdom, UNCIO, vol. 3, p 609. This formulation is based on Article 22 of the Covenant of the League of Nations. See also Australia, *idem*, p. 548.

[24] Huntington Gilchrist, "Colonial Questions at the San Francisco Conference" (1945), p. 986.

[25] Amendments Submitted by United Kingdom, UNCIO, vol. 3, p 609.

[26] Herbert Vere Evatt, *The United Nations* (1948), p. 32.

[27] See Proposed Text for Chapter on Dependent Territories and Arrangements for International Trusteeship (as Far as Approved by Drafting Subcommittee II/4/A, June 11, 1945), UNCIO, vol. 10, p.

US suggested some more substantial changes, which were all adopted.[28] No reference to independence or self-determination was ever included. The purposes are restricted to the promotion of self-government. A delegate of the Philippines believed that the phrase "to assist [the dependent peoples] in the progressive development of their free political institutions," added at the request of the US, could also mean independence, depending on the wishes of the dependent peoples themselves.[29] The executive officer of the relevant Commission later openly wondered about the meaning of the term "self-government" if it did not at least include "potential independence?"[30] Despite the fact that in subsequent practice and scholarship the provisions were generally interpreted in this way,[31] the Report of the Rapporteur clearly shows that this interpretation was not shared by most delegates.[32] When the entire provision was about to be adopted, the Dutch delegate referred to some "grievances which were acutely felt by dependent peoples," including "forced labour" and "the humiliation caused by the assertion of racial superiority," and asked the US whether these grievances were dealt with in the provision as redrafted by the US.[33] The US affirmed that in the draft there was an implicit "moral obligation to endeavour to overcome these […] evils."[34]

In San Francisco the Declaration on the relationship between the colonial powers and their colonies was qualified as "a unilateral declaration of member states, each for itself, which stated the principles they recognized in carrying responsibilities which they had or might have."[35] Qualifying it as a declaration should not be interpreted to mean that this part of the Charter was somehow less binding than the rest. By signing this declaration, which formed an integral part of the UN Charter, certain States, *i.e.* the colonizers, accepted certain fundamental

533. See also Draft Report of the Rapporteur of Committee II/4, UNCIO, vol. 10, p. 575, and Report of the Rapporteur of Committee II/4, UNCIO, vol. 10, p. 608.

[28] First, some minor changes were made. See Working Paper for Chapter on Dependent Territories and Arrangements for International Trusteeship, as of June 9, 1945 (as Approved Provisionally, with Amendments), UNCIO, vol. 10, p. 525, Proposed Text for Chapter on Dependent Territories and Arrangements for International Trusteeship (as Far as Approved by Drafting Subcommittee II/4/A, June 11, 1945), UNCIO, vol. 10, p. 533. But then the US proposed a whole list of more substantial changes. See the Fifteenth Meeting of Committee II/4, June 18, 1945, UNCIO, vol. 10, pp. 561-563. See also Redraft of Working Paper, Section A, UNCIO, vol. 10, p. 570.

[29] Fifteenth Meeting of Committee II/4, June 18, 1945, UNCIO, vol. 10, p. 562.

[30] Huntington Gilchrist, "Colonial Questions at the San Francisco Conference" (1945), p. 987.

[31] See Charmian Edwards Toussaint, *The trusteeship system of the United Nations* (1956), p. 58. See also the subsequent resolutions of the General Assembly.

[32] Report of the Rapporteur of Committee II/4, UNCIO, vol. 10, p. 609 (see also p. 576).

[33] Fifteenth Meeting of Committee II/4, June 18, 1945, UNCIO, vol. 10, p. 563. See also Annex B to the Report of the Rapporteur of Committee II/4, UNCIO, vol. 10, p. 619 (see also p. 586), where one can find a written version of the three questions.

[34] *Idem*.

[35] Coordination Committee's Summary Report of Thirty-Seventh Meeting, June 20, 1945, UNCIO, vol. 17, pp. 307-308.

legal duties and responsibilities towards their colonies.[36] As the principle stated in the Declaration applied to all colonial powers, while the purpose applied only to the trust territories, the principle and the purpose are not entirely consistent in their scope of application. Their content also differs substantially. Most importantly, the principle refers to the duty of colonial powers to promote "self-government" of basically all dependent peoples in the world, while the purpose refers to the role of the Organization in promoting "self-government or independence" only of the trust territories.[37]

2.2 The self-determination of peoples organized as a State (sovereignty)

2.2.1 The Preamble

Do peoples continue to have a right to self-determination after they have successfully gained their sovereign independence? A State's claim to sovereign independence is nowadays considered more of a hindrance to the promotion of values than a value-based claim.[38] This section examines the San Francisco documents to find out whether this was already the dominant view in 1945. The Preamble does not say much about sovereignty. It only contains a reference to equality of States, not to their independence.[39]

2.2.2 The Purpose

The Dumbarton Oaks proposals did not see the promotion of respect for the equality or independence of States as one of the Organization's purposes. Various States suggested that it should be a purpose of the Organization to promote the juridical

[36] See also Charmian Edwards Toussaint, *The trusteeship system of the United Nations* (1956), p. 230. One of those colonizers, the Netherlands, saw no problem with this declaration, because it "corresponded strikingly with the Dutch views regarding the overseas territories of the Kingdom." See the Dutch Government's "Memorie van Toelichting bij de Goedkeuringswet van het Handvest der Verenigde Naties," in Handelingen der Staten-Generaal, Tweede Kamer, Bijlagen Tijdelijke Zitting 1945, Bijlage no. 3, p. 24.

[37] See Articles 73 and 76 of the UN Charter, respectively. The difference between the principle and the purpose was pointed out during the Eleventh Meeting of Committee II/4, May 31, 1945, UNCIO, vol. 10, pp. 496-497.

[38] See *e.g.*, Robert McCorquodale, "An Inclusive International Legal System" (2004), p. 484.

[39] Draft Preamble to the Charter of the United Nations Proposed by the Union of South Africa, 26 April, 1945, UNCIO, vol. 3, pp. 474-475. According to Smuts' first draft of the Preamble, the United Nations was established, *inter alia*, to re-establish the faith "in the equal rights of […] of individual nations large and small." This paragraph got an awkward place: it was attached to the paragraph on respect for human rights, somewhat as an appendix. The phrase was never really commented upon, and, after a small modification, ended up in the Charter.

equality of States.[40] The Philippines believed this to be a matter relating to racial discrimination. It suggested that the Organization should have a mandate to develop "the spirit of brotherhood and racial equality among nations,"[41] and that this should be a purpose. At the request of the Soviet Union, the sponsors added a reference to equality in the provision on "friendly relations."[42] The idea was that this provision should state that the "[e]quality of rights […] extends in the Charter to States, nations, and peoples."[43] This was the only change made to the provision in San Francisco.[44] The provision does not give the Organization the mandate to promote the equality of States, nations and peoples. Even though the positions of the State flags, flying from the flagpoles in front of the San Francisco conference centre, "were being changed daily to guard against any complaints of inequality," the Organization did not have a general purpose to promote the equal rights of States.[45]

More or less the same is true for the independence of States. The Dumbarton Oaks did not see the promotion of respect for sovereign independence as a purpose of the Organization. Many States suggested that this purpose should be added.[46] Even Poland, which did not participate in the San Francisco Conference but nevertheless submitted a list of amendment proposals to the US Government, suggested that the Organization should afford "to all nations the means of dwelling within their own boundaries in freedom from fear and want."[47] Despite the popularity of this purpose, especially among the smaller States, it never made it into the Charter. Is this because it would be contradictory to oblige the United Nations to promote the sovereign independence of States when the *raison d'être* of the organization was to promote the increasing interdependence of States? Or maybe the purpose was so obvious that there was no need to state it explicitly. In Schachter's view, "one of [the UN's] primary aims, if not its *raison d'être*, was to preserve and promote the independence and integrity of States."[48] If that is true, it is

[40] See *e.g.*, Amendments Submitted by Panama, UNCIO, vol. 3, p. 273; Cuba, *idem*, p. 497; Honduras, *idem*, p. 349.
[41] Amendments Submitted by the Philippines, UNCIO, vol. 3, p. 535. See also Haiti, *idem*, p. 52, and Sixth Plenary Session, May 1, 1945, UNCIO, vol. 1, p. 443.
[42] Amendments Submitted by the United States, the United Kingdom, the Soviet Union and China, UNCIO, vol. 3, p. 622.
[43] See Text of Chapter I, as Agreed upon by the Drafting Committee, UNCIO, vol. 6, p. 684.
[44] See section 5.4 of Chapter VII.
[45] See "Charter for Peace," an editorial that appeared in the *New York Times* of May 20, 1945.
[46] This was one of the most important amendment proposals. See *e.g.*, Amendments Submitted by New Zealand, UNCIO, vol. 3, p. 486; Mexico, *idem*, p. 179; Ecuador, *idem*, p. 399; Iran, *idem*, p. 554; Honduras, *idem*, p. 349; Peru, *idem*, p. 596; Panama, *idem*, pp. 265 and 273; Cuba, *idem*, pp. 494-497.
[47] The proposals are not included in the UNCIO collection, but they are cited in James B. Reston, "Poles in London Ask Oaks Revision," in *New York Times* of February 11, 1945. Poland did not attend the conference, because there was a dispute as to who should represent Poland.
[48] Oscar Schachter, "The charter's origins in today's perspective" (1995), p. 45.

remarkable that this primary aim cannot be found in the UN Charter itself.

2.2.3 The Principle

The first principle, according to the Dumbarton Oaks proposals, was "the principle of the sovereign equality of all peace-loving states."[49] There was wide support for this equality principle.[50] At the same time, many States were concerned that the rest of the UN Charter did not do justice to this principle because it gave such a prominent role to the major powers.[51] These States considered that there were good reasons for the prominent position of the most powerful. However, the problem was that the balance between the effectiveness of the Organization, especially in the maintenance of international peace and security, and respect for the equality of States, had been lost.[52] On the final day of the Conference, President Truman (US) tried to reassure these States, when he said that the great powers were given great responsibilities rather than great privileges. He explained that "the responsibility of great States [was] to serve, and not to dominate the peoples of the world."[53]

Some States believed that the same provision also intended to oblige States to respect the sovereign independence of all other States.[54] The majority were not very convinced, and suggested including in the list of principles an explicit reference to the obligation to respect other States' independence.[55] Mexico was one

[49] Dumbarton Oaks Proposals for a General International Organization, UNCIO, vol. 3, p. 3.
[50] See *e.g.*, Amendments Submitted by Uruguay, UNCIO, vol. 3, p. 35; Chile, *idem*, p. 283; Paraguay, *idem*, p. 347; Ecuador, *idem*, pp. 398-399; Colombia, *idem*, p. 587.
[51] When the principle of sovereign equality of nations was discussed in the Committee, one delegate said that, since "states members of the world Organization would not receive equal treatment," the use of the words "sovereign equality" was "somewhat ironic." Seventh Meeting of Committee I/1, May 16, 1956, UNCIO, vol. 6, p. 304. See also Eleventh Meeting of Committee I/1, June 4, 1945, UNCIO, vol. 6, p. 332.
[52] See *e.g.*, Amendments Submitted by Colombia, UNCIO, vol. 3, p. 587, Panama, *idem*, pp. 260-261, Netherlands, *idem*, p. 315.
[53] Verbatim Minutes of Opening Session, April 25, 1945, UNCIO, vol. 1, p. 113. In the same speech, President Truman referred to the premise of "might makes right" as the "fundamental philosophy of our enemies", and as a premise that must certainly be denied. Senator Vandenberg later reffered to "might makes right" as a "jungle-creed." See Vandenberg, "Vandenberg's Plea for Charter as the Only Hope of Averting Chaos in World."
[54] See *e.g.*, Amendments Submitted by the Dominican Republic, UNCIO, vol. 3, p. 564. And see section 5.4 of Chapter VII of this study.
[55] This was by far the most popular amendment proposal. See *e.g.*, Amendments Submitted by Uruguay, UNCIO, vol. 3, pp. 30 and p. 35; Chile, *idem*, p. 283; Brazil, *idem*, p. 246; Mexico, *idem*, pp. 65-66; Ecuador, *idem*, pp. 398-399; Egypt, *idem*, p. 454; Ethiopia, *idem*, p. 558; Panama, *idem*, p. 270; Paraguay, *idem*, p. 347; Honduras, *idem*, p. 350; Czechoslovakia, *idem*, p. 467; Cuba, *idem*, p. 497; Bolivia, *idem*, pp. 582-583; Colombia, *idem*, p. 588; Documentation for Meetings of Committee I/1, UNCIO, vol. 6, pp. 542 and 563 (Iran).

of those States. In support of its non-intervention amendment, Mexico quoted from an American-Canadian Technical Plan, drafted by a group of individual experts. This stated that "each of the States which form the Community of States must be responsible for the conduct of its own household, [which implies] that in its internal affairs each State must be free from interference by other States acting on their own authority."[56] Panama believed that "[e]ach State ha[d] a legal duty to refrain from intervention in the internal affairs of any other State."[57] At the same time, Panama proposed that "[e]ach State ha[d] a legal duty to see that conditions prevailing within its own territory d[id] not menace international peace and order, and to this end it must treat its own population in a way which will not violate the dictates of humanity and justice or shock the conscience of mankind."[58] Bearing in mind the legal duty of States not to intervene proclaimed by Panama, the question is what happens when a State fails to comply with Panama's "legal duty" not to mistreat its own citizens. This issue later resurfaced in San Francisco, when the obligation of the Organization itself not to intervene in the internal affairs of its Members was discussed.

Despite the fact that many States suggested adding a genuine non-intervention principle, the relevant Subcommittee in San Francisco did not make any changes to the Dumbarton Oaks draft.[59] The prohibition on intervention was believed to be "explicitly or implicitly contained in other provisions of the Charter, particularly under Purposes and Principles."[60] However, no other purpose or principle springs to mind.[61] Thus the obligation of non-intervention must be derived from the sovereign equality principle. It was agreed that the term "sovereign equality" implied that "states are juridically equal," "that they enjoy the rights inherent in their full sovereignty," "that the personality of the state is respected, as well as its territorial integrity and political independence," and "that the state should, under international order, comply faithfully with its international duties and

[56] Amendments Submitted by Mexico, UNCIO, vol. 3, p. 67. This non-intervention principle was not aimed at the Organization, only at other Member States acting individually. See *idem*, p. 68. See also Uruguay, *idem*, p. 30.
[57] *Idem*, p. 270.
[58] Amendments Submitted by Panama, UNCIO, vol. 3, p. 269. See also Chile, *idem*, p. 293. On p. 54 of Louis B. Sohn, "The issue of self-defense and the UN Charter" (1995), it is suggested that this was an American formulation.
[59] There is no such provision in the Text of Chapter II, as Agreed upon by the Drafting Committee, UNCIO, vol. 6, p. 687.
[60] Report of Rapporteur of Subcommittee I/1/A, to Committee I/1, UNCIO, vol. 6, p. 717.
[61] One might think of the prohibition to use force. But, as Peru rightly remarked, "[w]hen the ideas of sovereignty and territorial integrity are dealt with only in relation to the use of force, there is not the absolute respect which in other cases would have been established." Second Meeting of Commission I, June 15, 1945, UNCIO, vol. 6, p. 68.

obligations."[62] Rolin, the Belgian President of the Committee, felt that "if we have succeeded in expressing these four concepts in two words, 'sovereign equality,' we have broken the record for conciseness."[63] Not all the delegates were equally impressed by this conciseness. Peru was particularly insistent on having all these elements – and duties – arising from the sovereignty of States explicitly mentioned in the Charter, rather than implied in the term sovereign equality.[64] But the majority believed that this was not necessary.[65]

The sovereign equality principle does not explain how States ought to behave in order to respect the sovereign equality of all States. Australia remarked that this makes the principle rather an "empty phrase."[66] The principle also says little, if anything at all, about sovereign independence. The UN Charter thus does not contain an explicit prohibition on States intervening in the domestic affairs of other States, even though this is one of the most important – and most widely supported – norms of all.[67] It was certainly widely supported in Latin America.[68] Their big brother, the United States of America, was much less enthusiastic. It even opposed any references to non-intervention in the Charter.[69] This US strategy

[62] Report of Rapporteur of Subcommittee I/1/A, to Committee I/1, UNCIO, vol. 6, p. 718. See also Eighth Meeting of Committee I/1, May 17, 1945, UNCIO, vol. 6, p. 311; Report of Rapporteur of Committee 1 to Commission I, UNCIO, vol. 6, p. 457.

[63] *Idem*, p. 70.

[64] Second Meeting of Commission I, June 15, 1945, UNCIO, vol. 6, pp. 67-69, and Report of Rapporteur of Commission I, UNCIO, vol. 6, p. 230. See also Eleventh Meeting of Committee I/1, June 4, 1945, UNCIO, vol. 6, pp. 331-332.

[65] The Rapporteur of the Subcommittee insisted once more that all this was implied in the term "sovereign equality." See Second Meeting of Commission I, June 15, 1945, UNCIO, vol. 6, p. 69.

[66] See remark of Australian delegate during the First Plenary Session, April 26, 1945, UNCIO, vol. 1 p. 173.

[67] Reference is sometimes made to Article 2(7) UN Charter. However, as Nolte rightly emphasized, that provision "protects only against acts of the United Nations [Organization] and not against acts of other States." Georg Nolte, "Article 2(7)" (2002), p. 151. On the place of the notion of sovereignty in the UN Charter, see also Nico Schrijver, "The Changing Nature of State Sovereignty" (1999).

[68] Latin American delegates constantly defended the principle of sovereign equality and independence. See *e.g.*, Venezuela (Seventh Plenary Session, May 1, 1945, UNCIO, vol. 1, p. 517), Amendments Submitted by Honduras, UNCIO, vol. 3, p. 349; Brazil, *idem*, p. 236; Mexico, *idem*, pp. 65-66 and 179. See also Sixteenth Meeting of Committee I/1, June 13, 1945, UNCIO, vol. 6, p. 495. These States referred to regional legal documents in which the non-intervention principle was included, such as the Convention of Montevideo on the Rights Duties of States (whose definition of a State, by the way, must be regarded as incorporated in the Charter), the Protocol of Buenos Aires relative to Non-Intervention, the Declaration of Lima, and the Constitution of their regional security arrangement, only a month old at the time: the Act of Chapultepec (Mexico). Human rights protection was also emphasized there. See Jan Herman Burgers, "The Road to San Francisco" (1992), p. 476.

[69] See especially the formal decision of the entire US Delegation to "oppose reference to non-intervention anywhere in the Charter." Minutes of Forty-first Meeting of the United States Delegation, May 16, 1945, in FRUS*, 1945, General:* Volume I, p. 751. See also *e.g.*, Minutes of the Fourteenth Meeting of the United States Delegation, April 24, 1945, in FRUS*, 1945, General:* Volume I, pp. 374-375.

explains why there is no general non-intervention principle in the UN Charter. Another explanation could be that States interpreted the word "force" in the prohibition on the use of force – Article 2(4) UN Charter – so broadly that it became a general non-intervention principle.[70]

The lack of such a principle also explains why the United Nations does not have any specific means at its disposal to ensure respect by States for the sovereign equality and independence of other States. The United Nations can protect a State against military interventions by other States. That was, after all, the main reason that the Organization was established. The prohibition on the use of military force is certainly covered by Article 2(4) UN Charter. However, the Organization does not have any specific powers to protect States against non-military intervention by other States in their domestic affairs.[71]

In sharp contrast to its opposition to a principle obliging States to respect the sovereign independence of other States, the US was a big supporter of a principle obliging the Organization to respect the sovereign independence of its Member States.[72] The original Dumbarton Oaks proposals had not contained such a general principle. There was only a non-intervention provision in the chapter on the settlement of disputes, which obliged the Organization not to interfere in the domestic affairs of States when settling international disputes.[73] To emphasize the importance of respect for the sovereign independence of States, the sponsors promoted this non-intervention provision from the chapter on the settlement of disputes to the list of general principles.[74] This promotion, which was not suggested by any of the smaller States, survived the San Francisco Conference.[75] It became Article 2(7) UN Charter, which reads as follows:

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[70] See section 4 of Chapter IV, above.

[71] Uruguay suggested that this ought to be a possibility: "The Uruguayan Government desires that there be confirmed, expressly, the guarantee of the independence and subsistence of the nations, and that there be established categorically for the associates of the international organization, the obligation of maintaining, even by armed force, the integrity of the rights and the frontiers of the countries threatened or attacked." Position of the Government of Uruguay Respecting the Plans of Postwar International Organization for the Maintenance of Peach and Security in the World, UNCIO, vol. 3, p. 30.

[72] See John H. Crider, "Stress Autonomy in Domestic Field," in *New York Times* of May 25, 1945.

[73] Dumbarton Oaks Proposals for a General International Organization, UNCIO, vol. 3, p. 13.

[74] See Amendments Submitted by the United States, the United Kingdom, the Soviet Union and China, UNCIO, vol. 3, p. 623 (the new principle) and p. 625 (deletion of the non-intervention principle in the chapter describing the collective security arrangement). See also Sixteenth Meeting of Committee I/1, June 13, 1945, UNCIO, vol. 6, p. 494-499. The reason why there was no such principle in the Dumbarton Oaks proposals is that the issue of "domestic jurisdiction" became entangled with the question on human rights. See Ruth B. Russell, *A history of the United Nations Charter* (1958), p. 463.

[75] The smaller nations only wanted more international law inserted into the provision. They wanted the distinction between the domestic and the international to be determined by law, and they wanted the International Court to make such a determination. For a discussion of the complete drafting history of Article 2(7), see *e.g.*, Lawrence Preuss, "Article 2, paragraph 7 of the Charter of the United Nations and

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

When asked to explain the need for such a general non-intervention principle for the Organization, the US explained that the constant broadening of the UN's purposes raised the question whether "the Organization [would] deal with the governments of the member states," or whether it would "penetrate directly into the domestic life and social economy of the member states." [76] The general non-intervention principle for the Organization, as suggested by the sponsors, made it clear that the Organization would deal only with governments in the promotion of its purposes.[77]

Because the non-intervention principle, as applied to the Organization, basically prohibits the United Nations from taking certain actions, it cannot come as a surprise that this principle has been the main inspiration for a great number of limitations and constraints on the functions and powers allotted to the Organization for the promotion of the other global values.

For example, the suggestion that only "democratic" States would qualify for UN membership was rejected, because it "would imply an undue interference with internal arrangements." [78] Furthermore, the distinction between non-self-governing territories and trust territories was based on respect for State sovereignty. As the UK pointed out, "[t]he compulsory application of the trusteeship system to existing colonies […] would amount to interference with the internal affairs of

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matters of domestic jurisdiction´ (1950). See also "Dulles Wins Plea to Bar League from Meddling in Domestic Issues," in the *New York Times* of June 16, 1945.

[76] Seventeenth Meeting of Committee I/1, June 14, 1945, UNCIO, vol. 6, p. 508.

[77] *Idem*. See also Report of Rapporteur of Committee 1 to Commission I, UNCIO, vol. 6, p. 486 (the Rapporteur agreed). According to the revised Dumbarton Oaks proposal, the only exception to the non-intervention principle was the action of the Security Council taken under Chapter VIII, Section B, of the Dumbarton Oaks proposals, which eventually became Chapter VII of the UN Charter. Australia believed that this exception was too wide, and suggested to narrow it down to "enforcement measures". See Amendment by the Australian Delegation to Proposed Paragraph 8 of Chapter II (Principles), UNCIO, vol. 6, pp. 436-440. The US also accepted this solution. See Minutes of Sixty-third Meeting of the United States Delegation, June 4, 1945, in FRUS*, 1945, General:* Volume I, p. 1142. Norway objected with convincing arguments to this Australian proposal. See Sixteenth Meeting of Committee I/1, June 13, 1945, UNCIO, vol. 6, p. 498, and Statement by the Norwegian Delegation on Paragraph 8, Chapter II, June 12, 1945, *idem*, p. 430. But the Committee nonetheless adopted the provision as amended by Australia. See Seventeenth Meeting of Committee I/1, June 14, 1945, *idem*, p. 513, and the Report of Rapporteur of Committee 1 to Commission I, *idem*, pp. 488-489.

[78] Sixth Meeting of Committee I/2, May 14, 1945, UNCIO, vol. 7, p. 36.

member states."[79] Therefore the Trusteeship Council was allowed to deal only with a few trust territories, and not with all colonies, which significantly diminished the Council's relevance.[80] The Rapporteur had to make it explicitly clear that "nothing in this Chapter [on the Trusteeship system] of the Charter shall be construed in or of itself to alter in any manner any rights whatsoever of any states or any peoples or the terms of existing international instruments to which member states may respectively be parties."[81]

When the functions and powers of the General Assembly were discussed, the Soviet Union considered that there was a danger that the Organization could interfere in the domestic affairs of States, and that the Charter should explicitly forbid the Assembly from doing so. The Dominican Republic made the same point in a separate statement.[82] In response, Evatt, the Australian delegate, referred to the general non-intervention principle cited above.[83] In his view, "the general prohibition of intervention in domestic affairs which is contained in the Charter is an overriding principle or limitation and controls each and every organ and body of

[79] Fourth Meeting of Committee II/4, May 14, 1945, UNCIO, vol. 10, p. 440. Other colonial powers shared this view. See *e.g.*, Belgian Delegation Amendment to Paragraph 2 of Chapter I, UNCIO, vol. 6, p. 300. When the trusteeship system was being discussed, France "called attention to the principle […] of nonintervention in the domestic affairs of member states." Third Meeting of Committee II/4, May 11, 1945, UNCIO, vol. 10, p. 433. France even issued a statement to this effect. See the Report of Rapporteur of Commission I, UNCIO, vol. 10, p. 622 (the text of the declaration), and Sixteenth Meeting of Committee II/4, June 20, 1945, UNCIO, vol. 10, p. 602 (introduction of this declaration). The Netherlands said, about the Trusteeship Chapter, that "[i]n this chapter we find far-reaching obligations and responsibilities but nobody need fear, as a consequence, interference in domestic affairs, since such interference has been expressly excluded in the Chapter on Principles." Third Meeting of Commission II, June 20, 1945, UNCIO, vol. 8, p. 129. Interestingly, the Netherlands also believed that "[t]he superimposition of [the trusteeship] system would be a backward step from the point of view of the more advanced colonial territories,"and thus the Netherlands "could not agree to its universal application." Third Meeting of Committee II/4, May 11, 1945, UNCIO, vol. 10, p. 433. Australia believed that "[t]here would be no interference with sovereignty," because "[a]ll that would be done [by the trusteeship system] would be to treat the welfare of dependent peoples as a matter not only of local but of international concern." First Plenary Session, April 26, 1945, UNCIO, vol. 1, p. 178. South Africa believed that "in drawing up general principles [relating to non-selfgoverning territories], that the terms of existing mandates could not be altered without the consent of the mandatory power." Fourth Meeting of Committee II/4, May 14, 1945, UNCIO, vol. 10, p. 439.

