Modern territorial statehood

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Modern Territorial Statehood

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Nicholas Gerald Hansen
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Education

1999-2000	Advanced Master of Laws (LL.M. Adv.) *cum laude*, Public International Law, Universiteit Leiden, Faculty of Law
1997-1999	Master of International Affairs, Columbia University, School of International and Public Affairs
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Professional Activities

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1996-1998	Office of the United Nations High Commissioner for Human Rights (New York)
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Stellingen behorende bij het proefschrift *Modern Territorial Statehood* van Nicholas Hansen

1. The concept of the 'nation-state' has no function in a legal framework.

2. The definitional criteria for statehood related to 'effectiveness' are comparably more fluid than those related to 'territory'.

3. The legal principle of *uti possidetis juris* is of chiefly historical application, whereas the legal principle of self-determination of peoples is continually perpetuated through Article 1 of the ICCPR and ICESCR.

4. Although minority rights regimes and peoples' rights are largely separate legal regimes, regional instruments such as Article 20 of the African Charter on Human and Peoples' Rights can demonstrate juridical linkages between the concepts.

5. The concept of self-determination may in some circumstances be equated with that of self-defence.

6. While many postcolonial states seek to vertically consolidate their effectiveness across their territory, postcolonial self-determination of peoples also reflects a horizontal societal preservation function.

7. A 'people' can be formed as a direct response to specific, predatory actions of a state.

8. When clear manifestations of (postcolonial) effectiveness can be readily observed, in juridical decisions involving territorial disputes, this should mitigate the dominance of the concept of original title, in determining sovereignty.

9. In modern territorial statehood, the 'effectiveness' of a state is not only measured by its credentials to legitimate claim over territory, but also the ability of that territory to administer itself in conformity with the precepts of modern public international law.

10. Promoveren buiten de faculteit geeft slechts een beperkte toegang tot een academische carrière.

Nederlandse samenvatting

De moderne territoriale staat

Deze studie onderzoekt de relatie tussen aan de ene kant klassieke vormen van soevereiniteit - met name het *suprema potestas* model, dat in essentie inhoudt dat een staat kan doen en laten wat hij wil op zijn eigen grondgebied - en moderne vormen van soevereiniteit. In die laatste worden rechten en verantwoordelijkheden erkend van individuen, vooral in die staten die partij zijn bij het Internationaal Verdrag inzake Burger- en Politieke Rechten (IVBPR) en het Internationaal Verdrag inzake Economische, Sociale en Culturele Rechten (IVESCR). Deze groep staten vormt een grote meerderheid.

Het belangrijkste juridische vraagstuk dat wordt onderzocht is het belang van gemeenschappelijk artikel 1 van deze twee mensenrechtenverdragen, dat bepaalt dat alle volken het zelfbeschikkingsrecht bezitten, voor de aard van soeverein optreden. Kort gezegd is binnen het kader van de Verenigde Naties die de twee genoemde mensenrechtenverdragen heeft opgesteld, de oorspronkelijke antikoloniale betekenis van "zelfbeschikking van volken" vervangen door een aanspraak op toegang tot het staatsbestuur voor de onderdanen van een territoriale staat.

Zelfbeschikking als wapen tegen kolonialisme is één van de grootste wapenfeiten van de Verenigde Naties geweest. Toch zal worden betoogd dat de manier waarop een aantal, met name postkoloniale, staten tot stand zijn gekomen grote uitdagingen met zich mee brengt voor zelfbeschikking in de zin van toegang tot het staatsbestuur. Het concept soevereiniteit komt min of meer overeen met het concept staat, in die zin dat de territoriale staat de primaire entiteit is waaraan internationale rechtspersoonlijkheid wordt toegekend. Een essentieel onderscheid tussen soevereiniteit en de staat is echter dat de staat per definitie een territoriaal element bezit, terwijl soevereiniteit het recht van de staat op onafhankelijkheid op het internationale vlak weerspiegelt. Dientengevolge kan een fundamenteel verschil worden waargenomen tussen staatsvorming als gevolg van koloniale activiteit en staatsvorming van Europese (en dus koloniserende) staten. De laatste zijn meer organisch gevormd. Verder kan worden geconstateerd dat dit verschil bepaalde gevolgen heeft voor zelfbeschikking in de zin van toegang tot het staatsbestuur als moderne vorm van soevereiniteit.

Het concept staat als juridisch fenomeen is van Europese oorsprong, en is over de gehele wereld geëxporteerd via imperialistische hegemonie. Hegemonie is een kernfactor in maatschappelijke ordening, en is daarom ook een factor in het moderne concept van de staat. Deze factor nam een voorname positie in bij de verspreiding van de Europese staat als overheersend model door middel van kolonialisme. Europees kolonialisme was gericht op het beschaven van de "onbeschaafden" door niet-Europese gebieden binnen de Europese gemeenschap te brengen door waar mogelijk het opleggen van de Europese rechtsvorm. Het is geen toeval dat dit plaatsvond op het hoogtepunt van het klassieke rechtspositivisme, hoewel het moderne internationaal recht nu probeert de meest dwingende vormen van inter-gemeenschappelijke hegemonie teniet te doen. De moderne territoriale staat moet echter niet verward worden met de natiestaat. De verdeling door de Europese kolonisten, bijvoorbeeld die van Afrika aan het einde van de 18^{e} eeuw, leidde tot verregaande transformaties van gemeenschappen. Deze transformaties werden gevolgd door de vorming van nieuwe soevereine gebieden door middel van dekolonisatie. Dit leidt tot een interpretatiemethode van het moderne concept van de staat die territoir als iets vaststaands beschouwt. De bestuurlijke capaciteiten van dergelijke staten, die veel meer fluïde zijn, staan hiermee in schril contrast. Deze fluïditeit wordt door het internatio-

naal recht erkend, wat impliceert dat een "beschaafde" moderne staat in theorie zeer beperkte bestuurlijke capaciteiten kan hebben. Ook lijken dergelijke staten vaak een bijzonder dwingende vorm van hegemonie te beheren. De moderne territoriale staat wordt dus niet noodzakelijkerwijze empirisch gevormd, maar is vooral ontwikkeld als gevolg van het feit dat een zich ontwikkelend, formalistisch, en in naam allesomvattend "positivistisch" internationaal publiekrecht moet omgaan met een potentiële tegenstelling tussen "natie" en "staat" onder één en dezelfde noemer.

Aan het begin van de 20e eeuw vond het begrip "zelfbeschikking" ingang, in een aantal verschillende definities en contexten. Vanuit een juridisch perspectief werd het in de context van de Verenigde Naties een politiek postulaat. Dit hield in dat een volk het recht had op toegang tot het bestuur. Dit nam in eerste instantie de vorm van dekolonisatie aan. Zelfbeschikking vond echter tegenwicht in het beginsel van *uti possidetis*, dat koloniale administratieve grenzen tot grenzen van moderne territoriale staten maakte. De kern van dekolonisatie is dat de vorming van postkoloniale staten door middel van het recht op zelfbeschikking een imperatief is. Het is als algemene regel aanvaard, met name in Afrika, dat dit gebeurd is zonder de koloniale grenzen te wijzigen. Het is ook gesuggereerd dat een "volk" bestaat uit de gehele bevolking van een grondgebied. Tegelijkertijd is zelfbeschikking een voortdurend recht. Na afloop van dekolonisatie neemt het een "interne" vorm aan, die een regering vereist die het gehele volk vertegenwoordigt zonder onderscheid naar soort, in het bijzonder ras, geloof of kleur. Een hoofdvraag betreffende de relatie tussen zelfbeschikking en het primaat van bestaande dan wel geërfde grenzen is de vraag naar de betekenis van "interne zelfbeschikking". Wat dit betreft is het denkbaar dat een territoir ervoor kan kiezen binnen een postkoloniale staat te blijven ("postkoloniale interne zelfbeschikking"). Een territoir kan er ook voor kiezen erkenning te zoeken als onafhankelijke eenheid ("externe postkoloniale zelfbeschikking"), of voor een meer aangepaste vorm van zelfbeschikking die alle etnische en culturele groeperingen aan vaste, territoriale vorm, bindt. De conceptuele dominantie van de laatste vorm wordt tegenwoordig getemperd in die zin dat een "volk" kan worden gezien als een territoriale eenheid die kleiner is dan de gehele bevolking van een staat. Dat een "volk" moet worden gezien als de optelsom van de individuen die zich binnen de grenzen van een postkoloniale staat bevinden is dus binnen het internationaal recht een gedateerd idee. Ten slotte volgt uit de *Friendly Relations Declaration* dat het begrip "volk" een raciaal of religieus element heeft. Dit is een belangrijke constatering bij het opnieuw richting geven aan het debat over enkele van de meer moderne aspecten van de postkoloniale staat.

Op basis van bovenstaande is het mogelijk de staat in juridische termen te conceptualiseren vanuit zowel een *top-down*, territoriaal perspectief, als vanuit een *bottom-up* perspectief gebaseerd op de delen waaruit de staat is opgebouwd. Dit concept van "collectieve groeperingen" ontleent haar specifieke juridische waarde aan de statenpraktijk in de Economische en Sociale Raad en de Algemene Vergadering van de Verenigde Naties. Internationaal recht is het recht van staten. Gezien vanuit het perspectief van de internationale "Bill of Rights" en de Friendly Relations Declaration echter zijn de bescherming van individuen en bepaalde verwachtingen aan hoe staten zich gedragen ook geldend recht geworden. Het recht van collectieve groeperingen is verder versterkt door de Algemene Vergadering die in het vervolg op de Milleniumverklaring vaststelde dat staten de verantwoordelijkheid hebben om hun bevolking tegen ernstige schendingen van de mensenrechten te beschermen. Nu zelfbeschikking van volken niet langer beperkt is tot gevallen van dekolonisatie en territoriale grenzen kunnen worden aangepast met instemming van de betrokken partijen, rijst de vraag naar de erkenning van nieuwe staten. Hoewel het geen verbazing zal wekken dat de internationale gemeenschap terughoudend is bij het erkennen van nieuwe postkoloniale staten, is territoriale afscheiding als gevolg van een gebrek

aan interne zelfbeschikking niet bij voorbaat uitgesloten. Het meest recente voorbeeld is de verwijzingsvraag naar het Canadese Hooggerechtshof betreffende de eenzijdige afscheiding van Quebec. Daarnaast kan worden geconstateerd dat het realiseren van zelfbeschikking snel kan worden gekanaliseerd in de richting van externe zelfbeschikking wanneer op grote schaal en systematisch de mensenrechten van een deel van de bevolking worden geschonden, zoals bijvoorbeeld in Bangladesh. Collectieve groeperingen – "volken", "minderheden", "inheemse volken" en andere territoriale collectiviteiten die relatief minder vastomlijnd zijn – overlappen vrijwel zonder uitzondering enigszins in vorm en omstandigheden. Zij zullen echter alleen een kans maken op adequate erkenning van hun claims door ze vorm te geven in overeenstemming met de rechtsregels die op een bepaald feitencomplex van toepassing zijn, en als zodanig worden aanvaard door nationale en internationale juridische autoriteiten.

Na de totstandkoming en de inwerkingtreding van het IVBPR en het IVESCR werden de rechten van "collectieve groeperingen" juridisch tastbaar, aangezien de bijna universele ratificatie van deze verdragen is gebaseerd op de vrije wil van staten. In de praktijk wordt van alle volken met een integrale territoriale component verwacht dat zij in eerste instantie hun rechten als volk collectief via de bestuurlijke en administratieve mechanismen van hun eigen staat proberen te realiseren. Tegelijkertijd worden echter "minderheden" die gelijke rechten als de meerderheid nastreven, los van collectiviteit en territoir, gezien als vormgegeven door de mensenrechten. De aandacht gaat in eerste instantie uit naar Azië en Afrika wanneer gekeken wordt naar postkoloniale praktijksituaties waarin de collectieve groeperingen "minderheden" en "volken" centraal staan. Vanwege het bestaan van een regionale intergouvernementele organisatie, de Afrikaanse Unie, heeft Afrika echter een duidelijk voordeel op Azië wat betreft de diepgravendheid van de juridische analyse. Het Afrikaanse Handvest voor de Rechten van Mens en Volken bevestigt dat alle volken bestaansrecht hebben. Dit laat zien hoe regionale inzichten behulpzaam kunnen zijn voor begrip van het concept "collectieve groepering" , aangezien de conceptueel gescheiden regimes betreffende de rechten van "minderheden" en "volken" elkaar potentieel overlappen. In de Afrikaanse context kan het onduidelijk zijn of een collectieve groepering moet worden aangeduid als "volk" of als "minderheid", omdat het concept "volken" extra, regionale, betekenissen heeft. In de regio's in kwestie is er grote kans op het bestaan van gewapende conflicten. In de meest extreme van zulke omstandigheden kan een "volk" ontstaan door middel van tegenstand tegen extreem optreden van de staat, met name wanneer zulk optreden herhaald en opzettelijk gericht is tegen een bepaald segment van de eigen bevolking. Het lijkt er op dat beter inzicht in de postkoloniale staat kan worden verkregen door de spanning tussen staat en gemeenschap op een conceptueel vlak te deconstrueren.

Eén manier waarop de postkoloniale territoriale staat kan worden voorgesteld is door de uitoefening van soevereiniteit door de staat op te delen in verticale en horizontale elementen. Daarbij wordt het territoriale aspect van de staat als vaststaand gezien, zonder af te doen aan een eventuele aanpassing van de *uti possidetis* regel. Het verticale aspect vertegenwoordigt het cumulatieve effect van de staat die zijn onafhankelijke soevereiniteit manifesteert. Het horizontale aspect vertegenwoordigt het vermogen van collectieve groeperingen om effectief te reageren op het territoriale bestuur van de postkoloniale staat. Het internationaal recht geeft in het algemeen de voorkeur aan bestuursvormen die leiden tot algemene verkiezingen. Vooral in het geval van postkoloniale staten echter is een kijk op democratie waarin verkiezingen centraal staan mogelijk onvoldoende om tegemoet te komen aan de vereisten van toegang tot het staatsbestuur uit het huidige internationale recht. Er lijkt zich een notie te ontwikkelen van wat kan worden gemanifesteerd door houders van een legitieme claim op "civil society". Interne zelfbeschikking komt echter grotendeels overeen met het recht van een volk op toegang tot het bestuur. Een dergelijke formulering leidt mogelijk in de praktijk tot uitsluiting. In het postkoloniale tijdperk ech-

ter, vooral in het nieuwe millennium, heeft de legitimiteit van een dergelijk principe gevolgen voor een recht op democratie, vooral omdat territoriale omstandigheden in de praktijk het recht op interne zelfbeschikking kunnen beperken. Het kan gebeuren dat territoriaal afgebakende juridische entiteit bepaalde administratieve tekortkomingen laat zien die voortvloeien uit tekortkomingen op de grond. Het is daarom voorstelbaar dat claims op territoriaal bestuur worden erkend door zowel de bevolkingsgroepen op de grond als door de internationale gemeenschap, door middel van bepaalde vormen van erkenning. Langs dezelfde lijnen laat ook de statenpraktijk zien hoe staten bepaalde vormen van bestuur uitoefenen waaraan juridisch gewicht wordt toegekend zodanig dat dit bestuur op lokaal niveau in de weg staat. Kortom, de postkoloniale staat kan met regelmaat in een situatie terecht komen die zowel door territoriale als administratieve (d.w.z. "democratische") omstandigheden wordt gekenmerkt. Deze studie bepleit dat de territoriale omstandigheden niet noodzakelijkerwijze de dominante variabele vormen in deze relatie.

De "moderne" aspecten van het concept staat, die zijn ontleend aan de mensenrechten, hebben de paradox van territoriaal bestuur nog verder gecompliceerd. In het algemeen is dit een welkome ontwikkeling. Echter, het weerspiegelt de mate waarin de internationale samenleving zich heeft ontwikkeld uit de buurt van de *étatism* van *suprema potestas*. Toch kunnen complicaties worden geconstateerd wanneer bevolkingen worden gezien als rechtssubject door de lens van staten, volken, minderheden, inheemse volken, andere groeperingen en individuen. De hoofdvraag is in hoeverre de staat wordt gedefinieerd door de bevolking, of de bevolking door de staat?

Toegang tot het bestuur blijft het uitgangspunt van de analyse van zelfbeschikking van volken. *Uti possidetis juris* is vooral van historische waarde, hoewel dit beginsel de koloniale grenzen naar de postkoloniale staat heeft overgezet. Het recht op zelfbeschikking daarentegen is permanent, in overeenstemming met artikel 1 van het IVBPR en het IVESCR.

Territoriale wijzigingen kunnen daarom optreden, zelfs in postkoloniale staten, als wordt geaccepteerd dat: zelfbeschikking van volken relevant blijft ook na dekolonisatie; een "volk" meer kan zijn dan de som van de inwoners van een staat; het recht op zelfbeschikking de keerzijde is van de rechten van minderheden; en de rechten van "volken" als onderwerp van juridische analyse zich blijft ontwikkelen in het licht van claims van delen van een territoriale staat jegens die staat en de internationale gemeenschap. Dit leidt tot de conclusie dat een effectieve administratieve structuur die niet formeel de status van regering heeft, beter gepositioneerd is om het formele bestuur over een grondgebied uit te oefenen dan wanneer de gouvernementele (en mogelijk ook de territoriale) *status quo* zou worden gehandhaafd.

Deze studie stelt dat het leggen van een verband tussen het concept zelfbeschikking en het concept zelfverdediging kan leiden tot een effectiever staatsbestuur. De reden hiervoor is dat er een gevaarlijke situatie kan ontstaan wanneer een postkoloniale staat zichzelf "verticaal" probeert te consolideren, onder meer door gedwongen assimilatie. In zulke omstandigheden moet binnen de staat op horizontaal vlak tegenwicht worden geboden zodat volken, minderheden, inheemse volken en andere kwetsbare groeperingen kunnen reageren. Dit houdt niet noodzakelijkerwijze overmatige kritiek in op het concept assimilatie *an sich*. Het staat immers vast dat collectieve groeperingen ook onderling assimileren. Het houdt wel in dat assimilatie onder dwang – in de praktijk betekent dat het voorrang geven aan "territoir" boven "effectiviteit" – afdoet aan het recht op zelfbeschikking, en dat de internationale gemeenschap daar adequaat op moet reageren.

Dit is vooral duidelijk in die gevallen waarin een staat niet bij machte is om de "responsi-

bility to protect" – op zichzelf een onduidelijke internationale verplichting - waar te maken, dan wel in andere gevallen van acute dreiging zoals in Darfur. Dit kan leiden, op een abstracter niveau, tot erkenning voor de gedachte dat het internationaal recht rekening moet houden met de wil van het volk. Dit blijkt ook uit sommige aspecten van de Kameroen v. Nigeria zaak voor het Internationaal Gerechtshof, vooral betreffende het Bakassi schiereiland. Soortgelijke omstandigheden zouden in toekomstige zaken voor het Internationaal Gerechtshof aan een kritischer onderzoek moeten worden onderworpen. In het concept van de moderne territoriale staat kan "verticaliteit" in het staatsbestuur gelijk staan aan assimilatie. Dit kan zo ver gaan dat het beginsel van instemming (consent) in het democratische bestuur van een bevolking wordt verlaten. Aan de andere kant is "horizontalisme" in het moderne concept van de territoriale staat grotendeels ondergeschikt aan het gewicht dat de staat juridisch in de schaal legt. Dit is met name het geval wanneer men kijkt naar het vermogen van juridische entiteiten als "volken" en "minderheden" om tastbare veranderingen in het staatsbestuur teweeg te brengen.

De "effectiviteit" van een staat wordt in het moderne concept van de territoriale staat niet alleen afgemeten aan de kracht van claims op grondgebied, maar ook aan het vermogen van dat grondgebied om zichzelf te besturen in overeenstemming met de beginselen van het moderne internationaal publiekrecht. In dit verband kan spanning ontstaan tussen de doctrines van "oorspronkelijke titel" (original title) en "historische consolidatie" (historical consolidation), zoals ook blijkt uit de contrasterende jurisprudentie van het Internationaal Gerechtshof in de zaken Kameroen *v*. Nigeria en Nicaragua *v*. Honduras. Deze studie beargumenteert dat het toepassen van de doctrine van historische consolidatie in juridische besluitvorming beter rekening houdt met het recht op zelfbeschikking van volken, en daarom aanmoediging verdient. Dergelijke toepassing draagt bij aan de versterking van de mensenrechten en aan een objectieve juridische erkenning van het *non-étatisme* in modern internationaal publiekrecht. Oorspronkelijke cessieverdragen, net als *uti possidetis juris*, hebben een functie in het recht betreffende de vorming van staten. Het recht op zelfbeschikking kan echter drie decennia na de inwerkingtreding van het IVBPR en het IVESCR niet meer als inopportuun of als een vergissing worden gezien waar het juridische besluitvorming met territoriale toepassing betreft. Het analytische startpunt voor analyse van de rechtspraak zou meer gericht moeten zijn op een continue feitelijke beoordeling van het vermogen van een staat om zichzelf te besturen als basis voor het bestaan van de staat, dan op koloniale activiteit. Daarbij moet rekening worden gehouden met basale burger-, politieke-, economische-, sociale- en culturele rechten, en met de vraag of dergelijke individuele rechten algemeen erkend en nageleefd worden op het betreffende grondgebied. Uiteraard zullen administratieve en juridische beslissingen steeds worden genomen op grond van de feitelijke omstandigheden van het concrete geval.