[80] According to Article 77 of the UN Charter, "[t]he trusteeship system shall apply to such territories in the following categories as may be placed thereunder by means of trusteeship agreements: a. territories now held under mandate; b. territories which may be detached from enemy states as a result of the Second World War; and c. territories voluntarily placed under the system by states responsible for their administration." There are no examples of the latter category.

[81] Revised Report of the Rapporteur of Commission II to the Plenary Session, UNCIO, vol. 8, p. 271.

[82] Statement Made by the Delegate of the Dominican Republic at the Fourteenth Meeting of Committee II/2, UNCIO, vol. 9, p. 102.

[83] Summary Report of Ninth Meeting of Executive Committee, June 17, 1945, UNCIO, vol. 5, pp. 524-525.

the Organization, of which the General Assembly is one."[84] The Soviet Union was not convinced, and the description of the Assembly's powers was changed to appease it.[85]

Certain States were worried that with the expansion of the Organization's socio-economic purposes, the UN would acquire the right to interfere in domestic affairs.[86] The new article proposed by Australia (the so-called pledge), obliging all States to take joint and separate action to promote these socio-economic purposes, did not help to reassure these States. Australia explained that the obligation to take separate action, *i.e.* the obligation of all States to "pursue the objectives of [Article 55] by its own action in its own way," did not imply that the Organization could interfere in the domestic affairs of States to ensure that they promoted the socio-economic purposes at a national level.[87] Belgium, supporting the Australian amendment, remarked that "[s]eparate action might imply interference with domestic affairs," but that the delegates need not be concerned, because "adequate protection [was] given elsewhere in the Charter."[88] The Belgian delegate was referring here to the general prohibition on the Organization intervening in domestic affairs, which became Article 2(7) UN Charter.[89] However, according to the US, this general "safeguarding clause [was] not sufficient since a pledge of the type adopted by Australia would make internal affairs matters of international concern." Thus they would cease to fall "essentially within the domestic jurisdiction," and therefore the safeguarding clause would not apply.[90] To avoid any ambiguity, the US delegate proposed including a statement in the records, which made it clear that the Organization could not interfere in domestic affairs when promoting the socio-economic purposes.[91] This declaration was unanimously adopted.[92]

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[84] Summary Report of Tenth Meeting of Executive Committee, June 18, 1945, UNCIO, vol. 5, p. 535. See also Summary Report of Eighth Meeting of Steering Committee, June 18, 1945, UNCIO, vol. 5, p. 272.

[85] See section 3.5 of Chapter III, above.

[86] For example, Liberia remarked that "in connection with the working out of details of whatever economic, social or other humanitarian problems, as may be projected at the Conference, care should be taken to see that definite and specific means be set out therefore; as otherwise unjustifiable interference in the internal affairs of nations might occur." Memorandum of the Liberian Government on the Dumbarton Oaks Proposals, UNCIO, vol. 3, p. 464. Uruguay was more open to the Organization's "interference." See New Uruguayan Proposals on Dumbarton Oaks Proposals, UNCIO, vol. 3, p. 43.

[87] Twelfth Meeting of Committee II/3, May 25, 1945, UNCIO, vol. 10, p. 100. See also the Fifteenth Meeting of Committee II/3, May 30, 1945, UNCIO, vol. 10, pp. 139-141.

[88] See Fifteenth Meeting of Committee II/3, May 30, 1945, UNCIO, vol. 10, p. 139.

[89] That is Article 2(7) UN Charter.

[90] Fifteenth Meeting of Committee II/3, May 30, 1945, UNCIO, vol. 10, p. 140.

[91] Eleventh Meeting of Committee II/3, May 24, 1945, UNCIO, vol. 10, p. 83. The proposed statement was as follows: "The members of Committee 3 of Commission II are in full agreement that nothing contained in Chapter IX can be construed as giving authority to the Organization to intervene in the domestic affairs of member states." It was adopted unanimously.

The most problematic was the apparent conflict between the obligation for the Organization to respect the sovereign independence of States and the obligation for the Organization to promote universal respect for human dignity and human rights. For the US, the biggest supporter of the non-intervention principle, intervention for the promotion of human dignity was acceptable. Even during the Dumbarton Oaks deliberations the US already wanted to include in the Charter an article making the principle of non-intervention dependent on the requirement that a State respect the human rights and fundamental freedoms of all its people and that it should govern in accordance with the principles of humanity and justice.[93] This suggestion was withdrawn even before the Dumbarton Oaks text was sent to the other States.

In an amendment, France made a similar suggestion:

> The provisions [in the Charter] should not apply to situations or disputes arising out of matters which by international law are solely within the domestic jurisdiction of the state concerned, unless the clear violation of essential liberties and of human rights constitutes in itself a threat capable of compromising peace.[94]

France explained that "experience of recent years had made it desirable that the Organization should intervene to protect certain minorities." [95] In response, Australia proposed that, by concluding a multilateral treaty on the topic of minorities, the community of States could in the future make the basic respect for minority rights – and human rights – within a certain country, a matter of international concern.[96] France, apparently convinced by the arguments put forward by Australia, withdrew its amendment.[97] However, until such a convention was concluded, Uruguay pointed out that a "dictatorial government could raise

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[92] The concerns were primarily of the USA (see the Ninth Meeting of Committee II/3, May 21, 1945, UNCIO, vol. 10, p. 52, and the Tenth Meeting of Committee II/3, May 22, 1945, UNCIO, vol. 10, p. 57), but others expressed them too. During the Eleventh Meeting of Committee II/3, May 24, 1945, UNCIO, vol. 10, p. 83, the American statement was adopted unanimously.

[93] See section 2.3 of Chapter VII.

[94] Comments of the French Ministry of Foreign Affairs, UNCIO, vol. 3, p. 386. This amendment resurfaced when Australia suggested considering only the Security Council's enforcement measures to maintain international peace and security as excluded from the non-intervention principle. See Sixteenth Meeting of Committee I/1, June 13, 1945, UNCIO, vol. 6, p. 498.

[95] Sixteenth Meeting of Committee I/1, June 13, 1945, UNCIO, vol. 6, p. 498.

[96] Amendment by the Australian Delegation to Proposed Paragraph 8 of Chapter II (Principles), UNCIO, vol. 6, p. 439. Belgium had some objections. See Belgian complaint at the Seventeenth Meeting of Committee I/1, June 14, 1945, UNCIO, vol. 6, p. 511. Already in 1947, this solution was defended in scholarship. See, *e.g.*, Clark M. Eichelberger, "The United Nations Charter: A Growing Document" (1947), p. 102.

[97] Sixteenth Meeting of Committee I/1, June 13, 1945, UNCIO, vol. 6, p. 499.

exceptions of 'domestic jurisdiction' to any interference by the Organization, with respect to its internal arbitrary rule."[98]

In the end, no human rights exception to the non-intervention principle was inserted in the UN Charter. This means that the UN cannot, against the sovereign will of its Member States, intervene in their essentially domestic affairs, not even to promote respect for human rights. Respect for the sovereign independence of States required this absolute prohibition. As soon as States voluntarily authorize the Organization to promote human rights at the national level as well, for example, by ratifying a human rights treaty, this argument will no longer form an obstacle to the Organization.

The conclusion is that the UN Charter does not contain an explicit prohibition on States intervening in the domestic affairs of other States. The United Nations Organization also has no clear mandate to promote the sovereign independence of States, and prevent one State intervening in the affairs of another. However, the Charter does contain a prohibition on the United Nations Organization itself intervening in the domestic affairs of its Member States. An explanation of this surprising fact is that the US had far less difficulty with the idea of States interfering in other States' domestic affairs than with the idea that the Organization could interfere in the affairs of Member States.

3 THE UN CHARTER SYSTEM

3.1 Introduction

The UN Charter devoted three chapters to the plight of a specific group of peoples who did not enjoy any form of self-government or independence, *i.e.* colonial peoples. To ensure their advancement, the UN set up the trusteeship system, and inserted a declaration into the Charter on the treatment of colonies. Self-determination is not mentioned even once in those chapters.

The UN's work related to these specific parts of the Charter is discussed below. Its objectives regarding colonial peoples quickly became much more ambitious than those set out in the Charter itself. The outline of those more ambitious goals is dealt with in the following section (4).

3.2 The Trusteeship Council and the trust territories

The Trusteeship system of the United Nations was set up to introduce emerging nations to adult statehood. In Toussaint's words: "Even as the education and

[98] Statement of Uruguayan Delegation on Its Position with Reference to Chapters I and II as Considered by Committee I/1, UNCIO, vol. 6, p. 632.

guidance of youth to take its place in the national society is recognized as of vital concern to the modern State government […] so is the education and guidance of youthful nations to take their places as adult members of the international society of vital concern to a present-day comprehensive international organization."[99] This comparison is unfortunate in many ways, but it does accurately reflect the way of thinking in the early days.

According to Article 76 of the UN Charter, one of the basic objectives of the trusteeship system was

> To promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement.[100]

The tortuous language of this paragraph can be explained by the disagreement among the major powers about the ultimate purpose of the trusteeship system. It was a compromise, and this compromise did not allow for an explicit reference to the self-determination of peoples. Thus "advancement" rather than "independence" was the ultimate objective of the trusteeship system.[101]

It is now generally agreed that the UN Charter is a "living document," and that its interpretation evolves with the evolution of the international community. [102] As well as looking at the Council's mandate, it is also important to look at its actual accomplishments.

What are the accomplishments of the trusteeship system? The trusteeship system of the United Nations was supervised by the Trusteeship Council. Despite being one of the principal organs of the United Nations, the Trusteeship Council actually operated under the authority of the General Assembly, just like the Economic and Social Council.[103] The Trusteeship Council has been very active from the very beginning. Because it had a limited task and a limited membership, its work was not as politicized as that of the General Assembly.[104]

On 13 December 1946, the General Assembly approved the first set of Trusteeship Agreements in accordance with Article 85 of the UN Charter.[105] Only

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[99] Charmian Edwards Toussaint, *The trusteeship system of the United Nations* (1956), p. vii.
[100] Article 76(b), UN Charter.
[101] Dietrich Rauschning, "Article 76" (2002), p. 1107.
[102] See section 2.4 of Chapter III.
[103] Articles 7 and 85, UN Charter.
[104] Annette Baker Fox, "The United Nations and Colonial Development" (1950), pp. 203 and 214.
[105] According to Article 85(1), "[t]he functions of the United Nations with regard to trusteeship agreements for all areas not designated as strategic, including the approval of the terms of the trusteeship agreements and of their alteration or amendment, shall be exercised by the General Assembly."

then could the Trusteeship Council be established and the Chapters on the Trusteeship Council become fully operational.[106] These agreements related to the following territories: New Guinea, Ruanda-Urundi, Cameroon, Togoland, Western Samoa and Tanganyika.[107] In the same resolution the Assembly appointed Australia, Belgium, France, New Zealand, and the United Kingdom as the Administering Authorities of these territories.[108] This automatically made them members of the Trusteeship Council, together with the remaining members of the Security Council, plus two elected members: Mexico and Iraq.[109] In 1947, certain Pacific Islands and Nauru were added to the list of trust territories,[110] followed in 1950 by Somalia.[111] The islands had the United States of America as the Administering Authority, Somaliland fell under the responsibility of Italy. No new territories have been added to the list since 1950. During the time of the League of Nations, a Mandate for Palestine was entrusted to the United Kingdom. Even though the United States called for a temporary trusteeship arrangement for Palestine in 1948, it never became a United Nations trusteeship.[112]

The Trusteeship Council was most apparent when it went on mission visits, interviewing the local inhabitants in the trust territories, and when it received petitions from those local inhabitants.[113] In some cases cultural conflicts occurred when the Trusteeship Council came to visit. For example, in the more traditional societies of the trust territories, a general rule applied that wisdom came with old age. Thus when a UN mission consisted mainly of young international civil servants and diplomats, this often had a negative effect on the respect shown to them by the local population.[114] Moreover, the United Nations was not well known as an organization in the colonial territories. In the early days, at least, "the peoples of the

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[106] Charmian Edwards Toussaint, *The trusteeship system of the United Nations* (1956), pp. 34-35.
[107] Approval of Trusteeship Agreements, General Assembly resolution 63(I), adopted 13 December 1946. For a list of trust territories, see Dietrich Rauschning, "Article 75" (2002), pp. 1104-1105.
[108] *Idem*.
[109] See Article 86 UN Charter, and Establishment of the Trusteeship Council, General Assembly resolution 64(I), adopted 14 December 1946.
[110] Trusteeship of strategic areas, Security Council resolution 21, adopted 2 April 1947; Proposed Trusteeship Agreement for Nauru, General Assembly resolution 140(III), adopted 1 November 1947. The reason that the Pacific Islands were the concern of the Council, and not the Assembly, was because these islands were considered strategic areas in the sense of Article 83 UN Charter.
[111] Trusteeship Agreement for the Territory of Somaliland under Italian administration, General Assembly resolution 442 (V), adopted 2 December 1950.
[112] See the Minutes of the Security Council meeting of 19 March 19 1948, UNDoc. S/P. V. 271, which contain the discussions in the Security Council on the adoption and further implementation of Security Council resolution 42 (1948), adopted 5 March 5 1948. In recent times, it has been suggested once again to turn Palestine into a US-supervised trusteeship. See *e.g.*, Martin Indyk, "A trusteeship for Palestine?" (2003).
[113] John Fletcher-Cooke, "Some Reflections on the International Trusteeship System" (1959), pp. 425-429.
[114] *idem*, p. 427.

trust territories ha[d] only the vaguest impression of what the United Nations [was] all about."[115] This made it difficult to earn their trust and confidence.

Be that as it may, whenever a UN mission arrived in a particular territory – this happened once every three years – the locals saw it as a "heaven-sent opportunity to ventilate [their] grievances," and this they frequently did.[116] These grievances then ended up in the Council's reports, and the administering territory had to respond to them. The petition system was also quite successful. At first, very few petitions made it to the UN Headquarters in New York.[117] However, since 1949 the number of petitions has "widened to a torrent."[118] Some of these petitions, especially those containing more general complaints, also ended up in the Council's reports.

Unlike the Security Council and the Economic and Social Council, the Trusteeship Council actually finished its work, although this does not make it the most successful of the three councils. The Trusteeship Council had a limited task: to assist eleven territories on their way to "advancement." With the independence in 1994 of the last Pacific Island (Palau), all the trust territories have become independent, and the Trusteeship Council therefore now finds itself essentially with nothing to do. [119]

3.3 Non-self-governing territories

In addition to the category of trust territories, the UN Charter also recognized a category of non-self-governing territories. These were defined as "territories whose peoples have not yet attained a full measure of self-government."[120] As the General Assembly later stated, "the authors of the Charter of the United Nations had in mind that Chapter XI [of the UN Charter] should be applicable to territories which were then known to be of the colonial type."[121] Strictly speaking, the eleven trust territories were also colonial territories, and thus also non-self-governing territories.

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[115] Sherman S. Hayden, "The Trusteeship Council" (1951), p. 232.
[116] John Fletcher-Cooke, "Some Reflections on the International Trusteeship System" (1959), p. 428.
[117] Sherman S. Hayden, "The Trusteeship Council" (1951), p. 232.
[118] *Idem*, p. 228.
[119] Recently, two major books were published which both claimed that the trusteeship-idea never really disappeared from the scene. See Carsten Stahn, *The law and practice of international territorial administration: Versailles to Iraq and beyond* (2008), and Ralph Wilde, *International territorial administration: how trusteeship and the civilizing mission never went away* (2008).
[120] See Article 73, and generally the Declaration regarding non-self-governing territories, which constituted chapter XI of the UN Charter.
[121] Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for in Article 73(e) of the Charter of the United Nations, annexed to General Assembly resolution 1541(XV), adopted 15 December 1960 ("Principles for Article 73(e)"), principle 1.

This meant that the objectives for the non-self-governing territories also applied to the trust territories, but not the other way round.[122]

As not all the colonial powers were prepared to submit their colonial territories to the supervision of the Trusteeship Council, a much larger group of colonial territories remained which were not labelled as trust territories, but which were also considered to lack "a full measure of self-government." In 1945, these territories were found over almost the entire globe. The group included the Belgian and French Congo, South West Africa, Indo-China, the Netherlands Indies, Morocco, Tunisia, Greenland and Alaska. At some point all these territories, and many others, had been considered to be non-self-governing territories.[123] The Trusteeship Council was not entrusted with any particular supervisory role for the non-self-governing territories, except for the eleven trust territories,[124] but at least colonial issues were no longer considered a domestic matter for the colonial powers. The chapter emphasized that "colonial problems should be considered as international problems and not merely problems of individual colonial powers,"[125] and that the international community recognized colonial territories as separate entities in international law.[126]

The ultimate objective for this gigantic group of non-self-governing territories was not "their progressive development towards self-government or independence as may be appropriate," as was the case for the trust territories, but a much more modest objective:

> To develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement.[127]

The most important difference between the trust territories and the other non-self-governing territories was the difference in the ultimate objective: "self-government

[122] See also Charmian Edwards Toussaint, *The trusteeship system of the United Nations* (1956), pp. 53 and 229.
[123] The Belgian and French Congo both became independent in 1960, and are now the Democratic Republic of the Congo and the Republic of the Congo. South West Africa became independent in 1990, as Namibia. Indo-China became independent in the 1940s and 1950s, as Laos, Vietnam and Cambodia. The Netherlands Indies became independent in 1949, as Indonesia. Morocco and Tunisia both became independent in 1956. Greenland and Alaska did not become independent, and are now an autonomous country within the Kingdom of Denmark and one of the United States of America, respectively.
[124] See Article 88, UN Charter.
[125] Huntington Gilchrist, "Colonial Questions at the San Francisco Conference" (1945), p. 982.
[126] Ulrich Fastenrath, "Article 73" (2002), p. 1090.
[127] Article 73(b), UN Charter.

or independence" for the trust territories, and "self-government" only for the other non-self-governing territories.[128]

This difference in the ultimate objective had to some extent already been "corrected" by the Assembly in 1952. The Assembly then proclaimed a list of "factors indicative of the attainment of independence or of other separate systems of self-government." [129] In this way the Assembly attempted to determine more specifically when a non-self-governing territory could be considered to be self-governing. It was important to determine this, because as soon as the territory concerned could be considered to be self-governing, the specific obligations relating to these territories, included in the Charter's declaration on non-self-governing territories, ceased to apply. [130] As factors indicative of the attainment of independence, the Assembly referred to a territory's capacity to assume international responsibility for both internal and external sovereign acts, its eligibility for UN membership, and the territory's capacity to enter into relations with other governments. The Assembly also referred to the existence within such territories of a separate government, acting without control or interference from other States, and based on the principle of "complete freedom of the people of the territory to choose the form of government which they desire."[131] This last criterion can be considered to be very strict, especially for its time. The question even arises whether all the States that were already recognized as independent and sovereign States at the time actually fulfilled this last criterion.[132]

In 1960, the Assembly declared that a "Non-Self-Governing Territory can be said to have reached a full measure of self-government by emergence as a sovereign independent State, free association with an independent State, or integration with an independent State." [133] The Assembly did not elaborate on the first option. Presumably, what was meant by becoming a sovereign State was self-evident. With regard to the second option, free association, the Assembly stressed that such an association could only come about on the basis of the "free and voluntary choice by the peoples of the territory concerned expressed through informed and democratic processes."[134] Similarly, integration "should be on the basis of complete equality

[128] Compare Articles 76 and 73, UN Charter. See also Ulrich Fastenrath, "Article 73" (2002), p. 1090. Other differences, such as the explicit reference to human rights only in the chapter on trust territories were soon "interpreted away" by the Assembly. See already Racial discrimination in Non-Self-Governing Territories, General Assembly resolution 644(VII), adopted 10 December 1952.

[129] Factors which should be taken into account in deciding whether a Territory is or is not a Territory whose people have not yet attained a full measure of self-government, General Assembly resolution 648(VII), adopted 10 December 1952 ("Factors").

[130] See especially the reporting obligation of Article 73(e), UN Charter. See also principles II and X-XII, Principles for Article 73(e).

[131] Factors, First Part, Section B.

[132] See also Clyde Eagleton, "Excesses of Self-Determination" (1953), p. 600.

[133] Principles for Article 73(e), principle VI.

[134] *Idem*, principle VII.

between the peoples of the erstwhile Non-Self-Governing Territory and those of the independent country with which it is integrated," and be the result of the "freely expressed wishes of the territory's peoples […] their wishes having been expressed through informed and democratic processes."[135] This leads to the conclusion that there was a presumption that peoples wanted to become States, and that if they chose otherwise, it had to be crystal clear that this was a free choice, arrived at without any outside pressure or coercion.[136] Both free association and integration were considered a suspect category, in the sense that some form of outside coercion was almost automatically presumed when a non-self-governing territory preferred either of these two options to independence.[137] Almost all of the non-self-governing territories have become independent States, and chose not to become associated or integrated with an existing State.[138]

3.4 Conclusion

Despite the careful language in the Charter, the Assembly explicitly expressed a preference for independence over other forms of self-government, and this is what happened with most of the non-self-governing territories.[139] Almost all of them ended up, in a relatively short time, as independent States.

It is difficult to see this process of decolonization, and the UN's role in this, as being based on, or inspired by, the chapters in the UN Charter about non-self-governing territories. First of all, the UN Charter did not see immediate independence as the desirable goal for all these territories. In fact, one could go even further and argue that the emphasis on independence as a goal for all non-self-governing territories was a deviation from the UN Charter's chapter on these territories, as the general "advancement" of the colonial peoples could be hindered by granting them independence too soon. The swiftness of the decolonization process was considered a problem by some commentators. For example, Eagleton reminded the United Nations that its duty to "guard the welfare of the whole community appear[ed] to be in direct conflict with the supposed obligation to produce more and more infant states and turn them loose upon the streets."[140] However, once the process of decolonization started, there was no way back.

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[135] *Idem*, principles VIII and IX.
[136] See also Hurst Hannum, "Rethinking self-determination" (1993), p. 14, and pp. 40-41.
[137] See also James Crawford, "The Right of Self-Determination in International Law" (2001), p. 17.
[138] Some territories did not become independent States. Netherlands New Guinea, Hong Kong, the Cameroons, Togoland, Alaska and Hawaii all joined another State. There are still 16 non-self-governing territories, most of which are islands in the Atlantic, Pacific and Indian Oceans, and the Caribbean Sea.
[139] See *e.g.*, Progress achieved in Non-Self-Governing Territories, General Assembly resolution 1535 (XV), adopted 15 December 1960.
[140] Clyde Eagleton, "Excesses of Self-Determination" (1953), pp. 601-602.

This quest for independence cannot be based on the chapters in the UN Charter discussed up to now. There is another version of the story, not based on the three chapters on trust and non-self-governing territories in the UN Charter, but rather on the value of self-determination of peoples. This story is the subject of the remainder of this chapter.

4 THE RIGHT OF PEOPLES TO SELF-DETERMINATION

4.1 Introduction

Article 1(2) of the UN Charter lists as one of the purposes of the United Nations:

> To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.

Respect for the principle of self-determination of peoples was seen in the UN Charter as a basis for the development of friendly relations among nations. Thus it was not seen as a purpose on its own.

However, as Cassese noted, "in the decades immediately following the Second World War, the principle [of self-determination] embedded in article 1(2) of the United Nations Charter evolved in a manner which those who drafted it could not have foreseen."[141] Most importantly, the value of self-determination became detached from the goal of developing friendly relations among nations, so that "self-determination has become an independent and absolute value."[142]

This process, which was led by the Assembly, started very early on.[143] After detaching self-determination of peoples from the purpose of developing friendly relations among States, the Assembly turned the principle of self-determination into a revolutionary principle, in exactly the same way as the principle of the universal protection of human rights. The principle of self-determination became a legal instrument, not to develop friendly relations among States, but to support the liberation struggles of the colonial peoples and other oppressed groups of people. This revolution often jeopardized, rather than "developed," the friendly relations among nations, as the Belgian delegate had already foreseen in San Francisco. [144]

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[141] Antonio Cassese, *Self-determination of peoples: a legal reappraisal* (1995), p. 44. See also Rosalyn Higgins, *Problems and process* (1994), pp. 111-112.
[142] Antonio Cassese, "Political self-determination" (1979), p. 147.
[143] See *e.g.*, Recommendations concerning international respect for the right of peoples and nations to self-determination, General Assembly resolution 1188 (XII), adopted 11 December 1957.
[144] See section 2.2 of Chapter VII.

The first part of this section looks for a general definition of the word "people," as used in the value of self-determination of peoples. This is followed by an examination of the application of the principle of self-determination to three different types of "peoples": colonial peoples, the entire population of a State, and minority peoples within a State.

4.2 Definition of peoples entitled to self-determination

Initially, only colonial peoples were recognized as having a right to self-determination. As it was clear what was meant by colonial peoples, there was no need to look for a definition of "peoples". Very soon, the colonial powers started to complain about what they perceived to be an arbitrary application of a general legal principle to a select group of peoples. They believed that it was unfair that their administration of colonial peoples was subject to international supervision, while the administration by States of other distinct peoples was not. The UN Charter clearly distinguished colonial peoples from all other peoples by devoting three chapters to the former category, and not a word to the plight of peoples residing within the metropolitan areas of a State (minorities). This distinction was followed in practice, even though its justification was not always clear.[145] Belgium was particularly outspoken in its criticism.[146] It proposed what came to be known as the "Belgian thesis," according to which the Declaration on non-self-governing territories should be applicable to all non-self-governing peoples, including indigenous peoples and other minorities residing within a State.[147] This thesis was rejected by the majority of Member States.

As time progressed and the United Nations was "dredging the bottom of the colonial reservoir," the principle of the self-determination of peoples – though not the Charter's chapters on non-self-governing territories – was also applied beyond the colonial context.[148] The first time that a general provision on the self-determination of peoples was included in a legal instrument, after the adoption of the UN Charter, was in the 1950s, when the classic human rights covenants were drafted.[149] The Article on the self-determination of peoples reads as follows:

[145] See Article 74, UN Charter.
[146] Charmian Edwards Toussaint, *The trusteeship system of the United Nations* (1956), pp. 233-234.
[147] See Patrick Thornberry, "Self-determination, minorities, human rights" (1989), pp. 873-875.
[148] Elmer Plischke, "Self-Determination" (1977), p. 47.
[149] Admittedly, it took a long time (until 1976) before these covenants actually entered into force.

> All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.[150]

As Franck later pointed out, the *travaux* of this Article showed that even in the 1950s, "the majority [of delegates] utterly rejected the notion that the entitlement applied only to colonial 'peoples,' declaring, rather, that if included [in the human rights covenants], it must apply to peoples everywhere." [151] The universal application of the right to self-determination made the need for a general definition of peoples more urgent than ever, but the human rights covenants did not define "people" at all.

In the search for a general definition of "peoples," the suggestion that the term is applicable only to individuals with a common religion, language, culture and/or ethnic origin must be rejected. Such a definition gives the impression that only homogeneous groups are entitled to self-determination. States do not have homogeneous populations consisting solely of individuals of the same ethnic, linguistic, and religious group. If the word "people" is interpreted as referring to a group of individuals united by shared ethnic, linguistic and religious characteristics, the entire population of a State cannot be referred to as a people. As Chowdhury explained, there is not a single State comprised of a "people" in that sense. [152] It has never been the goal to establish States with homogeneous populations. If all people with a shared language, ethnic origin etc. were granted their own State, then State borders would have to be redrawn, and most States would fall apart into several new States.[153] Individuals with a mixed heritage would have to live in different States simultaneously. This would not only be a tremendous operation, but as Falk rightly pointed out, "nurturing the dream of statehood for the several thousand distinct peoples in the world will provide continual fuel for strife."[154]

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[150] Article 1 of the International Covenant on Civil and Political Rights, annexed to General Assembly resolution 2200A (XXI), adopted 16 December 1966, entry into force 23 March 1976); and Article 1 of the International Covenant on Economic, Social and Cultural Rights, annexed to the same General Assembly resolution, entry into force 3 January 1976.

[151] Thomas M. Franck, "The Emerging Right to Democratic Governance" (1992), p. 58. See also Alexandre Kiss, "The peoples' right to self-determination" (1986), p. 174.

[152] S.K. Roy Chowdhury, "The status and norms of self-determination in contemporary international law" (1977), pp. 75-76. See also Robert McCorquodale, "Self-determination: a human rights approach" (1994), p. 866.

[153] Buchanan referred to this idea that all "people" deserve their own State as the "Nationalist Principle." See Allen E. Buchanan, "The right to self-determination: analytical and moral foundations" (1991), p. 46.

[154] See also Richard A. Falk, "Self-determination under international law" (2002), p. 31. See also p. 36.

There is no reason whatsoever to adopt such a narrow definition of the concept of a "people."[155] Most importantly, contrary to what some philosophers believe, the General Assembly never adopted such a definition.[156] Moreover, there are good reasons for not defining "people" in this way. What makes the concept valuable is that it allows a certain group of individuals to complain *as a group* – and thus not as isolated individuals – against outside oppression aimed *at the group*.[157] In colonial times, the so-called "colonial peoples" did not constitute a homogenous group. Far from it. They often comprised individuals of different ethnic tribes with a wide variety of religious beliefs. What united them, and what made them a "people," was the fact that they were oppressed by a colonial power. Or, to use the words of the Declaration on the Granting of Independence to Colonial Countries and Peoples, they were united by being subjected to alien subjugation, domination and exploitation.[158] The same applies for the entire population of a State – and for minority groups – who are oppressed by their own government. Therefore it is the oppression that alienates the oppressed from the oppressor. If the term "people" is interpreted in this way, *i.e.* as defining a group of individuals united in their struggle against outside oppression, the concept of "people" can be applied to colonial peoples, the entire population of a State, and minority peoples.[159]

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[155] Efforts were also made to define "people" in less substantive terms. For example, Cristescu suggested that a "people" could be identified with the help of the following elements: "the term 'people' denotes a social entity possessing a clear identity and its own characteristics," and "it implies a relationship with a territory, even if the people in question has been wrongfully expelled from it and artificially replaced by another population." Cristescu, Special Rapporteur of the UN 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*, a study published in 1981, UNDoc. E/CN.4/Sub.2/404/Rev. 1, para. 279. Cristescu added a third element, which was that "a people should not be confused with ethnic, religious or linguistic minorities, whose existence and rights are recognized in article 27 of the International Covenant on Civil and Political Rights." Some scholars, most notably Higgins, do believe that the issue of minority rights can be dealt with exclusively through Article 27, and that they should thus not be regarded as a "people." See Rosalyn Higgins, *Problems and process* (1994), pp. 124-125.

[156] Allen E. Buchanan, "Toward a Theory of Secession" (1991), pp. 328-329. Buchanan believed that using self-determination of peoples as basis for secession meant dividing the world into peoples, defined in the narrow terms just rejected.

[157] This comes very close to the argument made in Daniel Philpott, "In Defense of Self-Determination" (1995), pp. 364-366. He suggested that a group more or less identifies itself as such, when it starts to make claims and rebels against what it considers to be an oppressive "foreign" domination. However, Philpott did not believe some form of oppression was required to justify any claim to secession or statehood (see especially pp. 366-369). See also Margaret Moore, "On National Self-Determination" (1997), pp. 905-907.

[158] See section 4.3 of Chapter VII.

[159] See also Robert McCorquodale, "Self-determination beyond the colonial context and its potential impact on Africa" (1992).

4.3 The self-determination of colonial peoples

Initially the right to self-determination of peoples was used as a "convenient weapon against colonialism."[160] It was applied mainly with regard to the colonial peoples struggling for liberation. The fundamental questions relating to the self-determination of peoples – who? what? how? – all had relatively straightforward answers. According to the "colonial version" of the principle of self-determination, "the populations of colonies, within their existing frontiers, should receive full independence at the earliest opportunity and the metropolitan powers had the duty to carry this out."[161] Although each of these answers to the who?, what? and how? questions is a matter of debate, the process of decolonization did take place along these lines.

In 1952, the Assembly recommended that all States should "recognize and promote the realization of the right of self-determination of the peoples of Non-Self-Governing and Trust Territories."[162] Thus it linked the value of the self-determination of peoples to the Charter's chapters on trusteeship and on the non-self-governing territories. The Charter itself did not make this link.[163] With a single resolution, the Assembly changed the objective of "advancement" into that of "self-determination," overruling the tortuous compromise reached after the difficult discussions in San Francisco.[164] Furthermore, the States responsible for the administration of the non-self-governing territories were required to report on the "extent to which the right of peoples and nations to self-determination [was] exercised by the peoples of those Territories."[165] This reporting duty was based on Article 73(e) of the UN Charter, but there was nothing in that article about self-determination. According to the article on the right to self-determination contained in both classic human rights covenants: "The States […] having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations."[166] The end of the sentence suggests that the obligation to promote the self-determination of the

[160] Satpal Kaur, "Self-determination in international law" (1970), p. 482.
[161] Sally Healy, "The principle of self-determination still alive and well" (1981), p. 17.
[162] The right of peoples and nations to self-determination, General Assembly resolution 637(VII), adopted 16 December 1952, Section A.
[163] The UN's role in the transformation of the non-self-governing territories into sovereign States, and the UN's role in promoting the right to self-determination of colonial peoples, are discussed separately in this study only to improve the clarity of the examinations.
[164] See section 2.1 of Chapter VII, above.
[165] The right of peoples and nations to self-determination, General Assembly resolution 637(VII), adopted 16 December 1952, Section B.
[166] Article 1(3), International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights.

dependent territories was based on the UN Charter. However, the UN Charter did not oblige these States to promote self-determination, and the Assembly and the human rights covenants had therefore considerably changed the colonial powers' obligations.[167]

To remove all possible doubts, the Assembly adopted the most important resolution on decolonization a few years later. This was the Declaration on the Granting of Independence to Colonial Countries and Peoples.[168] Nirmal referred to it as "a milestone in the crusade against colonialism."[169] Whether or not "crusade" is a particularly fortunate choice of words, one must surely agree with Nirmal that this resolution marked the "acceptance of self-determination as an appropriate idiom for the process of decolonization."[170] It clearly and definitively replaced the more carefully phrased objectives regarding the non-self-governing territories in the UN Charter with the objective of self-determination. The Assembly, recognizing the "passionate yearning for freedom in all dependent peoples," declared that "all peoples ha[d] the right to self-determination [and that] by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[171]

The principal idea of the Declaration on the Granting of Independence to Colonial Countries and Peoples was that the colonized peoples were entitled to their own sovereign State. Hannum stated that the thrust of the resolution could be summarized in just one sentence: "All colonial territories have the right of independence."[172] The Assembly urged that immediate steps be taken for all "territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom."[173]

Many resolutions have been adopted since to monitor and encourage the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples. These resolutions were particularly addressed to the most

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[167] See also Antonio Cassese, *Self-determination of peoples: a legal reappraisal* (1995), p. 58.

[168] Declaration on the Granting of Independence to Colonial Countries and Peoples, General Assembly resolution 1514 (XV), adopted 14 December 1960 ("Declaration on the Granting of Independence to Colonial Countries and Peoples"). One year later, the Assembly established a Special Committee on Decolonization to oversee the implementation of the declaration. See The Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, General Assembly resolution 1654 (XVI), adopted 27 November 1961.

[169] B. C. Nirmal, *The right to self-determination in international law* (1999), p. 42.

[170] Sally Healy, "The principle of self-determination still alive and well" (1981), p. 17.

[171] Declaration on the Granting of Independence to Colonial Countries and Peoples, para. 2. This formulation was an exact copy of Article 1 of the two human rights covenants, an article which was drafted already in 1955, but which took a long time to enter into force.

[172] Hurst Hannum, "Rethinking self-determination" (1993), p. 12.

[173] Declaration on the Granting of Independence to Colonial Countries and Peoples, para. 5.

persistent colonizers. In the beginning, no specific countries were mentioned,[174] but later on, the Assembly named Portugal and South Africa as "colonial Powers" that "refuse[d] to recognize the right of colonial peoples to independence."[175]

The means available to colonial peoples to fight for their independence was a particularly problematic issue. In 1965, the Assembly "recognize[d] the legitimacy of the struggle by the peoples under colonial rule to exercise their right to self-determination and independence and invite[d] all States to provide material and moral assistance to the national liberation movements in colonial Territories."[176] These "national liberation movements" were later also referred to as "freedom fighters,"[177] or "fighters for freedom and self-determination."[178]

This issue of the legality of (armed) resistance to colonialism was revisited when the Friendly Relations Declaration was being drafted.[179] During the second session of the drafting committee, more delegates from developing nations were invited to participate.[180] The result was immediately apparent.[181] It was suggested that the Charter prohibited the use of force in international relations, that the relationship between a colonial power and the colonial territories was such an "international relation," and that therefore the use of force by colonial powers against their colonial peoples was prohibited under Article 2(4) UN Charter.[182] Others suggested that Article 2(4) was strictly about the use of force between sovereign States, and that it therefore said nothing about the relationship between colonial powers and their colonial territories.[183]

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[174] See *e.g.*, The Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, General Assembly resolution 1810 (XVII), adopted 17 December 1962, para. 5.

[175] Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, General Assembly resolution 2105 (XX), adopted 20 December 1965.

[176] *Idem*, para. 10. One year later, the Assembly went as far as to "declare[..] that the continuation of colonial rule threaten[ed] international peace and security." See Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, General Assembly resolution 2189 (XXI), adopted 13 December 1966, para. 6.

[177] Programme of action for the full implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, General Assembly resolution 2621 (XXV), adopted 12 October 1970, para. 6(a).

[178] Basic Principles of the Legal Status of the Combatants Struggling Against Colonial and Alien Domination and Racist Regimes, General Assembly resolution 3103 (XXVIII), adopted 12 December 1973.

[179] See section 5.5 of Chapter III.

[180] Consideration of principles of international law concerning friendly relations and co-operation among states in accordance with the Charter of the United Nations, General Assembly resolution 2103 (XX), adopted 20 December 1965.

[181] See also Bert V.A. Röling, "International Law and the Maintenance of Peace" (1973).

[182] Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, Report, A/6230, adopted 27 June 1966 ("Second Report"), para. 113.

[183] Special Committee, Second Report, paras. 114.

It was also suggested that under Article 51 UN Charter, colonial peoples had a right to defend themselves against colonial oppression by using armed force.[184] Opponents of this interpretation of the Charter suggested that Article 51 only recognized the inherent right of States to defend themselves, and that colonial peoples did not have their own State.[185] During the third session of the drafting committee, the right of self-defence for colonial peoples against colonial domination was once again proclaimed – and denied – by various States represented in the Committee.[186] During the fourth session, the right of colonial peoples to use armed force to defend themselves against colonial domination was referred to as a "sacred right." At the same time, it was suggested that if such an exception to the prohibition on the use of force were accepted, any rebel group could call itself a "liberation group" and refer to the opponent as a "neo-colonialist" power, in this way legalizing its use of force.[187] At the end of the discussions of the drafting committee's fifth session, the only serious disagreement that remained, and the only reason that no final text could be adopted, was the suggested right of colonial peoples to use armed force to defend themselves against colonial domination.[188] According to many representatives, such a right was inconsistent with the UN Charter, which gave only States a right to self-defence, and in any case no system of law could possibly establish a legal right of revolution, whatever the cause of such revolution. The same was said of minorities within a State. It was suggested that if grave discrimination occurred against any ethnic minority inside an independent State, that minority would have the right to rebel, but that it would be a purely domestic matter.[189]

In the end, no exception for colonial liberation struggles was inserted in the provision on the prohibition on the use of force finally adopted by the Committee.[190] What was included was the duty of every State to refrain from any use of force which deprived peoples of their right to self-determination. This duty was reiterated under the heading of self-determination, and followed by a paragraph stating that, in their actions to resist such armed actions, these peoples were entitled

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[184] Special Committee, Second Report, paras. 136-147. See also Vekateshwara Subramanian Mani, *Basic principles of modern international law* (1993), pp. 40-48.

[185] Special Committee, Second Report, paras. 151. Sohn had a big influence on the text of Article 51, as he himself later claimed. See Louis B. Sohn, "The issue of self-defense and the UN Charter" (1995).

[186] Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, Report, A/6799 ("Third Report"), paras. 100-106.

[187] Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, Report, A/7326, adopted 30 September 1968 ("Fourth Report"), paras. 102-110.

[188] Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, Report, A/7619, adopted 19 September 1969 ("Fifth Report"), p. 40.

[189] Special Committee, Fifth Report, paras. 111-116, and paras. 166-168, and 177 (on self-determination).

[190] See also Gaetano Arangio-Ruiz, "The normative role of the General Assembly" (1972), p. 569.

to receive foreign support.[191] This does sound like an internationally recognized right of colonial peoples to self-defence.

A few years later, the Assembly proclaimed certain basic principles determining the legal status of "freedom fighters" fighting for liberation from colonial powers. The most important of these principles was that "the struggle of peoples under colonial and alien domination and racist regimes for the implementation of their right to self-determination and independence [was] legitimate and in full accordance with the principles of international law."[192] The Assembly also proclaimed, *inter alia*, that "the armed conflicts involving the struggle of peoples against colonial and alien domination and racist regimes [were] to be regarded as international armed conflicts."

As time passed, many colonies became independent, with or without the use of armed force. On the twenty-fifth anniversary of the Declaration on the Granting of Independence to Colonial Countries and Peoples, the Assembly was pleased to note that in the past twenty-five years, approximately one hundred States had emerged into "sovereign existence," and that "the process of national liberation [was thus] irresistible and irreversible."[193]

In 1990, all that was required was to "remove the last vestiges of colonialism in all regions of the world." [194] Apart from the thorny issue of the Western Sahara and East-Timor, the only colonies left in the world were some small islands. Referring to those remaining colonies, the Assembly "declare[d] that exercise of the right to self-determination should be carried out freely and without outside pressure, in a form reflecting authentic interests and aspirations of the peoples."[195] Options other than independence were available to these islands. These other options (integration or association with an existing State) particularly appealed to them, as many were too small to function as an independent State.[196]

In 2010, The Assembly celebrated the fiftieth anniversary of the Declaration on the Granting of Independence to Colonial Countries and Peoples. It

[191] Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, Report, A/8018, adopted 1 May 1970 ("Sixth Report"), p. 43.
[192] Basic Principles of the Legal Status of the Combatants Struggling Against Colonial and Alien Domination and Racist Regimes, General Assembly resolution 3103 (XXVIII), adopted 12 December 1973, Principle 1.
[193] Twenty-fifth anniversary of the Declaration on the Granting of Independence to Colonial Countries and Peoples, General Assembly resolution 40/56, adopted 2 December 1985.
[194] Thirtieth anniversary of the Declaration on the Granting of Independence to Colonial Countries and Peoples, General Assembly resolution 45/33, adopted 20 November 1990, para. 3.
[195] International Decade for the Eradication of Colonialism, General Assembly resolution 46/181, adopted 19 December 1991, para. 3.
[196] In 2010, the General Assembly was "deeply concerned about the fact that, fifty years after the adoption of the Declaration, colonialism has not yet been totally eradicated." The mission was thus not yet completed. See Fiftieth anniversary of the Declaration on the Granting of Independence to Colonial Countries, General Assembly resolution 65/118, adopted 10 December 2010.

"recogniz[ed] the significant and commendable role played by the United Nations, since its very inception, in the field of decolonization, and not[ed] the emergence, during this period, of more than one hundred States into sovereign existence."[197]

4.4 The self-determination of entire populations of an independent State

Cassese pointed out that the word "peoples," as used in Article 1 of the human rights covenants, also applied to "entire populations living in independent and sovereign States."[198] Initially not much attention was devoted to this application, as there was a lack of political urgency.[199] The application was simply assumed.[200] Whenever the meaning of the word "people" was discussed, the dominant question was always whether it referred solely to colonial peoples – a suggestion explicitly denied in the legal instruments referred to above[201] – or whether it also applied to minority groups within a State. Other applications, such as the application to the entire population of a State, were not extensively discussed.

An exception to this general rule is the Friendly Relations Declaration, adopted in 1970. In that Declaration there is one notorious paragraph about the right to self-determination of the entire population of a State:

> Nothing in the foregoing paragraphs [on the self-determination of peoples should] be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.[202]

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[197] Fiftieth anniversary of the Declaration on the Granting of Independence to Colonial Countries and Peoples, General Assembly resolution 65/118, adopted 10 December 2010.

[198] Antonio Cassese, *Self-determination of peoples: a legal reappraisal* (1995), pp. 59-62. Cassese explicitly rejects this view. According to Higgins, the entire population of a State was the only group, besides colonial peoples, to which the label "people" was applicable. See Rosalyn Higgins, *Problems and process* (1994), p. 124.

[199] During the drafting of the human rights covenants, this type of self-determination did not get much attention. The few references to the right to self-determination of "majorities" as oppsed to "minorities" might point in the direction of a right to self-determination of the entire peoples. However, it is not quite the same. See, *e.g.*, Greece's remark at General Assembly's Third Committee, 647th Meeting, 28 October 1955, UNDoc. A/C.3/SR.647, or the remark at Special Committee, Third Report, para. 194.

[200] This only changed when it was "discovered" that the right to self-determination of peoples could actually be used against the government of a State. This will be discussed in the next section.

[201] For the Friendly Relations Declaration, see also C. Don Johnson, "Toward self-determination" (1973), p. 152.

[202] Friendly Relations Declaration.

This clause was reiterated in some of the most important declarations, in particular the Vienna Declaration and Programme of Action (1993), [203] and the Declaration on the Occasion of the Fiftieth Anniversary of the United Nations (1995).[204] In both these documents the phrase "without distinction as to race, creed or colour" was replaced by "without distinction of any kind," to emphasize that the list of prohibited distinctions in the Friendly Relations Declaration was not exhaustive.[205]

Although it reads like a savings clause, it is in reality much more than that.[206] It described the essence of the right to self-determination as being applicable to the entire population of a State. Rosenstock, who played a principal part in the drafting of the clause, considered that "a close examination of its text [would] reward the reader with an affirmation of the applicability of the principle [of self-determination] to peoples within existing states and the necessity for governments to represent the governed."[207] The clause suggests that respect for the right to self-determination of the entire population of a State requires that the entire population is represented in some way by the government of that State. According to Higgins, the right should be interpreted as requiring that "a free choice be afforded to the peoples, on a continuing basis, as to their system of government, in order that they [could] determine their economic, social, and cultural development."[208] It was the right of the entire population to control its own destiny.

This interpretation of the principle of self-determination would be consistent with that of the drafters of the UN Charter. In 1945 it had already been agreed that "an essential element of the principle in question [was] a free and genuine expression of the will of the people, which avoid[ed] cases of the alleged expression of the popular will, such as those used for their own ends by Germany

[203] Vienna Declaration and Programme of Action, para. 2.

[204] Declaration on the Occasion of the Fiftieth Anniversary of the United Nations, General Assembly resolution 50/6, adopted 24 October 1995, para. 1.

[205] See also James Crawford, "The Right of Self-Determination in International Law" (2001), p. 56. Antonio Cassese, *Self-determination of peoples: a legal reappraisal* (1995), pp. 112-118, believed that the list of prohibited distinctions in the Friendly Relations Declaration was exhaustive. He basically suggested that only religious and racial (minority) groups were protected by the savings clause.

[206] See also Antonio Cassese, *Self-determination of peoples: a legal reappraisal* (1995), pp. 108-125, who focuses almost entirely on this "savings clause" in his discussion of internal self-determination.

[207] Robert Rosenstock, "The Declaration of Principles of International Law Concerning Friendly Relations" (1971), p. 732.

[208] Rosalyn Higgins, *Problems and process* (1994), pp. 119-120. Thornberry simply defined self-determination as "the right of all peoples to govern themselves." Patrick Thornberry, "The principle of self-determination" (1994), p. 175. Plischke defined it as "the continuing exercise of free choice by peoples respecting their own political destiny." Elmer Plischke, "Self-Determination" (1977), p. 46. Similarly, Brownlie believed that the "core [of the principle of self-determination of peoples] consists in the right of a community which has a distinct character to have this character reflected in the institutions of government under which it lives." Ian Brownlie, "The Rights of Peoples in Modern International Law" (1988), p. 5.

and Italy in later years."[209] Any dictatorial government, comparable to the German and Italian governments during the Second World War, constituted a violation of the right to self-determination of the oppressed peoples. The principle basically called for some form of "representative government" in which "all the elements of the population of the territory [were] represented in the appropriate – representative – institutions."[210]

The link between the right to self-determination of peoples and representative government has often been reiterated in the literature, especially by liberal lawyers and philosophers. Franck, one of the most influential lawyers in the former category, was one of the first to argue for an "emerging right to democratic government," largely based on the right to self-determination.[211] According to Franck, self-determination could be seen as the "historic root from which the democratic entitlement grew."[212] This view was also supported by liberal philosophers, who argued that participation in a democratic community came closest to the liberal ideal, a world where all individuals live in the society in which they choose to live.[213]

A distinction is made between self-determination as applied to the relationship between peoples and their "own" rulers, and the relationship between peoples and oppressive forces "from outside." The former is referred to as "internal" and the latter as "external" self-determination.[214] Thornberry described this distinction most succinctly, when he referred to external self-determination as "casting off alien rule," and internal self-determination as "putting forward the people as the ultimate authority within the State."[215] The problem with this distinction is that it is highly artificial. What is a question of "internal" self-determination from the point of view of the oppressing government is often a matter

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[209] Report of Rapporteur of Committee 1 to Commission I, June 13, 1945, UNCIO, vol. 6, p. 455. See also Antonio Cassese, "Political self-determination" (1979), pp. 138-139, who has a slightly different interpretation of the UNCIO statement.

[210] See also Gaetano Arangio-Ruiz, "The normative role of the General Assembly" (1972), p. 570. In Hurst Hannum, "Rethinking self-determination" (1993), p. 17, it is pointed out that "representative government" is not a synonym of "democracy."

[211] Thomas M. Franck, "The Emerging Right to Democratic Governance" (1992), especially pp. 52-56.

[212] *Idem*, p. 52. Other scholars later agreed that self-determination, if applied to the entire population of a State, essentially came down to a claim for "democratic government." See Antonio Cassese, "The International Court of Justice and the right of peoples to self-determination" (1996), p. 352, who simply equated "internal self-determination" with "democratic government."

[213] Harry Beran, "A liberal theory of secession" (1984), pp. 24-25.

[214] Cassese is generally credited for having "invented" this distinction. See Antonio Cassese, "Political self-determination" (1979), p. 137. See also Rosalyn Higgins, *Problems and process* (1994), p. 117; Allan Rosas, "Internal self-determination" (1993), especially p. 232; Alexandre Kiss, "The peoples' right to self-determination" (1986), pp. 170-171; Frank Przetacznik, "The basic collective human right to self-determination of peoples and nations as a prerequisite for peace" (1990), pp. 54-55; Robert McCorquodale, "Self-determination: a human rights approach" (1994), pp. 863-864.

[215] Patrick Thornberry, "Self-determination, minorities, human rights" (1989), p. 869.

of "external" self-determination from the point of view of the oppressed peoples themselves.[216] This applies particularly to oppressed minority groups, who consider what might officially be their "own" government to be an oppressor "from outside."

It is not clear what the implications are of an entitlement to representative government. Does it mean that other States or the international community as a whole can interfere in the domestic affairs of a non-democratic State to assist the entire population of that State in securing its right to self-determination? The most obvious way to do so would be to remove the non-representative government from power and replace it with a democratically elected government. However, the principle of sovereign independence, itself also based on the value of the self-determination of peoples, prevents such action.[217] Only when the right to democratic governance, as based on self-determination, prevails over the principle of sovereign independence, can such interference be justified.[218]

4.5 The self-determination of minority peoples

The term "people" is not restricted to the entire population of a State or to colonial territories.[219] As Moore remarked, to grant a right to self-determination only to those categories would be "inconsistent and ethically problematic."[220] Indigenous peoples and other minority peoples also have a right to self-determination.

The term "minority peoples" is used to refer to a particular kind of "peoples," *i.e.* a particular group of individuals entitled to self-determination as a group. Minority peoples are groups of individuals who constitute an identifiable minority within a particular State. It is not the meaning of the term "minority" that is a matter of concern here, but the meaning of the term "people."