De staat, het volk, de minderheid, het inheemse volk, de onafhankelijke groepering en het individu zijn algemeen geaccepteerde en juridisch gefundeerde verklaringen van de *condition humaine*. Op dit vlak heeft het concept van de mensenrechten - ooit ondenkbaar, genegeerd of verworpen - zich zodanig ontwikkeld dat het nu centraal staat zowel in het *discours* van de menselijke gemeenschap als in het lexicon van internationaal recht. Zodoende kan de staat, zowel in termen van samenstelling als in termen van postkoloniale substantie, worden voorgesteld als niet meer dan een imaginair domein, met name in sommige postkoloniale omstandigheden.

De multi-dimensionale werkelijkheid van de postkoloniale staat wordt nog steeds geprojecteerd op de standaard staatsvorm als juridische constructie. Tegelijkertijd versterkt de statenpraktijk steeds meer de rol van het individu in het internationale recht. Bij het beoordelen van situaties waarin staten of collectieve groeperingen binnen een staat een stuk grondgebied opeisen, kan het nuttig zijn om de relatief vaststaande elementen van het concept staat – een bepaald

grondgebied dat permanent wordt bewoond – te verzachten door middel van de relatief fluïde elementen – controle door de regering en onafhankelijkheid – als dit een aantoonbaar effectievere staat tot gevolg heeft. De belangrijkste doelstelling van het moderne concept van de territoriale staat als juridische constructie is het scheppen en in stand houden van een staat die, in het kader van sociale cohesie, bij machte is om de verschillende bevolkingsgroepen te ondersteunen.

Acknowledgements

I would not know where to begin to adequately thank the many individuals who have guided me to the conclusion of this complicated, challenging task, so I shall be brief. I owe an eternal debt of gratitude to the Lauterpacht Centre for International Law at the University of Cambridge for welcoming me so heartily as a visiting scholar. David Raič and Gerard Kreijen, my predecessors in writing about statehood and sovereignty, have been keen in their encouragement. The unwavering support of Paul Martin at Columbia University is acknowledged with my most sincere gratitude and appreciation. I am lucky to count Marten Zwanenburg and Simon Olleson, my paranimfen, as my close friends. Many thanks to Marten for his translation services as well. Lisa Feder, Roger O'Keefe and Ayako Masumoto, in particular, kept me grounded during the challenges that arise in such an endeavour. Lastly, my parents, Neal and Olivia, and my brother Chris, have been a bedrock of warmth and support. Thank you all.

Brigitte Stern: "My first question is, What have been your main mistakes—as a lawyer, I mean?"

Oscar Schachter: "Gosh…a couple come to mind…because they indicate what a lawyer in international life faces. In 1948, nearly fifty years ago, at the United Nations, the architects planning the future headquarters asked me how many seats they should make in the General Assembly. Now is that a lawyer's question? Probably only a lawyer was thought able to answer. The United Nations then had only fifty-one members. An international lawyer would be expected to know how many sovereign states existed and were potential members. I confidently answered the architects (after checking some textbooks) that they could safely add twenty seats to the fifty-one. It did not take long for my estimate to be mistaken and for costly renovations to be needed. A simple point, perhaps, but can lawyers confidently take the world as it is at a given moment when we know that it is in constant change? Could anyone have foreseen the breakup of colonial empires and the Soviet Union? The real problem, of course, does not involve guessing numbers but how to develop ideas and proceedings to cope with the unexpected changes that are inevitable. International lawyers and international organization specialists could give that challenge more attention."

– A Conversation with Oscar Schachter, 1997 ASIL Proceedings 344

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INTRODUCTION
States and sovereignty in classical and modern forms

Statehood is a paradox. As the primary foundation of international law, it is simultaneously a monolithic construction by virtue of its conceptual ubiquity, and, when viewed in terms of its practical effectiveness, a highly variable circumstance. This study seeks to explore certain aspects of this paradox, particularly in view of the widespread establishment of international human rights law, as part of public international law generally. As one scholar observes, the relationship between statehood *per se* and international human rights protection is ironic due to the relationship of the state with the voluntarist nature of international human rights law itself. Philip Alston writes:

> States alone are the subjects of international law; human rights treaties are negotiated among states and with only limited involvement by other actors; the majority of human rights treaties are adopted on the basis of a consensus among states, thus giving any government at least a potential veto power and certainly the ability to delay the drafting process; human rights obligations attach directly only to states and not to other entities; the international implementation machinery is a creature of states and is dependant upon them legally, politically, and financially; national-level implementation is a function for states to perform; when international bodies monitor compliance, they focus only on governmental compliance; and when sanctions are applied they are imposed upon states and enforced by (or, more commonly, undermined with the acquiescence of) states. Indeed, it has often been said that the international human rights system makes an important contribution to the legitimacy of states both by enabling them to claim the moral high ground and by giving them the opportunity to take on obligations which, in effect, legitimize a more activist or interventionist role for the government within society.[1]

What this study seeks to explore more specifically is the relationship between the classical models of sovereignty, most readily identified as the '*suprema potestas*' model which essentially reflects the notion that a state's actions are wholly unrestrained within the confines of its own territorial boundaries, and the modern models of sovereignty, to which rights and responsibilities are attributed to individuals, particularly in states-parties to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights—that is to say, the clear majority of all states in the world.

The fundamental legal argument being considered is the relevance of common article one of these two principal human rights covenants, which proclaims that 'all peoples have the right to self-determination', to the nature of sovereign activity. Broadly, under the United Nations framework, which established the two human rights covenants, the original anti-colonial meaning of 'self-determination of peoples' has come to be supplanted by an expectation of access to government, for nationals of a territorial state.

Although self-determination as an anti-colonial measure has been one of the greatest accomplishments of the United Nations, it will be asserted that the nature of the construction of some, particularly postcolonial, states has demonstrated profound challenges to this latter, 'access to government' meaning of self-determination. The concept of sovereignty, itself, is relatively synonymous with statehood, in that the territorial state is the primary global element to which legal personality is attributed. But an essential distinction between sovereignty and statehood is immediately made, in that statehood has an inherently territorial element, whereas sov-

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[1] P. Alston, *Downsizing the State in Human Rights Discourse,* in N. Dorsen and P. Gifford (eds.), Democracy and the Rule of Law 358-359 (2001).

ereignty is reflective of a state's right to independence on the global plane. As such, it may be observed how a fundamental difference exists in the construction of states that have been formed, as a result of colonial activity, as compared with those essentially European (and therefore colonising) states, which have been formed more organically. It may be further observed that this constructional difference has certain implications for the 'access to government' provisions of self-determination, in the modern form of sovereignty.

To be certain, colonial activity globalised the phenomenon of sovereign statehood. Statehood was readily spread worldwide through an expansionist European colonialism that coincided with the apex of the formalised, chiefly European science of international legal positivism. The state was a European conception; the system expanded through European advocacy, and the administrative structures of all states today are of nominal European provenance. The establishment and export of positivism, in the form of sovereign statehood, it is assumed, by viewing the vast *corpus* of written public international law, was tremendously successful. The concept of statehood was, to positivists, a perfect formula for the fact that power and immediate self-interest ruled the world. Given that reality, a specific form and personality was helpful in developing the set of rational expectations that derive from the purportedly uniform mix of international legal personality and the basic criteria of statehood, namely a permanent population, a defined territory and an independent government. Adding the sanctity of contract (*pacta sunt servanda*) and the expectation of good faith amongst states in the discharge of their affairs, specific expectations of behaviour could be obtained, particularly when colonial activity incorporated the vast majority of the world's territory into sovereignties. This was positivism's greatest attraction, and it asserted itself with genuine force throughout the course of its own substantive development and administrative implementation, both in European states and their overseas colonial territories.

To examine international law's sources is to examine international law's power as an operative system in an otherwise anarchical world, not least because the sources of international law define the thresholds of established legality. The fact is that these thresholds have shifted so considerably in recent decades that many positivist jurists of a past era would likely be shocked at what has become 'legal'. Decolonisation happened with such great speed and resolute conviction, and manifested itself on such a largely voluntarist basis, that the role of pure legal positivism was greatly diminished as a defining entity. The crest of the great positivists had fallen with the creation of the United Nations, and, in the end, 'classical positivism' simply outdid itself. Statehood, as a legal conception, was now controlled by a genuine multiplicity of sources, and once so many newly-decolonised states were able to earn recognition as sovereign states *per se*, international law rapidly became infused with a greater diversity of opinion and a widening of focus.

Thus international law is guided simultaneously by the principle of 'sovereign equality' of states and the shared expectations of the 'international community'. Earlier positivism had made statehood the highest imaginable judicial form, but post-war positivism (*i.e.,* 'modern international law') made allowances for the fact that supranational legal structures were conceived and implemented by sovereign states, themselves, as a direct result of the global decisions taken immediately following the two world wars. That colonial states very quickly acquiesced into a new political reality, whereby the holding of colonial possessions became undesirable on a global scale. The planet was thus left with, essentially, two conceptual forms of statehood, bound together under the monolith of the 'sovereign equality of states' so familiar in public international law discourse. In essence, a distinction between 'empirical' and 'juridical' states has been made, most famously by Robert Jackson, in 1990.[2] In this sense, it may be seen as unsurprising that

[2] See generally R.H. Jackson, Quasi-states: Sovereignty, International Relations and the Third World 69

states defined more in terms of their national cohesion than their territorial composition would be comparatively more likely to achieve a fuller level of access to government for its nationals.

The conceptual distinction between 'empirical' and 'juridical' states serves to negate the existence of the 'nation-state' as a matter of circumstance, but not as a matter of necessity. It does so by separating statehood into the intangible and tangible elements related to territorial administration, and then considers the relationship of current legal statehood to the collective weight of past decisions. There are nations, there are states, and there is an international legal system. This is to say that, although sovereign statehood forms the main part of the international legal system, the operational effectiveness of that system is dependent upon the successful function of its constituent parts. For this to happen, 'the nation' and 'the state' should coincide, at least nominally. Yet this is a circumstance not always observed in postcolonial states, particularly when the 'nation' neglects the 'state' (or vice-versa).

What is brought under examination on a more specifically juridical level, however, is the relationship between the sources of law and the effects of their actions over time. This is of particular concern to the African region, because its independence from European territorial possession and administration is still relatively new. What is most significant for jurists is the extent to which the sources and evidence of international law have adapted to changing intertemporal circumstances.

International human rights law as part of modern territorial statehood

What comes most clearly under examination is the common article one to the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. The first covenant positively defines the circumstances necessary for the fullest implementation of all international human rights, such as access to food, housing and education, while the second covenant fundamentally rejects acts of state which degrade the human person, such as acts of torture and attacks on the independence of state judiciaries by governmental agents. At this stage of international legal development, no state could credibly withdraw from the core provisions of these treaties, as they serve to define customary international human rights law in general. International engagement, viewed as the product of the aftermath of the second world war, is a matter of eternal and fundamental importance. Thus human rights is *Realpolitik* in the modern world.

However, territorial sovereignties, endowed with written legal systems and the legislative and juridical forums inherent in statehood, are charged with the demonstrable manifestation of governmental authority. A recurring theme in the present study will be the relatively uncontroversial assertion that classical legal positivism acted without regard to issues such as culture and ethnicity. Classical legal positivism assumes the creation of a universal system of sovereignties with readily-identifiable political and legal systems. This thesis asserts that such systems are not automatically forthcoming, despite the elation felt amongst the populations of decolonising territories worldwide. Although the indifference to concepts such as 'culture' and 'ethnicity' was largely inconsequential during the era of colonialism, as it coincided with the positivists' great influence, this indifference has been dramatically minimised in a world in which international human rights law has evolved into the core of the larger public international law.

'Modern territorial statehood', in its fullest conceptualisation, means something palpably more than that emanating from the international legal personality allocated to a governmental

(1990).

entity possessed with, and concerned only with preserving, a title to territory and its own sovereign equality amongst peers. The definitional contradiction between historical forms (≈classical positivist) and modern forms (≈so-called 'access to government') lies within the immediate transition from 'newly independent states' to 'states'. The reason for this is that statehood is a binary proposition in its classical, positivist form: states were both 'discovered' and 'civilised' by European states or they were *terrae nullius*. Positivist statehood exists as a product of its recognition *per se*, and it will only be recognised *per se* by other states if it is able to assume the responsibilities of statehood, and consequently enjoy statehood's benefits. That this is an exclusionary formula under purely positivist-defined statehood must not go overlooked, but what will be brought under closer examination is the extent to which statehood perpetuates itself under the circumstances least likely to reflect 'social development'. Indeed, the question of state failure cannot be excluded either. Yet, to the contrary, when, through state practice, 'international human rights law' reaches such a specific level of development that it is possible to talk, in legal terms, about 'democratic entitlements' and so-called norms of 'global governance', it becomes increasingly difficult to view the varying conceptualisations of statehood through the exclusive prism of that of the early 1900s.

The underpinning of any discussion on statehood is the legal principle of 'effectiveness', which guarantees the stability of the positivist international legal order. Effectiveness refers to the actual situation on the ground, in a state. It is here wherein the legal fiction of juridical statehood must find translation to the practical reality of empirical nationhood. Actions that demonstrate acts of territorial administration or other legitimate manifestations of state power are *effectivités*. Positivist international law is deeply receptive to such actions as a matter of principle, in that it may be presumed that higher levels of effectiveness within a state imply a greater reliability of legal norms and a greater clarity of expected behaviours amongst states. The established doctrine of effectiveness has much less to say, however, about the particularities of postcolonial states. The inherent conservatism of positivism, and indeed international law in general, serves the specific and worthwhile purpose of aiming towards expected behaviour, but the question for postcolonial states is: At what point does this conservatism assume responsibility for the 'wrong' type of behaviour—genocide, widespread and systemic human rights violations, corruption and lesser forms of governmental malfeasance? Indeed, particularly in geographic areas far removed from the power centre of the capital, the static form of positivist statehood may give disproportionate power to agents of the state, as compared to local populations. Here the first nebulous ideas of 'peoples' or other forms of *collectivités* can be introduced. Identifying overlaps in content, between these concepts, can help develop effectiveness doctrine to reflect the challenges of postcolonial statehood.

It is here where 'self-determination of peoples' plays a significant, if subtle, role in public international law. In most states, it has become relatively uncontroversial to observe that a citizen's right of access to government, through specific democratic procedures, has become a requirement of modern statehood, and, as such, the cultural elements of statehood are brought comparatively closer to the territorial elements. This stems primarily from the 1970 UN General Assembly Declaration on Friendly Relations, which itself was the product of a decade-long preparatory process. This significant declaration has been used extensively in recent international legal arguments, employing the underlying assumption that states operate as functional systems, and therefore a state's citizenry should be able to administer the state in a representative manner. With this comes an expectation of behaviour that a state, itself, will act in the interest of their own populace, by guaranteeing its citizens' access to government and reaffirming a positive commitment to the international community to provide basic sustenance of life, in the form of 'economic, social and cultural' rights, and a negative obligation to avoid measures, in the course

of government, which violate individual 'civil and political' rights. However, 'modern territorial statehood' concurrently operates from primarily the same basic form of mutually exclusive territorial-based sovereignty, from which the international legal personality of statehood is derived. The problem is that, while international law has evolved since the end of the second world war to broadly embrace human rights, the structures to implement such rights remain the product of classical legal positivism, which paid no heed whatsoever to the status of individuals within a state, as reflected in Alston's earlier commentary.

Thus modern international human rights law, which has seen a forceful amount of standard-setting and substantive development in the past four decades, has had to evolve through the static instrument of positivist statehood. At the core of the argument, there remains no compulsory measure to guarantee human rights protection and promotion under all circumstances—there is no global super-state. Yet self-determination of peoples undoubtedly exists as a global phenomenon. Its emergence as a supranational legal structure is bolstered by possible overlaps with peremptory norms of international law and the extent to which it is invoked by states against other states, but its power can easily be dampened by the sovereign acts of independent states. This is not an inconsequential formula, and the machinery of the UN human rights programme is thus fragile.

Employing this broad terminology, linkages have been made between the expectation of citizens having access to the administration of a territory through a democratic process, and the expectation that such governments will promote and protect basic human rights in return. Certainly, however, given the newfound welcoming of criticism and concrete suggestions for improvement of governmental behaviour worldwide that is the product of the work of both non-governmental organisations and the intergovernmental machinery of the United Nations, these linkages remain tenuous, despite the increasingly vociferous proclamation of their existence. Although the scope of human rights violations is most likely the greatest in sub-Saharan Africa and Southwest Asia, human rights violations and governmental malfeasance are global phenomena. However, what makes Africa so interesting for analysis is the fact that it is a region of the world affected by *uti possidetis juris*, or the transfer of the internal administrative boundaries of colonial possessions into external frontiers of a sovereign state, at the moment of a 'critical date'. Nevertheless, the problem is that the 'one-size-fits-all' model of positivist statehood has been an inhibiting imposition on the African continent, generally, and the mechanisms existing in the separate legal *formulae* of a 'peoples' right to self-determination', 'minority rights', and 'the rights of indigenous peoples' have been largely insufficient in serving their purposes. This is most evident when trying to put into perspective the variables of newly-independent statehood, vast economic underdevelopment, widespread human rights violations, internecine civil conflict and self-affected governments, in a framework advocating a closer connection between a territory and its citizens.

Current scholarship has channelled the dissatisfaction resulting from the discord between state and society in the postcolonial world.[3] A recent LL.D. thesis critically appraising peoples' rights and the rights of minorities in modern international law concludes on a decidedly pessimistic note as to the responsiveness of states towards the implementation of these rights, particu-

[3] Some attempt to reduce this discord may be observed through actions on the international level seeking to establish the role of good governance in the promotion of human rights. See e.g. UN Commission on Human Rights resolution 2001/72, at operative paragraph 1, recognising "that transparent, responsible, accountable and participatory government, responsive to the needs and aspirations of the people, is the foundation on which good governance rests, and that such a foundation is a *sine qua non* for the promotion of human rights, including the right to development".

larly in postcolonial states:

> Imagine a huge pond of frogs, the water in which is being slowly warmed up one degree Celsius at a time. How will the frogs react when the amount of heat becomes life-threatening? Try to jump out? No, they will simply simmer until, after a while, the pond will be seething with boiled or cooked frogs. Why? Because the slow, gradual accruement of the temperature would dampen their intellectual vigor and survival instinct, making the dangerous heat 'tolerable', even 'comfortable', and lead, as a sequitur, to their premature death. The steam-bath hazard, however, could have been avoided had the frogs encountered the already boiling water at the outset of their dangerous adventure: they would be shocked and thrown reflexively out from the dangerous medium. The essence of their tragic misconception lies in the lack of sensory acuity and the belief that it is sufficient to keep fine-tuning *ad infinitum* to the gradual at the surface […].[4]

The central conclusion of Skurbaty's thesis implies that the chief after-effect of colonial domination existing as an accepted form of governance has been neo-colonial discord crystallised between state and society within newly independent states. It is therefore of interest to examine the existing legal criteria in such a way as to attempt to bridge this discord. This is even more the case when recalling that international law is a constantly evolving system, responding to developments in international society. It seems that the viewpoints of jurists on statehood, viewed as perfect and essential in classical positivism, have admitted of comparable fallibility, in the postcolonial, post-positivist world, through the strengthened position of international human rights law generally. Economic, social and cultural rights are aspirational in nature, positively formulated to be progressively implemented, while civil and political rights are immediate, negatively formulated restrictions on state behaviour. This is to acknowledge that modern statehood is a less perfect institution than was originally imagined in its original European positivist formulation. While statehood retains its central role in the international system, it must contend with the fact that a large number of sovereignties were created through decolonisation in a very short period, that competition for resources within these states would be fierce, that the territorial frontiers of the state may be incongruous to the local population, that entire regions may have no experience whatever with 'deliberative democracy', that a government may not have effective control of its entire territory and, most significantly, that, as a result, the bureaucratic institutions of these states can tend towards dysfunction, incapacitation or hijacking by the state's chief executive.

The very emergence of a body of rights, designed to protect individuals and *collectivités* within states, reflects the fallibility of territorially delineated, mutually exclusive sovereignties. While this was a distinction to be overlooked in classical legal positivism, placating dichotomies between state and society in the postcolonial state through the progressive implementation of all human rights has become a full part of the modern public international law. The present study will therefore be primarily concerned with (re-) introducing 'the nation' and 'the state' in the postcolonial world by linking an expansive definition of a state's *effectivités* with the existing collective human rights. These are bundles of rights formed by pragmatic amalgams of 'peoples' rights', the existing rights of individuals belonging to minority groups, and, as ancillary sources, the rights of indigenous peoples.