Be that as it may, it is still useful to say a few words about minorities here, in order to explain what is meant by the term "minority people." A "minority" is sometimes defined simply in a mathematical sense. In that case it is a distinct group of individuals living in a society where they constitute a relatively small part of the

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[216] And thus Rosas was entirely correct when he remarked that "even in its 'external' dimension, self-determination cannot be completely detached from the idea of democracy." Allan Rosas, "Internal self-determination" (1993), especially p. 235.

[217] See section 5 of Chapter VII, below.

[218] See also Pieter Hendrik Kooijmans, "Tolerance, sovereignty and self-determination" (1996), p. 212; and Ved P. Nanda, "Self-determination and secession under international law" (2001), p. 310.

[219] This view was highly criticized in Clyde Eagleton, "Excesses of Self-Determination" (1953). Eagleton point out that it is not easier to distinguish a colonial people than it is to distinguish a minority people. Most so-called "colonial peoples" were probably not homogenous groups at all. See also David Makinson, "Rights of peoples" (1988), p. 74.

[220] Margaret Moore, "On National Self-Determination" (1997)," p. 902. Moore actually believed this restricted view was the view of the UN. See also S. Prakash Sinha, "Has self-determination become a principle of international law today?" (1974), p. 347 and pp. 359-360.

general population.[221] A minority has also been defined in a more substantive sense. In that case the term refers to a group of people whose "ethnic, religious or linguistic traditions or characteristics […] differ from those of the rest of the population."[222] Individuals belonging to a minority as defined in that sense have been granted special protection and certain privileges. See Article 27 of the International Covenant on Civil and Political Rights,[223] and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.[224] This special protection has little to do with any right to the self-determination of the minority. It simply stresses that individuals in a minority group need special protection to safeguard their individual human rights, which are identical to the individual human rights of the majority.[225] Minorities are perceived as yet another particularly vulnerable group of people, who find it difficult to have their human rights recognized and adequately protected.[226] The reason why the substantive definition of a minority has been rejected in the context of self-determination was precisely because it "eliminate[ed] from the definition certain national groups which should be given special protection."[227] An overemphasis on ethnic, religious and linguistic traditions would also label certain groups as a

[221] In this sense, the term minority is used as a relational term; it simply means that there are less individuals of one group (minority) than there are of another group (majority). See also David Makinson, "Rights of peoples" (1988), p. 73.

[222] Definition proposed by the Sub-Commission on Prevention of Discrimination and Protection of Minorities, UNDoc. E/CN.4/Sub.2/149, para. 26, as cited at Capotorti, Study on the Rights of Persons belonging to ethnic, religious and linguistic minorities, UNDoc. E/CN.4/SUB.2/384/REV.1, p. 5. On pp. 1-12 of the Study, one finds an excellent overview of attempts to define "minority."

[223] Article 27 reads as follows: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language." On the relationship between Article 1 and 27, see Patrick Thornberry, "Self-determination, minorities, human rights" (1989), pp. 877-881.

[224] Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, annexed to General Assembly resolution 47/135, adopted 18 December 1992.

[225] See also Human Rights Committee, General Comment no. 23 on the rights of minorities (Art. 27), adopted 8 April 1994, UNDoc. CCPR/C/21/Rev.1/Add.5. There, the Committee noted that "this article establishes and recognizes a right which is conferred on individuals belonging to minority groups" (para. 1). The Committee explicitly separates this approach from the people's-approach of Article 1 (para. 3.1) These rights are therefore discussed in Chapter VI on human dignity. See also Rosalyn Higgins, *Problems and process* (1994), pp. 126-127; James Crawford, "The Right of Self-Determination in International Law" (2001), pp. 23-24, and Philip Alston, "Peoples' Rights: Their Rise and Fall" (2001), p. 274. Some authors are very convinced that minorities are generally excluded from the peoples with a right to self-determination. See *e.g.*, Jean Salmon, "internal aspects of the right to self-determination" (1993), especially p. 256.

[226] See section 6.4 of Chapter VI.

[227] Francesco Capotorti, Study on the Rights of Persons belonging to ethnic, religious and linguistic minorities, UNDoc. E/CN.4/SUB.2/384/REV.1, p. 6. See also James Crawford, "The Right of Self-Determination in International Law" (2001), pp. 64-65.

minority, though they should not be labelled as such. An example could be the Chinese living in Chinatown, New York.[228] Such minority groups are not entitled to autonomy or secession, but they are in need of special protection to guarantee their individual human rights.

In this chapter, the term "minority" does not refer to a group of people who are vulnerable to human rights violations because of their particular ethnic, religious or linguistic characteristics. Here, the term simply refers to a group of a relatively small number of individuals residing in a particular State. The way in which the minority can be distinguished from the majority differs in each case, and is left open. When considering whether such minority groups have the right to self-determination, the question is whether they can be considered as a "people." As Ryngaert and Griffioen pointed out, "minorities and peoples are not mutually exclusive terms;"[229] the one category ("people") does not by definition include the other ("minority").

The *travaux* of the common Article 1 in the human rights covenants provide an authoritative reflection of the views of various States on the question whether minorities could qualify as a "people." According to Venezuela the term "peoples" did not apply to "racial, religious, or other groups or minorities."[230] Greece suggested that the principle applied, not to minorities but only to "national majorities living in their own territory but unable freely to determine their political status."[231]

On the other hand, the delegate of the UK believed that "the concept of self-determination could not be whittled down to exclude minorities," because "its great force lay precisely in the fact that it was all embracing."[232] Thus it was necessary to carefully consider the consequences of granting minorities a right to self-determination.[233] Similarly the Soviet Union suggested that its own implementation of the right should be seen as exemplary. It recognized the right of all Soviet nations, as yet without statehood, to "free self-determination even to the extent of secession and the establishment of independent States."[234]

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[228] See also Frank Przetacznik, "The basic collective human right to self-determination of peoples and nations as a prerequisite for peace" (1990), p. 52.
[229] *Idem*, p. 578.
[230] General Assembly's Third Committee, 646th Meeting, 27 October 1955, UNDoc. A/C.3/SR.646.
[231] General Assembly's Third Committee, 647th Meeting, 28 October 1955, UNDoc. A/C.3/SR.647.
[232] General Assembly's Third Committee, 642nd Meeting, 24 October 1955, UNDoc. A/C.3/SR.642.
[233] General Assembly's Third Committee, 652nd Meeting, 4 November 1955, UNDoc. A/C.3/SR.652.
[234] General Assembly's Third Committee, 646th Meeting. However, some authors suggest that – at least in practice - the Soviet Union intended to apply the principle of self-determination exclusively to the colonies. See Antonio Cassese, "Political self-determination" (1979), p. 140; Frank Przetacznik, "The basic collective human right to self-determination of peoples and nations as a prerequisite for peace" (1990), p. 108; Robert McCorquodale, "Self-determination beyond the colonial context and its potential impact on Africa" (1992), pp. 596-599.

A literal reading of Article 1, as it was initially proposed, is consistent with the view that minority groups were not excluded from the definition of a "people." All the paragraphs of the initial draft of the Human Rights Commission applied to *all* peoples, not just colonial peoples. The provision read as follows:

> All States, including those having responsibility for the administration of Non-Self-Governing and Trust Territories and *those controlling in whatsoever manner the exercise of that right by another people*, shall promote the realization of that right in all their territories, and shall respect the maintenance of that right in other States, in conformity with the provisions of the United Nations Charter.[235]

This provision applied to all peoples, albeit with a special reference to the responsibilities of States responsible for colonial territories. It therefore obliged all States to promote the self-determination of any people within its territory.

To prevent such a universal application, the provision was redrafted to make it applicable only to colonial territories.[236] India defended the new discriminatory provision, stating that "the colonial problem was the most pressing," and that "the problems of other groups might be tackled later."[237] Iraq was more categorical. It believed that "the right of self-determination applied to a people under foreign domination, whether it could be defined as a nation or not, but not to a separatist movement within a sovereign State."[238] These two States were thinking of the treatment of their own minority groups. Many former colonies were faced with similar issues with regard to minorities within their State borders. As Thornberry remarked, such issues were largely concealed from international scrutiny in colonial times, but after decolonization, minorities in former colonies had good reason to fear that the "inter-ethnic solidarity in the face of a common alien oppressor may be ruptured and replaced by a more intimate, local and knowing oppression."[239] In general, it can be said that the Western States favoured the universal application of the right to self-determination, while "the new States

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[235] Emphasis added. Commission on Human Rights, Report of the Tenth Session, 23 February—16 April 1954, UNDoc. E/2573, p. 62.

[236] Although all peoples were granted a right to self-determination, the Working Party (a drafting commission) changed the paragraph on obligations (para. 2 in the initial proposal cited above and para. 3 in the Working Party's draft) in such a way that only States responsible for Trust Territories and Non-Self-Governing Territories had a responsibility to promote the realization of the right in territories under their jurisdiction. See UNDoc. A/C.3/L.489. As Belgium rightly pointed out, in this way the right and the obligation were inconsistent, the former being universal and the latter applicable only to colonial peoples. General Assembly's Third Committee, 669th Meeting, 23 November 1955, UNDoc. A/C.3/SR.669.

[237] General Assembly's Third Committee, 671st Meeting, 25 November 1955, UNDoc. A/C.3/SR.671. During the same meeting, Pakistan expressed an identical view.

[238] *Idem*.

[239] Patrick Thornberry, "Self-determination, minorities, human rights" (1989), p. 867.

which had won independence under the banner of self-determination were not at all prepared to concede this right to their own minorities."[240] The discriminatory redraft was soon "undone" at the request of Yugoslavia in particular, but with the approval of most States.[241] Thus the provision which was finally adopted once again fully applied to all peoples, including minority peoples.[242]

With the recognition of minorities as "peoples" entitled to self-determination, the consequences of this right also had to be discussed. Sweden immediately came to the point, when its delegate stated that "it was problematical […] whether every minority should be deemed to have the right to sever its connexion with the political entity to which it belonged."[243] The key problem was whether minority peoples had a right to secede and start their own State. According to China, this question had already been settled in San Francisco in 1945, when it was decided that "the principle [of self-determination] conformed to the purposes of the Charter only insofar as it implied the right of self-government of peoples and not the right of secession."[244] The Netherlands delegate believed that the provision as it was first drafted could be read to mean that "every group which regarded itself as a nation was entitled to form a State of its own, irrespective of whether it had previously been part of another State or had been ruled by another State."[245] This would also apply to minority peoples. Canada, whose population included various indigenous peoples and other minority peoples, believed that the preferences and interests of such minority peoples should not automatically prevail over those of the State as a whole. A balance had to be found, and the automatic right to secession of minority peoples lacked sufficient flexibility.[246] Australia, where there were also

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[240] Sally Healy, "The principle of self-determination still alive and well" (1981), p. 18. See also Jean-François Dobelle, "Article 1, paragraphe 2" (2005), p. 340.

[241] General Assembly's Third Committee, 669th Meeting. Yugoslavia submitted an amendment, to make the application universal once more: A/C.3/L.489. Many States supported the amendment. See Denmark, General Assembly's Third Committee, 669th Meeting; UK, Costa Rica, General Assembly's Third Committee, 670th Meeting, 24 November 1955, UNDoc. A/C.3/SR.670; Netherlands, Iraq, General Assembly's Third Committee, 671st Meeting.

[242] Unfortunately, India preferred to maintain its position that the right only applied to colonial peoples, and especially not to minority groups within a State. See the Declaration made by India at the time of its accession to the International Covenant on Economic, Social and Cultural Rights, on 10 April 1979, and the objection made by the Netherlands on 12 January 1981, both available at http://treaties.un.org. See also Allan Rosas, "internal self-determination" (1993), p. 242; Patrick Thornberry, "Self-determination, minorities, human rights" (1989), p. 879; Hurst Hannum, "Rethinking self-determination" (1993), pp. 25-26; See also James Crawford, "The Right of Self-Determination in International Law" (2001), pp. 28-29.

[243] General Assembly's Third Committee, 641st Meeting, 21 October 1955, UNDoc. A/C.3/SR.641.

[244] Sixth Meeting of Committee I/1, May 14, 1945, UNCIO, vol. 6, p. 296. See also Colombia, Saudi Arabia, General Assembly's Third Committee, 648th Meeting, 31 October 1955, UNDoc. A/C.3/SR.648. See also Antonio Cassese, *Self-determination of peoples: a legal reappraisal* (1995), p. 40.

[245] General Assembly's Third Committee, 642nd Meeting.

[246] General Assembly's Third Committee, 645th Meeting, 27 October 1955, UNDoc. A/C.3/SR.645.

various indigenous peoples, similarly believed that it would be unfortunate if the human rights covenants suggested that "any minority [was allowed] freely to determine its own status," rather than stating that "minorities should have equal rights with majorities within a State."[247]

Other States also believed that it would be enough if the rights and interests of minority peoples were sufficiently represented in government. For example, Greece stressed that the right to self-determination of peoples was a "corollary of the democratic principle of government with the consent of the governed."[248] If the question could be settled by allowing minority peoples meaningful participation in domestic politics, then the Netherlands foresaw a more practical problem. It believed that it was not always clear how a minority could express itself in domestic government, as there was often no official representative of minority groups. [249]

The debate on this topic was not definitively settled in the Committee. The text of the covenant is ambiguous – or silent – on exactly what "peoples," especially minority peoples, are entitled to. This is not surprising, considering that there was no generally agreed definition of either "people" or "minority" in the first place. Thus it may be concluded that the precise application of the right to self-determination is almost entirely dependent on the context.[250]

After 1955, when the drafting of the common Article 1 was finished, the Assembly adopted various other resolutions on a more general right of peoples to self-determination. The Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960 proclaimed the right to self-determination of colonial peoples, but said little about minorities.[251] One of the most important resolutions is the Friendly Relations Declaration adopted in 1970 at a time when the "substantial work of decolonization was already over."[252]

As the Friendly Relations Declaration is such an important resolution on the right to self-determination of minority peoples, it is worth looking in more detail at the *travaux préparatoires*. During the second session of the Special Committee responsible for drafting it, a number of newly independent States were invited to join the debate.[253] From that second session onwards, the Committee started to

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[247] General Assembly's Third Committee, 647th Meeting.

[248] *Idem*. See also Denmark, General Assembly's Third Committee, 644th Meeting, 26 October 1955, UNDoc. A/C.3/SR.644.

[249] General Assembly's Third Committee, 642nd Meeting. See also Belgium, in General Assembly's Third Committee, 643rd Meeting, 25 October 1955, UNDoc. A/C.3/SR.643. See also David Makinson, "Rights of peoples" (1988), pp. 77-78.

[250] Richard A. Falk, "Self-determination under international law" (2002), p. 47.

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

[252] B. C. Nirmal, *The right to self-determination in international law* (1999), p. 43. See also p. 152,

[253] Consideration of principles of international law concerning friendly relations and co-operation among states in accordance with the Charter of the United Nations, General Assembly resolution 2103 (XX), adopted 20 December 1965.

work on the principle of equal rights and the self-determination of peoples.[254] It was suggested that this principle, as proclaimed in Article 1(2) UN Charter, should apply both to States and to peoples, and possibly even to individuals,[255] but that it was currently most relevant in the colonial context.[256] According to this principle, peoples under colonial rule – and possibly also other peoples – had a right to independence, and a right to freely choose their political system.[257]

It is interesting to point out that it was once again the new States that suggested that the principle should apply, first and foremost, to colonial peoples. This caused Houben, the Dutch delegate at the Committee, to remark that it was "seriously distressing that the majority of the United Nations membership [was] so little interested in the universal application of the principle of self-determination," which he considered "a blatant example of the supremacy of narrow self-interest over the demands of world-wide justice." [258] This remark was not entirely inappropriate, since it was mainly the Western States that called for the universal application of the right to self-determination, and the "new" States that called for a "discriminatory" application.[259]

One of the main problems in defining the principle of self-determination, as acknowledged during the third session of the Special Committee, was to determine the beneficiaries of this right. It was suggested that all peoples had a right to self-determination, but others objected that this would motivate minority groups within States to claim "people" status and then to secede. Therefore it was suggested that the principle applied only to a majority within a generally accepted political unit.[260] According to India, the principle's application should be even more restricted. In the Indian delegate's view, it "was applicable only to peoples under alien subjugation or colonial rule, but not to parts of existing States."[261] This suggestion that the principle applied, as a special privilege, exclusively to colonial peoples, which India also brought forward when the human rights covenant was

[254] Special Committee, Second Report. As noted in Edward McWhinney, "The 'New' Countries and the 'New' International Law" (1966), p. 2, the influence of the small countries on the work of the Special Committee was already visible during the first session, but this influence only increased in subsequent sessions.
[255] The link with human rights was made from the very beginning. See Special Committee, Second Report, paras. 464 and 489.
[256] Special Committee, Second Report, paras. 464, 477-479.
[257] Special Committee, Second Report, paras. 480-481.
[258] Piet-Hein Houben, "Principles of International Law Concerning Friendly Relations and Co-Operation Among States" (1967), p. 724.
[259] No agreement was reached during this session of the Committee. Special Committee, Second Report, para. 519.
[260] Special Committee, Third Report, para. 194.
[261] Vekateshwara Subramanian Mani, *Basic principles of modern international law* (1993), p. 230.

drafted, was rejected.[262] Thus there was a general consensus that the right to self-determination was "a universal right of *all* peoples."[263]

The principle of self-determination was also discussed extensively during the Special Committee's fourth session. One of the first issues brought to the table was whether reference should be made to a right of all peoples to self-determination, or to a principle of self-determination which entailed certain duties for States.[264] This is a very important point, because if self-determination is considered as a principle, there is no immediate need to consider peoples as separate entities, with their own rights and duties in international law. As Rosenstock remarked in the Special Committee, there was a "split between those who accepted a right of self-determination of peoples and the duty of states to grant it, and those who argued that under international law only states could have rights or be the beneficiaries of rights."[265] One representative preferred the latter option, as it was still difficult to determine exactly who would have the right of self-determination, if this were to be proclaimed as a right.[266]

During the fifth session, many of the debates of the previous session continued. The idea that the principle applied to all peoples gained some ground.[267] It was suggested that the application of the principle to "multinational States" would strengthen rather than weaken this application, as "the right was the very foundation of a voluntary association among the peoples."[268] At the same time, some representatives suggested that granting each tribal, racial, ethnic and religious group a right to self-determination would carry the principle to an "absurd extreme."[269] Ethnic minorities subject to grave forms of discrimination had the right to rebel, but this was not considered an international issue.[270]

In the end, the Friendly Relations Declaration does not explicitly exclude or include minorities, or any other group, in its definition of "peoples." It merely stated that

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[262] Special Committee, Third Report, paras. 195-196, 198. See also Gaetano Arangio-Ruiz, "The normative role of the General Assembly" (1972), p. 565.
[263] Robert Rosenstock, "The Declaration of Principles of International Law Concerning Friendly Relations" (1971), p. 731.
[264] Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, Report, A/7326, adopted 30 September 1968 ("Fourth Report"), paras. 154-160.
[265] Robert Rosenstock, "The Declaration of Principles of International Law Concerning Friendly Relations" (1971), p. 730.
[266] Special Committee, Fourth Report, para. 157.
[267] Special Committee, Fifth Report, para. 156.
[268] *Idem*, para. 176.
[269] *Idem*, para. 157.
[270] *Idem*, para. 177.

> By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.[271]

The consequences of accepting the right to self-determination of minority peoples were also discussed. Some delegates believed that only by becoming a sovereign State could peoples be regarded as being able to successfully exercise this right. Others believed that what mattered was that peoples achieved some form of self-government through their own free choice. If they chose a free association with an existing State, or integration into an existing State, that would be just as acceptable as the choice to become an independent State.[272] What was important was that it was up to the peoples themselves. They always had the option of becoming an independent State.[273]

Those were the general rules. But did they also apply to minority peoples? The most thorny issue was the right to secession.[274] Secession essentially meant independence. The word ”secession” was never used in reference to the liberation, or road to independent statehood, of colonial peoples, but it quickly became the key word in the discussions about the rights of minority peoples. According to Emerson, this difference was easy to explain, as “the transition from colonial status to independence” [was] seen as “the ‘restoration’ of a rightful sovereignty of which the people ha[d] been illegitimately deprived by the colonial Power.”[275] The situation was entirely different with respect to minority peoples, or so it was suggested.[276]

It was believed that the principle of self-determination of all peoples should not be formulated in such a way that it entailed “the right of any group of disaffected people to break away at their pleasure from the State to which they presently belong[ed] and establish a new State closer to their hearts’ desire,” *i.e.*

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[271] Friendly Relations Declaration. However, when one looks at the description of the exact obligations that flow from the right to self-determination as so defined, there are good reasons to include minorities into the definition.

[272] Special Committee, Third Report, paras. 211-213. See also Vekateshwara Subramanian Mani, *Basic principles of modern international law* (1993), pp. 243-244.

[273] Christian Tomuschat, “Self-determination in a post-colonial world” (1993), p. 12.

[274] On secession, including this thorny issue, see also Marcelo G. Kohen (editor), *Secession: international law perspectives* (2006).

[275] Emerson, “Self-Determination” (1971), p. 465.

[276] Of course, one can object to this. Indigenous peoples (*e.g.*, Indians, Inuits), for example, must by definition be seen as the original owners of the land they live on, and the remainder of the population effectively occupied this land.

motivating all kinds of secessionist movements.[277] However, if minority peoples were not entitled to secession, what exactly were they entitled to? The right to self-determination was closely linked to the right of all individuals – including individuals of minority peoples – to have the chance of meaningful political influence. The right to self-determination called for a democratic form of government, or at least a government which "derive[d] its existence and powers from a certain minimum of consent of the peoples under its control."[278]

Some last minute discussions about the problem of secessionist movements took place during the sixth and final session of the Special Committee.[279] The question of secession was the most difficult unresolved question at that time. It was suggested that the right to secession of minority peoples was not a right under international law, but rather an issue to be regulated by domestic constitutional law. The international principle of non-intervention would ensure that a State could deal with the issue independently of other States. In response, it was suggested that all peoples – and not just colonial peoples – had a right to self-determination under international law. This meant that minority peoples were a separate entity in international law, precisely because they could be defined as a "people." In that case, the exercise of the right to self-determination by such a minority would by definition be an international issue, and not an issue of essentially domestic concern.[280]

In the end the Assembly solemnly proclaimed that "all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development."[281] This was a right to be promoted and respected by all States, and States owed this duty directly to all peoples.[282] Furthermore, the Assembly explained 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[d] modes of implementing the right of self-determination by that people."[283] The choice was up to the peoples themselves.[284] These modes of implementation were available to all peoples, not just colonial peoples.

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[277] Special Committee, Fourth Report, paras. 163-164. The description is taken from Satpal Kaur, "Self-determination in international law" (1970), p. 491. The author strongly rejected that secession could be based on the right to self-determination (see *idem*, p. 493).
[278] *Idem*, paras. 185-188. During the fifth session, the link between self-determination and democracy was once again acknowledged. The principle of self-determination was even referred to as "one of the fundamental elements of modern democracy." Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, Report, A/7619, adopted 19 September 1969 ("Fifth Report"), para. 147.
[279] Special Committee, Sixth Report.
[280] Special Committee, Fifth Report, pp. 52-53.
[281] Friendly Relations Declaration.
[282] See also Gaetano Arangio-Ruiz, "The normative role of the General Assembly" (1972), pp. 564-565.
[283] *Idem*.

There is good reason to suggest that the drafters did *not* intend to grant minority peoples a right to secede. The ”savings clause” in the Friendly Relations Declaration supports this conclusion. This clause suggests that as long as all individuals, including individuals that are in some way identifiable as a minority group, are represented by their own government in some way and are not suppressed by the majority, no issues following from the right to self-determination of peoples will arise.[285] In Crawford's words, peoples are not “non-self-governing” in a State with a representative government: since they are represented in government, they are self-governing.[286] This implies that minorities residing within a State do not, at least not in all circumstances, have the option of becoming a separate State.[287] The rule is that secession is prohibited, and any group wanting to secede therefore has to present arguments showing why its case is exceptional. The most important exceptional circumstance, as implied in the ”savings clause,” is political exclusion and oppression of the minority by the majority.

This issue came up recently in a case before the International Court of Justice.[288] In 2008, the General Assembly of the United Nations asked the International Court of Justice to give legal advice on the following question:

> Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?[289]

Although the question was not directly about Kosovo's claim to statehood, or about the right of the people of Kosovo to self-determination and secession from Serbia, this was clearly the underlying issue. The question then, was whether any claim to secession by Kosovo, and possibly international assistance to the people of Kosovo in enforcing that claim, would constitute a violation of Serbia's sovereign independence. If the general rules outlined above are followed, the people of

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[284] S.K. Roy Chowdhury, “The status and norms of self-determination in contemporary international law” (1977), p. 81.

[285] As is often pointed out, this might mean that a “pure” democracy is not good enough, since it might prevent certain small minorities from having their particular interests taken care of. See S.K. Roy Chowdhury, “The status and norms of self-determination in contemporary international law” (1977), pp. 77-78; Hurst Hannum, “Rethinking self-determination” (1993), pp. 60-61; James Crawford, “The Right of Self-Determination in International Law” (2001), p. 26, and p. 65; Harry Beran, “A liberal theory of secession” (1984), pp. 26-28.

[286] James Crawford, *The creation of states in international law* (2006), p. 127.

[287] See also Patrick Thornberry, “The democratic or internal aspect of self-determination” (1993), p. 116.

[288] Before this case, the Court never had to deal with self-determination outside the colonial context in any great detail. See also Antonio Cassese, “The International Court of Justice and the right of peoples to self-determination” (1996); James Crawford, “The Right of Self-Determination in International Law” (2001), p. 36.

[289] Request for an Advisory Opinion, transmitted to the International Court of Justice pursuant to General Assembly resolution 63/3, adopted 8 October 2008.

Kosovo are entitled to secession from Serbia only if Serbia makes it impossible for the people of Kosovo to participate in Serbian politics, and if the Kosovo people are otherwise isolated and discriminated against *as a people*.

In their pleadings, the Netherlands suggested this application of the principle of self-determination to the situation in Kosovo. The Netherlands distinguished two ”substantive conditions” for secession:

> A right to external self-determination [i.e. secession] only arises in the event of a serious breach of either [..] the obligation to respect and promote the right to self-determination due to the absence of a government representing the whole people belonging to the territory, or the denial of fundamental human rights to a people; or […] the obligation to refrain from any forcible action which deprives people of this right.[290]

There was also a procedural condition. According to the Netherlands, secession was only an option in the case that “all effective remedies [were] exhausted in the pursuit of a settlement.”[291] This meant that “all avenues must have been explored to secure the respect for and the promotion of the right to self-determination through available procedures, including bilateral negotiations, the assistance of third parties and, where agreed or accessible, recourse to domestic or indeed international courts and arbitral tribunals.”[292] This view, *i.e.* that secession is a “qualified right,” in the sense that it is available to minority groups only in exceptional circumstances as a measure of last resort, is generally shared in both the legal and philosophical literature.[293] The advisory opinion was issued by the International Court, but little was said about the extent of the rights of minorities to self-determination.[294]

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[290] Verbatim record of the public sitting held on Thursday 10 December 2009, at 10 a.m., at the Peace Palace, on the Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo, available at http://www.icj-cij.org, p. 9.
[291] *Idem*.
[292] *Idem*.
[293] See *e.g*., Dietrich Murswiek, “The issue of a right of secession – reconsidered” (1993), pp. 26-27; Patrick Thornberry, “The democratic or internal aspect of self-determination” (1993), p. 116; Cedric Ryngaert & Christine Griffioen, “The Relevance of the Right to Self-Determination in the Kosovo Matter” (2009), pp. 575-576, and p. 579; Allen E. Buchanan, “Toward a Theory of Secession” (1991), p. 342.
[294] The direct answer to the question actually posed by the Assembly was that international law had nothing to say about declarations made by individuals claiming to represent minorities residing within a particular State. See International Court of Justice, Accordance with Accordance with international law of the unilateral declaration of independence in respect of Kosovo, Advisory Opinion of 22 July 2010.

4.6 Arguments about various peoples' claims to self-determination

The States and the United Nations did not manage to define the term "people." They also failed to clearly define the content of any people's right to self-determination. The conceptual confusion resulting from this indecision inspired many scholars to endeavour to establish conceptual clarity.

According to Beran, Philpott and other liberal philosophers, all peoples had a *prima facie* right to secession. Such a right could be based directly on the liberal idea, that as far as possible, people were free to live in the society of their choice.[295] Any restrictions on this freedom had to be justified.[296] This was the case for both colonial and minority peoples.

For both lawyers and philosophers, it is unacceptable if one and the same principle is applied differently in identical situations. The principle of self-determination of peoples has to be applied "coherently."[297] It is necessary to explain why secession was the rule in the case of colonial peoples and other options were considered "suspect," while secession was the exception in the case of minority peoples.

One explanation is that the implementation of any people's right to self-determination must be balanced against the principle of the sovereign independence of the State, or as Buchanan put it, the right of the larger community to "preserve itself."[298] The effect on the State's sovereignty is more substantial if it is a metropolitan area that is at stake.[299] Another much more convincing argument is to see colonialism itself as a special circumstance. The argument is that the oppression of minority peoples generally does not reach the level of oppression used by

[295] Since personal choice and autonomy constituted the core of this argument, one possible argument to resist secession was the prevention of the emergence of a dictatorship. If the whole idea is that secession would benefit individual people's autonomy, and if secession would mean changing a democracy run by "foreigners" by a local dictatorship, this would not mean progress. See Allen E. Buchanan, "Toward a Theory of Secession" (1991), pp. 335-336; Daniel Philpott, "In Defense of Self-Determination" (1995), pp. 371-375.

[296] See Harry Beran, "A liberal theory of secession" (1984), especially pp. 30-31; Christopher H. Wellman, "A Defense of Secession and Political Self-Determination," (1995), especially p. 161; Daniel Philpott, "In Defense of Self-Determination" (1995). It must be pointed out that Philpott does not talk about secession, but about any actualization of self-determination. At the end of his article, he actually argues that "a presumption against secession should be adopted" and a "more benign form" of exercising one's right to self-determination must be found (*idem*, pp. 381-382), since secessionist movements lead to much bloodshed.

[297] See Martti Koskenniemi, "National Self-Determination Today" (1994), p. 242.

[298] Allen E. Buchanan, "Toward a Theory of Secession" (1991), pp. 332-335.

[299] See also James Crawford, "The Right of Self-Determination in International Law" (2001), p. 7; Cedric Ryngaert & Christine Griffioen, "The Relevance of the Right to Self-Determination in the Kosovo Matter" (2009), p. 575.

colonial powers to dominate colonial peoples.[300] It has to stop somewhere, otherwise all kinds of peoples, not treated entirely according to their own wishes, would be entitled to secede. In the end, this would lead to a situation in which "everyman's yard [is] his country."[301]

Some philosophers concluded from the above that a people's right to secession was *not* a *prima facie* right, but that it should be granted only in special circumstances.[302] The burden of proof was on the seceding people.[303] This should not be interpreted to mean that the existence of oppression alone *is* a justification for secession. The claim to self-determination is still based on the principle of autonomy, but taking other considerations into account, any claim to autonomy prevails over competing claims only in the case of oppression.[304] History actually reflects philosophy on this particular issue. Over the years, the actual desire for secession of minority peoples has not in general been based solely on claims for autonomy. In fact, as Higgins pointed out, "the desire of ethnic groups to break away [was] most noticeable when they [were] oppressed."[305]

International law has also adopted the latter view. Because the interests of the larger group (the State) and that of the international community have to be taken into account, secession can only be considered an option if the oppression reaches a certain level of gravity. This balancing act allows for the conclusion that it is only when the oppression of minority peoples approaches a level of gravity reminiscent of colonial times, that minority peoples have a right to secede. Minority peoples

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[300] Hurst Hannum, "Rethinking self-determination" (1993), pp. 41-49. Hannum did not believe there actually was a right to remedial secession, but discussed various reasons why there ought to be such a right.

[301] Allen E. Buchanan, "Toward a Theory of Secession" (1991), pp. 337-338.

[302] Based on the idea that the exercise of the right to self-determination by one people – Rawls did not really differentiate between States and peoples - might affect the enjoyment of that same right by another people, John Rawls in his *Law of Peoples* (1999), especially p. 38, presented the right to self-determination as a conditional right. It could only be exercised with respect for the rights of other peoples and individuals.

[303] Allen E. Buchanan, "Toward a Theory of Secession" (1991), pp. 337-338. The most important ground for secession was "discriminatory redistribution," *i.e.* the situation where a minority is discriminated against when it comes to the distribution of the State's goods. The other group of philosophers did not deny the importance of historic and present grievances and oppression, but believed those to be supporting arguments, not necessary arguments. See Daniel Philpott, "In Defense of Self-Determination" (1995), pp. 375-378.

[304] As was pointed out in Alan Patten, "Democratic Secession from a Multinational State" (2002), especially pp. 559-561, the outcome of both competing theories ("a right to secession with lots of exceptions" versus "a right to secession only in special circumstances") was generally identical. Still, he tried to find a third way. In his view, secession was allowed only "when the State has failed to introduce meaningful constitutional arrangements that recognize the distinct national identity of (some) members of the secessionist group" (p. 563).

[305] Rosalyn Higgins, *Problems and process* (1994), p. 124.

have a right to what Crawford termed "remedial secession," but only "in extreme cases of oppression."[306]

This is how the savings clause of the Friendly Relations Declaration has generally been interpreted.[307] Thus secession was implicitly authorized in the savings clause of the Friendly Relations Declaration, but only as an *ultimum remedium.* In Kooijmans' words, the right to secession was the "avenging angel for the persistent denial of the right of (internal) self-determination of a minority group."[308] However, the focus should be on meaningful participation. As Franck pointed out, if this was the correct interpretation of the right to self-determination, it "stopped being a principle of exclusion (secession) and became one of inclusion: the right to participate."[309] In the view of the Canadian delegate speaking in the Committee which drafted the Friendly Relations Declaration, this was the correct approach, as "there would […] be no danger that some might be misled in attempting to invoke the principle to justify the dislocation of a State within which various communities had been co-habiting successfully and peacefully for a considerable time."[310]

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[306] James Crawford, *The creation of states in international law* (2006), p. 119. In the literature, the legality/desirability of "remedial secession" has received more attention than any issue relating to self-determination. See *e.g.*, Patrick Thornberry, "Self-determination, minorities, human rights" (1989), p. 876; Allen E. Buchanan, "Toward a Theory of Secession" (1991), pp. 330-332 and p. 342; Cedric Ryngaert & Christine Griffioen, "The Relevance of the Right to Self-Determination in the Kosovo Matter" (2009), p. 575; Margaret Moore, "On National Self-Determination" (1997), p. 902; Robert McCorquodale, "Self-determination beyond the colonial context and its potential impact on Africa" (1992), pp. 603-604; Robert McCorquodale, "Self-determination: a human rights approach" (1994), pp. 862 and 880 and 883. In the latter article (especially on p. 883), it is suggested that the right to self-determination only applies in cases of oppression. This is incorrect, however. The idea, rather, is that it always applies to a "people," but that secession is only a consequence of its application in cases of serious oppression. Hurst Hannum, "The right of self-determination in the twenty-first century" (1998), pp. 776-777, believed that the oppression-exception to the prohibition to secede was lex ferenda.

[307] For the sake of convenience, the savings clause will be repeated here: "Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour." Friendly Relations Declaration.

[308] Pieter Hendrik Kooijmans, "Tolerance, sovereignty and self-determination" (1996), p. 215. See also Ved P. Nanda, "Self-determination and secession under international law" (2001), p. 314; Cedric Ryngaert & Christine Griffioen, "The Relevance of the Right to Self-Determination in the Kosovo Matter" (2009), p. 581. Not everybody agreed. See *e.g.*, Johan D. van der Vyver, "The Right to Self-Determination and its Enforcement" (2004), pp. 427-430.

[309] Thomas M. Franck, "The Emerging Right to Democratic Governance" (1992), p. 59.

[310] Special Committee, Sixth Report, para. 177. Later on, the Canadian Supreme Court explicitly accepted the right to remedial secession, but denied it to the people of Quebec. See James Crawford, *The creation of states in international law* (2006), pp. 119-120.

The most authoritative example of this balancing act can be found in a judgment of the Canadian Supreme Court. The case before the Court was about the legal entitlements of the Quebecois. Because many of the most influential scholars on the topic were involved in the case, the Canadian Court became, at least for a short while, a pseudo-International Court of Justice.[311] In its judgment, the Court stated that

> A right to secession only arises under the principle of self-determination of peoples at international law where "a people" is governed as part of a colonial empire; where "a people" is subject to alien subjugation, domination or exploitation; and possibly where "a people" is denied any meaningful exercise of its right to self-determination within the state of which it forms a part. In other circumstances, peoples are expected to achieve self-determination within the framework of their existing state. A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its internal arrangements, is entitled to maintain its territorial integrity under international law and to have that territorial integrity recognized by other states.[312]

For minority peoples the right to form their own State (to secede) is unavailable, as long as they find themselves in a State providing them sufficient means to be represented in the government of that State.

This general rule also applies to a particular kind of minority: indigenous peoples. According to the United Nations Declaration on the Rights of Indigenous Peoples, "indigenous peoples have the right to self-determination," and "by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[313] It may be concluded from this general language, reminiscent of Article 1 of the human rights covenants, that indigenous peoples are a "people." The Declaration does not grant them a right to secede. Instead, the Assembly proclaimed that "indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in

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[311] Abi-Saab, Franck, Pellet, Shaw, and Crawford all participated in some way. See James Crawford, "The Right of Self-Determination in International Law" (2001), footnote 105, on p. 47.

[312] Supreme Court of Canada, Reference re Secession of Quebec, judgment delivered 20 August 1998, para. 154. See also paras. 130 and 138. The judgment has been cited very frequently in the self-determination literature, since it is basically the only post-colonial self-determination judgment available. See in particular James Crawford, "The Right of Self-Determination in International Law" (2001), pp. 57-63. See also *e.g.*, Ved P. Nanda, "Self-determination and secession under international law" (2001), pp. 316-317; Cedric Ryngaert & Christine Griffioen, "The Relevance of the Right to Self-Determination in the Kosovo Matter" (2009), p. 582.

[313] Article 3, Declaration on the Rights of Indigenous Peoples**.** As Thornberry rightly pointed out, indigenous peoples are almost by definition minorities. See Patrick Thornberry, "Self-determination, minorities, human rights" (1989), p. 869.

matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions;"[314] and that "indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State."[315] Thus they have a right to participate in the government of the State in which they live, and to a certain degree of autonomy. But what if these rights and political privileges are not granted to them? What if indigenous peoples are gravely discriminated against, and what if they are completely barred from exercising any governmental functions?[316] The Declaration is silent on these matters. It was no accident that secession was not mentioned in the declaration as one of the options available to these peoples, but it is always difficult to interpret the meaning of silence.[317] Presumably, since indigenous peoples are minority peoples, the general rule also applies to them. Thus the extent of their rights as peoples depends only on the gravity of the oppression to which they are subjected by the majority.

4.7 Conclusion

Initially the principle of self-determination of peoples was used to dismantle the colonial empires. The United Nations has been very successful in convincing the colonial powers that their colonial possessions were immoral, in the sense that they violated the respect for the self-determination of the colonial peoples. The principle of self-determination of peoples therefore required that all colonial territories, whether they were trust territories or non-self-governing territories, had the right to complete independence. This is exactly what happened.

So far everything was relatively clear, calm, and uncontroversial. As Koskenniemi noted, it was during the period of decolonization that "we were able to contain [the principle's] potentially explosive nature by applying it principally to the relationships between old European empires and their overseas colonies."[318] With decolonization largely completed, the bomb burst. The consequences of the

[314] *Idem*, Article 4.
[315] *Idem*, Article 5.
[316] According to Margaret Moore, "An historical argument for indigenous self-determination" (2003), when answering these questions, past forms of injustice should also be taken into account, together with the present consequences of that past oppression (see especially p. 97). Although the past is very similar to that of the colonies, the present situation of many indigenous peoples is much better than the situation of the colonies when they all became independent States, and thus the indigenous peoples' claims may not be identical to those of the colonial peoples. See especially *idem*, p. 104. See also Allen E. Buchanan, "Toward a Theory of Secession" (1991), pp. 329-330.
[317] See Alfredsson, "The right of self-determination and indigenous peoples," who gives an overview of the debates on this matter (the article was published before the resolution was finally adopted). See also Christian Tomuschat, "Self-determination in a post-colonial world" (1993), p. 13.
[318] Martti Koskenniemi, "National Self-Determination Today" (1994), p. 241.

application of the principle of self-determination outside the colonial context, *i.e.* to *all* peoples, including the entire population of independent States and minority peoples within a State, was confusing and unclear, and there was a general lack of philosophical thinking about what "peoples" are. This lack of clarity led some scholars to extrapolate far-reaching consequences from the principle. Others argued that the principle did not even apply outside the colonial context.[319] It is hard to justify, in the language of international law, why one and the same principle should be applied in one way in the colonial situation and differently in all other situations. Therefore an attempt has been made to come up with a general theory and general criteria for the application of the principle to all peoples.

These were not that difficult to find. All claims based on self-determination have one thing in common: they are responses to oppression. As Falk rightly noted, "the whole history of the right of self-determination is, for better and worse, the story of adaptation to the evolving struggles of peoples variously situated to achieve effective control over their own destinies, especially in reaction to circumstances that are discriminatory and oppressive."[320] In this sense, there is nothing unique about the colonial form of oppression. Only the gravity of the oppression and the openness with which it was practised are unique.

A general rule was distilled on the basis of this history: if the oppression of a people reaches the level of oppression of "colonial times," or more in general, of flagrant and mass violations of human rights, the right to independence of such peoples should not be denied.[321] This rule, which can be referred to as the rule on remedial secession, can just as easily be applied to the oppression by local dictators as it can be applied to colonial rule.[322]

In post-colonial situations, independence was seen as an *ultimum remedium*. A preferable way for a State to respect the right to self-determination of its entire population, and that of minority peoples within it, was to grant them a right to meaningful political participation. This solution was unimaginable for the colonial peoples, but it is available in other situations. As long as this right was

[319] Cassese believed Article 1 of the human rights covenants only applied to "entire populations living in independent and sovereign States," "entire populations of territories that have yet to attain independence," and "populations living under foreign military occupation." Antonio Cassese, *Self-determination of peoples: a legal reappraisal* (1995), pp. 59-62.

[320] Richard A. Falk, "Self-determination under international law" (2002), p. 48.

[321] *Idem* (about indigenous peoples). Margaret Moore, "An historical argument for indigenous self-determination" (2003), pp. 90-91, also suggests that the mistreatment of indigenous peoples often reached the level of oppression in colonial times.

[322] See also James Crawford, *The creation of states in international law* (2006), p. 127. As Philpott phrased it, "just as self-governing people ought to be unchained from kings, nobles, churches, and ancient custom, self-determining peoples should be emancipated from outside control – imperial power, colonial authority, Communist domination." See Daniel Philpott, "In Defense of Self-Determination" (1995), pp. 352-353. International lawyers would probably say it the other way around, since the issue of secession started in colonial times.

granted, peoples had no right to secede. "Internal" self-determination comes first. "External" self-determination is only an option in extreme cases, when "internal" self-determination is frustrated.[323] In this sense, the self-determination of peoples was, in Hannum's words, "both a shield that protect[ed] a State (in most cases) from secession and a spear that pierce[d] the governmental veil of sovereignty behind which undemocratic or discriminatory regimes attempt[ed] to hide."[324]

The UN never took a clear position in the "peoples" debate. There is as yet no universal agreement about the application of the right to self-determination of peoples to *all* peoples. These uncertainties will not disappear in the near future. Nevertheless, the right to self-determination of peoples is now firmly established in international law, and the United Nations can congratulate itself for having played a crucial role in this.[325] It is often suggested that the principle should be recognized as having the status of *jus cogens*,[326] especially in relation to the struggle against the colonial domination of the 1960s.[327] This enthusiasm is in contrast with the lack of agreement about what the principle entails exactly, and what States should do to respect it. Another question is whether general rules and principles can be objectively applied. The United Nations quickly recognized the Republic of South Sudan, but has much more difficulty in reaching a common position on Kosovo or the Palestinian territories.[328]

[323] See also para. 138, Supreme Court of Canada, Reference re Secession of Quebec, judgment delivered 20 August 1998.
[324] Hurst Hannum, "Rethinking self-determination" (1993), p. 32.
[325] The International Court of Justice referred to the principle of self-determination of peoples as "one of the essential principles of contemporary international law." See Case Concerning East Timor (Portugal v. Australia), Judgment of 30 June 1995, para. 29, and the caselaw referred to there. See also International Court of Justice, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Terrirory, Advisory Opinion of 9 July 2004, para. 155.
[326] Afghanistan, UNDoc. A/Conf.39/5 (Vol. II), p. 288; Bulgaria, p. 298, Cyprus, p. 303, Czechoslovakia, p. 304, Pakistan, p. 312, Peru, p. 313, Poland, p. 315, Ukraine, p. 319, USSR, p. 321; USSR, p. 294 of UNDoc. A/Conf.39/11[A], Sierra Leone, p. 300, Ghana, p. 301, Cyprus, p. 306. See also Hector Gros Espiell, "Self-determination and jus cogens" (1979); Alexandre Kiss, "The peoples' right to self-determination" (1986), p. 174; McCorquodale, "Self-determination beyond the colonial context and its potential impact on Africa," p. 594 and literature referred to there in footnote 8.
[327] Byelorussian Soviet Socialist Republic, p. 307 of UNDoc. A/Conf.39/11[A]; Ukraine, p. 322. See also Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, as included in the Yearbook of the International Law Commission, 2001, vol. II, Part Two, p. 85.
[328] Admission of the Republic of South Sudan to membership in the United Nations, General Assembly resolution 65/308, adopted 14 July 2011, without vote.

5 THE RIGHT OF STATES TO SELF-DETERMINATION

5.1 Introduction

History shows that the principle of self-determination of peoples has been used essentially to liberate peoples from governments that oppress them. This has been the case for all colonial peoples. It is also the case for minorities ruled by majority governments. It is equally true for the entire population of a State dominated by a dictatorial regime. But the same value of self-determination of peoples can also be used as the basis for State sovereignty. It can provide the moral basis for all States' claims for protection against unwanted interference from *other* States.

Statehood is the most comprehensive realization of the self-determination of peoples. Most peoples, especially the colonial peoples, saw statehood as their ultimate aim. Becoming an independent State was the ultimate expression or consequence of a people's right to self-determination, autonomy and responsibility for its own future. This sovereign independence was not a given once it was successfully achieved. It had to be continuously defended. The value of self-determination of peoples continued to serve as the value inspiring the on-going struggle for the sovereign independence of all peoples.

The principles of sovereign independence and equality of States are considered here as ways to protect the self-determination of peoples, organized in the form of a State, from outside oppression and coercion. As Crawford pointed out, it is only because this theory does not always work in practice, *i.e.* because so many peoples are ruled by governments that exploit rather than represent them, that it was necessary to distinguish "peoples" and States.[329] In the ideal situation, the State and its peoples are essentially one and the same thing.[330] In that case at least, the principle of self-determination of peoples and the principle of sovereign independence are, as Kooijmans said, "two sides of the same coin."[331] There are many States in the world where the actual situation comes close to the ideal. In such cases, the international community's obligation to respect the right to self-determination of the State, and its obligation to respect the self-determination of the State's entire population, are essentially identical.

The sovereign equality and independence of States is seen by States themselves as one of the most valuable principles of international law. It is something to cherish and defend. When the international community of States drafted the Vienna Convention on the Law of Treaties, and included a definition of

[329] James Crawford, "The rights of peoples" (1988), p. 56. See also pp. 166-167. See further Pieter Hendrik Kooijmans, "Tolerance, sovereignty and self-determination" (1996), p. 217.
[330] Obivously, this is not a factual statement. It is always possible to distinguish a group of people from the abstract concept we call State. See also David Makinson, "Rights of peoples" (1988), p. 73.
[331] Pieter Hendrik Kooijmans, "Tolerance, sovereignty and self-determination" (1996), p. 217.

jus cogens in that Convention, two of the most popular examples of *jus cogens* norms were the sovereign equality of states[332] and the non-intervention principle.[333] Those States that most strongly supported the concept of *jus cogens*, and the underlying idea that certain norms aiming to protect certain fundamental common interests overruled other norms of international law, were also the States that most strongly supported respect for sovereign independence and the non-intervention principle, granting both the status of *jus cogens*.[334]

The popularity of the principles of sovereign independence and equality can be explained by saying that governments, especially those which oppress their own population, prefer to be left alone. This argument has nothing to do with morality, and it has nothing to do with values. However, if sovereignty is linked to self-determination, to the right of peoples to live in freedom and be considered as equal to other peoples, to develop their own political system and to exploit their own natural resources, it becomes something that *can* be morally defended.

Sovereignty is examined below not as a factual given or a necessary evil, but as a value-based concept, something worth defending in law and in scholarship.

5.2 The self-determination of peoples organized in a State

Some scholars have interpreted the references to self-determination in the UN Charter – Articles 1 and 55 – as essentially referring to the self-determination *of States*. At the same time, just as many scholars have rejected this view, arguing instead that it applies to peoples.[335] Because of its ambiguity, the text of the UN Charter cannot serve as conclusive evidence of either of these approaches.

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[332] Bulgaria, UNDoc. A/Conf.39/5 (Vol. II), p. 298; Cyprus, p. 301, Czechoslovakia, p. 304, Ethiopia, p. 306: "the inalienable right of States to live in independence and dignity", Ukraine, p. 319, USSR, p. 321; USSR, p. 294 of UNDoc. A/Conf.39/11[A], Ghana, p. 301, Cyprus, p. 306, Byelorussian Soviet Socialist Republic, p. 307, Italy, p. 311, Czechoslovakia, p. 318.

[333] Bulgaria, p. 298 of UNDoc. A/Conf.39/5 (Vol. II), Cyprus, p. 301, Czechoslovakia, p. 304, Peru, p. 313, Poland, p. 315, Ukraine, p. 319, USSR, p. 321; USSR, p. 294 of UNDoc. A/Conf.39/11[A]). Some states also mentioned the norm invalidating unequal or "leonine" treaties, where one party is the lion and the other the prey, or, in less metaphorical terms: where a powerful state, often the (former) colonizer, imposes a treaty on the powerless (the colonized). Algeria, p. 288 of UNDoc. A/Conf.39/5 (Vol. II); Byelorussian Soviet Socialist Republic, p. 299; Ukraine, p. 319; USSR, pp. 320-321; Cyprus, p. 306 of UNDoc. A/Conf.39/11[A]).; Finland objected to this example by remarking that the *jus cogens* article "started from the hypothesis that the partners had freely concluded the treaty but had violated some peremptory norm of jus cogens which harmed the interests of the international community, of a third State, or of individuals", p. 295.

[334] This was already pointed out by Virally in Michel Virally, "Réflexions sur le « jus cogens »" (1966), pp. 12-13.

[335] See Eyassu Gayim, *The principle of self-determination: a study of its historical and contemporary legal evolution* (1989), pp. 21-23. On pp. 23-26, he lists writers and primary sources suggesting the exact opposite, but this, as Gayim implicitly admits, cannot be based on a strict reading of the Charter's text or *travaux*. G. S. Swan, "Self-Determination and the United Nations Charter" (1982), p. 273, also

The *travaux préparatoires* of the UN Charter contain an interesting discussion about the differences between the terms "State," "nation," and "people," as used in the UN Charter.[336] According to the drafters, the word "State" was used "to indicate a definite political entity."[337] The word was compared with the word "nation," as follows:

> The word "nation" [was] used […] for the most part in a broad and non-political sense, *viz.,* "friendly relations among nations." In this non-political usage, "nation" would seem preferable to "State" since the word "nation" [was] broad and general enough to include colonies, mandates, protectorates, and quasi-states as well as states. It also ha[d] a poetical flavour that [was] lacking in the word "State."[338]

If this is the correct interpretation of the word "nation," it is a much broader term than "State."[339] This interpretation of the word "nation" comes close to that of a "people." As the UN is an organization of sovereign States and not peoples, the name "United Nations" is inappropriate. Moore's suggestion that to be precise the "United Nations Organization" should be renamed the "Assembly of Sovereign States"[340] deserves some sympathy.