The innate ability of humanity to adapt to differing circumstances and achieve both individual and communal self-preservation reflects the fact that self-determination is a right, of ongoing scope, that runs well beyond the colonial context. The central argument for any modern study on statehood will inevitably include discussion on postcolonial self-determination, or 'in-

[4] Z. Skurbaty, As if Peoples Mattered: A Critical Appraisal of 'Peoples' and 'Minorities' from the International Human Rights Perspective and Beyond 446 (2000); LL.D. thesis submitted to the Raoul Wallenberg Institute, University of Lund.

ternal self-determination', in its more recognisable legal terminology. This reflects the rise in voluntarism as a source of international law and emergence of the International Bill of Rights (peoples' rights) and the Friendly Relations Declaration (minority rights), through the United Nations. In this study, the point emphasised is that *collectivités* have earned legal recognition in ways previously unimaginable to classical legal positivists, and this is a welcome development as it contributes to the effectiveness of postcolonial statehood. The underemployment of peoples' rights and the rights of minorities by state actors should be reconsidered. In the developing world, and particularly in Africa, those who are able to uphold the responsibilities of modern governance, derived from international human rights law and UN practice, and reflecting the will of states, generally, may increasingly be recognised as holding legitimate title to 'effective governance' and should receive, on a gradient scale, legal recognition as such, through access to government and the state's international legal personality, and under conceivable but highly restrictive circumstances, to independent statehood on its own.

Methodology, breakdown of argument and brief chapter synopsis

The core of legal analysis, in the present thesis, revolves around the interplay between the legal principle of *uti possidetis juris* and the 'right of peoples to self-determination'. In the first instance, it could be imagined how these principles are *prima facie* in conflict with each other, as *uti possidetis* created decolonising states on colonial lines, yet self-determination was the legal basis for decolonisation. However, further examination of these two legal principles, through the practice of the International Court of Justice, will reveal a more nuanced juridical interpretation that demonstrates how the definition of 'self-determination of peoples' has evolved over time. This study's basic method of analysis is to view the development of self-determination through an inter-temporal prism: from political formulation, to initial form of implementation and to subsequent adaptations and modifications.

The legal principle of *uti possidetis juris* lies latent behind all questions of self-determination of peoples, as was most famously demonstrated by the outcome of the Badinter Commission, the familiar name of the EC Arbitration Commission on Yugoslavia. This study will contrast *uti possidetis juris* with similar variables to produce a result which may draw into question its probative application in both literally and figuratively setting the lines of decolonisation. Wholesale retroactive abandonment of *uti possidetis juris* would be a most unlikely occurrence, but the question of whether the effects of boundary lines formed through *uti possidetis* is both eternal and irrefutable is an open one, and can only be adequately considered by the international community of states taking intelligent decisions on specific cases.

As such, the thesis first discusses how universal statehood is the product of a legal formula, whereby elements related to a state's administration are seen as more malleable than those related to its territorial definition. The implication is that a so-called 'civilised', modern territorial state could be critically deficient in its governance capability. But 'self-determination of peoples', referred to as common article one in the covenants on civil and political, and economic, social and cultural rights, has meant both decolonisation and access to government. This has led to considerable development of the law relating to 'collective groupings', of peoples, minorities and indigenous peoples. In Africa, as elsewhere, the phenomenon of state failure must be examined in the context of particularities of geography to be properly understood. In the parts of a state not manifestly under the control of a central government, or where governmental activity is malfeasant, collective groups that are demonstrably contributing to the implementation of international human rights law, including the right to development, should be viewed as the *de facto* manifestation of *effectivités*. The objective, in doing so, is to contribute to

horizontal societal preservation, in light of the vertical homogenisation process of postcolonial state-building in these nascent sovereignties. State practice has, unsurprisingly, been cautious in the recognition of developments in the field of sovereignty, but significant milestones have been passed governing the legal relationship between a state and its citizens and residents. In sum, this study seeks to demonstrate how these substantive developments have transpired whilst the underlying legal machinery has remained relatively constant.

In chapter one, 'positivist statehood' is shown to be contradictory, arbitrary and spread by colonialism. In chapter two, the implications of decolonisation in the modern state are considered. The challenges to recognising the rights of collective groupings, in modern international law, is then considered in chapter three, and particular application to the African continent follows, in chapter four. Chapter five concludes with an analytical deconstruction of the modern territorial state, by observing certain factors and tensions existing in postcolonial statehood; it then considers a number of practical observations, with regard to the issue of 'access to government' and 'democratic governance', and observes approaches taken by the ICJ and other legal bodies in responding to the self-determination/*uti possidetis* rubric.

This study emphasises international human rights law so as to reinforce its basic provisions, while giving proper consideration to the underlying *collectivités* of so-called 'third generation rights'. While development of peoples' rights in international law can be seen to be stagnant at present, the existence of the underlying concept cannot be refuted. The international community will thus need to formulate coherent answers to complicated circumstances on the ground, particularly in the least-developed states. Taken to its outermost extremes, 'answers' to these 'problems' will involve the re-assessment of the ways and means by which established international human rights law undergoes its progressive implementation. This is to say that statehood, remaining at the pinnacle of entities possessed with international legal personality, is unlikely to disappear. However, assessing the extent to which this most fundamental of legal structures allows itself to adapt to modern realities, such as the inescapable emergence of collective rights as a product of international human rights law, is the objective of this product of research.

CHAPTER ONE
Formulating the modern territorial state

Hegemony is a primal factor in societal ordering, and thus it is also a factor in modern territorial statehood. It assumed a paramount position in the expansion of the European state to worldwide dominance through colonialism. European colonialism aimed at 'civilising' the 'uncivilised' by bringing non-European lands into European society through the imposition of the European legal form, wherever possible. That this occurred at the apex of classical legal positivism is not coincidental, although modern international law now aims to negate the most coercive forms of inter-societal hegemony. However, the modern territorial state should not be confused with a nation-state. As evidenced inter alia by the partition of Africa in the late 1800s, this partition by European colonialists caused deep societal transformations. These transformations were followed by the creation of new territorial sovereignties through decolonisation. This leads to a method of interpretation of modern legal statehood which views territorial considerations as distinctly 'fixed'. This is contrasted with the governance capabilities of such states, which are considerably more 'fluid'. As this fluidity is recognised by international law, it implies that a 'civilised', modern territorial state could potentially have critical deficiencies in governance capability. It may be that such states tend to administer an excessively coercive form of hegemony as well. The modern territorial state is thus one which is not necessarily formed through empiricism, but more predominantly developed as a result of the need for an emerging, formalistic, and purportedly all-encompassing 'positivist' public international law to address a potential contradiction between 'nation' and 'state' under a common chapeau. The tensions between 'empirical' and 'conceptual' formulation of statehood as a legal precept will form, in the main, the basis for this study.

The relationship between statehood and social order: Identifying early foundations

The present analysis begins with a brief commentary about the difficulties in *generally* thinking about states and statehood. This is perhaps self-apparent when considering the enormity of the task at hand, as statehood is probably the foremost universal instrument.

Planet Earth has been divided into a comprehensive series of entities attributable to one particular state, to the exclusion of another. Explorers have landed far and wide throughout 'modern times', *i.e.,* the Common Era. What one thinks of 'history' is a reality largely tainted by the reality of universal statehood. One would have to think very carefully to identify a geographic region of Planet Earth that is 'undiscovered' or 'undefined' and, as such, unincorporated into the functional system of public international law.[1]

Every part of the planet is assigned to, or affiliated with, a state. Concurrently, every state is of specific legal construction. All states are known to have international legal personality, or standing before, and obligation to, a body of law directed at states. This 'international law' is, itself, largely consent-based, something formed as the amalgamation of convention, custom and other specific theoretical principles inherent within the states of the world. One would not go too far wrong in considering international law, generally, as being the sum of history's decisions. Yet most likely as an after-effect of the twentieth century's two world wars, this international law also reflects a societal will for the consensual imposition of restraint in one's actions within that

[1] With exception of the high seas and the *sui generis* entity that is Antarctica.

society. On the international level, that society is comprised of political actors, and those political actors are sovereign states.[2]

This political underpinning of states represents a delineated repository of power not subordinated to other religious or secular authorities. As from the 1970s, it is furthermore impossible to deny that 'an age of rights' is inherent in modern times. This phrase is meant to reflect the ascendancy of universal protections of individual rights, and all responsibilities associated therein, to global society. Holders of state power are not unlimited in their choice of actions in state activity. In times of armed conflict, customary international humanitarian law, coupled particularly with that specified by the four Geneva Conventions and their optional protocols, serves to set a certain benchmark of legal standards obliging basic standards of conduct towards individuals acting under the rubric of state authority related to the use of armed force. International human rights law similarly establishes a framework for individuals to have recourse to the rights and responsibilities set forth in the Universal Declaration of Human Rights and subsequent state practice.

'Statehood', as a legal construction, tolerates the possibility that different circumstances, in otherwise similar cases, may produce different results. The reality is that throughout its jurisdiction, yet regardless of its formation and composition, the state will play a supreme role in manifesting its legal personality. This reflects the interesting dichotomy of public international law at the outset of the 21st Century. Although states are no longer wholly unconstrained in their own actions, they remain the largest and highest repositories of legal power. The underlying question is that, if states are sovereign, then sovereign states may do as they will, yet it is similarly obvious that there exists sufficient judicial will to safeguard the roles of citizens within the state. Statehood is intrinsically linked to a functional judiciary capable of deciding specific questions put to it in the established forums. Statehood thus presumes, in some way, that each judicial forum is able to translate such state activity into binding jurisprudence, all the while upholding 'international' standards of behaviour vis-à-vis individuals.

Statehood often fails at this task, however. Statehood, whether overtly, or by exploiting the underlying juridical premise supporting its own existence, puts itself before its own subjects. A state may even impose its own will on individuals to better serve specific interests that it deems sufficiently significant to enforce or regulate. Nevertheless, that the reality of modern life may, on occasion, gravitate towards the Hobbesian floor never negates the existence of the Kantian ceiling. With limited exceptions, individuals are subjected to a basic core of protections through customary international human rights law and international humanitarian law. Regardless of circumstances, customary international human rights law and international humanitarian law establish the clear and absolute minimums necessary to paint a fuller picture of law. Indeed most states supplant these bare minimums with their signature, accession to, and ratification of, separate covenants on human rights and humanitarian law.

State power in the 21st Century is composed differently than that of the 19th, and that this is so deserves specific mention. In strictly normative terms, if a law is designed to be a law, then it is a law and will, over time, develop jurisprudence. This is as true for human rights law and humanitarian law as it is for penal law, contract law or other legal forms. In practice, jurisprudential development will favour some principles over others. If it were to be assumed that the cumulative force of international humanitarian law and international human rights law has developed sufficient jurisprudence so as to work as a grounding force, the dichotomy of modern

[2] *Cf.* L. Henkin, *International Law: Politics, Values and Functions*, 216 Rec. des Cours 22 (1989): "First, law is politics."

public international law is apparent. Speaking to the example at hand, penal law enjoys, and may tend to exhibit, a structural dominance. However, the practical dominance of e.g. penal law over e.g. human rights law does not constitute a normative relativism between these two forms. That is to say, both conceptualisations of the law are of equal merit and validity, as both conceptualisations form part of the total legal sphere as such.

Thus there exists an external counterweight against state malfeasance towards individuals, such as that of the internationally-established core provisions of humanitarian and human rights law.[3] With that rubric in mind, let it then be presumed that there are benefits for individuals to the socio-juridical construction of 'statehood', and those benefits of statehood are overarching, at least conceptually.[4] One operates, furthermore, from the basis that a state is, or certainly purports to be, an everlasting entity. This is reflected through perhaps the foremost assumption, in analysing international affairs, that of the presumption in favour of the continuity of the state. This is most likely due to the fact that states, themselves, are practical guarantors of the concept of sovereignty, or the employment of legitimate authority by a specific entity. In terms of legality, an entity exercising sovereignty over a portion of territory is viewed as upholding 'territorial integrity' over its portion of the earth. Seen in aggregate, the fact that each state exercises sovereignty over its own portion of the earth (*i.e.,* its own 'territory' is 'administered') is reinforcing territorial integrity as a highly important variable in the statehood equation. By forming a system governed by peer relations, linkages have been made to such an extent that the phrase an 'international community' of states is universal and common parlance. When each state upholds its own territorial integrity through the exercise of its own sovereignty, a self-reinforcing system of such statehood is formed throughout the planet. Over time, expected behaviours flowing from this system are established.

Thus, the roots of this system run deep, and statehood remains at its consistent core. According to Wolfgang Friedmann, a state would give up its basic primacy in international relations (and therefore its privileged access to the international stage) "only if national entities were absorbed in a world state".[5] The United Nations is indeed the legitimate and globally recognised generator of legal texts concerning states and their peer interactions, but it was never designed to be a 'world state' *per se*. Therefore, the importance of the concept of territorial integrity becomes inherently apparent: everyone currently would readily agree that one singular global state hardly exists, and yet the existence of an 'international community' is often proclaimed on the global stage. Hence, the reality that states, themselves, play a primal role within that 'community' becomes apparent; it is further implied that the inherent precepts of 'statehood', as the basis of that community, are projected throughout that community, international or otherwise.

The precepts of 'statehood' must be reconsidered. It may be that they can be distilled both to animate and inanimate notions, as a state certainly is more than a piece of land or a group of similarly minded individuals. Yet, here, a truth is revealed: because of the essential importance attached to it, statehood also implies a strong human link, both within the municipal amalgama-

[3] Such a statement draws heavily upon the work of the United Nations Organization, in that the ratification of international humanitarian law was facilitated by the United Nations, and the codification and establishment of international human rights law was catalysed by the UN. Operating from the basis of five decades of UN practice, all states now are bound to the notion that all individuals possess a battery of certain indelible rights regardless of the state of their residence or citizenship.
[4] For example, the predisposition in mentality that one would rather be a citizen of a state than a stateless person is borne out by the establishment, during the considerable period of postwar international legal development through the United Nations system, of the 1954 Convention relating to the Status of Stateless Persons (ECOSOC Resolution 526A (XVII), 26 April 1954).
[5] W. Friedmann, The Changing Structure of International Law 214 (1964).

tion of itself as well as through the interactions of these municipal amalgamations collectively on the world stage.[6] This may account for some of the difficulties in defining and, particularly, categorising statehood, as is manifested in the often-divergent views expressed in academic literature and in general understanding of international affairs.

The 'nation-state': An imprecise yet omnipresent fusion of two independent concepts

This hybrid notion of connection between a portion of the earth's land and its own inhabitants can be seen as taking on its own form, in a contemporary setting. The underlying assumption herein is often to equate statehood with the idea of a '*nation-state*', implying an intense connection between a people, or a collective grouping of individuals, and its 'own' territory. Whether this is actually the case is worthy of closer examination, however, not just because state boundaries and borders can be obviously artificial and arbitrary, such as in much of Africa and in Southwest Asia. The prevalence of this assumption in a modern global context is seen by some as being undesirable, however, as it is seen as something that constitutes a real detriment to the establishment of a true 'global society'.[7] It is therefore not unreasonable to assume that, at least in some circumstances of statehood,[8] 'nationality'[9] is a subset of statehood, subjugated to its own terms and demands. Under a global human rights regime, no person can be deprived of a nationality.[10] However, given that, with nominal frequency, some individuals do change their nationality between one or more states, whereas it is a much rarer occasion when states exchange territory with each other, the inherent distinction between the two concepts is exposed.

The potential dominance of 'statehood' over 'nationality' within the concept of a 'nation-state' presupposes an inherent link between the specific categorisation of a territory's organisation according to the will of its inhabitants, in spite of the fact that this may or may not be grounded in actual fact: for example, it is one thing to be 'French', or 'Japanese', or 'American' (wherein real 'nations'—constructed or indigenous—are equated with different 'states'); it is arguably less distinct to be 'Ivorian' or 'Rwandan' or 'Angolan' (wherein different societies have markedly less clearly-defined relations with their 'states' in other regions).

The variables at hand involve the earth's territory, the 'things' on that territory and the individuals in existence on that territory. Given the fragile nature of global society, it would hardly come as a surprise to see how conflicts can arise through the interaction of these independent variables. And yet, the idea of 'nation-state' has become a colloquial and seemingly ubiquitous fusion of the legal concepts of 'statehood' and 'nationality'. Nevertheless, the phrase is technically imprecise, because the concepts are not necessarily synonymous. Therefore, the question of the hybrid 'nation-state' is something that must be addressed directly from the outset.

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[6] See e.g. U.S. Restatement (Third) at § 206, stating that the capacities, rights and duties of states include, *inter alia*, sovereignty over its territory *and general authority over its nationals* (emphasis added).
[7] *Cf.* D.P. Calleo, *Reflections on the Idea of the Nation-State*, in C.A. Kupchan (ed.) Nationalism and Nationalities in the New Europe 15 (1995): "The nation-state remains the dominant political formula of our century, a reality regretted by many enlightened analysts of international affairs."
[8] Statehood as a legal subject is discussed extensively in this chapter, *infra* at text accompanying note 139 *et seq*.
[9] See e.g. Universal Declaration of Human Rights at Article 15.
[10] The right to a nationality was less controversial in the drafting of the UDHR than was the right to a freedom of movement. But, obviously, changing one's nationality would be nearly impossible without freedom of movement, and protections against arbitrary deprivation of one's own nationality are needed for a state's citizens returning from abroad. See V. Boutkevitch, *Freedom of Movement*, working paper for the Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc. E/CN.4/Sub.2/1997/22, 22 July 1997.

A nation-state, in its most unadorned formulation, can be seen as existing when a demonstratively historical link can be established between a measure of the earth's territory and those who inhabit it. The historical link by the inhabitants comprises the nation; the territory comprises, in the main, the state. Although it would be perhaps unwise to enter into the minutiae of nationalism at this stage, thereby heeding Eric Hobsbawm's oft-repeated warning that "the problem is that there is no way of telling the observer how to distinguish a nation from other identities *a priori*, as we can tell him or her how to recognize a bird or to distinguish a mouse from a lizard"[11], it would be misleading to imply that the concept of nation-state is monolithic. Although one individual human being has a specific legal right to take possession of one nationality, or perhaps multiple nationalities due to personal circumstances, when multiple individual human beings are grouped together, as a result of cultural factors and geographic proximity, such specific legal rights become more complicated to define inter-temporally.

This study attempts to identify and evaluate the effects of such complications through the 'coloniser' / 'colonised' relationship. It begins with a general assessment of the traditional criteria for statehood and becomes progressively more focused on the relative legal weight of these criteria in the postcolonial period. In doing so, the relative weight of the various criteria for statehood can be contrasted with the *status quo*, under varying practical circumstances, to determine whether benefit may be derived from greater legal weight being attached to variables of greater contemporary importance, as contrasted with the colonial period.

This general methodology is of interest because, in the academic literature on the topic, it is hard to identify one singularly-accepted specific juridical definition of the 'nation', as it is aggrandised into a collective element, as opposed to one specific individual possessing a nationality. The wide diversities of peoples and ways of life across the planet cannot be ignored when attempting to think *generally* about states and statehood. Despite this, the singular concept of 'nation-state' remains in common parlance, with the 'state' having a specific legal definition and the 'nation' tending to take the form of Walter Bagehot's famous observation: "We know what it is when you do not ask us, but we cannot very quickly explain or define it".[12]

Legal consequences of the interactions between 'nations' and 'states' cannot be ignored under modern international law. The concept of the nation-state must be addressed with precision, and it is here where political theory can play a useful role in beginning to channel a separation of the concepts. A theoretical 'deconstruction' is provided by Barry Buzan, who has identified four specific models of 'nation-states'.[13] The first model, working from the bottom up, is one of a (pure) 'nation-state', where a 'nation' historically predates the 'state' and contemporarily the 'state' protects the 'nation'; Hungary, Italy and Japan are cited as examples. The second model, or the 'state-nation', follows a top-down approach whereby the state fosters the development of a nation; the states of the 'new world' (the Americas, Australia) are given as examples. Buzan's third model is the 'part nation-state', whereby one nation is divided amongst two or more states; the Korean, Chinese and Greek nations are cited as examples. Finally, his fourth model, the 'multination-state' can be further broken down into two subgroups. The first subgroup is that of the 'federative state', whereby the state is completely un-rooted in one specific nationalism, thereby allowing multiple nationalities to exist within the state (Canada and—his book having been written in 1991—Yugoslavia are examples). The second subgroup is known

[11] E.J. Hobsbawm, Nations and Nationalism Since 1780: Programme, Myth, Reality 5 (1990) [hereinafter Hobsbawm].
[12] W. Bagehot, Physics and Politics 20 (1887), as quoted in Hobsbawm, *supra* note 11, at 1.
[13] See B. Buzan, People, States and Fear: An Agenda for International Security Studies in the Post-Cold War Era (1991), at 72 *et seq*.

as the 'imperial state' wherein one nation demonstrates active dominance of the state, usually to the detriment of other national groups within the state (Russians within the Tsarist and Soviet states, Punjabis in Pakistan and Tutsis in Burundi are Buzan's examples).

'Statehood', interacting as it somehow must with 'nationhood', takes on a spectrum of contextually-defined meanings, on the one hand, yet retains its almost dogmatic meaning of doctrinal simplicity, on the other.[14] For now, four points will be made which may help to clarify lines of thinking. In the first instance, statehood can be seen in both inanimate and animate forms, reflecting two distinct concepts. The inanimate view quite simply delineates geographic territory (roughly equivalent to 'the state'), whilst the animate view identifies specific linkages between land and inhabitant (roughly equivalent to 'the nation'). Moreover, as has been discussed, there also exists some undefined linkage between the concurrently existing animate and inanimate concepts of statehood. Thus, while the intellectual confusion, which tends to equate statehood with some sense of a nation-state, does seem quite prevalent, it is also important to bear in mind that statehood can also be legitimately viewed in a much more restrictive manner.

Individual states are usually well set to preserve their own independence—as well as that of *all states* collectively—to the highest extent possible. This quest for independence leads to two important implications for the international legal system, forming the aforementioned points three and four.