After dealing with the terms "State" and "nation," the drafters turned to the word "people." This word was used in different ways. First of all, it was used "whenever the idea of 'all mankind' or 'all human beings' [was] to be emphasized," as it was, for example, in the Preamble.[341] What is more interesting is the use of the term in relation to self-determination. According to the drafters, "the phrase 'self-determination of peoples' [was] in such common usage that no other word seem[ed] appropriate."[342] That does not help much. The answer to the question raised by the drafters, as to whether "the juxtaposition of 'friendly relations among nations' and 'self-determination of peoples' [was] proper" was more enlightening.[343] In response, it was suggested that "there appear[ed] to be no difficulty in this juxtaposition since 'nations' [was] used in the sense of all political entities, states

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suggests that the drafters did not intend to apply the principle only to States. See also S. Prakash Sinha, "Has self-determination become a principle of international law today?" (1974), p. 334, who points out that the *travaux* do not provide the answer (p. 336).

[336] Coordination Committee, Memorandum on a List of Certain Repetitive Words and Phrases in the Charter, UNCIO vol. 18, pp. 654-658. See also Patrick Thornberry, "Self-determination, minorities, human rights" (1989), p. 871.

[337] Coordination Committee, Memorandum on a List of Certain Repetitive Words, p. 657.

[338] *Idem*.

[339] Some authors have a different opinion, and believe that "State" and "nation," as used in the UN Charter, have an identical meaning. See Hurst Hannum, "Rethinking self-determination" (1993), p. 11.

[340] Margaret Moore, "On National Self-Determination" (1997), p. 901.

[341] Coordination Committee, Memorandum on a List of Certain Repetitive Words, p. 658.

[342] *Idem*.

[343] *Idem*.

and non-states, whereas 'peoples' refer[red] to groups of human beings who may, or may not, comprise states or nations."[344] Thus "nations" were defined as groups of human beings, *i.e.* "peoples" organized as a political entity, such as a State or colony. Groups of human beings without any political organization were still "peoples," but not "nations," let alone "States."

According to Article 1 of the human rights covenants, which contains the most authoritative definition of self-determination available since the entry into force of the UN Charter, the right applies to all peoples, irrespective of whether they are organized as a "nation," "State," or not organized at all. This definition is as follows:

> All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.[345]

What is interesting for present purposes is that initially the Human Rights Commission referred to the right to self-determination of peoples *and* nations.[346] This led to a debate about the exact meaning of these two terms, "peoples" and "nations." The delegates who discussed the difference between self-determination of peoples and self-determination of nations pointed out that the two words were not identical and that, as Australia stated, "a people was not necessarily a nation and a nation was not necessarily one people."[347] This is consistent with the views presented in 1945, according to which nations were politically organized peoples, and it is possible that two or more peoples unite in one nation.

A few other States also tried to explain the difference between peoples and nations. The UK's explanation was the most straightforward. Its delegate explained that "peoples" meant "peoples who were not independent," and "nations" meant "sovereign States."[348] This view seems incorrect. In any case it is much more restrictive than that of the drafters in San Francisco. The UK basically said that "nation" and "State" were synonymous. The Syrian delegate disagreed. In his view, a nation was not necessarily the same as a State. He considered that "a nation should be comprised of people belonging to the same ethnic group," "the land on which the nation was settled should be delimited," and "the individuals concerned

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[344] *Idem*.
[345] Article 1, International Covenant on Civil and Political Rights/International Covenant on Economic, Social, and Cultural Rights.
[346] In 1955, the Third Committee had before it the following draft of the Human Rights Commission: "All peoples and all nations shall have the right of self-determination, namely, the right freely to determine their political economic, social and cultural status." Commission on Human Rights, Report of the Tenth Session, 23 February—16 April 1954, UNDoc. E/2573, p. 62.
[347] General Assembly's Third Committee, 647th Meeting.
[348] General Assembly's Third Committee, 652nd Meeting, 4 November 1955, UNDoc. A/C.3/SR.652.

should show a collective will to live together."[349] This is yet another approach, which is difficult to reconcile with the approach chosen in San Francisco.

Although interesting, the correct interpretation of the word "nation," as used in the first draft of the right to self-determination, is of little relevance anymore, since the word was soon removed from the article.[350] If the San Francisco approach is followed, this makes little difference, as the word "people" refers both to politically organized peoples, *i.e.* "nations" and "States," and to non-politically organized peoples, including minority peoples. That appears to be the correct interpretation. After all, when the USSR asked whether the remaining concept of "peoples" included the deleted concept of "nations," it got an affirmative reply.[351] Presumably then, "nations" and "States" are included in the definition of "peoples."[352]

Although most agreed with the deletion of the word "nations," Pakistan was not so happy with this change. Its delegate suggested that "in its revised form [*i.e.* with the word "nations" deleted], the paragraph was more likely to harm sovereign States than to help colonial peoples," as it "would apply to all national minorities everywhere, no matter how small, and might lead to the disintegration of existing States."[353] This objection had little to do with the deletion of the word "nations," but more with the interpretation of the word "peoples." Belgium neatly summarized the debate by stating that the deletion of the word "nations" had not made the meaning of the word "peoples" clearer in any way.[354]

When the Friendly Relations Declaration was drafted, little was said about the application of the principle of self-determination to nations or States. At one point, it was suggested that the right to external independence and internal autonomy of peoples, organized as an independent State, could be based on the principle of self-determination.[355]

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[349] General Assembly's Third Committee, 648th Meeting. In an ambitious attempt to clarify the applicability of the principle, the delegate of Lebanon distinguished six categories to which the principle applied. See General Assembly's Third Committee, 649th Meeting.

[350] It was removed by the Working Party, which was basically a drafting committee. Their version of the provision was almost identical to the one that ended up in the Covenants. See UNDoc. A/C.3/L.489. See also General Assembly's Third Committee, 668th Meeting, 22 November 1955, UNDoc. A/C.3/SR.668.

[351] General Assembly's Third Committee, 668th Meeting.

[352] And, as Hannum pointed out, Article 1 as finally adopted could easily be applied even to States. Hurst Hannum, "Rethinking self-determination" (1993), p. 19.

[353] General Assembly's Third Committee, 671st Meeting.

[354] General Assembly's Third Committee, 669th Meeting. But it did in a way remove the term 'nation' from the discourse about self-determination. In order for a people to have a right to self-determination, it need not be a nation. As a consequence, the literature about the nation and nationalism, such as the work by Ernest Gellner and Benedict Anderson, is not dealth with in great detail in this study. See Ernest Gellner, *Nations and nationalism* (2008), esp. pp. 1-7; and Benedict Richard O'Gorman Anderson, *Imagined communities* (2006, original of 1983), esp. pp. 6-7.

[355] Special Committee, Third Report, paras. 197 and 228-229.

Do States have a right to self-determination? They do, but it is difficult to base such a right to self-determination of States on either the UN Charter or common Article 1 of the human rights covenants. The subsequent sections will show that the concept of "sovereignty" rather than "self-determination" is used as the basis of the claim that States are entitled to respect for their independence and equality. But the link with self-determination is still there.

5.3 The independence of States and the prohibition of inter-State intervention

The principle of non-intervention, based on the self-determination of the State, is examined below. There is enormous disagreement regarding this principle in the literature. According to some, it is a non-derogable principle of international law (*jus cogens*) which constitutes the basis of the entire international legal order. According to others, the principle does not even exist.[356] The two views could not be further removed from each other.

When Article 1 of the human rights covenants was being drafted, various delegates believed that the non-intervention principle could be derived from the right to self-determination. For example, according to the Dutch delegate, the "external" aspect of self-determination consisted of "the right of a nation already constituted as a State to choose its own form of government and freely to determine its own policies."[357] The word "freely" meant without any outside interference. This shows the clear links between self-determination and non-intervention. This link has been affirmed in scholarship. For example, Crawford wrote that when the principle is applied to existing States, "the principle of self-determination normally takes the well-known form of the rule preventing intervention in the internal affairs of a State, a central element of which is the right of the people of the State to choose for themselves their own form of government."[358]

[356] Lowe believed that "the most interesting question regarding the principle of non-intervention in international law is why on earth anyone should suppose that it exists." Vaughan Lowe, "The principle of non-intervention" (1994), p. 67.
[357] General Assembly's Third Committee, 642nd Meeting. Colombia had a slightly different interpretation of the distinction, see General Assembly's Third Committee, 648th Meeting, 31 October 1955, UNDoc. A/C.3/SR.648.
[358] James Crawford, *The creation of states in international law* (2006), pp. 126 and 128.

5.4 Self-determination as the basis for the principle of non-intervention

5.4.1 Introduction

The prohibition of one State to intervene in the affairs of another follows directly from the principle of sovereign independence of States.[359] This principle is in turn a "continuation" of the principle of self-determination of peoples.[360] That last link is the least obvious. There is some disagreement in the literature on whether such a link can be made at all. Some of the most renowned scholars see self-determination as a "justification" for State sovereignty and the sovereign independence that comes with it.[361] Others believe the link to be "unnecessary."[362]

In any case, the link was particularly evident – and essential – from the perspective of the socialist countries, as well as the "new" countries, established after liberating themselves from colonialism. The former believed that the right to self-determination of peoples changed into the right to non-intervention as soon as a newly formed State was generally recognized.[363] The latter believed that the principle of non-intervention protected their sovereign independence from any future attempts at colonization. Thus it served as a principle complementing that of self-determination.[364]

The problem with this argument was that the prohibition on intervening in the affairs of States could also be used to block any international assistance for people still suffering from colonization to liberate themselves from their oppressor. As Koskenniemi rightly pointed out, this showed the "ambiguous relationship" between statehood and self-determination: it could be used to justify statehood, but also to challenge it.[365]

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[359] Hans Kelsen, "The Draft Declaration on Rights and Duties of States" (1950), p. 268.

[360] The Assembly has often assumed the two principles are closely connected, without, however explaining the connection in any great detail. See Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, General Assembly resolution 2131 (XX), adopted 21 December 1965, para. 6; Report of the Sixth Committee, UNDoc, A/5671, adopted 13 December 1963, para. 83.

[361] In *The Law of Peoples* (1999), John Rawls essentially described all peoples as having their own State. In such an ideal world, self-determination can of course be used as foundation for the non-intervention principle. Another example is Martti Koskenniemi, "National Self-Determination Today" (1994), p. 245.

[362] See, *e.g.*, Hurst Hannum, "Rethinking self-determination" (1993), p. 36, footnote 146; James Crawford, "The Right of Self-Determination in International Law" (2001), p. 41.

[363] Antonio Cassese, *Self-determination of peoples: a legal reappraisal* (1995), p. 45.

[364] See also Edward McWhinney, "The 'New' Countries and the 'New' International Law" (1966), p. 23.

[365] Martti Koskenniemi, "National Self-Determination Today" (1994), pp. 248-249. See also Jean-François Dobelle, "Article 1, paragraphe 2" (2005), pp. 345-346.

This problem was generally solved by the small States themselves, by recognizing a "colonial exception" to the non-intervention principle, which meant that the principle did not apply to the relations between a colonial people and the colonial power.[366] To prevent any further appeals to self-determination, many of the resolutions on the topic contained what Higgins termed an "anxious refrain," stressing that the right to self-determination should never lead to threats to the territorial integrity of States.[367] This only made the conflict between sovereign independence and the right to self-determination of peoples more evident. It did not solve any of the doctrinal difficulties with the relationship between statehood and self-determination in any way.

After the process of decolonization was largely completed, the non-intervention principle became more and more absolute. What disappeared into the background was the idea, very much at the basis of self-determination as applied to States, that it included the right of peoples to control their own destiny. It is only in the last few decades that these origins of the non-intervention principle have been taken seriously once again, in the sense that it has been suggested that governments do not deserve to be protected from international interference if they blatantly refuse to act on behalf of (all) the State's peoples.

5.4.2 Absolute prohibition on all forms of inter-State intervention

The non-intervention principle is not explicitly mentioned in the UN Charter anywhere. This was deliberate. Although the drafters of the United Nations Charter did refer to the self-determination of peoples in the list of purposes, they deliberately refrained from including the promotion of respect for the sovereign independence of States in that list. They also refrained from including the prohibition of inter-State intervention in the list of principles.

Although the efforts to include a non-intervention principle in the Charter failed, it is useful to look more closely at these efforts.[368] In San Francisco, Cuba suggested that a Declaration of the Duties and Rights of Nations be annexed to the Charter.[369] Panama proposed simply using the Declaration of the Rights and Duties of Nations, adopted by the American Institute of International Law in 1916, for this purpose.[370] Both declarations contained an explicit right to independence for all States. The Panamanian declaration states that

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[366] Edward McWhinney, "The 'New' Countries and the 'New' International Law" (1966), p. 24.
[367] Rosalyn Higgins, *Problems and process* (1994), p. 121.
[368] See section 2.1 Of Chapter VII.
[369] See Seven Proposals on the Dumbarton Oaks Proposals Submitted by the Delegation of Cuba, UNCIO, vol. 3, pp. 495-499.
[370] See the Additional Amendments proposed by Panama, UNCIO, vol. 3, pp. 265, 266, and, for the text of the Declaration, pp. 272-273. The Netherlands also suggested annexing a similar declaration, but it

> Every nation has the right to independence in the sense that, it has a right to the pursuit of happiness and is free to develop itself without interference or control from other states, provided that in so doing it does not interfere with or violate the rights of other states.[371]

Similarly, according to Article I of the Cuban Declaration,

> A state has the right […] to defend its integrity and independence, to provide for its maintenance and prosperity, to organize itself as it sees fit, to legislate on its interests, to administer its services, and to determine the jurisdiction and qualification of its courts [and] the exercise of these rights has no other limits than respect for the rights of other states, in conformity with international law.[372]

Cuba later explained that it did not wish to insist on the inclusion of its Declaration in the Charter, but rather that "note should be taken of the fact that the Cuban Delegation had made these specific suggestions and [that it] hoped that the Assembly of the world Organization would give them due consideration."[373]

This is exactly what happened. A first draft of a Declaration on Rights and Duties of States was drawn up by the International Law Commission, and presented to the world by the Assembly in 1949.[374] The word "independence" was predominant in the ILC's declaration. According to Article 1, "every State has the right to independence and hence to exercise freely, without dictation by any other State, all its legal powers, including the choice of its own form of government."[375] Article 3 proclaims that "every State has the duty to refrain from intervention in the internal or external affairs of any other State."[376] The Assembly largely ignored the Declaration, and no further work was done on it. Kelsen's conclusion that the ILC's Declaration "ha[s] no legal importance whatsoever," therefore quickly turned out to be entirely correct.[377]

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did not actually propose a first draft of such a declaration. See Amendments submitted by the Netherlands Delegation to the San Francisco Conference, UNCIO, vol. 3, p. 323.

[371] Additional Amendments proposed by Panama, UNCIO, vol. 3, p. 273.

[372] Seven Proposals on the Dumbarton Oaks Proposals Submitted by the Delegation of Cuba, UNCIO, vol. 3, p. 496.

[373] Seventh Meeting of Committee I/1, May 17, 1945, UNCIO, vol. 6, p. 304.

[374] Draft Declaration on Rights and Duties of States, annexed to General Assembly resolution 375 (IV), adopted 6 December 1949. The ILC's Declaration was almost identical to a Panamanian draft presented to it.

[375] *Idem*, Article 1.

[376] *Idem*, Article 3.

[377] Hans Kelsen, "The Draft Declaration on Rights and Duties of States" (1950), p. 260.

The story continued twenty years later, with the adoption of the Friendly Relations Declaration.[378] The non-intervention principle was discussed in some detail during the first session of the Declaration's drafting committee.[379] The principle of non-intervention was mainly promoted by the small Latin American nations which did not appreciate the constant interventions of their big brother, the United States of America, in their internal affairs.[380] Consistent with its position in San Francisco, the "big brother" claimed that only the use of military force was prohibited, not other types of inter-State intervention.[381] The Latin American States wanted to separate the prohibition on the use of force and the general prohibition on intervention.[382] In their view, any form of intervention by one State in either the internal or external affairs of another State, was illegal. As this would make international cooperation difficult,[383] it was suggested that only *coercive* intervention should be prohibited.[384] As was often suggested, the basis of the principle of non-intervention was respect for the self-determination of peoples.[385] However, it was also pointed out that, strictly speaking, the non-intervention principle prohibited interventions in the internal affairs of States, and this was not always in the interest of the peoples concerned.[386]

Because an extensive interpretation of the word "force" would transform the prohibition on the use of force essentially into a general non-intervention principle, it is interesting to link the debates on the meaning of the word "force," as used in the provision prohibiting the use of force, to the debate about the legal consequences of the lack of a general principle of non-intervention.[387] According to some delegates, this lack of a general non-intervention principle in the UN Charter was not an accidental omission. Therefore it should be concluded that, at least according to the UN Charter, the only inter-State intervention that was not permitted was intervention by military force, as defined in Article 2(4) of the Charter.[388] However, according to others, a more general non-intervention principle

[378] See also section 5.5 of Chapter III.
[379] Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, Report, A/5746, adopted 16 november 1964 ("First Report"), paras. 211-291.
[380] See also Gaetano Arangio-Ruiz, "The normative role of the General Assembly" (1972), p. 549; Piet-Hein Houben, "Principles of International Law Concerning Friendly Relations and Co-Operation Among States" (1967), p. 735.
[381] See proposals of the USA, Special Committee, First Report, paras. 211-291.
[382] See also Gaetano Arangio-Ruiz, "The normative role of the General Assembly" (1972), p. 560.
[383] As was pointed out frequently by some delegations. See Special Committee, First Report, paras. 252 and 264.
[384] Special Committee, First Report, paras. 240-241.
[385] *idem*, paras. 257.
[386] *idem*, paras. 260.
[387] The prohibition to use force can be found in Article 2(4), UN Charter, and is discussed extensively in this study's chapter on peace and security (Chapter IV).
[388] *Idem*, para. 219. See also Vekateshwara Subramanian Mani, *Basic principles of modern international law* (1993), pp. 59-61; Vaughan Lowe, "The principle of non-intervention" (1994), p. 68.

was implied, by the principle prohibiting the use of force itself, as well as the principle of sovereign equality, Article 2(1) UN Charter.[389] Article 2(7) was also mentioned, but generally rejected as it was about the *Organization's* duties to respect the non-intervention principle, not the duty of *States* themselves.[390]

During its second session, the discussion of the Special Committee on the non-intervention principle was heavily influenced by the Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, adopted in 1965. [391] Even though there was general agreement that the Inadmissibility Declaration was not "sacrosanct" for the Committee, it chose to adopt the definition of the non-intervention principle contained in that resolution as a *fait accompli*.[392] The Dutch representative later complained about the way in which the Eastern European countries in particular used the General Assembly declaration as a general discussion killer.[393] This did not mean that there were no interesting discussions during the second session at all. It was suggested once again that the basis of non-intervention was the recognition of an inalienable right of all peoples to freely determine their own destiny, free from outside interference.[394] This linked non-intervention to the principle of self-determination of peoples, a link which was especially obvious for new States, which had just gained their independence through decolonization.[395] Moreover, it was suggested that when a colonial power violated a peoples' right to self-determination, it was violating the non-intervention principle, and other States could assist these peoples.[396] According to the more traditional view, which considered the relations between a colonial power and its colonies as a "domestic affair," such third State assistance would actually violate the non-intervention principle. But in the Committee's view, peoples, as separate entities in international law, were also protected by the non-intervention principle.

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[389] Article 2(1), UN Charter. See Special Committee, First Report, para. 216. This was also the view of Mani, who wrote that "although the principle of non-intervention is not specifically referred to in the U.N. Charter, it has been generally recognized to be embedded in the Charter system." Vekateshwara Subramanian Mani, *Basic principles of modern international law* (1993), p. 57.

[390] Special Committee, First Report, paras. 216, 219-220, and paras. 286-291.The USA was particularly outspoken in its defense of a literal and thus restricted interpretation of Article 2(7), UN Charter. See Robert Rosenstock, "The Declaration of Principles of International Law Concerning Friendly Relations" (1971), p. 726.

[391] Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, Report, A/6230, adopted 27 June 1966 ("Second Report"), paras. 292-300.

[392] Gaetano Arangio-Ruiz, "The normative role of the General Assembly" (1972), p. 560.

[393] Piet-Hein Houben, "Principles of International Law Concerning Friendly Relations and Co-operation Among States" (1967), pp. 716-718.

[394] Special Committee, Second Report, para. 289.

[395] *Idem*, para. 289.

[396] *Idem*, paras. 321-324.

When the non-intervention principle was discussed during the third session, one superpower (USSR) remarked that the other (USA) had recently assumed the function of an international policeman, and was practising open and systematic intervention in the affairs of other States.[397] Such behaviour motivated the smaller States to call for a complete prohibition on all forms of inter-State intervention. The use of military force was also discussed in this context as the most intrusive form of such intervention.[398] This makes perfect sense, but the Assembly had already chosen to treat the prohibition on the use of inter-State force as a separate principle.[399] Less intrusive forms, such as coercive economic measures, were also considered to be prohibited.[400] Mani, the delegate from India, later proposed the following general definition of unlawful forms of intervention:

> An impugned act of intervention generally consists of two elements: first, the act in question must at least be an attempt to coerce another State; second, such coercion must be directed towards producing a desired effect, namely, to obtain the subordination of the sovereign will of the victim State, or secure from it advantages of any kind.[401]

The delegate of the United Kingdom, who proposed a similar definition, referred to the first element as the element of "intent," and the second as the element of "effect."[402] This definition used "coercion" as the central notion of unlawful forms of intervention, an approach consistent with that of most delegates of the Special Committee. Other States were more cautious, and remarked that it was hard to make a distinction between coercive measures, and the legitimate persuasion and bargaining with which States usually sought to influence each other.[403]

In the end, the definition of the non-intervention principle in the Friendly Relations Declaration adopted by the General Assembly in 1970 was an exact copy of that contained in the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and

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[397] Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, Report, A/6799, adopted 26 September 1967 ("Third Report"), para. 311. The USA later complained that such accusations should not be made in a Special Committee, and should not be mentioned in the Reports. See Special Committee, Third Report, para. 476.
[398] Special Committee, Third Report, paras. 349-350.
[399] In this study, the same approach was chosen. The prohibition to use force has been discussed in section 4 of Chapter IV.
[400] Special Committee, Third Report, para. 352.
[401] Vekateshwara Subramanian Mani, *Basic principles of modern international law* (1993), p.67.
[402] Vaughan Lowe, "The principle of non-intervention" (1994), p. 67.
[403] Special Committee, Third Report, para. 353.

Sovereignty.[404] As the Friendly Relations Declaration is generally considered to be more authoritative, the non-intervention principle as it was defined there is used as reference here.[405]

In the Friendly Relations Declaration, the Assembly prohibited all forms of inter-State intervention. It solemnly proclaimed the "principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State."[406] This principle was described in the strictest sense, as follows:

> No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State.

This was followed by a list of every kind of imaginable type of intervention. Direct armed intervention, armed assistance to rebel groups operating in another State, economic measures as a means of coercion, and various forms of political interference were all prohibited.

The United Kingdom made an interesting "reservation" to this broad definition of the non-intervention principle. It reiterated a remark it had made earlier, which stated that:

> In considering the scope of "intervention," it should be recognized that in an interdependent world, it is inevitable and desirable that States will be concerned with and will seek to influence the actions and policies of other States, and that the objective of international law is not to prevent such activity but rather to ensure that it is compatible with the sovereign equality of States and self-determination of their peoples.[407]

The extensive definition of intervention was also highly criticized in the literature mainly for the same reasons given by the UK in its reservation. Arangio-Ruiz, for example, believed that it "condemn[ed] indiscriminately undesirable and innocent (or even useful) conduct."[408] The only way to discriminate between undesirable and innocent inter-State interventions was to read into it a sort of a bad intent requirement. The prohibition would then be confined to "evildoing interference," or

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[404] Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, General Assembly resolution 2131 (XX), adopted 21 December 1965.

[405] Only para. 6 of the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States was not copied into the Friendly Relations Declaration. This paragraph was about the right to self-determination and independence of peoples and nations.

[406] Friendly Relations Declaration.

[407] Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, Report, A/8018, adopted 1 May 1970 ("Sixth Report"), para. 231. See also Special Committee, First Report, paras. 264, and p. 116 (original statement).

[408] Gaetano Arangio-Ruiz, "The normative role of the General Assembly" (1972), p. 555.

"bad faith interference," or "unjustified interference."[409] However, the absolute formulation of the non-intervention principle does not have such a bad intent requirement.

The adoption of this very extensive prohibition on intervention did not stop certain States from continuing their attempts to influence the domestic organization of other States. In 1976, the Assembly "not[ed] with great concern that several Member States ha[d] been subjected to various forms of interference, pressure and organized campaigns of vilification and intimidation designed to deter them from pursuing their united and independent role in international relations."[410] It therefore "reaffirmed the inalienable sovereign right of every State to determine freely, and without any form of interference, its political, social and economic system and its relations with other States and international organizations," and "denounce[d] any form of interference, overt or covert, direct or indirect, including recruiting and sending mercenaries, by one State or group of States and any act of military, political, economic or other form of intervention in the internal or external affairs of other States."[411]

A few years later, the Assembly adopted a resolution on the inadmissibility of the policy of hegemonism in international relations.[412] The word "hegemonism" was defined as the "manifestation of the policy of a State, or a group of States, to control, dominate and subjugate, politically, economically, ideologically or militarily, other States, peoples or regions of the world."[413] As past examples of hegemonism, the Assembly referred to imperialism, colonialism, neo-colonialism and racism. In the Assembly's view, it was the "common desire of all peoples to oppose hegemonism and to preserve the sovereignty and national independence of States," and therefore it "reject[ed] all forms of domination, subjugation, interference or intervention and all forms of pressure, whether political, ideological, economic, military or cultural, in international relations."[414]

In 1981, the Assembly adopted a Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States.[415] The Declaration declared that "no State or group of States ha[d] the right to intervene or interfere in any form or for any reason whatsoever in the internal and external affairs of other States."[416] It then provided a long list of specific rights that followed from this

[409] *Idem*, p. 558.
[410] Preamble, Non-interference in the internal affairs of States, General Assembly resolution 31/91, adopted 14 December 1976.
[411] *Idem*, paras. 1 and 3.
[412] Inadmissibility of the policy of hegemonism in international relations, General Assembly resolution 34/103, adopted 14 December 1979.
[413] *Idem*, Preamble.
[414] *Idem*, Preamble and para. 3.
[415] Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, annexed to General Assembly resolution 36/103, adopted 9 December 1981.
[416] *Idem*, Article 1.

principle. The Assembly proclaimed, *inter alia*, the "sovereign and inalienable right of a State freely to determine its own political, economic, cultural and social system, to develop its international relations and to exercise permanent sovereignty over its natural resources, in accordance with the will of its people, without outside intervention, interference, subversion, coercion or threat in any form whatsoever."[417] This was followed by an equally long list of prohibitions, including essentially all imaginable forms of interference. For example, the Assembly proclaimed that all States had a duty "to refrain from the exploitation and the distortion of human rights issues as a means of interference in the internal affairs of States."[418] At the same time, the Assembly proclaimed "the right and duty of States […] to work for the elimination of massive and flagrant violations of the rights of nations and peoples, and in particular, for the elimination of *apartheid* and all forms of racism and racial discrimination."[419]

In 1983, the Assembly adopted a resolution on economic measures as a means of political and economic coercion against developing countries.[420] In an understatement, the Assembly "consider[ed] that coercive measures ha[d] a negative effect on the economies of the developing countries and their development efforts and [did] not help to create a climate of peace and friendly relations among States." [421] Thus it "reaffirm[ed] that developed countries should refrain from threatening or applying trade restrictions, blockades, embargoes and other economic sanctions […] against developing countries as a form of political and economic coercion which affects their economic, political and social development."[422]

5.4.3 The prohibition on intervention by the United Nations

In the resolutions referred to in the previous section, the prohibition on inter-State intervention was presented as a fundamental principle of international law, respect for which was considered essential, especially by the new and small States.[423] As the international community focused on prohibiting more and more forms of

[417] *Idem*, Aricle I(b).
[418] *Idem*, Article II(l).
[419] *Idem*, Article III(c).
[420] Economic measures as a means of political and economic coercion against developing countries, General Assembly resolution 38/197, adopted 20 December 1983. See also Elimination of coercive economic measures as a means of political and economic compulsion, General Assembly resolution 51/22, adopted 27 November 1996, and Unilateral economic measures as a means of political and economic coercion against developing countries, General Assembly resolution 52/181, adopted 18 December 1997.
[421] *Idem*, Preamble.
[422] *Idem*, Preamble and para. 3.
[423] See also Separate Opinion of President Nagendra Singh to International Court of Justice, Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment of 27 June 1986, p. 156.

intervention, it lost sight of the justifications or roots of the principle. The principle can only be justified morally to protect of the value of self-determination of peoples – not governments – against foreign oppression and coercion.[424]

Admittedly, some of the earlier resolutions did already acknowledge that the prohibition on inter-State intervention had its limits. The savings clause of the Friendly Relations Declaration can be referred to here.[425] When promoting the right to self-determination of peoples, this clause prohibited States from engaging in any form of intervention in the affairs of States, on condition that "States conduct[ed] 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."[426] If the latter condition was not fulfilled, intervention that was intended to promote the right to self-determination of non-represented people would be permitted. As Chowdhury said, "a State not possessed of a representative government […] cannot claim immunity by relying on the principle of non-intervention."[427] The most important question now is who will be the judge? Who will decide when a State violates the right to self-determination of peoples within its jurisdiction? And who decides what to do in the case that a Government abuses the prohibition on inter-State intervention, and treats "its" peoples as it likes? Since States are prohibited from intervening in the affairs of other States, only the United Nations Organization can play this role.

However, according to Article 2(7) of the UN Charter, the Organization cannot intervene in the internal affairs of its Member States:

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

As the last part of this provision already indicates, there are exceptions to the rule that the Organization cannot intervene. The most explicitly formulated exception relates to the Organization's work in promoting the value of peace and security. The idea that this exception was also applicable in cases of the abuse of sovereign rights was developed in more detail with the introduction of the responsibility to

[424] See also Nico Schrijver, "The Changing Nature of State Sovereignty" (1999).
[425] See section 4.4 of Chapter VII.
[426] Friendly Relations Declaration. See also S.K. Roy Chowdhury, "The status and norms of self-determination in contemporary international law" (1977), p. 80.
[427] S.K. Roy Chowdhury, "The status and norms of self-determination in contemporary international law" (1977), p. 84.

protect.[428] It is a matter of dispute how "new" the responsibility to protect is. It can easily be traced back at least to the San Francisco Conference, where the following principle was proposed:

> It is the duty of each member of the Organization to see to it that conditions prevailing within its jurisdiction do not endanger international peace and security and, to this end, to respect the human rights and fundamental freedoms of all its people and to govern in accordance with the principles of humanity and justice. Subject to the performance of this duty the Organization should refrain from intervention in the internal affairs of any of its members.[429]

Such a principle never made it into the list of principles of the UN Charter. The idea of conditional sovereignty, which constitutes the basis of the responsibility to protect, has experienced a revival in recent times. The concept can best be seen as the expression of a change in attitudes brought about by the end of the Cold War. It was during the first high-level Security Council meeting of 1992 organized to celebrate the end of the Cold War that the Belgian representative made the following statement:

> My country believes that the *raison d'être* of the principle of non-interference is to allow States to foster in freedom the well-being of their peoples. However, no Government should use that principle as a legal argument to condone abuses of human rights.[430]

The principle of non-intervention was therefore seen as a principle with a specific purpose, *viz.* to secure the freedom of peoples. Abuse of this principle, which the Belgian representative described in terms of human rights violations, should not be condoned. This could be called the modern, conditional version of the non-intervention principle.

The representative of China, on the other hand, provided an excellent summary of the "old" thinking about non-intervention. According to China, international affairs were governed by five principles of peaceful coexistence, *viz.* the principles of mutual respect for sovereignty and territorial integrity, mutual non-

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[428] The literature on the concept is overwhelming. See *e.g.*, James Pattison, *Humanitarian intervention and the responsibility to protect* (2010); Ekkehard Strauss, *The emperor's new clothes?* (2009); Alex J. Bellamy, *Responsibility to protect* (2009); Gareth Evans, *The responsibility to protect* (2008); Ramesh Thakur, *The United Nations, Peace and Security* (2006), pp. 244-264.

[429] See also sections 2.1 of Chapter VII and 2.4 of Chapter VI. This suggestion is very similar to Principle 2 of the Principles for the International Law of the Future, published in *the American Journal of International Law*, Vol. 38, No. 2, Apr., 1944 (Supplement: Official Documents). See also the interesting commentary which was published together with the Principle.

[430] Verbatim Records of the 3046th meeting of the Security Council, 31 January 1992, UNDoc. S/PV.3046, p. 73.

aggression, non-interference in each other's internal affairs, equality, and mutual benefit.[431] As China also explained, "[t]he core of these principles is non-interference in each other's internal affairs."[432]

In the post-Cold War period, it was the Belgian view that prevailed. In December 2001, the non-governmental International Commission on Intervention and State Sovereignty (ICISS) published a report introducing the responsibility to protect. The concept can be defined by the following two basic principles:

> State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself.
>
> Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.[433]

The responsibility to protect was embraced by the General Assembly in 2005. According to the Assembly, "each individual State ha[d] the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity." If a State failed to do so, "the international community, through the United Nations" had the responsibility to "help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity."[434] The Assembly stressed that such international action had to be taken in accordance with the UN Charter, in particular in accordance with its rules on the use of force. The Assembly was very careful about the words it chose, but at least it accepted the *rationale* behind the concept, *i.e.* the conditionality of the non-intervention principle and the prohibition of its abuse.

In 2009, the General Assembly discussed the concept extensively.[435] It gathered to discuss the Secretary-General's report on the implementation of the responsibility to protect.[436] The report distinguished three pillars. First, the primary responsibility of each State to protect its own population from genocide, war

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[431] *Idem*, p. 92.
[432] *Idem*.
[433] See the Synopsis of International Commission on Intervention and State Sovereignty (ICISS), *Responsibility to Protect*.
[434] 2005 World Summit Outcome, resolution adopted by the General Assembly on 16 September 2005, UNDoc, 60/1, paras. 138-139.
[435] On 18 April 2008, the Pope addressed the General Assembly, and focused his speech on embracing the responsibility to protect.
[436] Report of the Secretary-General, Implementing the responsibility to protect, distributed 12 January 2009. UNDoc. A/63/677. For a commentary, see Advisory Council on International Affairs of the Netherlands, *The Netherlands and the Responsibility to Protect: The Responsibility to Protect People from Mass Atrocities*, Advisory report no 70, published June 2010.

crimes, ethnic cleansing and crimes against humanity. Secondly, the complementary responsibility of the international community to assist States in carrying out their national obligations. And thirdly, the commitment of the international community to take timely and decisive action, in accordance with the UN Charter, whenever a State was manifestly failing to meet its responsibilities.

The 63rd President of the General Assembly, d'Escoto-Brockmann of Nicaragua, who was not the most enthusiastic supporter of the concept, opened a special discussion on the topic. He understood the responsibility to protect to mean that "people ha[d] the right to get rid of their government when it oppresse[d] them and ha[d] thereby failed in its responsibility to them."[437] This was the general idea behind the concept. In his view, this showed why – even though the concept was only introduced in 2001 – "the great anti-colonial struggles and the anti-*apartheid* struggles […] were the greatest application of responsibility to protect in world history."[438] On the other hand, at the time some of the colonial powers actually used arguments similar to those on which the responsibility to protect was based in order to defend their intervention in the colonies. D'Escoto-Brockmann explained that it was therefore precisely those "recent and painful memories related to the legacy of colonialism [that gave] developing countries strong reasons to fear that laudable motives [could] end up being misused, once more, to justify arbitrary and selective interventions against the weakest states."[439]

After d'Escoto-Brockmann, a number of experts took the floor. This was one of the opportunities for experts to address the delegates of the General Assembly directly and be asked questions afterwards. This approach can be applauded for being a most original and direct means of connecting the scholarly community and the political community of the UN.

Most of the experts focused on the potential and past abuse of the language used to justify the responsibility to protect. According to Chomsky: "Virtually every use of force in international affairs ha[d] been justified in terms of [the responsibility to protect], including the worst monsters."[440] As examples, Chomsky referred to Japan's attack on Manchuria, Italy's invasion of Ethiopia, and Hitler's occupation of Czechoslovakia. Similarly, Bricmont reminded the international community that the (traditional) barbarities in a particular society were often

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[437] Office of the 63rd President of the General Assembly, *Concept note on responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity* ("*Concept note on responsibility to protect*"), p. 2. This note was used as basis for the Interactive Thematic Dialogue of the United Nations General Assembly on the Responsibility to Protect, held on 23 July 2009, at United Nations Headquarters.

[438] *Concept note on responsibility to protect*, p. 1.

[439] D'Escoto-Brockmann, Statement at the Opening of the Thematic Dialogue of the General Assembly on the Responsibility to Protect, UN Headquarters, New York, 23 July 2009.

[440] Chomsky's untitled statement to the United Nations General Assembly Thematic Dialogue on the Responsibility to Protect.

replaced by the barbarities of military intervention. This was especially the case during the colonial age, but some more recent military interventions also qualified as this sort of barbaric response to barbarities.[441] All these statements focused on reminding the international community of the enormous potential for abuse of the concept, to justify all sorts of military interventions by one State in the affairs of another. In response, the delegate of Ghana rightly remarked that all principles were susceptible to abuse, and that the principle of non-interference was certainly no exception.[442] Although explicitly addressed to him, Chomsky did not respond to this verbal intervention.

Evans, the principal author of the ICISS Report, made a more positive contribution to the debate. He summarized the idea of the responsibility to protect as follows:

> The issue is not the "right" of big States to do anything, including throwing their weight around militarily, but the "responsibility" of all States to protect their own people from atrocity crimes, and to assist others to do so by all appropriate means. The core responsibility is that of the individual sovereign State itself, and it is only if it is unable or unwilling to do so that the question arises of other States' responsibility to assist or engage in some way.[443]

In Evans's view, the whole idea of the concept was to achieve a "conceptual shift from 'the right to intervene' to 'the responsibility to protect'," *i.e.* to emphasize not the foreign military intervention, but the reinterpretation of sovereignty, and the principle of non-intervention.[444] This had been understood by the General Assembly in 2005, when it committed itself to the responsibility to protect. Earlier, the UN Secretary-General had already suggested that this was a "universal and irrevocable commitment."[445] What was needed now was agreement on ways of implementing the responsibility to protect.[446]

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[441] Bricmont, *A More Just World and the Responsibility to Protect*, Statement to the United Nations General Assembly Interactive Thematic Dialogue on the Responsibility to Protect. See also Ngugi's Statement entitled *Uneven Development is the Root of Many Crimes*. He emphasized the increasing gap between the "haves" and "have nots" in the world.

[442] Delegates seek to end global paralysis in face of atrocities as General Assembly holds interactive dialogue on responsibility to protect, UNDoc. GA/10847.

[443] Evans, *Implementing the responsibility to protect*, Statement to United Nations General Assembly Informal Interactive Dialogue on the Responsibility to Protect.

[444] *Idem*.

[445] General Assembly, 96th plenary meeting of the sixty-third session, held 21 July 2009, UNDoc. A/63/PV.96.

[446] Luck, the Secretary-General's adviser, also suggested that the participants focus on the implementation of the responsibility to protect. See Edward C. Luck, Special Adviser to the Secretary-General, Remarks to the General Assembly on the Responsibility to Protect, New York. 23 July 2009.

After the experts had spoken, all the delegates gathered in the General Assembly had an opportunity to respond.[447] Formally, the Secretary-General's report on the implementation of the responsibility to protect served as the basis of the Assembly's discussion. Despite this, the debate focused just as much on the concept itself as it did on its implementation. The Swedish delegate, who spoke on behalf of all the member States of the European Union and some associated States, explained that "the basic principle of State sovereignty is and should remain undisputed," but that "it should also be recognized that State sovereignty implie[d] not only rights, but also responsibilities and obligations under international law, including the protection of human rights as an essential element of responsible sovereignty." Therefore sovereignty was not a right to be left alone, but a responsibility to care for one's population: a "responsible sovereignty." The most important responsibility flowing from sovereignty was the responsibility of every State "to protect the populations within its own borders." If a State failed to carry out this responsibility, the international community had to intervene, but always in accordance with international law. Sweden and the rest of Europe agreed with the Secretary-General that the challenge for the immediate future was the effective implementation of the concept. There was a need to turn the "authoritative and enduring words of the 2005 World Summit Outcome […] into doctrine, policy and, most importantly, deeds."[448]

According to the Egyptian delegate, who spoke on behalf of an even larger group, the non-aligned States, it was undoubtedly true that "each individual State had the responsibility to protect its populations." At the same time, the group had some hesitations about the concept, especially because of the potential of "misusing it to legitimize unilateral coercive measures or intervention in the internal affairs of States."[449] Thus, as usual, the new and smaller States stressed the need for absolute respect of their sovereign independence and the principle of non-intervention.

After these two collective statements, representatives of individual States shared their views with their fellow delegates. Although these mainly repeated the two collective statements, occasionally there were some interesting additional thoughts.

With regard to the first pillar about the primary responsibility of States to care for their own population, one group, mostly Western States, saw the responsibility to protect as a sign of a new interpretation of sovereignty, *i.e.* responsible sovereignty.[450] Although most other States agreed that sovereignty

[447] D'Escoto-Brockmann also opened the Assembly's plenary on the topic. See General Assembly, 97th plenary meeting of the sixty-third session, held 23 July 2009, UNDoc. A/63/PV.97.
[448] General Assembly, 97th plenary meeting of the sixty-third session, pp. 4-5.
[449] *Idem*, p. 5.
[450] For the UK, see General Assembly, 97th plenary meeting of the sixty-third session, p. 7; France, p. 9; Belgium, p. 18; Korea, p. 19; Costa Rica, p. 23; Czech Republic, 98th plenary meeting of the sixty-third

entailed responsibilities, they were hesitant to accept the conclusions drawn by the Western group, that whenever a government manifestly failed to carry out its sovereign responsibilities, the non-intervention principle could be set aside and the international community could intervene. For example, Malaysia agreed that the sovereignty-as-responsibility approach actually "strengthened the principle of sovereignty by making the State responsible for the protection of its population," in the sense that it showed that "the population [was] guaranteed safety and protection in return for granting legitimate power to the State and its machinery."[451] However, it could not accept that States would lose some of their sovereign rights whenever they failed to protect their own population from genocide, crimes against humanity, war crimes or ethnic cleansing.[452]

Because of these and similar concerns, another group stressed that the responsibility to protect could never be interpreted as altering the principle of non-intervention in any way, especially not by allowing the always controversial "humanitarian interventions."[453] The representative of Guatemala spoke on behalf of many of the "new" and relatively small States, when he remarked that "for countries like mine that greatly value the principle of non-intervention in the internal affairs of sovereign States, there is a lingering suspicion that the responsibility to protect can, in specific moments or situations, be invoked as a pretext for improper intervention."[454]

Regarding the second pillar on international assistance, many developing States stressed the importance of development aid as a form of international assistance.[455] Some developed countries agreed, but added that such aid should also

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session, held 24 July 2009, UNDoc. A/63/PV.98, p. 22. For Ireland, see General Assembly, 99th plenary meeting of the sixty-third session, held 24 July 2009, UNDoc. A/63/PV.99, p. 1; Romania, p. 9; Slovenia, p. 11; Croatia, p. 15. For Sri Lanka, see General Assembly, 100th plenary meeting of the sixty-third session, held 28 July 2009, UNDoc. A/63/PV.100, p. 2; East-Timor, p. 15; Panama, p. 16; Tanzania, p. 28.

[451] General Assembly, 101st plenary meeting of the sixty-third session, held 28 July 2009, UNDoc. A/63/PV.101, p. 4.

[452] *Idem*.

[453] About humanitarian interventions, see especially the remarks by Argentina, at General Assembly, 101st plenary meeting of the sixty-third session, pp. 10-11. According to Argentina, it was clear that "the concept of the responsibility to protect equal[ed] humanitarian intervention." See also Serbia (*idem*, p. 13), who reminded fellow delegates of the humanitarian intervention in Kosovo in 1999, which he believed was evidence that "paths paved with good intentions can sometimes lead to unjustifiable actions."

[454] General Assembly, 97th plenary meeting of the sixty-third session, p. 15. For Pakistan, see 98th plenary meeting of the sixty-third session, p. 3; Ecuador, p. 9; Chile, p. 11; Colombia, p. 14; Uruguay, p. 18. For Venezuela, see General Assembly, 99th plenary meeting of the sixty-third session, pp. 5-6; Bolivia, p. 9; Luxembourg, p. 17. For Iran, see General Assembly, 100th plenary meeting of the sixty-third session, p. 10; Nicaragua, p. 13; North Korea, pp. 17-18. Argentina, General Assembly, 101st plenary meeting of the sixty-third session, pp. 10-11.

[455] See *e.g.*, Brazil, at General Assembly, 97th plenary meeting of the sixty-third session, p. 13; Denmark and Costa Rica, p. 23. For Pakistan, see 98th plenary meeting of the sixty-third session, p. 3;

be used to improve good governance and democracy within developing States. For example, France suggested that "development aid, by promoting democratic governance and respect for the rule of law, play[ed] a major role in implementing the responsibility to protect."[456] This was based on the idea, explicitly expressed by Chile, that "democracies, despite their imperfections, tend[ed] not to commit atrocities such as the four mass crimes."[457] As this suggested that aid could be accompanied by various conditions and interference in domestic affairs, such remarks worried some of the developing States. For example, Ecuador stressed that "the issue of development assistance [should not be] linked to possible conditionalities with regard to the responsibility to protect."[458] Some States were concerned that the implementation of the responsibility to protect would not lead to more development assistance, but that it would take away some of the resources used for development assistance. For example, the delegate of the Philippines warned that "the United Nations resources to be used for [the responsibility to protect] should not affect other activities undertaken in the context of other legal mandates, such as development assistance."[459]

Some States suggested that, with regard to the third pillar which dealt with international intervention in case of abuse of sovereignty, the list of situations calling for international intervention should be broadened, and include more than the categories recognized in the World Summit Outcome Document: *i.e.* war crimes, crimes against humanity, ethnic cleansing and genocide. For example, France pledged to

> Remain vigilant to ensure that natural disasters, when combined with deliberate inaction on the part of a Government that refuses to provide assistance to its population in distress or to ask the international community for aid, do not lead to human tragedies in which the international community can only look on helplessly.[460]

This suggested that the responsibility to protect could also be violated by a State in the case of a government's unwillingness to act and come to the aid of its people. The Assembly only saw a violation of the responsibility to protect in certain

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South Africa, p. 16. Ireland, 99th plenary meeting of the sixty-third session, p. 2; for Swaziland, see General Assembly, 100th plenary meeting of the sixty-third session, p. 21; Benin, pp. 24-25.

[456] General Assembly, 97th plenary meeting of the sixty-third session, p. 10.

[457] General Assembly, 98th plenary meeting of sixty-third session, held 24 July 2009, UNDoc. A/63/PV.98, p. 11.

[458] *Idem*, p. 9. See also Malaysia, at General Assembly, 101st plenary meeting of the sixty-third session, p. 5.

[459] General Assembly, 97th plenary meeting of the sixty-third session, p. 12.

[460] *Idem*, p. 9.

specific and deliberate attacks by a Government on its own population.[461] That was enough for almost all the delegates. Immediately after the French delegate had spoken, the delegate of the Philippines stressed that the concept's application "should be limited to those four crimes and applied only to them," and that "any attempt to enlarge its coverage [might] diminish its value or devalue its original intent and scope."[462]

For present purposes, it is relevant to point out that the responsibility to protect, as adopted in the World Summit Outcome Document, has great potential in the sense that it protects the population of States from certain forms of oppression by their own government. Thus it helps to solve the above-mentioned problem that the principle of self-determination can be invoked both by a dictatorial government to prevent other States from interfering, and by (parts of) the population of that very same State to demand international assistance to achieve their right to self-determination. However, the applicability of the responsibility to protect as a trump card to overrule non-intervention is extremely limited. As yet it does not include a duty of the international community to intervene whenever a State fails to represent its entire population. Furthermore, the responsibility to protect, as formulated in the World Summit Outcome Document of 2005, emphasizes the importance of collective responses. It does not allow States, acting unilaterally or in small groups, to intervene in the affairs of other States, not even to prevent genocide, war crimes, crimes against humanity, or ethnic cleansing from being committed. The United Nations, especially its Security Council, continues to be the only "judge" that can authorize such interventions. Therefore it is important that the Council has already applied the responsibility to protect a number of times since its adoption in the World Summit Outcome Document of 2005.[463]

5.5 Introduction

In this section the value of self-determination of peoples was used as the foundation for the principle of the sovereign independence of States, and the non-intervention principle. The popularity of the latter principle among State representatives can be easily explained. Government officials have good reason to defend the view that

[461] These specific acts were genocide, war crimes, ethnic cleansing and crimes against humanity. See quotation from the 2005 World Summit Outcome document above.
[462] General Assembly, 97th plenary meeting of the sixty-third session, p. 11. Similarly, the Brazilian delegate stressed that "attempts to expand the responsibility to protect to cover other calamities, such as HIV/AIDS, climate change or the response to natural disasters, would undermine the 2005 consensus and stretch the concept beyond recognition or operational utility." *Idem*, p. 12. See also Pakistan, at General Assembly, 98th plenary meeting of the sixty-third session, p. 3.
[463] See *e.g.*, Security Council 1973 (2011), adopted 17 March 2011, and Resolution 1975 (2011), adopted by the Security Council on 30 March 2011.

other States, headed by other governments, should not interfere with their work. However, to justify the existence of the non-intervention principle by stating that it has always been there and that it protects governments from unwanted interference is not a valid moral argument. In this section, the moral justification of the non-intervention principle was sought and found in the value of self-determination of peoples, as organized in a State. This grounding of sovereign independence in the self-determination of peoples clearly explains why the principle of non-intervention does not leave States, and their governments, entirely free to act. As soon as a government ceases to represent its people, the link between the sovereign independence of the State and the self-determination of its people ceases to exist, and in that case a government can no longer invoke the non-intervention principle.

6 THE HUMAN RIGHT TO SELF-DETERMINATION

6.1 Introduction

It is sometimes argued that the self-determination of peoples is not a value in and of itself, but that it is ultimately based on the value of human dignity. This was Waldron's view.[464] He argued that, "if we were asked to give an account of the dignity of an institution or a nation, we might well answer in terms that focused mostly on the contribution the entity makes to the well-being and rights and dignity of the individuals who live under it," and thus "it is not clear […] that we are getting to any idea of a foundational or inherent dignity of groups when we talk of the dignity of the nation-state or the dignity of this or that institution or community."[465] This is a common argument in liberal philosophy: any claim to self-determination is a claim to "self-rule," a demand to be responsible for one's own choices and destiny. A claim to self-determination of peoples, both the external (non-interference) and internal element (representative government), is ultimately based on the individual's entitlement to autonomy.[466]

However, the fact that the self-determination of peoples ultimately protects the dignity of the individuals of those peoples does not mean there is nothing intrinsic about the value of peoples' claims to self-determination. The two values of human dignity and peoples' claims to self-determination are merely very closely related.

So can the value of self-determination of peoples be defined independently from human dignity? As was the case for all other global values, the value of self-

[464] See also p. 163, C. Don Johnson, "Toward self-determination" (1973).
[465] Jeremy Waldron, "The Dignity of Groups" (2008), p. 8.
[466] See *e.g.*, Daniel Philpott, "In Defense of Self-Determination" (1995), especially pp. 355-362.

determination of peoples shows itself most clearly when it is trampled upon. In colonial times, certain groups of individuals were seen as being "backward." Although this had direct consequences with regard to the respect for the dignity of the individuals concerned, it was above all an insult to the group as such. Therefore it was the group as such, and not the individuals constituting the group, that felt a need to defend itself by upholding its right to freedom, autonomy, and self-determination. In Waldron's words,

> If a dignitary slur on a[n] individual is based wholly or partly on contempt for the group to which that individual belongs as a collective entity, then perhaps nothing less than an assertion or a reassertion of its dignity as an entity, its equal foundational dignity as a group, will succeed in combating or rebutting such prejudice.[467]

This is exactly what happened. The principle of self-determination of peoples has been used primarily to assist groups, mainly colonial peoples, in their efforts to liberate themselves from oppression aimed at the group. Although both the principle of self-determination of peoples and the entire body of human rights are thus legal tools to fight oppression, they are responses to two fundamentally different kinds of oppression, with differing targets.[468] One kind of oppression is aimed at the group, another at individual people. Thus the legal tools aim to protect different values. One aims to protect the dignity and self-determination of peoples from oppression. The other aims to protect the dignity and autonomy of individuals, or human dignity. The principle of self-determination of peoples thus serves a function which is conceptually separable from any norms protecting human dignity.