The presumption in favour of the continuity of the state forms the core of international law. As such, the modern notion of 'state failure' is anathema to classical legal positivism. This reflects the very strong legal presumption that once a state is created it continues to exist in perpetuity as a specific legal person. Bilateral treaty-making would be of little relevance if statehood were conceived on the basis of excessive malleability. Classical international law also makes this assumption because of the great importance placed in demonstrating state practice, for the purpose of creating customary international law. Such state practice must consider issues such as: generality of the practice, its duration of time, the consistency and uniformity of its application, *et al*. Furthermore, in assessing the validity of state practice, opposing state actions such as silence, acquiescence, protest and contrary practice may all be employed. The stability of the international legal system is thus predicated upon a clear understanding of what constitutes legality *per se*, which reinforces the expectation of irrevocability inherent in statehood's classical legal formulation.

The fourth point simply draws marked attention to extent to which states preserve their independent decision-making authority, even in an environment otherwise conducive to, and encouraging of, multilateralism.[15]

As the discussion progresses, it will be of interest to present a historical overview of the instillation of the territorial state across the globe. The consensus in the international legal com-

[14] *Cf.* particularly United Nations Charter at Article 2(1): "The Organization is based on the principle of the sovereign equality of all its members"; UN Charter at Article 4(1): "Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgement of the Organization, are able and willing to carry out these obligations"; Montevideo Convention on the Rights and Duties of States (1933).

[15] As the university professor and former executive staff member in the cabinet of UN Secretary General Kofi Annan, John Ruggie, writes: "[N]o state goes out of its way to construct international collective arrangements. Where possible, unilateral or bilateral arrangements are preferred. Collective arrangements are turned to only when national objectives cannot be achieved in their absence. Thus, collective arrangements are derivative and their purpose is to compensate for the 'imperfections' in the state system". *Cf.* J.G. Ruggie, Constructing the World Polity: Essays on International Institutionalization 55-56 (1998).

munity would be that the 1648 Peace of Westphalia,[16] which marked the advent of sovereign states both with legal personality and territorial limits. The system of international relations, which persisted and evolved until the creation of the United Nations,[17] was thus established and, prior to the two world wars, bore witness to the development of the positivist international legal system of comprised sovereign, exclusive and so-called 'civilised' states. The Peace of Westphalia was a series of treaties that cemented the modern territorial state in law and politics. Although the historical proximity of this aspect of international law to the law of modern statehood is obvious, care should be taken not to ignore that the concepts of statehood predated the Westphalian state, which are also worthy of consideration.

Anticipating and acquiring modern statehood: The role of hegemony as a component of territorial ordering and administration

> When the Holy Roman Empire began to crumble and an increasing number of States became independent of the Emperor in law as well as in fact, chancelleries had at their disposal a reasonable number of standard forms of treaties and even fragmentary rules of international customary law which had long been in use, even though they were not necessarily considered as a branch of law separate from municipal law. This continuity, as well as the gradual character of the transition from the medieval order to the modern State, deserves being emphasized, as these significant aspects of the evolution of present-day international law have been unduly neglected.[18]

The limitations of this study prohibit a detailed discussion on forms of statehood before the emergence of the modern European state. Thus, the primary purpose of this section is to demonstrate the existence of some forms of statehood as precursors to the modern state system as defined by the Peace of Westphalia. It should be noted, however, that, as the pathway to contemporary globalised statehood is European in origin, only the most direct precursors to the development of the Westphalian state would be feasibly addressed in this analysis. Even within this limitation, however, a series of relevant observations could be made about the foundations of societal order and, specifically, the ways of guaranteeing such order. The sub-text throughout this period is one of hegemony, or the presence of dominance, either by acquiescence or by force, of one collective grouping over other collective groupings such that the interests of the weak are subjugated to those of the powerful.

The question of hegemony is thus a recurring theme throughout this study. To begin such explorations, it may be asserted from an early stage that hegemony, through colonialism, followed by a rapid abandonment of colonial rule, preserved the colonially-administrative *status quo* in the postcolonial state. This is to say that, in later history, many states affected by colonialism did not automatically revert to pre-existing realities following independence. Colonialism was a largely transitory force, and yet such transitory influence also tended to find a juridical base, as a result of the actions taken by local administrators in guaranteeing the legitimacy of the colonialists' actions. The international *rôles* played by colonising states and their eventual administrative subjects are particularly governed by treaties of cession entered into by indigenous governing officials and European powers, particularly at the height of colonial expansion, at the latter half of the 17th Century.[19]

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[16] Discussed extensively *infra* this chapter at text accompanying note 34.
[17] See A. Cassese, Self-Determination of Peoples: A Legal Reappraisal (1995) [hereinafter Cassese], at 325.
[18] G. Schwarzenberger, A Manual of International Law, Book 1, 7 (4th ed., 1960) [hereinafter Schwarzenberger].
[19] It will be important to observe throughout that reciprocity is a fundamental underpinning of public international law, most colonial histories can date back to a specific treaty, from where 'original title' can be

The present analysis aims at remaining cognisant of these historical realities and attempts to reframe them in a modern form. What should therefore come under closer scrutiny is the extent to which colonial hegemony becomes internalised in the postcolonial state. A true examination of statehood *in vogelvlucht* cannot exist without considering the extent to which societies have been inter-temporally modified by juridical, positivist statehood. The question of what affect such historical interactions have on modern society is not insignificant. Although it is true that international law gives foremost respect to the purely juridical definition of statehood, it would, however, also be correct to say that 'statehood' *per se* has taken on numerous recognised forms prior to the ascendancy of the specific legal authority of a recognised government, across a defined territory.

Identifying socio-cultural fusions, from antiquity to Westphalia

Although linkages between ancient Greek civilisation and modern territorial statehood are conceivable, in analysing the early European context, it follows that Rome was an even greater pre-Westphalian 'state'. It began as a minute settlement in central Italy. From roughly 500 BCE, Rome was organised in the form of a republic, and soon began a gluttonous, vainglorious, yet not wholly unsuccessful, expansion. The conquest of the entire Italian peninsula was followed by Sicily, Spain, North Africa and, later, the Hellenic area, thereby acquiring control of the entire Mediterranean. By the year 475, it stretched from England to Arabia, having shed the republic for an empire, under Caesar. Along the way, grandiose physical and political infrastructures, of legendary importance, developed from what first originated as a conservative, agrarian society. Toward the end of the Roman Empire, the challenges of governing over such an expansive geography made it partially anarchical, and it eventually collapsed as a political body, although its cultural dynamic would prove to have great centrifugal force.

Although these antiquarian experiences find nominal parallel with the global expansion of the colonial European legal system, the changing nature of Roman history, over time, defies broad generalisations.[20] This discussion limits itself to establishing a fundamental underlying point: ancient Rome was a hugely impressive force for societal homogenisation, via the employment of its own hegemony throughout its spheres of influence.[21] Homogenisation is a societal force potentially laden with hegemony. Rome, in antiquity, did largely as it wished, as have later states, many of which have suffered from similar inter-temporal instability. Yet this does not negate the fact that homogenisation was the prime antecedent for future European societies. This thereby makes it the prime antecedent for future global state societies, as well.

This is to say that Roman society instilled, developed and refined the imperial domination by one superior culture over others of its time. It undoubtedly evolved the concept of hegemony to a higher level than previously observed. The powers of Roman assimilation were profound: it was able to incorporate hugely divergent peoples into its society—particularly early on, during the Empire—by making the idea of Roman citizenship a political one. As Roman society expanded and exercised hegemony over others, those dominated by Rome were seen as barbarians, in the first instance. Only by embracing the Latin language and identifying with

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seen to have been derived.

[20] For commentary on the earlier Roman civilisation, see e.g. J.M. Roberts, History of the World (2d. ed, 1993) [hereinafter Roberts], at Book 1, Chapters 6-9; for later Roman civilisation, see e.g. W.W. Buckland, A Text-Book of Roman Law from Augustus to Justinian (3d. rev. ed. 1963). And see generally M. van Creveld, The Rise and Decline of the State (1999).

[21] *Cf.* Roberts, *supra* note 20 at 219: "If we no longer look back on the Roman achievement as our ancestors often did, feeling dwarfed by it, we can still be puzzled and even amazed that men could do so much."

'Roman' ways would this citizenship become complete indeed, by no means were all subjects of Roman rule ever to be considered as full citizens anyway. The pathway to Roman civilisation was laden with tyrannical, exclusive processes. The strict societal hierarchy within Roman civilisation was, in many ways, reflected through Roman law (although early Roman law was hardly immune to the emperor's whim) and subjugated to administrative structures within such law. As the empire expanded, a central bureaucracy was then developed and expanded to support it, which became an essential feature of governance. Ultimately, the level of homogenisation, as well as the level of implied consent to such homogenisation, on the part of citizens (and even to a certain extent, the outsiders commonly viewed as so-called 'barbarians'), was high. As Adam Watson comments:

> [E]thnic and civil loyalties increasingly found their place within an imperial political and cultural horizon. The will and the capacity to assimilate subject peoples, and their eagerness to be assimilated, were greater in the Roman Empire than in any other imperial system of antiquity. In this respect the only empire comparable to Rome has been China.[22]

Thus ancient Rome was active in cementing defined territorial borders as cornerstones of societal development. From the earliest Roman settlements, territorial divisions became something constructed from human decision rather than as an inheritance from local surroundings. The geography and topography of ancient Latium was open and surprisingly unconstrained for the landscape. Furthermore, from the earliest times, the centre of the Italian peninsula was a meeting point for varied groups of peoples, such that the idea of constructing formal demarcations of territory seemed natural. As Rome expanded, so did the practice of accommodating individuals from differing national backgrounds under a common rubric. This certainly was a discriminatory and aspirational system, whereby newcomers hoped to find societal places alongside autochthonous inhabitants. Over time, throughout Roman lands, this led to "a hierarchy of territorial divisions, commencing with the *pagus* at the base, then the *civitatis*, and at the apex, the *provincia* or *regio*".[23] In ancient Rome, each division had its own internal structure, from which collective control structures developed in a discriminate, yet unsystematic, manner throughout its spheres of influence. Rome expanded rapidly, and soon the Roman world became a known, and defined, entity. A concept of *terra nullius*—land attributed to no one—did not exist in the highly structured regions of direct Roman governance.

Thus a territory under direct Roman rule was directly accounted for and administered by Rome.[24] Two observations may be made on the nascent foundations for future international law concerning territory. The first is the emergence of a concept of territorial integrity. The Romans themselves saw the totality of the Roman Empire as a specific concept—the *imperium*, which was the apex of Roman hierarchy as a whole, from which the modern notion of sovereignty was derived.[25] Seen another way, control over territory is reflective of ownership of territory, from which an administering authority would exercise sovereignty, and a failure to occupy territory would preclude that entity from either being owned *per se*, or as being treated as sovereign. Ergo, the absence of *terra nullius* is to be found within Roman society, and this further implied a cohesive, sovereign, territorial unit. Of course things were more complicated in reality, as the emergence of procedural rules related to possession of territory within the Roman legal system show. As could be imagined, on occasion, two or more parties might claim ownership of the same bit of territory. When this occurred, provisional possession of the land was given to the actual pos-

[22] See A. Watson, The Evolution of International Society (1992), at 102.
[23] M. Anderson, Frontiers: Territory and State Formation in the Modern World 13 (1996) [hereinafter Anderson].
[24] *Id.* at 14.
[25] *Id.*

sessor, thereby shifting the burden of proof before a praetor regarding ownership to the non-possessor.[26]

Thus the second observation is that this early Roman *uti possidetis* has set the stage for future thinking about possession. Modern *uti possidetis juris* will be seen to operate chiefly in the sense that recognised possession of a territory means everything to its juridical form. However, 'modern' possession of a territory will always beg the question of how is the preservation (and thus who is the preserver) of the 'peace and dignity of the state' to be continually upheld. That a state reinforces peace and dignity, as a matter of practice, is demonstrated, for example, by criminal indictments throughout common law jurisdictions. *Uti possidetis juris* is free to borrow terminology from its antiquarian past employing a usage irrelevant to its past construction. *Uti possidetis*, in Roman antiquity meant that, if one held an object in one's own physical possession, such possession could be claimed as evidence of ownership were one to be called before a judiciary. *Uti possidetis juris*, in modernity, means that, when constructing a universalism, such as a coherent system of public international law, the effects and indeed the after-effects of colonialism are likely to reflect a dominant predisposition towards continuity. To speak colloquially, both the historical and modern forms of *uti possidetis* draw from the notion of 'finders' keepers'. This was the ambition—that post-colonial states would achieve a form of genuine competence to manifest independence; however, such independent forms would only be witnessed long after imperial Rome's own demise.

Interpreting specific concepts derived from pre-Westphalian socio-cultural fusions

The sheer size of the empire implied that its effects were geographically far-reaching and profoundly influential. As the formal Roman civilisation peaked and declined with the splitting of the empire into east and west, its societal vibrancy carried on. Furthermore, the rise of Latin Christianity throughout the region perpetuated the notion of universalism, which further continued homogenisation in a way not far removed from the original Roman tradition. Meanwhile, individuals simultaneously began to organise themselves in societal groupings which were more immediately based on local reality than universal principle, and a different type of state was formed. As Anderson writes: "With hindsight, there is a sense of historical inevitability about the shift to state sovereignty; but absolute control of territory by rulers recognizing no superior authority was for a long time challenged by various forms of universalism."[27]

Basic elements of modern territorial statehood—e.g. assimilation, consent, governance, hegemony, sovereignty and territoriality—were framed in ancient times. Additional clarity to these concepts would be developed further along the pathway that led the dominance of Europe on the global level. However, the increasing convolution of history makes it a different exercise to distil into brief, written form the period between the death of the Roman Empire and the birth of an international community of sovereign states. Still, in Europe, the refinement of concepts of nationality and statehood were the prime developments of the medieval period,[28] as

[26] The declaration by a praetor between two contending parties was that *"uti eas oedes de quibus agitur, nec vi, nec clam, nec precario, alter ab altero possidetis, quominus ita possideatis vim fieri veto"*, meaning, roughly: "as you possess the [properties] referred to, without having obtained possession thereof, one from the other, by force, or clandestinely, or by sufferance, I forbid that you be hindered in continuing so possessed". It is more concisely summarised is *uti possidetis, ita possideatis*: as you possess, so may you possess. See J.B. Moore, Costa Rica-Panama Arbitration: Memorandum on *Uti Possidetis* (1913), at 6.
[27] Anderson, *supra* note 23, at 17.
[28] See Watson, *supra* note 22, at 142 *et seq*.

manifested through the social stratification of nobility, clergy, tradesmen and commoners.[29] As Latin Christianity expanded, so did the collective European territorial space, but with a more autonomous character than ever before seen. This is implied through the disappearance of a central bureaucracy in Rome, coupled with the continuity of a unifying force of religion—and indeed, *religions,* given the reformation of Catholic traditions during this time period.

The Holy Roman Empire itself was, at first, an attempt to revive the collapsed western half of the original Roman Empire.[30] In that regard, and in spite of the fact that it 'existed' in various forms for roughly a thousand years (800-1806), its success may be questioned, as it was territorially limited roughly to present-day Germany and some of the *statos* of northern Italy. Its overall authority was dubious, as the Roman emperor's power was limited from around *circa* 1250. By the 1400s, power was almost completely vested in the Hapsburg family.[31] Capitalism and trade were prominent features of the period, and societal developments, such as the Protestant reformation, were also highly significant. Here, overt linkages between the state itself and the society within that state are made. Watson, for example, points out the need for Lutheran-minded leaders of German *statos* to ensure loyalty from their subjects, to prevent conflict at this time of flux, and to take preventive steps in order to extract this loyalty.[32] This, then, obviously was a far cry from the power and influence once effected by Rome directly and through its soldiers posted throughout its empire. Indeed, power and influence were generally manifested in a quite different manner, as the time period was marked by extreme warfare with monotheistic religion and monarchical power at its core.[33]

The Peace of Westphalia: Socio-cultural fusions crystallised into a juridical 'statehood'

As time passed, it can be observed how the pinnacle of this phenomenon was the multi-faced, brutal Thirty Years' War (1618-1648).[34] Although it was fought mainly in modern-day Germany, practically all of Western Europe had a hand in the conflict, as powerful European societies such as France and Sweden were keen to limit the power and influence of the now-fractured Holy Roman Empire. Religion did indeed play a large role in the early stages of the war; however, towards the end, it became an overt contest for hegemony between the Hapsburgs and France, in particular. In the end, the conflict became haphazard and confused. In signing the Peace of Westphalia, the parties to the conflict recognised the independence of each its signatories as sovereign states. As the emperor in Rome was therefore made formally redundant, the political climate of the time tended towards consolidation in France, the Netherlands and Switzerland, whilst the Hapsburg dynasty and the Holy Roman Empire were left

[29] See generally Roberts, *supra* note 20, at book 2, chapter 5.
[30] But *cf.* Voltaire's famous comment that, at the end, it was "neither Holy, nor Roman, nor an Empire".
[31] See Roberts, *supra* note 20, at 549, 579.
[32] *Cf.* Watson, *supra* note 22, at 173: "The essence of the *politique* (of the Augsburg compromise of 1555) […] was to allow rulers large and small, and even some individual towns, the right to choose the religious denomination of their *stato*, and to allow dissatisfied subjects to 'vote with their feet'. An extensive transfer of populations within Germany followed."
[33] *Viz.* The Christian Crusades (1096-1291), the Hundred Years' War (1337-1453), the War of the Roses (1455-1485), the Dutch Revolt (1554-1648), the English Civil War (1642-1651) and the Thirty Years' War (1614-1648).
[34] *Cf.* Roberts, *supra* note 20, at 581: "With a brief lull as it opened, European rulers and their people indulged in the seventeenth century in an orgy of hatred, bigotry, massacre, torture and brutality which has no parallel until the twentieth [century]."

fragmented and beaten. But therein lay the basis for territoriality-defined statehood and the right for a sovereign to govern that state. This set the stage for future global society.[35]

Westphalia, if not negating overt hegemony in the European area outright, at least made it a bit more subtle. It is generally accepted that the Peace of Westphalia represented the birth of the modern state system,[36] and therefore the birth of the 'imperfect' system of contemporary public international law with its fixed borders and sovereign equality of states. Essentially, the peace legitimised a society of sovereign states, which were not juridically equal. It saw the development of an 'anti-hegemonial order among states' which "in practice recognized each other's independence and dealt with each other on an equal plane".[37] In the post-hegemonial period it was realised that, absent a 'true' balance-of-power between sovereign states, negotiated rules of expected behaviours to which states bind themselves were necessary. Such rules began to develop, largely based on customary practice.[38] One must be minded, however, to keep the accomplishments of the Westphalian peace in its proper perspective. Hedley Bull writes that the peace "marked the end of Hapsburg pretensions to universal monarchy",[39] which is, itself, significant as explicitly legitimised partitioning the 'universal' Christendom into Catholic and Protestant worlds. This may be the grandest legacy of Westphalia, as it led to, in Bull's terms, a 'Christian international society' which would, over time, develop into a 'European international society' and eventually a 'world international society' based on the sovereign territorial state.[40]

However, this is hardly cause for utopian celebration. As Stephen Krasner writes, "There has never been some golden age of the Westphalian state. The Westphalian model has never been more than a reference point or a convention; it has never been some deeply confining structure from which actors could not escape".[41] It has, however, cemented—more or less—the notion of sovereignty as the basis for legitimising governance. This seems clear when considering that the Westphalian peace legitimised the religious partition of Europe. In accepting Protestantism, Westphalia opened the door to the notion of tolerance, by providing a limited measure of protection for religious minorities (even if the minimum guarantee of that protection was limited to being able to 'vote with one's feet').[42] It also gave rise to ways of using this sovereignty to guarantee the terms of the peace.[43]

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[35] For discussion of the history of the Peace of Westphalia, see N.J. Schrijver, *The Changing Nature of State Sovereignty*, 70 BYIL 1999 65 (2000). And see R.G. Asch, The Thirty Years War: The Holy Roman Empire and Europe (1997).
[36] *Cf.* Damrosch *et al*, International Law: Cases and Materials xxii (4th ed., 2001) [hereinafter Damrosh *et al*, Int'l Law]; A. Cassese, International Law in a Divided World 34 (1986).
[37] Watson, *supra* note 22, at 187.
[38] *Cf. Id.* at 203: "The rules of the European commonwealth were there therefore not immutable ethical commandments; they could be modified by negotiation to keep pace with changing practice. Their function was to make international life more orderly and more predictable, safer and more civilized […]."
[39] H. Bull, The Anarchical Society 31 (1st ed., 1977).
[40] *Id.* at 27 *et seq*. But consider that this society existed only within Christendom collectively and was being in the process of being defined internally.
[41] S.D. Krasner, *Compromising Westphalia*, 20(3) Int'l Security 115 (Winter 1995-1996) [hereinafter Krasner].
[42] *Cf.* L. Gross, *The Peace of Westphalia, 1648-1948*, 42 AJIL 20, 23 (1948) [hereinafter Gross], citing the Treaty of Osnabrück which stated that, on all commissions of the Diet, equality between Catholicism and Protestantism was required 'where possible'.
[43] *Cf. Id.* at 24, citing D.J. Hill, A History of Diplomacy in the International Development of Europe, Vol. II, 605 (1925). Hill stated that Europe obtained "what may fairly be described as an international constitution, which gave to all its adherents the right of intervention to enforce its engagements".