This section examines what the UN has made of this debate. It looks at the relationship between self-determination of peoples and human dignity and human rights.

The most authoritative definition of the right to self-determination of peoples can be found in common Article 1 of the two classical human rights covenants. Therefore one is tempted to conclude that on the basis of this fact alone, it must be regarded as a human right, like the other rights in those covenants. The right to self-determination does have a lot in common with these other human rights. As Crawford pointed out, like human rights, "the primary impact of [the right to self-determination of peoples] is against the government of the State in question, and one of its main effects is to internationalize key aspects of the relationship between the people concerned and that State, represented by its government."[469] It turns what used to be a national matter into an international

[467] Jeremy Waldron, "The Dignity of Groups" (2008), p. 19.
[468] Robert McCorquodale, "Self-determination: a human rights approach" (1994), p. 872, believed that the oppression was essentially identical.
[469] James Crawford, *The Rights of Peoples* (1988), p. 164.

matter, *i.e.* the relationship between the State and (parts of) its own population. Moreover, in resolutions of the Assembly, human rights and self-determination are often interrelated. For example, in 1980, "the subjection of peoples to alien domination" was not only labelled as a threat to international peace and security, but also as "a denial of fundamental human rights."[470]

Despite the many interrelations, there are good reasons not to go down the road of equating human rights and self-determination. As a brief examination of the *travaux préparatoires* of the human rights covenants shows, the right to self-determination ended up in the covenants because the "new" States believed it to be a good opportunity to achieve wide recognition of the right in a multilateral treaty. Even the most enthusiastic supporters did not consider the right to self-determination to be a human right *per se*. There are many good reasons to agree with this assessment. First of all, the right to self-determination of nations and peoples does not pertain to individuals, as do all other human rights. Secondly, the right to self-determination of nations and peoples is not directly based on the value of human dignity, but rather on the value of the dignity and self-determination of peoples.

6.2 Article 1 of the Covenants

The Universal Declaration of Human Rights does not say anything about any human right to self-determination. Two years after the adoption of the Universal Declaration, the Assembly, initially at the initiative of the Soviet Union, "call[ed] upon the Economic and Social Council to request the Commission on Human Rights to study ways and means which would ensure the right of peoples and nations to self-determination."[471] A few months later, the Soviet Union suggested the first version of an article on national self-determination and minorities, to be included in any future human rights covenant.[472]

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[470] Preamble, Plan of Action for the Full Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, General Assembly resolution 35/118, adopted 11 December 1980. This was reiterated in Twenty-fifth anniversary of the Declaration on the Granting of Independence to Colonial Countries and Peoples, General Assembly resolution 40/56, adopted 2 December 1985.

[471] Draft international covenant on human rights and measures of implementation: future work of the commission on human rights, General Assembly resolution 421 D(V), adopted 4 December 1950. See also Antonio Cassese, *Self-determination of peoples: a legal reappraisal* (1995), p. 48. See also Note by the Secretary-General, on section D of resolution 421 (V) of the General Assembly, concerning the right of peoples and nations to self-determination, UNDoc. E/CN.4/516.

[472] USSR's Proposal for additional articles, printed on p. 26, Report of the Commission on Human Rights, Sixth Session (27 March - 19 May 1950), UNDoc. E/1681. See also the Proposal by the Union of Soviet Socialist Republics, UNDoc. A/C.3/L.96, printed on p. 35, Report of the Commission on Human Rights, Seventh Session (16 April - 19 May 1951), UNDoc. E/1992.

As the Human Rights Commission did not have enough time to fulfil the Assembly's request in 1950, the Assembly decided to do the work itself two years later, and proposed the text of a provision on self-determination to be included in any forthcoming covenant(s) on human rights, stating that "all peoples shall have the right to self-determination."[473] The adoption of this resolution embracing the human right to self-determination had an enormous impact on all future developments, but it did not mean that the debate on the legal character of the right to self-determination was finally settled. In particular, it did not mean that there was universal agreement that the right belonged in a human rights covenant, let alone that it should be considered as a human right in and of itself. In the same year the Assembly saw "the right of peoples and nations to self-determination [as] a prerequisite to the full enjoyment of all fundamental rights," and thus presumably not as a human right, but as a necessary condition for the realization of human rights.[474]

Some serious discussions took place on the legal nature of the right to self-determination three years later, especially in the Third Committee of the General Assembly. The culmination of these debates was the General Assembly's session of 1955, at the end of which the final text on the right to self-determination was adopted, as it appeared in both of the classic human rights covenants.[475] These debates are examined below, insofar as they relate to the human rights character of the right to self-determination.[476]

At the very beginning of the debates, the Egyptian delegate reminded States that the provision on the right to self-determination was the only provision in the covenants explicitly requested by the General Assembly itself.[477] He – and many other delegates with him – concluded from this that the Third Committee was obliged to include a provision on the right to self-determination in the human rights covenants, and could no longer choose to reject it entirely.[478]

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[473] Inclusion in the International Covenant or Covenants on Human Rights of an article relating to the right of peoples to self-determination, General Assembly resolution 545(VI), adopted 5 February 1952.

[474] The right of peoples and nations to self-determination, General Assembly resolution 637(VII), adopted 16 December 1952.

[475] As the representative of Lebanon rightly pointed out, it was during the 1955 session that "the [General Assembly's Third] Committee was discussing the question of self-determination more thoroughly than it had ever done before." General Assembly's Third Committee, 649th Meeting, 1 November 1955, UNDoc. A/C.3/SR.649.

[476] See also Antonio Cassese, *Self-determination of peoples: a legal reappraisal* (1995), pp. 49-52; Marc J. Bossuyt, *Guide to the "travaux préparatoires" of the International Covenant on Civil and Political Rights* (1987), pp. 19-48.

[477] General Assembly's Third Committee, 641st Meeting, 21 October 1955, UNDoc. A/C.3/SR.641. Reference was made to General Assembly resolution 545(VI).

[478] For Egypt, Ukraine, Afghanistan, see General Assembly's Third Committee, 641st Meeting. For Poland, see General Assembly's Third Committee, 643rd Meeting, 25 October 1955, UNDoc. A/C.3/SR.643. For Czechoslovakia, El Salvador, Iran, see General Assembly's Third Committee, 645th Meeting, 27 October 1955, UNDoc. A/C.3/SR.645.; Philippines, see General Assembly's Third

Other delegations did not feel bound by the Assembly's resolution. They suggested deleting the entire article. For example, the Swedish delegate believed that self-determination, as codified in the Charter, was more of a "guiding principle" than a (human) right, and that "the notion of self-determination did not come within the sphere of human rights covered in the draft covenants, and that the adoption of [an article on self-determination] might even jeopardize the covenants."[479] The Swedish delegate explained that the right to self-determination of peoples and nations "was not, like the other rights stated in the draft covenants, an individual right or a right coming within the domestic jurisdiction of States."[480] Thus it was a "mistake to mention it in the covenants."[481] Similarly, the Netherlands believed the article to be "entirely unacceptable," because it related "not to an individual right, but to a collective right, to be exercised by peoples and nations," and therefore it had "no place in the covenants."[482] Together with Australia and the UK, the Netherlands formally proposed to delete the entire article.[483]

In response to these objections, many supporters of the article spoke eloquently about the importance of the liberation of colonial and other suppressed peoples, and wondered why anyone would be against their liberation.[484] These statements were misleading, as those rejecting the article did not do so – or at least did not do so formally – because they were opposed to self-determination. They rejected the provision because they did not consider it a (human) right.[485] New Zealand reminded fellow delegates that it was "futile" to "approach the problem in a violently anti-colonialist frame of mind."[486]

Even some of the most fervent supporters of the right to self-determination of peoples did not see it as a human right. They referred to it as a "prerequisite" for the enjoyment of fundamental human rights, exactly as the Assembly had done

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Committee, 646th Meeting, 27 October 1955, UNDoc. A/C.3/SR.646; Guatemala, General Assembly's Third Committee, 647th Meeting, 28 October 1955, UNDoc. A/C.3/SR.647.

[479] General Assembly's Third Committee, 641st Meeting. Similarly, the UK referred to it as a "political principle," as opposed to a right. See General Assembly's Third Committee, 642nd Meeting, 24 October 1955, UNDoc. A/C.3/SR.642.

[480] *Idem*.

[481] *Idem*. See also UK, in General Assembly's Third Committee, 641st Meeting.

[482] General Assembly's Third Committee, 642nd Meeting. See also UK, in General Assembly's Third Committee, 641st Meeting; Belgium (who made the same objection but did not believe it was reason enough to delete the right entirely), in General Assembly's Third Committee, 643rd Meeting; Denmark, in General Assembly's Third Committee, 644th Meeting, 26 October 1955, UNDoc. A/C.3/SR.644; Canada, in General Assembly's Third Committee, 645th Meeting.

[483] See amendment proposal A/C.3/L.460, p. 3.

[484] See *e.g*., Syria, General Assembly's Third Committee, 648th Meeting, 31 October 1955, UNDoc. A/C.3/SR.648; Bolivia, General Assembly's Third Committee, 651st Meeting, 3 November 1955, UNDoc. A/C.3/SR.651.

[485] See also remark by Australia, in General Assembly's Third Committee, 647th Meeting.

[486] General Assembly's Third Committee, 649th Meeting.

previously. The Final Communiqué, adopted at the Asian-African Conference which took place between 18 and 24 April 1955 in Bandung, Indonesia also referred to it in this way.[487] Some scholars also adopted this view.[488]

Brazil most explicitly rejected this "prerequisite" argument. It admitted that human rights and self-determination "were closely linked and even to some extent interdependent," but it also argued that "it did not follow [from this close link] that self-determination must be regarded as a prerequisite of the exercise of the other rights," as "experience showed that a society could be master of its destiny without its members necessarily enjoying the individual rights enunciated in the draft covenants."[489] The idea that respect for the dignity of individual human beings required something other than respect for the value of self-determination of peoples, was the most important challenge to the position that the realization of the self-determination of peoples was necessarily a sufficient foundation for respect for more traditional human rights. As Waldron argued, "if we accord dignity to groups, it is possible that we may be dignifying the very structures of rank and privilege that egalitarian dignity-talk aims to transcend." In doing so, "we may be undermining the transvaluation that lies at the heart of the association of dignity with human rights."[490]

Other States did not directly challenge the "prerequisite" argument, but pointed out that the right to self-determination had to be promoted differently from the more traditional human rights. The inclusion of the right to self-determination in the human rights covenants would not do justice to this difference. For example, the delegate of the UK pointed out that "the various delegations […] had been so carried away by their enthusiasm and their desire to affirm an important principle that they had failed to give due consideration to the legal and political effects of converting a principle into a universal right."[491] To do so would mean, as the UK delegate pointed out, that the right to self-determination of nations and peoples

[487] For the Assembly, see General Assembly resolution 637(VII), adopted 16 December 1952. Many States referred to the Bandung document. For some background about this conference, see Roland Burke, "Compelling Dialogue of Freedom" (2006). For statements calling the right to self-determination a "prerequisite," see for Egypt, the Ukraine, and Saudi Arabia, General Assembly's Third Committee, 641st Meeting. For Belarus and Indonesia, see 644th Meeting. For Czechoslovakia and Iran, see 645th Meeting. For Greece, see 647th Meeting; for India, see 651st Meeting. Similarly, Poland believed that "the right of self-determination was the very basis of the individual rights, and that no man could be free unless his people were free" (643rd Meeting). Belarus made similar remarks (644th Meeting); and so did Chile (645th Meeting). The USSR believed self-determination was the "primary condition for the exercise of all the other human rights" (646th Meeting). See also Yugoslavia (647th Meeting).

[488] See *e.g.*, Antonio Cassese, "Political self-determination" (1979), p. 142; Alexandre Kiss, "The peoples' right to self-determination" (1986), p. 174; Robert McCorquodale, "Self-determination: a human rights approach" (1994), p. 872.

[489] General Assembly's Third Committee, 650th Meeting, 2 November 1955, UNDoc. A/C.3/SR.650.

[490] Jeremy Waldron, "The Dignity of Groups" (2008), p. 25.

[491] General Assembly's Third Committee, 642nd Meeting.

would become subject to the same supervisory mechanism as all the other more traditional human rights. This meant, *inter alia*, that States had the obligation to ensure respect for the right to self-determination of peoples and nations within their territories, and allow complaints about potential violations.[492] The UK could not go into detail, because the exact obligations regarding the promotion and protection of all human rights in the covenants were not known at the time that the article on the right to self-determination was discussed.[493]

The most important problem with the "prerequisite" argument was that it did not respond to the objections made by the Netherlands and many other Western States, that there was no room for such a so-called "collective right" as the right to self-determination of peoples in a covenant which proclaimed individual human rights. Some States did come up with a direct response to this Dutch objection. Generally, their response was that the distinction between collective rights and individual rights was artificial. For example, the delegate of the Soviet Union suggested that, "depending upon the angles from which they were regarded, rights appeared as both individual and collective," in the sense that "it was individuals who enjoyed them, but they had a meaning only because individuals lived in a society."[494] The delegate of El Salvador reminded delegates that the French Declaration of the Rights of Man of 1789 was considered to be one of the first examples of a document containing individual human rights, but "it included the right to resist oppression among its most important provisions," and "that right might be described as collective on the same grounds as the right of self-determination." In other words, the "distinction could be misleading, since the so-called collective rights constituted the expression of individual will through collective methods."[495] Another case in point was the right to vote, which was meaningless if perceived as the isolated right of one individual to write a name on a piece of paper.[496] The act of casting a vote only had meaning in a collective institution called democracy, but this did not mean the right to vote was not a human right.

Instead of arguing that the distinction between collective and individual rights was flawed, other States suggested that it was a good idea to place greater emphasis on collective rights, because they were also rights enjoyed by individual human beings. For example, Mexico believed that the covenants should not treat the

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[492] *Idem*.

[493] Lebanon made a big point of this, and wondered whether what was to become Article 2 of the Covenants actually applied to Article 1. See General Assembly's Third Committee, 668th Meeting, 22 November 1955, UNDoc. A/C.3/SR.668.

[494] General Assembly's Third Committee, 646th Meeting. See also remark by Greece, in General Assembly's Third Committee, 647th Meeting.

[495] General Assembly's Third Committee, 645th Meeting. See also Egypt, General Assembly's Third Committee, 651st Meeting.

[496] See also remark by Greece, in General Assembly's Third Committee, 647th Meeting.

human being as an "isolated unit but as a member of his family and social group, and the intention was to stipulate [..] a right which, though applying to the community, was essentially an attribute of the individual."[497] The delegate of Costa Rica explained that "the right of self-determination was pre-eminently a human right, since it could not be exercised through a Government or a representative organ, but pertained exclusively to each of the individuals who comprised a people," and "it was the sum of individual wills that constituted the will of a people."[498] Yugoslavia came up with a very original, but unworkable suggestion. The Yugoslav delegate suggested that "if the inclusion of the article were approached from the point of view that every individual had the right to decide the status of his people, the whole problem became quite simple."[499] This solution would only work if all the individuals constituting a people would choose the same status of the people they belonged to. In the end, all these counter-arguments may not convince everyone, but at least they were direct responses to the question posed by so many Western States, *i.e.,* why a peoples' right should be included in a treaty about individual rights.

Some States attempted to answer the Western States' question by connecting the right to self-determination to more traditional human rights. [500] India, for example, reminded fellow delegates that, even though there was no explicit right to self-determination in the Universal Declaration of Human Rights, it was closely linked to the remark to be found in Article 21(3) of the Universal Declaration, that "the will of the people shall be the basis of the authority of government." [501] This link between the right to self-determination of peoples, especially its internal aspect, and human rights, especially the civil and political rights of the individuals which together constitute those peoples, is often made in the literature.[502] Taken together, they amount to what can only be called a right to live in a political system representing the rights and interests of all people, peoples, and individuals.[503]

The Western States were not convinced and maintained their position that the right to self-determination did not have a place in a covenant listing individual

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[497] General Assembly's Third Committee, 646th Meeting.
[498] General Assembly's Third Committee, 649th Meeting.
[499] General Assembly's Third Committee, 647th Meeting.
[500] No State ever suggested that the right to self-determination was an individual human right. However, in the literature this argument has been made. See Matej Accetto, "The Right to Individual Self-Determination" (2004).
[501] General Assembly's Third Committee, 651st Meeting. See also Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, Report, A/6799, adopted 26 September 1967 ("Third Report"), para. 218-222.
[502] Antonio Cassese, *Self-determination of peoples: a legal reappraisal* (1995), pp. 53-55. Cassese concluded that self-determination ultimately requires a democratic form of government, in order to secure the rights of all individuals, including minorities, to meaningful political participation.
[503] Allan Rosas, "Internal self-determination" (1993), especially p. 241.

human rights. Some States put forward a compromise solution. Brazil suggested dealing with "the human rights proper in the covenants and with the right of peoples to self-determination in a supplementary protocol."[504] Because it believed that "the right to self-determination fell into a different category from the other rights recognized in the draft covenants," China suggested that a third multilateral treaty be drawn up, specifically about the right to self-determination.[505] As the Chinese delegate explained: "While it could not be denied that the right of self-determination belonged to peoples and nations, and not to individuals, it had been argued that every individual belonging to a people or nation had to exercise the right individually."[506] The latter view was unacceptable to China, as the right to self-determination was "one of a people or nation in relation to other peoples and nations, while all the other rights recognized in the draft covenants were rights of persons in relation to other persons or to the State."[507] Because of the "unique nature" of the right, China therefore suggested a separate treaty, and many other delegates agreed with this proposal.[508]

The Chinese suggestion was withdrawn, and the right to self-determination did end up in the human rights covenants. It is difficult to conclude from this that the right to self-determination of peoples can therefore be regarded as a "basic collective human right," in the words of Przetacznik.[509]

The general comment on the right to self-determination of peoples adopted by the Human Rights Committee in 1984 must also be discussed briefly. This comment, which interpreted Article 1 of the covenants, saw the right to self-determination as "an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights."[510] This is certainly reminiscent of the "prerequisite" argument, *i.e.,* that respect for self-determination of peoples constitutes a *conditio sine qua non* for the

[504] See General Assembly's Third Committee, 648th Meeting and 650th Meeting.
[505] General Assembly's Third Committee, 642nd Meeting. Similarly, Brazil suggested a protocol about self-determination. See General Assembly's Third Committee, 648th Meeting.
[506] Idem.
[507] *Idem*.
[508] *Idem*. See *e.g*., Israel (643rd Meeting); Honduras (647th Meeting); Costa Rica (649th Meeting); Egypt (651st Meeting); Sweden, Denmark (669th Meeting).
[509] Frank Przetacznik, "The basic collective human right to self-determination of peoples and nations as a prerequisite for peace" (1990), p. 50. Hurst Hannum, "The right of self-determination in the twenty-first century" (1998), pp. 773-774, also believed it was a collective human right.
[510] General Comment No. 12: The right to self-determination of peoples (Art. 1), adopted by the Human Rights Committee on 13 March 1984. The Committee added that "it is for that reason that States set forth the right of self-determination in a provision of positive law in both Covenants and placed this provision as article 1 apart from and before all of the other rights in the two Covenants."

respect of human rights, but that it is not a human right itself.[511] This conclusion is largely supported by the *travaux*.

6.3 Conclusion

The close connection between human rights and the right to self-determination of peoples is acknowledged by all States. Whether the right to self-determination should be seen as a human right in and of itself, whether it should be "deconstructed" into more traditional human rights, or whether it ought to be perceived as a "prerequisite" for the enjoyment of human rights, are more controversial issues.

All three positions were defended, and with good arguments. The "prerequisite" argument appears to be the most popular, but there are some dissenting opinions. The Brazilian delegate explained why respect for human rights and respect for the principle of self-determination could lead to inconsistent obligations.[512] This suggests that the right to self-determination of peoples and more traditional human rights ultimately aim to protect different values. There is a good explanation for this. The legal language of human rights and that of self-determination respond to different types of oppression and humiliation. The former aims to preserve the dignity of individuals against inhuman and degrading treatment, while the latter aims to preserve the dignity of peoples against degrading treatment of peoples as such.

7 CONCLUSION

The term "self-determination" appears only twice in the UN Charter, in a very ambiguous sense. The chapters in the UN Charter on the non-self-governing territories do not contain any explicit link with the right to self-determination of peoples. Nevertheless, the United Nations played an immensely important role in the road to independent statehood of virtually all colonial territories. The Organization also played a major role in protecting the sovereign independence of all its Member States, including that of the States that were the proud result of a

[511] Similarly, when the Friendly Relations Declaration was drafted, it was suggested that respect for the self-determination of peoples should be seen as the "foundation" of human rights. Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, Report, A/6799, adopted 26 September 1967 ("Third Report"), para. 191. The link with human rights was made from the very beginning. See Special Committee, Second Report, paras. 464 and 489. However, at the World Conference on Human Rights (1993), "the denial of the right of self-determination [was considered] as a violation of human rights." Para. 2, Vienna Declaration and Programme of Action.

[512] General Assembly's Third Committee, 650th Meeting, 2 November 1955, UNDoc. A/C.3/SR.650.

colonial people's successful struggle for self-determination. After the waves of decolonization in the 1960s and 1970s, the United Nations began to play a principal part in the "modernization" – or "evolution" – of this age-old concept of sovereignty, in an attempt to reconnect it to its roots: the self-determination of peoples.

The story of the self-determination of peoples shares many characteristics with the story of the other global values. The value became prominent only after those peoples who did not enjoy it were able to come to the fore and have their voices heard as recognized participants in the global discussions taking place in the United Nations. Initially, the peoples who did not have a right to control their own destinies were the colonial peoples. When the UN Charter was drafted, they could not participate in the global discussions. This explains why there are so few references to the value of self-determination in the Charter. The General Assembly, where the value-based authoritative decision making continued after San Francisco, did much better. When the debate in the Assembly became more and more inclusive with the admission of more and more liberated peoples, the value of self-determination was taken more and more seriously.

Despite the success of the decolonization process, the value of self-determination has not been fully and finally realized. The story of the value of self-determination is the same as the story of all other values: instead of ever achieving the full realization of this global value, it serves to motivate the world to continuously improve itself. Admittedly the Trusteeship Council has not had all that much work to do since the last trust territory became independent, but the value of self-determination of peoples continues to serve as a guiding value in the relationship between people, however defined, and those who rule over them. Any kind of oppression constitutes a violation of a people's right to freely determine its own future. There is no reason to claim that such oppression must be "foreign" in some way before it can be considered as a hindrance to the enjoyment of the self-determination of a people. As the recent wave of popular uprisings in the Middle East and elsewhere has shown, this struggle against oppression did not come to an end with decolonization.[513] It will never end, just as the quest for peace and security, respect for human dignity, and universal social progress and development will never end.

What about the place of this value in international law, the language which motivates action *par excellence*? The UN also helped to establish the right to self-determination of peoples firmly as an international legal principle. The problems

[513] Reference is made here to the popular uprisings of 2011 in Tunisia, Egypt, Libya, Syria and elsewhere in the Arab world. Both the Security Council and the Assembly responded quickly in the case of Libya. See Resolution 1970 (2011), adopted by the Security Council on 26 February 2011, and subsequent resolutions. And Suspension of the rights of membership of the Libyan Arab Jamahiriya in the Human Rights Council, General Assembly resolution 65/265, adopted 1 March 2011.

are in the details. These problems mainly started to arise when the principle was applied outside the colonial context. In the process of decolonization the international community could work with a shared "instinct" of what constituted a colonial people. Now that minorities and other peoples have begun to claim a right to self-determination, the need for a more conceptual definition has become increasingly urgent. What are "peoples"? How can they be defined? And what exactly are they entitled to? These questions remain largely unanswered. What is clear is that the value of self-determination becomes relevant when a certain group of individuals experiences a particular form of oppression directed at the group. This leaves the group without any control over its own destiny. This is what happened to colonial peoples, whose oppressor was always relatively easy to identify. The colonial peoples could therefore be identified, despite the fact that the individuals within these groups were often of mixed ethnic and religious origin. However, oppression has also been experienced by certain minority peoples, including indigenous peoples, and by the entire populations of dictatorial States. There too, the oppression united the oppressed individuals in their desire to determine their own future, *i.e.* to enjoy their right to self-determination.

More conceptual or philosophical thinking on the subject is necessary. Nevertheless, there is no controversy about the status of self-determination of peoples as a value and as a principle of international law. This results in a situation where, as Crawford said, there is a right which is generally admitted to exist, even though no one knows what exactly is meant by it.[514] Thus it is unique in the sense that the principle – or is it a right? – of self-determination has been qualified as both *jus cogens* and *jus obscura*.[515]

The value of self-determination of peoples was also applied to States. It was suggested that as long as the government of a State represented the interests of its people, it could rely on self-determination as the basis for its claims to sovereign independence. The non-intervention principle protects States from outside oppression by prohibiting interference in the group's internal affairs. However, as soon as a State starts oppressing its own population, outside interference against the wishes of the oppressing Government is acceptable, provided that the interference responds to the demands for international assistance by the oppressed peoples themselves. The relationship between the value of self-determination of peoples and the prohibition for States and the Organization to intervene in the affairs of States is therefore a rather complex relationship. This relationship was examined in more detail in the discussion about the responsibility to protect, a concept which allows

[514] James Crawford, "The Right of Self-Determination in International Law" (2001), p. 10. See also Jean-François Dobelle, "Article 1, paragraphe 2" (2005), p. 355.
[515] For the former label, see *e.g.*, Hector Gros Espiell, "Self-determination and jus cogens" (1979). For the latter label, see James Crawford, "The Right of Self-Determination in International Law" (2001), p. 38.

for certain exceptions to the non-intervention principle, thereby obliging States to use their sovereign powers responsibly.

Finally, a human rights version of the value of self-determination of peoples was examined, as was done for all other values. It was noted that the right to self-determination had found a prominent place in the two classic human rights covenants, but that this did not mean that self-determination should itself be considered as a human right. There were essentially three possibilities: self-determination could be seen as a human right in and of itself, as essentially replaceable by certain more traditional human rights, or as something distinct from human rights. It was suggested that the right to self-determination of peoples was based on the value of peoples' self-determination. Traditional human rights, on the other hand, are based on the value of human dignity.

Despite the cautious language of the UN Charter, and despite many legal uncertainties, the value of self-determination of peoples has found its place in the language of international law. Thus Hannum's suggestion that the issue of self-determination was "too important to be left to lawyers" has not proved to be correct.[516]

[516] Hurst Hannum, "The right of self-determination in the twenty-first century" (1998), p. 779.