Herein one finds the philosophical underpinnings of statehood. This study will therefore draw repeated reference to the notion of 'international legal positivism', which is a primarily state-sponsored event, in that international law is the sum of the actions of states, and that legal positivism assumes that the validity of any law recognised as law *per se* is presumed independently of moral concerns or ethical values. As will be reiterated throughout the course of the present discussion, if law is defined completely independently of morality, and the law of states largely defines the public international law, to what extent must the state itself uphold and reflect the basic standards of humanity?[44] Or, conversely, to what extent must the state exist so as to dictate and proscribe human activity though its sovereign acts?[45] While it may even be possible to observe that modern international law has become sufficiently developed to construct nominal bridges between Hegel's bottom-up and the Oppenheim's top-down approaches, such discussions find their genesis in Westphalia.

Although the Westphalian peace caused the direct hegemony of one society over another to fall into disfavour, the Europe of those times was largely the antithesis of today's pacific, consensus-oriented 'union' of sovereign states subjected to a supranational legal hierarchy. Raw power still mattered a great deal, and the manifestation of such power in many ways mattered even more. These were the formations of a nascent, state-centred public international law, which indeed is the starting point for contemporary international law.[46] The manifestation of this power was through the governance of the state. European states of the era were highly formalised and particular in their actions, and through the accumulating force of these actions, Europe began emerging into a community of sovereign states. That said, however, any idealism related to the use of the word 'community' must be kept firmly in check. This 'community' was one borne largely out of competitiveness and mistrust from one state to another, and of absolutism vis-à-vis the subjects of any one particular state by that state itself. The community, as such, was grounded in the defensive manifestation of power by one Christian European state towards other Christian European states. Herein lies the origins of the balance-of-power system, which came to dominate European affairs more or less until the modern, post-war era. Leo Gross provides a succinct assessment:

> Instead of creating a society of states, the Peace of Westphalia, while paying lip-service to the idea of a Christian commonwealth, merely ushers in the era of sovereign absolutist states which recognized no superior authority. In this era the liberty of states becomes increasingly incompatible with the concept of the international community, governed by international law independent of the will of states. On the contrary, this era may be said to be characterized by the reign of positivism in international law. This positivism could not admit the existence of a society of states for the simple reason that it was unable to find a treaty or custom, proceeding from the will of states, which could be interpreted as the legal foundation of a community of states.[47]

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[44] To develop the point somewhat, consider Hegel's 'philosophy of right', reflecting his belief that law is a reflection of the daily activities of humankind. Legal norms, which are the product of natural human interactions, are those having the best likelihood of obedience, and, from this, it can be inferred that the state exists in reflection of these activities and interactions. See particularly T. Knox, *Hegel's Philosophy of Right* (1942), at 136-148.

[45] *Cf.* L. Oppenheim, 1 International Law: A Treatise (2d ed., 1912), at 115: "In spite of all the differences in defining sovereignty, all authors of the sixteenth and seventeenth centuries agree that sovereignty is indivisible and contains the centralization of power in the hands of the Sovereign, whether a monarch or the people itself in a republic."

[46] *Cf.* Gross, *supra* note 42, at 26: "[Westphalia] undoubtedly promoted the laicization of international law by divorcing it from any particular religious background, and the extension of its scope so as to include, on a footing of equality, republican and monarchical states."

[47] *Id.* at 39.

Examining legal positivism, administrative governance and the underlying state

The rise of positivism, as a legal form, will be put under close examination when the 'civilisation' process is discussed later in this chapter.[48] Anticipating this, for the moment it will be of interest to consider broadly the concept of governance. Soon after the end of the Thirty Years' War, as the autonomous European societies confirmed by Westphalia began to take shape, governance primarily implied the advancement of the governor's interests, whatever those might be. Usually, those interests were in some way related to defining and consolidating the state. Placing sovereignty in the hands of supreme individuals (indeed, numerous such individuals existed even within single 'states', in the early stages of the Westphalian peace) with little accountability for how that sovereignty was exercised, led to a different set of tensions. Sovereigns obtained their monopoly of force by extracting individual power and collectivising that power throughout their state, making various territorial and monarchical claims and generally taking actions as they saw fit.[49] While, over time, this added definition to European territorial boundaries, it also caused this nascent international system to be inherently competitive and calculating. A system of absolute sovereignty disbursed amongst mutually-exclusive territorial states had arrived. Krasner crystallises sovereignty in four different, yet interrelated, ways which reflect this reality.[50] He sees it, first, as the taking of decisions related to regulation of territorial borders, as well as decisions related to people and goods crossing those borders.[51] Actions taken by sovereigns in the name of the state on the international plane are further seen as manifestations of sovereignty (and the conceptual basis for treaty-making and a parallel system of international law). Finally, Krasner presents a conception of the 'Westphalian model' of sovereignty whereby political life is based on the concepts of territoriality and autonomy governed by domestic political authorities. This certainly was something completely new in the historical development of public international law.[52]

These developments secured the position of the state in Christian European international society. Actions taken by sovereigns in the name of their state contributed to the development of a true international law. Although a sort of international law, as such, had had its adherents from the times of St. Thomas Acquinas and his just war theories and Grotius' natural law reasoning, it was the rise of state-based and state-focused legal positivism on the international plane which established the permanence of statehood as a specific construction. It was the expansion of this model, by European colonialism and subsequent decolonisation, which globalised the phenomenon. This is why the territorial state is the baseline unit of analysis for contemporary international affairs.

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[48] See generally B.V.A. Rolling, International Law in an Expanded World (1960).
[49] *Cf.* K.J. Holsti, The State, War, and the State of War 3 (1996): "The result was that as states became more established in their sovereignty, they became greater threats to their neighbors. Their rulers demanded that others recognize their status as sovereigns, but they did not always reciprocate the favor, for some aspired to reorganize the states system under principles different than that of sovereign equality of independent states. They thought in terms of hierarchies and domination. Dreams of empire and hegemony did not die out with Charles V and the Treaties of Westphalia."
[50] See Krasner, *supra* note 41, at 118-119.
[51] *Cf.* Anderson, *supra* note 23, at 19: "As far as crossing frontiers was concerned […] the right [of entry to a territory] was the gift of the sovereign, who could impose any conditions on foreigners who sought it."
[52] *Cf.* Krasner, *supra* note 41, at 119: "A Westphalian state system is different from an empire, in which there is only one authority structure; it is different from tribes, in which authority is claimed over groups of individuals but not necessarily over specific geographic areas; it is different from European feudalism, where the Catholic Church claimed authority over some kinds of activities regardless of their location; and it is different from a system in which authority structures over different issue areas are not geographically coterminous, one possible description off the European Union."

First, from Westphalia comes territoriality and sovereignty. Next, from more modern world history, comes the imposition of this socio-juridical construction onto non-European societies throughout the planet. Finally, a system of states upholding territorial integrity and enjoying sovereign equality is at the cornerstone of contemporary international affairs. This is the reality under examination at present, as the next main substantive section of this study will examine the wholesale incorporation of the African continent into the emerging European model. For now, it would suffice to observe that a system of order has progressed, through the emergence of basic provisions of a positivist international law, of which states are both the principal subjects and greatest beneficiaries.

Bull has identified three functions of international law vis-à-vis international order: to identify a supreme way of universal political organisation (if such a task can indeed be done), to state the basic rules of coexistence of international society, and to promote compliance with these rules (and those of co-operation) in international society.[53] These theoretical perspectives were only beginning to emerge in the post-Westphalian peace and may seem more theoretical than practical, even in contemporary times.[54] This reality is fundamentally important when considering both the time required for a real, actual solidification of the Westphalian state system in Europe, and its imposition in lands world-wide.

One last conceptual foundation of contemporary statehood should be considered through a prism of duality: both within the individual state as such and throughout all of the individual states as a whole. Aspects of Western statehood representing the very essence of original Western traditions were transferred, by the growth and expansion of the European state system, even to lands having no contact with, or connection to, Western society. Perhaps this reality would be more benign if the Western state was not such an effective conduit for the manifestation of power. As the sociologist Michael Mann suggests, working from a mainline Weberian perspective, power is diffused to an abstraction, through both religious and secular institutions, such as the contemporary state. While Mann has no romantic illusions about the causes for this—he finds its source more through the need to form credible external military opposition than in an inherent desire for a truly enabling internal bureaucratic administration—he does identify a number of elements which were brought about by the eventual dissolution of the Holy Roman Empire and the birth of the state system. These are: "(a) a differentiated set of institutions and personnel, which embody (b) centrality, in the sense that political relations radiate outward to cover (c) a territorially demarcated area, over which it exercises (d) a monopoly of authoritative, binding rule-making, backed up by a monopoly of the means of physical violence".[55]

Towards an understanding of modern international law

Some time has been spent setting the framework for the legal analysis at hand in its broader, socio-historical context. Such perspectives will be of particular usefulness in promulgating the notion that certain inter-societal relationships were in evidence prior to the significant expansionist activity, undertaken by the European colonialist powers, in the 1800s, and, therefore, although the law of sovereign states was, is and most likely will continue to be the primary foundation of public international law, it is not the case that inter-societal groupings, as may be

[53] Bull, supra note 39, at 135.
[54] Although the dynamic changes in international law since the end of the second world war negate this statement to an ever-growing degree.
[55] M. Mann, States, War and Capitalism: Studies in Political Sociology 4 (1988).

observed through 'statehood', are the direct result of the global form of statehood as established through global colonialism.

In this sense, this study is broadly seeking to explain the phenomenon of global statehood in three inter-temporal perspectives: pre-colonial, whereby natural groupings self-identified an a 'national' sense; colonial, whereby the planet was 'carved up' and integrated into a global system of law, as defined by colonial activity; and post-colonial, whereby colonies widely obtained their independence, and international society began a process of accepting and incorporating what would become known as international human rights law into its established international legal framework.

Specifically, the perspectives put forth by the authors mentioned heretofore are useful both in the social sciences generally, and in the present international legal analysis. When viewed through an inter-temporal prism, it will be observed how, as a direct consequence of colonial activity, by European states, all geographic areas of Planet Earth have come under a common juridical structure, as defined by European colonialism. This, certainly, is 'the state' in its global form. The problem necessitating the widest historical conceptualisations possible of the phenomena underlying statehood, is that statehood's interactions with colonial territories *per se* are, in the first instance, a matter of conquest, or territorial acquisition, followed by acquiescence to an anti-colonial reality, supplemented by a system of international human rights law holding self-determination of peoples at its essential core. Surely it is uncontroversial to chart these evolutions from the baseline of the pre-colonial antecedents of global statehood, so as to understand completely the territorial (*i.e.,* imposed) and thematic (*i.e.,* postcolonial) aspects of statehood, under international law.

The point being made is that the 'nation'—a concept which, prior to the imposition of the territorial state globally would have been relatively obvious, or, at the very least, possible to observe—will have been wholly subsumed into the legal phenomenon of the sovereign state, as a direct result of colonial activity. Ironically, in its concurrence to decolonisation, international law has also come to encompass various individual civil and political rights, such as the right to political participation and some minority rights guarantees, as well as certain collective rights, such as the right of peoples to self-determination. Thus, the groundwork is preliminarily laid for a contemporary examination of state-creation, in a manner capable of identifying the causal relationship between the state's overlapping roles in the manifestation of power and the possession of a monopoly of the means of physical violence. The cause and effect of such interactions, and international law's evolving responses to the degrees of power manifested by a state against its subjects, including the exercise of physical violence by agents of the state, will form the bedrock of the overall discussion.

From *Barbaroi* to Berlin: Colonialism and the process of 'civilising'

> A man born in 1800 who lived out the psalmist's span of three-score years and ten could have seen the world more changed in his lifetime than it had been in the previous thousand years. […] No one could deny that it had produced wealth on an unprecedented scale and that it dominated the rest of the globe by power and influence as no previous civilization had ever done. Europeans (or their descendents) ran the world. […] As for the non-European countries still formally and politically independent of Europe, most of them had in practice to defer to European wishes and accept European interference in their affairs. Few indigenous peoples could resist, and if they did Europe often won its subtlest victory of all, for successful resistance required the adoption of European practices and, therefore, Europeanization in

another form.[56]

J.M. Roberts entitles Book Six of his world history "The Great Acceleration". By Book Seven, it is "The End of the Europeans' World". The effects of this reality are significant not only for Europeans but also for those who 'adopted European practices'. It will come as no surprise that the greatest of these practices was the inheritance of the European state as a system of societal organisation—again, whether one liked it or not. The further development and refinement of a system of public international law, which reinforced this reality, soon followed. The political conditions within Europe, however, were profound. The continent was undergoing a pronounced period of economic and population growth and industrial development, such that it reigned supreme. As Europe expanded, it also became an exporter of population, as it had in more limited measure, since the days of the first forays of the European explorers. It also recognised the potential for colonialism to be the fuel powering its own growing industrial machine.

Territorial cession though colonialism: The manifestations of European state power

European expansionism, as a wholehearted phenomenon, dated from *circa* 1500 and transformed the planet many times over. The Americas, southern Asia and Africa (*i.e.,* a great deal of non-European world) were the targets, in various measures, of this assault. In the New World, indigenous populations were subsumed into the colonial apparatus or were massacred outright due to their comparatively weak position against the Europeans. Asian societies, particularly those easily accessible by sea, came under the dominance of Europeans, although generally their *Hinterlands* proved to be less penetrable. Africa, however, was completely different. Despite the fact that Europeans had to sail around the entire continent to reach Asia, Africa was initially difficult for the Europeans to penetrate, particularly beyond their coastal slaving installations. Later, in the 19th century, however, the overt colonisation of Africa as a whole became of fundamental importance to the European balance-of-power system.

In terms of financial cost, Africa certainly was not the only recipient of a series of transactions greatly favouring the Europeans.[57] On a global level, colonialism was something of a malleable concept, in that some societies, such as the Ethiopians, the Liberians, the Ottomans, the Thais and the Japanese were able to repel European advances and remain independent, even as their neighbouring societies came under direct European influence and rule. If overt European hegemony 'at home' was made more subtle by its distillation into the abstraction of the European state, its hegemony overseas was blatantly manifest. As time passed, the great European colonialists were the British, Dutch (and the Belgians, following their secession from the Netherlands, in 1830), French, the increasingly-unified Germans, in the 1800s, Italians, Portuguese and Spanish. In its own manner, quite separate from the expansionism of the West, Russia began its own process of eastward territorial expansion through tsar Nicholas I's forceful 'official nationality' concept. When territorial expansion by Europeans extended in earnest to Africa through its colonial partition, the world bore witness to arguably the first truly globalised phenomenon, European world hegemony, a reality which was quite easily rationalised by its own peoples.[58]

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[56] Roberts, *supra* note 20, at 671-72.
[57] Indeed it is commonly established in American mentality, for example, that the colonial territorial acquisition of Manhattan amounted to a land grab indicative of a most astonishing terms of trade.
[58] *Cf.* Roberts, *supra* note 20, at 781-82: "Europeans witnessed these things happening and did not stop them. It is too simple to explain this by saying they were all bad, greedy men. […] The answer must lie somewhere in mentality. Many Europeans who could recognize that the native populations were damaged, even when the white contact with them was benevolent in intention, could not be expected to understand

The effects of colonialism worldwide, causing a hybrid of peoples, ideas, animals, goods, plants, raw materials, disease and seemingly countless other things, were profound. Perhaps the most profound effect—at least in terms of lasting practical consequence—was the transference of the Westphalian state system beyond Europe to the overseas European colonies. This is particularly important, as in the emerging international legal positivism of the time, these colonies were considered constituent parts of the colonising state. By the mid-1800s, the competitiveness inherent in the balance-of-power system manifested itself in the grand scramble by European powers for Africa. While many European societies had colonial activities in Africa prior to the mid-1800s, from this point on, the continent as a whole fell within the totality of Europe's domain. Herein was the basis for European hegemonic power to be manifested in a form which was both tangible, on the one hand, and undisruptive of the nominally anti-hegemonic societal system, which was now operating in full force on the European continent, on the other hand. No prior colonial excursion took on such deeply meaningful implications 'back home', for it was the partition of Africa by European powers which reflected the actual hegemonic capacity of these powers themselves. For Europe, it was the natural expression of its own political game. Imperialism was inherent amongst the rival powers, within the European system; thus, it follows that imperial rivalry would not be irrational. For Africa, it was "a time of profound upheaval and irreversible change for all of Africa's peoples. Nothing would ever be the same again".[59]

While not entering into the minutiae of the political situation between European powers, in the mid-1800s, Africa was partitioned, through the Berlin Conference of 1884-1885, and, more substantively, the rise of positivism as a legal construction, which served to support the decisions taken in this conference, and developments in the Euro-centric field of public international law. That statehood's most common definitional reference-point, the Montevideo Convention on the Rights and Duties of States, dates from only 1933, demonstrates how the Convention's antecedents are also worthy of examination. Particular attention will be drawn to the ways in which the sovereignty of colonised territories was transferred from indigenous to external powers, as well the corresponding establishment of an 'international community' of individual sovereignties holding 'civilised' European legal systems at its core.

Considering Africa's partition as a consequence of the Berlin Conference

> The Berlin Conference was the ultimate expression of an age whose newfound enthusiasm for democracy had clear limits, and slaughtered game had no vote. Even John Stuart Mill, the great philosopher of human freedom, had written, in *On Liberty*, "Despotism is a legitimate mode of government in dealing with barbarians, provided the end be their improvement." Not a single African was at the table in Berlin.[60]

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the corrosive effect of this culture on established structures. [The European] *knew* he was on the side of Progress and Improvement, and might well see himself as on the side of the Cross, too. […] This was a confidence which ran through every side of European expansion. […] The confidence in belonging to a higher civilization was not only a licence for predatory habits as Christianity had earlier been, but the nerve of an attitude akin, in many cases, to that of the crusaders. It was their sureness that they brought something better that blinded men all to often to the actual and material results of substituting individual freehold for tribal rights, of turning the hunters and gatherers, whose possessions were what they could carry, into wage-earners."

[59] B. Davidson, Modern Africa: A Social and Political History 4 (1989). And *cf.* C.H. Alexandrowicz, The Afro-Asian world and the law of nations: (historical aspects) 123 Rec. des Cours (1968-I) 117-214.

[60] A. Hochschild, King Leopold's Ghost: A Story of Greed, Terror, and Heroism in Colonial Africa 84 (1998).

The basic legitimisation for colonial activities was derived from the original Roman law doctrine equating *res communis* with *res nullius*, which is to say that the concept of common lands simply did not exist, and that, therefore, the 'civilised' European state was not precluded from making claims to them.[61] Within Europe, all lands were accounted for. Outside Europe, however, all lands were 'owned' by nobody,[62] as they were 'uncivilised'. Herein lies the insular nature of the original European 'community', in that *Europe* was what it meant to be civilised. Inter-European politics became European law, which was the only law unquestionably recognised by Europe. Legal personality was inherently European, to the exclusion of non-European societies; it could be obtained in a territory only from Europe. Some highly functional non-European societies, such as the Ottoman Empire and Japan were granted nominal exemptions from the 'barbarianism rule', because of their comparatively well-developed societal status. The rest of the world, however, was forced to face Europe on terms dictated by its individual great powers: *le pouvoir a créé le droit*.

Discovery and occupation contrasted with the transfer of territorial title as incorporation methods

If a territory has never formed part of a state, or was abandoned by a state, international law has permitted original title to territory to be acquired through occupation. This is demonstrated by a state's occupation of a territory 'belonging to no one' (*terra nullius*), and under "open, continuous, effective and peaceful" administration,[63] as stated by Judge Max Huber, acting as arbitrator, in the landmark case on territorial sovereignty, the Island of Palmas case. Huber awarded the island to the Netherlands on the basis of the fact that the continuous and peaceful display of the functions of a state form the 'constituent element' of territorial sovereignty.[64]

The possession of a territory must be effective; that is, it must be, in some way, tangible. Yet international law recognises a great level of tolerance, on the actual levels of such tangibility required. It is the specific and particular intent of the administering state to exercise or manifest sovereignty, particularly through the creation and maintenance of legal structures, which must not go overlooked.[65]

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[61] *Cf.* M. Shaw, Title to Territory in Africa: International Legal Issues 32 (1986) [hereinafter Shaw]: "In Roman Antiquity, any territory which was not Roman was *terra nullius*. In the fifteenth and sixteenth centuries any territory which did not belong to a Christian sovereign was *terra nullius*, and in the nineteenth century any territory which did not belong to a civilized State was *terra nullius*. Such a historical survey is used to demonstrate how law has followed on meekly from power, while the development of the concept in the nineteenth century saw it primarily as a method of adjusting relationships between the colonizing powers themselves, rather than as between the colonizer and the colonized. It was used to emphasize that might was right." (The concepts of *res nullius* and *terra nullius* can be equated.)

[62] It would be uncontroversial to say that the legal principle of *terra nullius,* as 'land belonging to no one', ignores the fact that indigenous populations are now most certainly subjects of consultation when determining final outcomes of territorial delineation processes. An implication of this may be that, whereas in previous times, possession of recognised claim to territorial sovereignty, as well as a nominal manifestation of such, was sufficient to reflect judicial fiat, but in present times counteractions from civil society groups cannot be politically ignored and may well indeed imply direct legal consequences.

[63] Permanent Court of Arbitration, Island of Palmas case (Netherlands *v.* United States), 2 RIAA 829 (sole arbitrator: Huber) (1928) [hereinafter Island of Palmas case].

[64] *Id.* at 840.

[65] *Cf.* Legal Status of Eastern Greenland Case (Denmark *v.* Norway), 53 PCIJ Rep. Ser. A/B (1933), at 45-46, noting two elements required for a continued display of authority, namely the intention and will to act as a sovereign, and some actual exercise or display of such authority.

All territories in modern statehood must, in principle, be defined, although, in practice, a state may also exist without a fixed definitional form. In order to be defined, however, a state will have first been discovered through the movements of mankind over time. Whereas at the time of colonial expansion, in Europe all lands were accounted for, we can now say that in the entire world, all lands are accounted for, at least in juridical formulation. A glance at a political map will confirm that territories are delineated against each other, in conformity with the strength of their definition. To speak in practical terms, definitional strength could be measured in the sense that the boundary between e.g. Switzerland and its neighbours is considerably more defined than that between e.g. India and Pakistan. Once territories have been defined and delineated, then they undergo a procedure of being physically demarcated. Again, the circumstances at hand will define the extent to which the physical demarcation corresponds to the 'actual' definition of the territory. Certainly the final demarcation will be of greatest practical importance, and it is here where the strength of the territorial definition will be measured.

The main traditional modes of acquiring title to territory are occupation, or the acquisition of original title; prescription, or the transference of title; accretion and avulsion, or the natural movement of established legal frontiers; conquest, or territories acquired in means contrary to rules proscribing or otherwise restraining the use of force; and cession, or the transfer of territory from one legal entity to another. The last of the above forms related to territorial delineation—that of cession—is of greatest importance at present because of the fact that, during the 1800s, it should not be assumed that the African continent constituted wholesale *terra nullius*. Colonising states were therefore, in the main, precluded from outright conquest of overseas territories. A pattern of interactions between coloniser and colonised began to emerge whereby an actual transaction would have to take place to solidify the form of future territorial administration.

If 'might made right', as such, then it was Europe which then 'held' the territory through its sovereignty over that territory, as well as control of the governance of that sovereign territory. The governance factor is of enormous significance. Europeans wanted guarantees that, if they would enter into formal relations with other societies, those societies would be of a similar calibre as their own, with particular regard to situations related to recognition of the legitimacy of a territorial title. Reciprocity was something European colonialists were not particularly minded to grant freely, particularly to those who did not share their own cultural or values system (*i.e.*, Christianity and the 'civilisation' of Europe).[66]

In practice, a rapidly industrialising Europe was exporting skilled workers to its foreign colonies, some of which, along African coasts, for example, had now been in existence for hundreds of years. Capitalism was a driving force, both in necessitating the extraction of raw materials from colonies, as well as projecting intra-European economic rivalries onto the colonised lands themselves. Racism, of course, was pronounced and omnipresent.[67] As European states

[66] *Cf.* C.H. Alexandrowicz, The European-African Confrontation (1973), at 6 [hereinafter Alexanderowicz].

[67] *Cf.* B. Freund, The Making of Contemporary Africa 76 (2d. ed, 1998) [hereinafter Freund]: "The new 'scientific' racism, built around a vulgarised interpretation of Charles Darwin's theory of the survival of the fittest as the key mechanism of human (and biological) evolution, suffused European culture." One of the most striking practical examples of this reality is the Belgian colonialist attitude towards the Tutsi ethnic group in Rwanda. The Tutsis, already versed in hegemonic dominance over the Hutu ethnic group, profited from the favoured treatment they received from the Belgians, who thought of them as their "noble European cousins". *Cf.* also F. Reyntjens, L'Afrique des Grands Lacs en Crise 18-19 (1994). See also Duke Adolphus Frederick of Mecklenberg, Into the Heart of Africa (1910) for the first accounting of theories of racial superiority by Europeans of the Tutsi over Hutu.

manifested their influence according to their power, the potential for disrupting the balance of these states was ever-present. European colonial activity in Africa was a well-established phenomenon, which provided a clear indicator of a European society's power and influence. The pace of European expansion inland, beyond the original coastal colonial settlements, increased. As was becoming increasingly accepted, the actions of a European state took on a set of certain legal implication as well. Europeans began to realise that the best way to advance their interests was to bring these colonised territories formally into the domain of their own statehood. In so doing, colonialists both clearly demarcated their own claims to power and influence and legitimised in their own eyes the overseas expansion of their legal structures.[68]

Mostly this was achieved through the practice of 'cession', or the agreed territorial transfer of one part of a state to another.[69] To be reconciled at present is the fact that cession is a means of passing derivative title, and as such, defects in such title are passed along to the recipient, and the fact that it would be controversial to characterise the 'treaties of cession', between coloniser and colonised, as wholly legitimate treaties *per se*. Indeed, along these lines, in the *Island of Palmas* case, in referring to territory ceded by Spain to the United States under the Treaty of Paris (1898), Judge Huber broadly established that a ceding state sets the validity of title at the time of territorial cession, and does so for the reason that "Spain could not transfer more rights than she herself possessed".[70] Yet complicating matters further is international law's concern with reciprocity of status and its reliance upon a system of expected behaviours amongst sovereignties (e.g. *pacta sunt servanda*). As such, cession of territory to colonialists may not necessarily be seen as occurring at a sufficient level of legality, as those colonised were not, strictly speaking, sovereign states. As observed by Surya P. Sharma,[71] some authors viewed them as legislative acts of individual colonising states, therefore lacking in international significance, whereas others assumed European powers acquired African territory by occupying *terra nullius*.[72] But Sharma presents more a persuasive analysis derived from M.F. Lindley[73] and J.A. Andrews,[74] to conclude that:

> [f]ew parts of Africa were unilaterally annexed and European state practice does not show that the European powers thought of Africa as *terra nullius*. Thus, while the fact of European

[68] *Cf.* R.H. Jackson, Quasi-states: Sovereignty, International Relations and the Third World 69 (1990) [hereinafter Jackson]: "Europeans and Africans for centuries engaged in treaty-making along the coasts, but whether it had the same meaning and significance for both parties is open to doubt. Europeans signed treaties with an eye on other Europeans and with the aim of acquiring trading rights or territorial claims which conformed with international law. Africans probably made them to gain commercial and political advantage over local rivals. They could hardly have realized the European international legal implications of what they were doing."

[69] See e.g. J.H.W. Verzijl, International Law in Historical Perspective 366 (1970), categorising cession as (a) a gratuitous transfer; (b) a transfer by 'sale' involving the exchange of money; or (c) a mutual transfer through exchange.

[70] Island of Palmas case, *supra* note 63, at 842.

[71] See e.g. A. Keller, O. Lissitzyn and F. Mann, Creation of Rights of Sovereignty Through Symbolic Acts 1400-1800 (1938), at 14-32, as cited in S.P. Sharma, Territorial Acquisition, Disputes and International Law (1997) [hereinafter Sharma], at 139.

[72] See A.D. McNair, The Law of Treaties 52-54 (1961), as cited in Sharma, *Id.* at 140, and particularly at note 437.

[73] *Cf.* M.F. Lindley, The Acquisition and Government of Backward Territory in International Law 176 (1926) [hereinafter Lindley], as cited in Sharma, *Id.*: "It is difficult to see how, having regard to the universality of the practice of grounding a colonial protectorate upon an agreement with the local authority, and to the importance attached by the European powers to these agreements in their relations *inter se*, the requirement for such an agreement can be regarded otherwise than as a rule of law."

[74] *Cf.* J.A. Andrews, *The Concept of Statehood and the Acquisition of Territory in the 19th Century*, 94 LQR 408, 419 (1978), as cited in Sharma, *Id.*: "Either [African] rulers had a sovereign title and sufficient personality to cede this in international law or the territory was occupied as *terra nullius*."

> powers acquiring substantial African territory through treaties of cession is beyond doubt, the genuineness of many of these cessions is questionable. It is believed that the rulers were often subjected to considerable pressure and may well have been ignorant about what was happening.[75]

It is then not unreasonable to think of Africa, at the time of its colonisation, as finding itself occupying a nominal middle ground between 'discovery' by, and 'cession' to, European powers, but gravitating much more towards the latter. Certainly the most interior lands would have been 'discovered' *per se*, save perhaps for the explorations of Livingstone and his contemporaries. The settlement of Africa by Europeans formed an inverted territorial core-periphery model. This is not insignificant when the nature of territorial demarcation in Africa is fully considered, in that newly-formed territorial boundaries may well stretch far inland from costal ports.

None of this was of great consequence to the agents acting on behalf of the colonising state, who were generally unconcerned with the juridical competence of those signing the papers resulting in territorial cession.[76] Furthermore, treaties signed under duress by an African leader were generally seen as still being valid,[77] regardless if a treaty's signatory was genuinely competent to undertake such authority. This is demonstrated by Jeffrey Herbst, referring to Frederick Lugard's 1922 study, partially replicated here:

> Treaties were produced by the cartload in all the approved forms of legal verbiage—impossible of translation by ill-educated translators. It mattered not that tribal chiefs had no power to dispose of communal rights, or that those few powerful potentates who might perhaps claim such authority looked on the white man's ambassador with contempt.[78]

Herbst, however, asserts that the colonial state had 'limited ambitions', and in the immediate aftermath of the Berlin Conference, the partition of Africa was a largely European event, of greatest concern to European lawyers, politicians and mapmakers.[79] This was the collective hegemony of the balance-of-power system in action, as developing the colonial societal structures was essentially to the benefit of the colonial power and to the indifference of the local needs. Such a particular hegemonial form served to permanently orient dependence towards the colonial power. Instances of decision-making drawn from the concepts of consent and consensus were fundamentally contradictory to the colonial experience. Indeed, the main purposes of the colonial partition of Africa by European powers were commercial exploitation (often through chartered companies), strategic interests and, according to Dan Smith of the International Peace Research Institute, greed.[80] For this system of collective hegemony to take on a practical form as colonial administration developed a greater competence and scope, the exercise of effective control on a territory would have to be manifested in some recognised manner.

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[75] Sharma, *supra* note 71, at 140.
[76] But see Hertselet, The Map of Africa by Treaty 996-998 (3d. ed. 1909), as cited in Shaw, *supra* note 61, at 36. In the Delafoa Bay case, for example, Portugal claimed a local chief lacked capacity to enter into a treaty with the British and therefore contested Britain's title to that territory.
[77] See Shaw, *supra* note 61, at 43.
[78] F.J.D. Lugard, The Dual Mandate in British Tropical Africa 15 (1922), as cited in J. Herbst, States and Power in Africa: Comparative Lessons in Authority and Control 75 (2000) [hereinafter Herbst]
[79] *Cf.* Herbst, *Id.* at 77: "[i]f the European powers had fought significant wars in Africa, either against each other or Africans, part of the inevitable detritus of those conflicts would have been the establishment of some kind of security establishment with the accompanying infrastructure of roads, railroads, and extended administrative systems that armies need to fight. Without such conflict, the infrastructure of rule was slow in coming. As a result, for many rural areas of Africa, formal colonial administration can be counted only lasting the sixty years starting from the turn of the century."
[80] D. Smith, The State of War and Peace Atlas 52 (1997).

A diplomatic conference constructed in the balance-of-power fashion

The Berlin Conference of 1884-85 was the cynically-motivated initiative of the German chancellor Bismarck who began to identify the commercial benefits that could be provided if Germany would play more active role in European colonial life. By the time of the conference itself, the African continent began a process of being delineated into spheres of influence for the European states.[81] The job was completed by 1902.[82] Although there was, by necessary implication at least, a sense of some sort of sovereignty extracted from the part of African leaders from whom title to territory was obtained,[83] the tangibility of such sovereignty was categorically discarded by the terms of the colonialists' subsequent practice. This demonstrates a tangible malleability in the context of reciprocity in that, although reciprocity is a highly prized principle to be shared amongst sovereign equals, the level of capacity to act as a sovereign equal would be set considerably much lower, if the end result would be the colonial acquisition of an overseas territory for the purposes of 'civilisation' and administration.

It is therefore little wonder that the level of administrative competence required to demonstrate that an overseas territory came under a European power's legitimate sphere of influence was decidedly set very low. Looking to the terms of the General Act of the Berlin Conference of 1884-85,[84] it is clear how a prime objective of the conference itself was to afford its participants the possibility to make anticipatory territorial claims in colonial regions so as to be able to preclude similar claims from competing European powers.[85] This laid the foundation for the doctrine of 'effective occupation'. What is further implied is a correlation between the existence of a recognised territorial claim and the tangible elements of manifested sovereignty by those, at that time. This is so because to relinquish sovereignty—as was the case when treaties of cession were concluded, between colonisers and the colonised—a modicum of manifested sovereignty would need to be demonstrated in reinforcement of the territorial lines drawn at Berlin. African statehood is rife with historical examples manifesting the limited inward territorial reach of European colonialists. The point being emphasised here is that "[w]hat is most remarkable about the scramble for Africa is not that it happened, but that it occurred so late, so fast, and without significant fighting between the colonialists".[86] It may be observed that this sentiment reflects the concept of 'spheres of influence' is established in the Berlin Act. Taking pos-

[81] *Cf.* Alexanderowicz, *supra* note 66, at 7: The Berlin Congress "was in the first instance not a race for the occupation of land by original title, but a race for obtaining derivative title deeds which the European powers had to acquire according to the rule of international law relating to negotiation and conclusion of treaties".
[82] See Freund, *supra* note 67, at 84-90. Germany, of course, lost its colonial possessions as a result of the first world war.
[83] *Cf.* Shaw, *supra* note 61, at 38: "The General Act of the Berlin Conference of 1884-5 itself recognized implicitly the existence of African sovereign entities."
[84] The General Act of the Berlin of 26 February 1885 was merged with the General Act and Declaration of Brussels of 2 July 1890 (aimed at counteracting the slave trade as specified by the 1885 Berlin Act). The convention revising both documents is readily reproduced in 17 Aust. Treaty Series (1920).
[85] *Cf.* General Act of the Berlin Conference of 1884-85, at articles 34 and 35: "Any power which henceforth takes possession of a tract of land on the coasts of the African Continent outside of its present possessions, or which, being hitherto without such possessions, shall acquire them and assume a protectorate [. . .] shall accompany either act with a notification thereof, addressed to the other Signatory Powers of the present Act, in order to enable them to protest against the same if there exists any grounds for their doing so. The Signatory Powers of the present Act recognize the obligation to insure the establishment of authority in the regions occupied by them on the coasts of the African Continent sufficient to protect existing rights, and, as the case may be, freedom of trade and of transit under the conditions agreed upon."
[86] Herbst, *supra* note 78, at 66.

session of a territory already claimed by another European power was to be, strictly speaking, precluded by international law.

It would not be unexpected that the emergence in the 1800s of a tangible, obvious international legal positivism would serve to reinforce the 'spheres of influence' concept, as the colonial activities of a sovereignty would want to be subjected to a stable, sustaining form. Writing in 1938, James Simsarian notes a shift in attitudes from about the year 1700, reflective of an increasing acceptance of territorial occupation as being demonstrative of legal title, as compared to discovery *per se* as being satisfactory to constitute the taking of possession of *terra nullius*. While focusing generally on North America as the subject of his overall study (and chiefly the lucrative nature of commerce therewith), he observes that the diplomatic correspondence of the time reflected a widespread sense that occupation of a territory was sufficient to reflect legitimate title both to commerce and also "the extent of asserted legal title to the territory in dispute".[87] Prior to 1700, it could readily be assumed that concern for the assertion of legal title was predated by a fixation on conquest as comprising a legitimate form of territorial acquisition, particularly through the methods of subjugation or debellation, whereupon legitimacy is overtly derived from the spoils of military victory, or perhaps from implied abandonment, where a military force acquiesces to an obviously greater power, in the course of hostile interactions.

Given that accepted territorial borders in colonised Africa were now to span considerable geographic and therefore cultural separations, and mindful of the assertion heretofore that the 'nation-state' *per se* may have the potential to take on mythological proportions, colonial 'statehood', as a legal concept, was considerably stretched by its transcendence from Europe to e.g. Africa. That this is so is demonstrated by the limited extent to which European colonialists were actually able to physically penetrate the African continent. The legitimacy of territorial claims asserted and recognised at the Berlin Conference would be readily accepted, regardless of how deep the colonial presence was able to grow beyond the usual coastal instillations. Any fresh act of taking possession on any portion of the African coast would have to be notified by the power taking possession, or assuming a protectorate, to the other signatory powers.

Furthermore, as observed by Lindley,[88] whereas the balance-of-power framework in Europe had the genuine potential to provoke overt hostilities, the overseas expansion of European colonialists was largely guided by the anticipation and accommodation of competing states' needs. The result of this is the uneasy stability that accompanied the international affairs of the period, generally. Greater clarity on the exercise of effective control and the manifestation of sovereign activities would need to be jurisprudentially developed as the implications of colonial actions made their way into burgeoning legal systems. Similarly, all colonising states would keep close watch on the activities of other, competing colonising states.

Introducing the concepts of effective control and sovereign activities (effectivités)

The question of whether Africa was *terra nullius* prior to colonisation is not entirely uncontroversial, despite widespread evidence of transactions reflecting transfer of territory from colonised to coloniser, even if the 'transfers' could be viewed only in the most nominal sense possible. Most significant is the 1975 Western Sahara case before the ICJ,[89] as the subject of *terra nullius* arises directly. The main question brought to the Court was this: "Was Western Sahara at

[87] J. Simsarian, *The Acquisition of Legal Title to Terra Nullius*, 53(1) Political Science Quarterly 111 (1938).
[88] See Lindley, *supra* note 73, at 210.
[89] Western Sahara (Advisory Opinion) [hereinafter Western Sahara], 1975 ICJ Rep. 12, 39.

the time of colonisation by Spain a territory belonging to no one (*terra nullius*)?" Algeria argued that this was the case, but the ICJ, in analysing the state practice of the colonial period, ruled "that territories inhabited by tribes or peoples having a social and political organisation were not regarded as *terra nullius*", before ruling that "agreements with local rulers, whether or not considered as an actual 'cession' of treaty, were regarded as derivative roots of title, and not original title obtained by occupation of *terra nullius*".[90] Western Sahara itself, the Court declared, was not *terra nullius* due to the social and political organisation of local residents.

Questions from this example seek to determine the actual meaning of the taking of possession from circumstances of *terra nullius* (or, indeed, circumstances similar to *terra nullius,* as observed from the formal malleability of the territorial title ceded to colonialists). Could the possession be physical alone, or would there have to be some additional form of political or administrative structure? In what way should state authority be manifested so as to make it tangibly recognisable for both the colonised subjects within a territory and for competing powers looking on, in a manner befitting the balance-of-power system?

In the literature, the clearest answers to such questions are found in Malcolm Shaw's textbook on international law. In it, he recalls the most memorable component of the Island of Palmas arbitration requires an "actual, continuous and peaceful display of state function".[91] Shaw claims, however, that "[c]ontrol, although needing to be effective, does not necessarily have to amount to possession and settlement of all of the territory claimed".[92] The circumstances of a particular case, primarily geography and international responses to the actual situation, will play considerable roles in determining outcome. Perhaps unsurprisingly, Shaw characterises the legal challenges of the time as being rife with opportunistic competition, but refers to the Clipperton Island arbitration,[93] whereby, although the arbitrator required an actual (not nominal) taking of possession, for a territorial occupation to be seen as valid, "a proclamation of sovereignty by a French naval officer later published in Honolulu was deemed sufficient to create valid title".[94] In reality, however, this should reflect less upon the frivolous nature of certain claims and more upon a genuine willingness to incorporate local factors into legal decision-making. Shaw makes this observation explicit when discussing *Western Sahara*. He writes:

> While international law does appear to accept a notion of geographical or natural unity of particular areas, whereby sovereignty exercised over a certain area will raise the presumption of title with regard to an outlying portion of the territory compared with the claimed unity, it is important not to overstate this. It operates to raise a presumption and no more and that within the wider concept of display of effective sovereignty which need not apply equally to all parts of the territory. Neither geographical unity nor contiguity are as such sources of title with regard to all areas contained within the area in question.[95]

Therefore, the manifestation of sovereign activities will depend on the existence of a valid legal title to the territory being administered. This premise was reaffirmed in the ICJ *Frontier Dispute* (Burkina Faso/Mali) judgment, whereby legal title was shown to be of superior legal weight than was effective possession, in forming a basis for sovereignty.[96] Where this is the case,

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[90] *Id.* But *cf.* Lindley, *supra* note 73, at 11-20.
[91] Island of Palmas case, *supra* note 63, at 839.
[92] M.N. Shaw, International Law 432 (5th ed., 2003) [hereinafter Shaw, Int'l Law]. Shaw naturally draws upon work published in the aforementioned Title to Territory in Africa: International Legal Issues (1986), as well as his earlier Africa Boundaries: A Legal and Diplomatic Encyclopaedia (1979).
[93] See 26 AJIL 390 (1932).
[94] Shaw, Int'l Law, *supra* note 92, at 434. He continues, *Id.*: "[t]he effectiveness of the occupation may indeed be relative and may in certain rare circumstances be little more than symbolic."
[95] *Id.* at 435.
[96] The case dovetails with the discussion of the colonial *uti possidetis juris* and is discussed more exten-

the *effectivités* manifested will serve to confirm the existence of valid legal title. In cases where the legal title is in doubt, or does not specifically exist, *effectivités* are not to be ignored.

It will be important to bear this perspective in mind as the discussion progresses, since there could be implications for determining state practice in the event of contradictory, incomplete or non-existent title claims or confusion over the exact point of territorial limits. Shaw's conclusion reinforces this assertion. He writes:

> [E]xamples of state practice may confirm or complete but not contradict legal title established, for example, by boundary treaties. In the absence of any clear legal title to any area, state practice comes into its own as a law-establishing mechanism. But its importance is always contextual in that it relates to the nature of the territory and the nature of competing state claims.[97]

European positivism and the emergence of state sovereignty as a global construction

> The basic structures of colonialism, I conclude, are reproduced in all the major schools of international jurisprudence: naturalism, positivism and pragmatism. If this is the case, then we must surely rethink the prevalent history of the discipline, which sees each of these schools of jurisprudence as being significantly different from the others. My argument is that while these schools are distinctive, what is disturbing is that they all have served to reproduce colonial relations. It is in this sense that I argue that, far from being ancillary to the discipline, colonialism is central to its very constitution. Formal sovereignty is very important, and provides Third World states with a vital means of protecting and furthering their interests. But the enduring vulnerabilities created by the processes by which non-European states acquired sovereignty pose an ongoing challenge, not only to the peoples of the Third World, but also to international law itself.[98]

The discussion heretofore has revolved around the fact that European states were formed from a complex web of socio-cultural practices and traditions, and that European states readily exported this form of societal administration, globally, through colonial activity. It was generally asserted that European states were formed as nation-states largely on the basis both of consent and consensus. By the time of the European scramble for overseas colonies, Schwarzenberger's original two conditions for the formulation of international law—a 'reciprocated equality of status' and a 'level of contact which necessitates regulation of conduct'—appear to be met, particularly as Britain, France, Russia, Prussia, and Austria agreed to further solidify territorial boundaries through the 'Concert of Europe', for example.

A significant problem that remained was how to bring the newly-partitioned African continent into this European international legal system. This problem, from a conceptual standpoint, at least, is profoundly vexing, as, although Africans may have given an element of

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sively in chapter two. *Cf.* Case concerning the *Frontier Dispute* (Burkina Faso *v.* Republic of Mali), Judgement, 1986 ICJ Rep. 544, at para 63: "Where the [sovereign] act corresponds exactly to law, where effective administration is additional to the *uti possidetis juris*, the only role of *effectivité* is to confirm the exercise of the right derived from a legal title. Where the act does not correspond to the law, where the territory which is the subject of the dispute is effectively administered by a State other than the one possessing the legal title, preference should be given to the holder of the title. In the event that the *effectivité* does not co-exist with any legal title, it must invariably be taken into consideration. Finally, there are cases where the legal title is not capable of showing exactly the territorial expanse to which it relates. The *effectivités* can then play an essential role in showing how the title is interpreted in practice."

[97] Shaw, Int'l Law, *supra* note 92, at 435.

[98] A. Anghie, Imperialism, Sovereignty and the Making of International Law 195 (2004) [hereinafter Anghie]. This draws upon ideas originally formulated in A. Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law*, 40 Harvard Int'l L.J. 1-80 (1999) [hereinafter Anghie HILJ].

consent (through the cession treaties of often-dubious circumstances creating African dependencies in the now-European territories), the actively reaffirming element of consensus within colonial societies certainly did not exist. This notion will be of fundamental importance, as it is an original point of a more contemporary phenomenon known as 'negative sovereignty', which remains a prime feature of contemporary African statehood. Regardless of the particular logic of the situation, the problem remained, and the way Europeans got around this was by constructing a 'scientific' form of international legal positivism to explain, justify and control colonial activities. In terms of legal effect, what had been a considerably more informal activity became formalised by the Berlin Conference. In this sense, parallels could be drawn between the effects of the 1648 Peace of Westphalia on Europe to those of the outcome of the Berlin Conference on Africa in 1885, in that social structures were solidified under the pretence of providing bellwethers for future behaviours.

The rise of 'positivism' as a legal phenomenon *per se* is both complicated and intricate, as voluntarism gradually replaced naturalism as the dominant force in managing international affairs, through the establishment of positivism as the dominant definitional form of the law of nations, from the late 18th century to the early 20th century. This study reaffirms the established distinction between that which is deemed to be 'naturally' derived as an established source of law (*jus naturale*), and that which is a recognised source of law, either by custom or conduct (*jus gentium* and *jus voluntarium*, respectively).[99] Certainly, between the 18th and 20th centuries, this definitional shift was readily evidenced and, therefore, it seems reasonable to assume the existence of a correlation between the rise of positivism as a legal philosophy, and the imperial actions of 18th century European powers. While it is commonly thought that the colonial experience universalised international law, it can also be seen that so-called 'scientific' positivist jurisprudence was developed in an arbitrary manner, based primarily on the whims of the European powers. The least controversial aspect of legal positivism revolves around the fact that, as a theory, it requires a law to be able to be traced back to a source of some kind, which has been accepted as authoritative by the parties to that law, or is a consistent product of decisions taken by such authority. The existence of a true European international legal community and the mad scramble for Africa, within that community, had the effect of a Petri dish in the development of this 'scientific' method.

Antony Anghie has, in a major work of recent scholarship entitled *Imperialism, Sovereignty and International Law*, presented an analysis of this phenomenon. This study follows a similar line of argumentation, in the sense that a valid legal definition of 'statehood' *per se* could be formed through established legal variables, which allocate greater weight to animate notions of statehood. Anghie generally argues that, as colonialism played such a prevalent role in the development of statehood in a positivist legal sense, it deserves to be an additional theoretical principle through which modern territorial statehood is viewed in the juridical definition of states. One may begin with a central tenet of legal positivism, H.L.A. Hart's famous statement that "the 'law as it is' should be kept conceptually distinct from 'the law as it ought to be'".[100] What is meant to be revealed, through an examination of Anghie's argument, is the contradictory reality of public international law—that the 'is' of European state sovereignty also contains aspects of the 'ought'. The 'is' reflects the evolutionary process emanating from the roughly two hundred years of history between European states, dating specifically from Westphalia in 1648. The

[99] Furthermore, it observes how the international law, of the last quarter of the 20th century, witnessed considerable overlaps between what was once exclusively 'natural' and what was once exclusively 'positivist'. To this end, see generally the discussion *infra* chapter five.
[100] H.L.A. Hart, The Concept of Law 222 (1961). The interplay between the 'ought' and the 'is' with regard to self-determination of peoples is discussed in depth *infra* chapters two and four.

'ought' reflects the outcome from Berlin, in 1885, in that non-European territories were to be integrated into European systems of administration. Anghie's categorisation of the separation between European and non-European societies, under the umbrella of state sovereignty, is innovative and serves to reveal the logical difficulties involved in the reconciliation of these realities.

Overall, the patterns of colonialism demonstrate the transplantation of European law patterns to areas outside of Europe. This reflects the state-centred perspective, which is also largely inherent in classical legal positivism. Within that state, there existed a set of principles not unlike Hobbes' mythical state of nature. But the Hobbesian approach was becoming wholly discredited by the growth of European state activity. As Anghie writes, "within the [positivist approach], the myth of the state of nature is replaced in positivist jurisprudence with the myth of a fixed set of principles and a scheme of classifications that reveals itself to the scrutiny of the expert jurist who uses this scheme to establish and develop international law".[101] Many positivists wanted to reconstitute the entire framework of international law on the basis of the sovereign state, due to the lack of an obvious global sovereign. Overseas expansionism was therefore a fundamental part of international law's own development.

The foremost positivist of his time, John Austin, said that law, generally, was a form of positive morality drawn directly and explicitly from a sovereign source, and that international law, while lacking a such a sovereign source *per se*, was something on which a scientific jurisprudence could be built, particularly through the discrediting of natural law as a legitimate source of law.[102] Austin's credentials as the foremost positivist amongst his contemporaries are firmly established in that he held this view so strongly that he negated custom as a legitimate source of law. From this perspective, the non-European 'state' (as it were)—that is to say, the colony—was lacking in sovereignty and therefore lacked legal personality. From that, the rise of positivist international law was fuelled by colonialism. The relationship between colonial and colonised was to be managed by positivism, in that overseas colonies were legal entities of colonising states. A recurring theme is exposed when discussing statehood generally, that being the interaction between land and population. Austin disclaimed the existence of custom as a legal source, thus implying that the interactions between land and population in colonised areas were without juridical merit or weight. In terms of legal effect, colonised lands had no history, and their inhabitants formed no society. It is therefore not surprising that counterarguments to Austin's theory were readily promulgated, particularly concerning the very existence of independent cultural patterns, regardless of whether they have surpassed a sufficient threshold of legality so as to be recognised as (customary) international law.[103]

A filtering process then occurred, whereby the colonised territories, which needed to be incorporated into the established legal structures of the colonisers, became so incorporated and established. This was the process of 'civilisation'. Its procedures simultaneously conformed to the rigours of scientific positivism and to the necessity for social exclusion inherent in colonialism. Martti Koskenniemi calls the international law formed from ascendant positivism a 'collec-

[101] Anghie HILJ, *supra* note 98, at text accompanying note 69.
[102] See Anghie, *supra* note 98 at 45 *et seq*, and *cf.* J. Austin, The Province of Jurisprudence Determined (1954), at 201: "The law obtaining between nations is not positive law: for every positive law is set by a given sovereign to a person or a person in a state of subjection to its author."
[103] *Cf.* T.J. Lawrence, The Principles of International Law 3 (1895) [hereinafter Lawrence]: "Without society no law, without law no society. When we assert that there is such a thing as international law, we assert that there is a society of states: when we recognize that there is a society of states, we recognize that there is international law."

tive European conscience' which was "understood always as ambivalently either consciousness or conscience, that is, in alternatively rationalistic or ethical ways".[104]

It can be seen that jurists used positivism to create a cultural gap between civilised and uncivilised European and non-European worlds—a gap which they then tried to bridge by 'civilising the uncivilised'. In so doing, not only would they be legitimising colonialism in legal terms, but they would also be assimilating colonial subjects into European social structures. The core of Anghie's argument is that, in fact, the problems of colonialism challenged the institution of positivism to such an extent that the very so-called scientific European positivists ended up restating and writing the laws to explain how a positivist system could exist, even in regions which were so culturally distinct from Europe. This serves to demonstrate that 'civilisation' is both an inconsistency and an ambiguity in a system which aims to scientifically separate the 'ought' from the 'is'. It is, essentially, a negatively-composed definitional form.[105] In Berlin, it was decided that colonial territories *ought* to be incorporated into the structures of the colonising states, and indeed, by the early 20th century, they largely *were*. The stringency associated with positivism's own ascendance was itself built upon a fundamental change in underlying predicate (*i.e.,* that it is even possible for an 'uncivilised' territorial possession even to become 'civilised' *per se*), and furthermore tended to reflect the disfavour into which natural law fell during this period.

Over the roughly seventy years between 1850 and 1920, the 'ought' did become the 'is', as the juridical process of 'civilisation' became completed, as observed by the general independence of colonial entities and their admission as sovereign states into intergovernmental organisations, such as the United Nations. The point remains, however, that the 'civilisation' process is negative in terms of its definitional composition. The threshold for determining its existence is inherently exclusionary, by virtue of having been set by the 'civilisers'. As such, when approaching the circumstance through the prism of 'modern territorial statehood', the 'scientific' aspect of the dominant legal positivism of the time can be drawn into question, as being viewed through the long lens of 21st century history and jurisprudence, the obsession for global order following European exploration, and overseas settlement. Eventual imperial control would also appear to have certain tangible hegemonic effects which modern international law would disallow on the basis of individual and collective international human rights law. Yet these are precisely the circumstances which classical legal positivism sought to preserve.

The dichotomy thus exposed, which will be repeated and reinforced throughout the course of this study, is that the colonising states' structures evolved organically over centuries in Europe, while Africa, for example, was both colonised and decolonised within one century, and thus was left with the form, but not necessarily the function, of European society.

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[104] M. Koskenniemi, The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960 51 (2002) [hereinafter Koskenniemi]. After crediting Anghie for the argument's formulation, he continues, *Id.*: "This view emerged less as a reaction to Austin than an independent stream of historical jurisprudence, linked with liberal-humanitarian ideals and theories of the natural evolution of European societies. Even in the absence of a common sovereign, Europe was a political society and international law an inextricable part of its organization."

[105] *Cf. Id.* at 103: "[M]uch of what the lawyers behind the *Institut de droit international* had to say about the conditions of international society related to the degrees of civilization possessed by its members. That 'civilization' was not defined beyond impressionistic characterizations was an important aspect of its value. It was not part of some rigid classification but a shorthand for the qualities that international lawyers valued in their own societies, playing upon its opposites: the uncivilized, barbarian, and the savage."

The concept of 'society' within the 'civilisation' process

Koskenniemi's view of sovereignty in *The Gentle Civilizer of Nations* is that it is a 'gift of civilization'.[106] This runs parallel to the irony faced by modern international lawyers when coming to terms with the well-known Article 38(1)(c) of the Statute of the International Court of Justice; it states that one of the primary sources of international law is "the general principles of law recognised by *civilized* nations" (emphasis added).

Although some non-European states have been recognised by established, sovereign states as forming part of the law of nations even in the early 1800s,[107] the point being extracted from Anghie's study is that only European law counted as law, and so it follows that discrimination would be the end result. Different standards could therefore easily be applied to different sets of peoples, and, from a legal perspective, as non-European entities had no legal personality of their own, they were excluded from the increasingly significant realm of sovereignty, and, therefore, had no capacity to make specific claims under international law. This is what Anghie calls the 'dynamic of difference',[108] and it refers to the gap which would need to be bridged to go from barbarian to burgher. This gap would tend to be bridged by the pure positivist perspective that control over territory is what constitutes sovereignty, and that a failure to occupy territory would preclude that entity from being treated as sovereign.[109]

Anghie also demonstrates a problem associated with the assumption of sovereignty through colonialism, namely, that there were also many otherwise 'uncivilised' states in Africa (e.g. Benin, Ethiopia, Mali) and Asia (e.g. India), which would meet the requirements of sovereignty, if only the product of their formal administrative structures were to have equal status with European positive law. To meet this challenge, positivists developed the concept of 'society' to make the distinction between the civilised and uncivilised. The members of society, by and large, were the amalgam of the individual European sovereigns, their territorial possessions and their citizens. Faced with the task of civilisation, the distinction between colonial society and colonised society had to be maintained. From here, the cultural distinction Anghie terms as the 'dynamic of difference' is developed. He summarises this argument as such:

> The problem of cultural difference, then, antedated the problem of how order is maintained among sovereign states, the problem that has preoccupied the discipline since at least the Peace of Westphalia and the emergence of the modern state system. Indeed, it could be argued that the Peace of Westphalia was precisely an attempt to resolve this problem of difference, the internecine warfare resulting from religious divisions within Europe. Sovereignty, I argue, did not precede and manage cultural differences; rather, sovereignty was forged out of the confrontation between different cultures and, at least in the colonial confrontation, the appropriation by one culture of the powerful terms 'sovereignty' and 'law'. Perhaps, then, Westphalia and the model of colonial sovereignty structured by the 'civilizing mission' that I have sketched here might be understood as two different responses to the same problem of

[106] See generally *Id.* at chapter two.
[107] See generally US Supreme Court case *The Antelope* 23 U.S. (10 Wheat.) 66 (1825).
[108] See generally Angie, *supra* note 98, at 52-65. *Cf. Id.* at 64 the assertion that colonialism was "an encounter, not between two sovereign states, but between a sovereign European state and an amorphous uncivilized entity; and enforcement posed no real difficulties because of massively superior European military strength. Having stripped the non-European world of sovereignty, then, the positivists in effect constructed the colonial encounter as an arena in which the sovereign made, interpreted and enforced the law. In this way, the colonial arena promised international jurists a chance to develop a jurisprudence which demonstrated the efficacy, coherence and utility of international law free of the ubiquitous and unanswerable Austinian objections. In short, the colonies offered international law the same opportunity they traditionally extended to the lower classes—and the dissolute members of the aristocracy—of the imperial centre: the opportunity to make something of yourself, to prove and rehabilitate yourself."
[109] See *Id.* at 37 *et seq*.

> cultural difference.[110]

Given that each colonial European state manifested its own sovereignty and self-identified the members of its own society, there is a predisposition for their actions to be seen as being inherently within the law, and, indeed, the foremost extraction from Austin's form of absolutist legal positivism probably revolves around the fact that he denied the specific existence of public international law *per se*. Austin nevertheless would not be strongly minded to disprove the emergence of a proper system of public international law that developed in the absence of a universal sovereign. Fundamentally, as the level of reciprocity in expected behaviours amongst European societies was naturally high, contact between states was relatively formal and societal exclusion towards non-European societies was held constant, state practice began to accumulate, as official interactions between governments of sovereign states transpired. In aggregate, this serves to reinforce the notion that a system of international law was theoretically conceivable by granting individual European societies the legal competences associated with state sovereignty, even in the absence of a universal sovereign. Bilateral treaty-making amongst neighbouring, and indeed competing, sovereign European states greatly increased under the dominant positivism. This state practice demonstrated further evidence of international law's existence in the absence of an overarching, global sovereign state.

If it is therefore accepted that a system of international law was conceivable under classical legal positivism, if only through voluntarist activity undertaken by the governments of sovereign states, the question then turns to the ways in which 'non-sovereign' territories are to be incorporated into this framework. Rejoining Anghie's argument, he asserts that non-Europeans are outside international law not so much because they lack sovereignty, or indeed the capacity to undertake acts akin to formal sovereignty, but more so because that they lack a place at the societal table. Positivists asserted that no law existed in uncivilised, that is, non-European regions. Second, positivists asserted that, even if some societies did have their own systems of law, there were not *European* systems of law and, as such, were not valid. Finally, positivists constructed the colonial encounter as an arena in which the sovereign made, interpreted and enforced the law. Colonialism promised jurists a chance to develop a jurisprudence that demonstrated the coherence and utility of an international legal system. As few jurists of the time would be strongly minded to see anything wrong in colonial activity in the first place, positivism—and European jurists—must have had a privileged position within this burgeoning European society and this position must have been reflected in the structures promulgated by the positivist international law of the colonial/imperial period.

The theory of 'quasi-sovereignty' and the process of assimilation

And yet, while the positivist system aimed at the subservient incorporation of the non-European world into international society, positivists developed a theory of 'quasi-sovereignty', to assist in the assimilation of the uncivilised into the civilised framework.[111] This assimilation took place through four basic, and often interrelated, techniques: by treaty, by colonisation, by official recognition by European states, and by protectorate agreements.

In terms of treaty relations, the ultimate manifestation of this was the aforementioned Berlin Conference, which marked a new phase in colonial enterprise, because it formulated a structural framework for the management of the colonial scramble for Africa, which otherwise

[110] *Id.* at 311.
[111] See *Id.* at 76-78, and see also R.H. Jackson, Quasi-states: Sovereignty, International Relations and the Third World (1990).

threatened the European balance-of-power system. In many cases, treaties were conducted with African chiefs, from which European states claimed to derive their title rights.[112] Jurists, in the positivist tradition, put all their effort in demonstrating the binding effect of such treaties. This does, then, imply some sort of quasi-sovereignty for the non-European entity with which the treaty is concluded, in that it does confer a sort of recognition upon the entities with whom treaties were concluded. But such actions always played into the hands of the Europeans through their system of collective hegemony over their African colonies, as they were able to derive rights from such treaties, but refused to accept associated responsibilities from them. The practical effect of this is to draw the positivists approach into question, as problems arising from the interpretation of such treaties were settled on a largely *ad hoc* basis. Anghie writes:

> Positivists grandiosely claimed that while their system was based on empirical science, it nevertheless remained autonomous from the messy world of politics, society and history that it had imperiously and decisively ordered. The complex realities of late-nineteenth-century politics and the ambiguous character of the native overwhelmed the positivist system; its failure to coherently place and incorporate the non-European entity into its overall scheme, negated its much-vaunted claims of being comprehensive, systematic and consistent. The ambivalent status of the non-European entity, outside the scope of law and yet within it, lacking in international personality and yet necessarily possessing it if any sense was to be made of the many treaties which European states relied on, was never satisfactorily defined or resolved […].[113]

Alternatively, European powers could turn to outright colonisation, which would completely solve the problem of legal personality, in that the colonising power assumed sovereignty over the non-European entity, and any European state carrying on business with that territory would deal with the colonial power. The third technique that could be employed is by official recognition. This was primarily the case in states such as Japan and Siam, whereby European standards were agreed to in these countries' external and internal relations, at least as applies to Europeans.[114] In essence, non-European states had to provide extra-territorial jurisdiction to Europeans as conditions for recognition. Finally, there could be a creation of a protectorate which appears to be little more than 'colonialism lite', in that European states exercised extensive control over non-European states without fully assuming sovereignty over those states. Britain was keen on this technique, in that it allowed it to exercise economic control over a non-European state that was nominally sovereign.[115]

The overall practical effect of these four techniques again relates back to the concept of society, in that it allowed for a distinction to be made between types of states. To conclude this point, it may be observed that reliance on the concept of 'society', as discussed by Anghie, to es-

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[112] One needs only to consider the Treaty of Nanking between Britain and China to observe the fact that it was legal to compel parties to enter into legally-binding treaties. See Treaty of Nanking, Treaty of Peace, Friendship and Commerce Between Her Majesty the Queen of Great Britain and Ireland and the Emperor of China, 29 August 1842, G.B.-I.R.-P.R.C., 93 Consol. T.S. 467.

[113] Angie, *supra* note 98, at 81.

[114] *Cf.* J. Westlake, Chapters on the Principles of International law 140 (1894): "When people of European race come into contact with American or African tribes, the prime necessity is a government under the protection of which the former may carry on the complex life to which they have been accustomed in their homes […]." *Cf.* also *Id.* at 144, as cited in Anghie, *supra* note 98, at 75: "We find that one of [European colonisers'] first proceedings is to conclude treaties with such chiefs or other authorities as they can discover: and very properly, for no men are so savage as to be incapable of coming to some understanding with other men, and whatever contact has been established between men, some understanding, however incomplete it may be, is a better basis for their mutual relations than force. But what is the scope which it is reasonably possible to give to treaties in such a case, and what effect which may be reasonably attributed to them?"

[115] See discussion in Angie, *supra* note 98, at 80-90.

tablish sovereignty casts doubt on the claim that sovereignty is the core principle of international law, and that everything within the international legal system derives from sovereignty.

Sovereignty, society, assimilation and the colonial experience: A recapitulation

Given that the interaction between European and non-European societies was one not between equals, but between sovereign and non-sovereign, this in many ways draws into question the paradigm of 'order among sovereign states' that is inherent in modern territorial statehood. But the concepts of sovereignty differ significantly in terms of underlying motivation. For European states, the issue is how conflicts between sovereigns can be resolved in the absence of an overarching sovereign, but for non-European territories that would become states the issue is how to obtain sovereignty in the first instance. Ironically, in this sense, legal personhood was achieved precisely when a society was absorbed into European colonial empires or altered its own practices to fit the needs of Europeans. Anghie is correct to observe the difficulties positivism faced in reconciling the 'mission' of 'civilising the uncivilised', and the core of his argument is structurally valid and highly relevant for the purposes of this study. However, the strength of his argument as it stands must be mitigated somewhat, however, in that Anghie may be overstepping his bounds by positing an essentialist dichotomy between Europeans and non-Europeans. An ample restatement of Angie's argument follows:

> Achieving the European ideal becomes the goal of the non-European states. Consequently, for the non-European world, the achievement of sovereignty was a profoundly ambiguous development, as it involved alienation rather than empowerment, the submission to alien standards rather than the affirmation of authentic identity. […] The question of the enduring effects for non-European societies of the history of exclusion is related to the issue of the legacy for the discipline as a whole. Lawrence's definition of international law reflects both the view prevalent at the time and the fundamental nexus between race and law: "International law may be defined as *The rules which determine the conduct of the general body of civilized states in their dealing with one another*". A century later, international law is defined by Henkin and his colleagues in their major textbook on the subject as 'the law of the international community of states'. The notion of 'community' is retained, but no distinctions are made between civilized and non-civilized states. […] [T]he nineteenth century is something of an embarrassment to international law, for a number of reasons. Its monolithic view of sovereignty, its formalism and rigidity, were important causes of the First World War in the view of distinguished inter-war jurists such as Lauterpacht and Alvarez, who set about the task of reconstructing a New International Law. Its complete complicity with the colonial project has led to its denunciation as an international law of imperialism. Subsequent generations of international lawyers have strenuously attempted to distance the discipline from that period, in much the same ways that positivists distanced themselves from naturalists. And as with that previous attempt at distancing, the results are ambiguous.[116]

Such a formulation fails in large measure to take account of the fact that colonialism was and is a *fait accompli*, and certainly has been recognised as such in terms of history, politics and, indeed, law. Anghie's argument does a good job in demonstrating the inherent contradictions and problems in the ways in which sovereignty has come to be conferred upon all parts of the world. However, that position itself is inherently modern, in the sense that it looks backward through the prism of, and therefore is fundamentally defined by, the 'right of peoples to self-determination', decolonisation and the rise of international human rights law, through the United Nations and other intergovernmental organisations. In terms of history, culture and logical reasoning, difficulties are caused by viewing all non-European entities as existing completely in a vacuum. All societies develop and evolve, all peoples witness changes to their own

[116] Anghie, *supra* note 98, at 108-109, citing Lawrence, *supra* note 103, at 1, and Henkin 3e, *supra* note 2, at xvii.

cultures and traditions over time. The fact that Angie tends to de-emphasise, throughout the course of his otherwise challenging and interesting analysis, is that, although colonialism happened, so did decolonisation, inherent with the creation of a right of self-determination, and in Africa, for example, the decision was taken by the Africans themselves that the effects of colonialism, that is, their arbitrary borders, were also accepted.[117] To be certain, from this right came many other universal rights.

In sum, while the present state system may well have been created through morally indifferent legal positivism, the inclusion of more natural law perspectives in modern (positivist) international law, *i.e.,* the core tenets of customary international human rights law, tends to negate these effects. The complications in incorporating such wildly divergent societies under one overarching rubric were not lost on even the most progressive of international lawyers from the positivist period. Koskenniemi cites Pasquale Fiore's *Le droit international codifié et sa sanction juridique*, and suggests that Fiore held the collective European conscience to be "the highest form of civilization ever known".[118] Koskienniemi posits that, under Fiore's worldview, "law was not an effect of sovereign decision, but a spontaneous outgrowth of society",[119] but such 'spontaneous outgrowth', itself, was completely European in composition. The existence of imperial dominance is unmistakable, as Koskenniemi observes, again referring to Fiore:

> Only fully civilized States could be members of the *Magna civitas*, the juridical community. For "[t]his community is already a product of civilization. To the extent that it expands to savage countries, it gives rise to needs and interests that united the civilized nations with barbaric or other peoples less advanced in the path of progress." Full membership in the legal community required the possession of "un certain niveau de culture." This level was first attained in Europe but through commerce and other contacts it was slowly spreading. Fiore made the commonplace distinction between the somewhat civilized cultures of Asia (such as Turkey and the "great Oriental empires") and the less civilized ("peut-être barbares") of Asia and Africa that did not possess a stable political organization that would make the development of juridical culture possible.[120]

The reality remaining is that, through the exercise of the right of self-determination, in conjunction with other universal rights, peoples within these states have more tools available to them to defend themselves within these state structures than they did during the times of imperial dominance by European powers. While the following chapter will be devoted to considering decolonisation in detail, a simple point is made for the moment: colonialism spread the European state system far throughout the globe. By the 20th century, the bloodiest in human history,[121] the entire planet was now 'civilised'.

A globalised 'system' of statehood which underpins all modern legal analysis

Much as barbarianism originally meant that *barbaroi* were people who could not be properly understood, 'civilised' society was originally simply a reflection of the accumulation of inter-European contact. Both concepts, then, took on secondary meanings of greater importance than their origins. Thus came colonialism, followed by the eventual global decolonisation, which will be considered in-depth, in the next chapter.

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[117] See discussion *infra* at chapter two.
[118] Koskenniemi, *supra* note 104, at 54, citing P. Fiore, *Le droit international codifié et sa sanction juridique* (1890) [hereinafter Fiore].
[119] *Id.* at 55.
[120] *Id.* at 56, citing Fiore, *supra* note 118, at 74-94.
[121] Observations about the outset of the 21st century, notwithstanding.

By the time the two world wars took place, colonialism was firmly implanted and legitimised worldwide. The first truly 'globalised' phenomenon had occurred. As once-colonised lands began to assert and gain their independence, as a general rule they did so as a constituent whole, as per the rule of *uti possidetis juris*. However, Krasner's 'Westphalian model' of sovereignty, whereby political life is based on the concepts of territoriality and autonomy, governed by domestic political authorities, was transplanted, along with the external Westphalian state, with much less vigour. Although this will be seen to have considerable implications regarding the effectiveness of the nascent post-colonial state, for the moment, it will be useful to take a step back and get an overview of contemporary reality.

This reality, simply, is that there are more than three and a half times the number of sovereign states in the world at the outset of the 21st century than existed some fifty years earlier. Every part of the globe, from the most densely-settled metropolitan areas to the most sparsely-populated *Hinterlands,* is attributed to one sovereign state derived from the original Westphalian model. There are, of course, obvious examples of boundary disputes (*viz.* Ecuador-Peru), liberation movements (*viz.* Palestine-Israel) and other self-determination claims (*viz.* Western Sahara) being exceptional situations, but, in general, the statement is conceptually valid. The aforementioned global territorial integrity model came into place largely as a result of the sudden political unpalatability of colonialism following the second world war. This reality was catalysed with the bipolar global political climate of the times, marked by the superpower rivalry between the Soviet Union and the United States. Contemporary events have left a changing series of political interpretations for conceptualising the purported 'international community', as well as a series of legal institutions to reinforce that community. It is within this context that the decolonisation experience should be viewed.

The world, now a purported 'community' of sovereign states, is a strikingly different place from region to region. African states, for example, are marked by their relatively low population densities, often challenging climates, natural environments and general difficulty in projecting power over distances.[122] Their boundaries, so arbitrary and artificial, have remained more or less fixed in spite of the nature of their imposition and the relatively brief amount of time spent actually under colonial rule.[123] Yet The Gambia, for example, is as much an inanimate, territorial state as is the United Kingdom; Senegal is as much an inanimate, territorial state as is France. But The Gambia exists as an independent state today only because it was the British who explored up the Gambia River into Africa, whilst France controlled the periphery of that territory.

In situations like this, it is very difficult to see how any semblance of animate statehood, even remotely comparable to that of their former colonial masters, existed in The Gambia or Senegal. The challenge to be addressed in upcoming chapters is to address the reality that, clearly, in some places statehood means one thing, and in other places statehood means something completely different, but all states are part of the same 'international community'. This point will become clearer as it is observed, in the next chapter, that e.g. African states are, in the main, consisting of the 'right of peoples to self-determination', the contemporary rule of *uti possidetis juris* and some largely piecemeal attempts at 'nation-building' over a few decades of independent statehood.

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[122] See generally Herbst, *supra* note 78, at chapter one ('The Challenge of State Building').
[123] *Cf.* C. Young, The African Colonial State in Comparative Perspective 9-10 (1994): "The colonial state in Africa lasted in most instances less than a century—a mere moment in historical time. Yet it totally reordered political space, social hierarchies and cleavages, and modes of economic production. Its territorial grid—whose final contours congealed only in the dynamics of decolonization—determined the state units that gained sovereignty and come to form the present system of African politics."

The Montevideo Convention on the Rights and Duties of States: Critically evaluating the most commonly-accepted definition of statehood

> In a rapidly changing world, the definition of 'a state' has remained virtually unchanged and continues to be well described by the traditional provisions of the Montevideo Convention on the Rights and Duties of States. […] But it should not be thought that, because the formal definition of statehood has remained unchanged, the concept of statehood is rigid and immutable. Its component elements have always been interpreted flexibly, depending on the circumstances and the context in which the claim of statehood is made.[124]

Developmental history and overview of the convention's substantive provisions

The progression of international society beyond the historical notion of *rex est imperator in regno suo* ('the King is Emperor within his own realm'),[125] toward the more contemporary development of the Westphalian-based statehood system, led to the identification and enthronement of the most fundamental legitimising concept of state-based sovereignty in public international law: the role played by the state as an international legal person.[126] From this follows the specific designation of the state as the primary subject of the corpus of public international law, as possessing certain rights and obligations and an entitlement to take certain specific actions with regard to its own foreign relations. Given that the capacities and obligations of states include, *inter alia*, "the capacity to make treaties and agreements under international law, the capacity to make claims for breaches of international law, and the enjoyment of privileges and immunities from national jurisdiction",[127] and particularly, in view of the rise in importance of legal positivism in the 19th and early 20th centuries, it stands to reason that, at some point, international society would want to codify *what it is to be a state*.

The Monevideo Convention itself[128] dates from the 1933 Eighth Pan-American Conference[129] (Montevideo, 3-27 December 1933), which culminated prior work done at the sixth and

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[124] R. Higgins, Problems and Process: International Law and How We Use It 39 (1994).
[125] *Cf.* S. von Pufendorf, VII *De Jure Naturae et Gerntium Libri Octo*, Ch. 3, para. 690 (1672, Oldfather trans. 1934): "Just as a king owes his sovereignty and majesty to no one outside his realm, so he need not obtain the consent and approval of other kings or states, before he may carry himself like a king and be regarded as such."
[126] *Cf.* 1 Oppenheim's, International Law: A Treatise 117, § 63 (H. Lauterpacht, 8th ed. 1955) [hereinafter Oppenheim]: "The conception of International Persons is derived from the conception of the Law of Nations. As this law is the body of rules which the civilised States consider legally binding in their discourse, every State which belongs to the civilised States, and is therefore a member of the Family of Nations, is an International Person."
[127] Damrosch, *et al*, Int'l Law, *supra* note 36, at 241.
[128] See Montevideo Convention on the Rights and Duties of States (1933) 49 Stat. 3097, T.S. No. 881, 165 L.N.T.S. 19. [hereinafter Montevideo Convention] The Convention entered into force one year later, on 26 December 1934. Bolivia was the only participant in the Conference which did not sign the Convention. Brazil, Peru and the United States offered reservations to the Convention, primarily concerning the issue of intervention by one state into another state; however, as Article 8 of the Convention, dealing with non-intervention in the internal and external affairs of states, was reaffirmed by protocol on 23 December 1936, these reservations have become moot points. Nevertheless, by the time of the adoption of this protocol in 1936, only five states had actually ratified the convention itself.
[129] The Pan American Conference, predecessor of the Pan American Union and the Organization of American States, was first established in 1890 at the initiative of James G. Blaine, a controversial Republican political leader (including two terms as Secretary of State) in the post-Civil War United States. He cast a particularly strong eye on international relations between the United States and Latin America, particularly involving commercial interest. The Pan American Conference was designed as a standing forum to bring together Latin American and United States leaders at five-year intervals; however, the often con-

seventh conferences in working toward defining 'a state' in international law. The US Restatement (Third), at §201, recapitulates the most salient parts of the Montevideo definition, as primarily found in Article 1 of the Convention itself.[130] According to the Restatement, "under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities". The formulation provided by the Restatement is of particular interest, in that the provisions of §201 are to be read in conjunction with those at §206, which state that the capacities, rights and duties of states include: "(a) sovereignty over its territory and general authority over its nationals; (b) status as an international legal person, with capacity to own, acquire, and transfer property, to make contracts and enter into international agreements, to become a member of international organizations, and to pursue, and be subject to, legal remedies; and (c) capacity to join with other states to make international law, as customary law or by international agreement."

Although there seems to be a large measure of general agreement that, in James Crawford's words, the Montevideo Convention on the Rights and Duties of States has become the "best known formulation of the basic criteria for statehood",[131] two rather striking points about the convention can be identified. The first is that it is a product of a specialised regional conference, a point not lost in the literature of the time. As J.G. Guerrero, the then-Vice President of the Permanent of International Justice pointed out:

> *Il est bien évident que la Convention sur les "Droits et Devoirs des Etats"* […] *produira la plénitude de ses effets entre les Républiques et un Etat non américain. Nous toucherons ici au point faible de la codification du droit international réduite a l'usage d'un seul continent. Ses règles demeurent totalement dépourvues de l'autorité universelle que doit constituer l'essence même de la codification du droit international.*[132]

Despite Guerrero's concerns, and his grouping of North and South America, however, it seems clear that the Montevideo provisions have been widely accepted through state practice, and now find themselves at the centre of the customary international law defining statehood. This does not mean that the provisions are adequate, exhaustive or able to be equally applied. This observation thus leads into the second point to be made about the convention, namely that

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tentious political and military climate between the regions led to a rather limited effectiveness of the forum, particularly following the pronouncement of the Monroe Doctrine in 1895, although later this was somewhat mitigated by Franklin Roosevelt's 'Good Neighbor Policy' of the 1930s. For discussion, see e.g. D. Healy, James G. Blaine and Latin America (2001).

[130] Article 1 of the Convention is as follows: "The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states." Caution should be made in over-interpreting the implications of the meaning of the word 'should' in the text (as opposed to a more definitive terminology such as 'shall'), in view of the French translation of Article 1: "L'État, en tant que personne de droit international, *doit* réunir les conditions suivantes […]." (emphasis added)

[131] J. Crawford, The Creation of States in International Law 36 (1979) [hereinafter Crawford, Creation]. But *cf.* J. Crawford, *The Criteria for Statehood in International Law*, 48 BYIL 93, 107 (1976-77) [hereinafter Crawford, Criteria]: "…there is nevertheless no generally accepted and satisfactory contemporary legal definition of statehood. This may well because the question normally arises only in the borderline cases…" And see particularly, J. Crawford, The Creation of States in International Law 37-45 (2d. ed, 2006).

[132] J.G. Guerrero, *La VII^e Conférence Panaméricaine : Montevideo, 3-27 décembre 1933*, XLI Rev. Gén. de Droit Int'l Public 401, 411 (1934). Author's translation: It is certainly evident that the Convention on the "Rights and Responsibilities of States" will produce considerable effects between Republics and non-American states. We are touching upon a weak point in the codification of international law reduced to its usage in only one continent. Its rules remain completely deprived of the universal authority which must constitute the essence of international law's codification.

it was originally formulated with little substantive development of the logical elements which would come to shape its provisions.[133] This point is succinctly made in a more contemporary context by Thomas Grant, in his critique of the Montevideo Convention:

> That the framing of the Montevideo Convention has gone largely unexamined may reflect the fact that its content was a restatement of ideas prevalent at the time of the framing. So apparent were the Montevideo criteria to contemporary observers that few thought to inquire as to their basis or origin. At the crux of the Montevideo criteria lay the concepts of effectiveness, population, and territoriality. In the late 1930s, these may have seemed a long-established feature of international law. They certainly were not new. Georg Jellinek, writing in the late nineteenth century, had posited a Drei-Elementen-Lehre—a "doctrine of three elements"—and this was the essential core of the Montevideo criteria. By the 1930s, the three elements were widely assumed to be a mainstay of statehood. Reflecting their prevalence, the elements of effectiveness, population, and territoriality were enumerated as a basis for statehood (or of sovereignty) by many leading publicists of the half-century leading up to the Montevideo Convention.[134]

While the principal substantive issue at hand concerns defining which entities are to be instilled with international legal personality, the US Restatement also demonstrates how, in more recent years, states have lost their exclusive—but not primary—claim to being an international legal person. While contemporary international law remains principally centred on the law governing interstate relations, it must be simultaneously observed that there exists an ever-growing number of intergovernmental organisations existing as international legal persons.[135] For example, §101 of the Restatement is of use in determining the scope of modern international law itself; it states that international law deals "with the conduct of states and of international organizations and with their relations *inter se*, as well as with some of their relations with persons, whether natural or juridical". Thus clearly some intergovernmental organisations have freely appropriated the concept of international legal personality from the exclusive domain of states to serve their own interests.

Nevertheless, the primary international legal person, and the focus of the analysis at hand is the sovereign state, and at the very least, the Montevideo Convention must be seen as the starting point for a discussion of the legal elements incorporated into the rubric of 'statehood'. Furthermore, subsequent practice demonstrates the importance of the Montevideo formulation in

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[133] *Cf.* R.R. Wilson, *International Law In Treaties of the United States*, 31 AJIL 271, 284 (1937): "The nature of the five specific references to international law in [the Montevideo Convention] […] suggest that the Convention on Rights and Duties was, except for the important provisions on intervention, intended to be mainly declaratory rather than legislative."; G. Fitzmaurice, General Principles of International Law, 92 Rec des Cours 5, 13 (1957): "To give a strict definition of [states] would be to encounter the same kind of logical difficulties as are involved in defining an international person—that is to say, it tends to involve the use of terms which themselves require definition but can only be defined by reference to the very concept it was originally sought to define." See also R. Higgins, The Development of International Law Through the Political Organs of the United Nations 13 (1963) [hereinafter Higgins] and J.E.S. Fawcett, The British Commonwealth in International Law 92 (1963).

[134] T.D. Grant, *Defining Statehood: The Montevideo Convention and its Discontents*, 37 Colum. J. Transnat'l L. 403, 416 (1999) [hereinafter Grant]. The 'doctrine of three elements' is extracted from G. Jellinek, Allgemeine Staatslehre, at 396 *et seq*. (3d ed. 1914).

[135] This is particularly clear with regard to the United Nations, *viz.* Advisory Opinion on Reparations for Injuries Suffered in the Service of the United Nations, 1949 ICJ Rep. 3, concluding, broadly, that if an organisation was expressly intended to have international legal personality or has other implied powers involving international legal personality, dependant upon the purposes and functions of the organisation, including, *inter alia*, the capacity to bring claims for injuries suffered by the organisation as a whole or the seeking of reparations for injuries against agents of the organisation, then the organisation itself must have international legal personality.

defining statehood.[136] In so doing, it may be observed that the greatest practical function of the convention was to identify particular elements governing interactions between humans and the land on which they live. This is particularly clear given the interrelated equation identified by Jellinek and Grant (and reinforced by the US Restatement) that the law of statehood is **'territory + population + effectiveness (≈ territorial integrity) = sovereignty (≈ statehood)'**. Finally, it cannot be ignored that recognition of a state by other states and the effects of such recognition are fundamental to the actual determination of a 'defined' state, and indeed Articles 3, 4, 5, 6 and 7 of the Convention speak to this reality.[137] Although the recognition of new states and the roles played by the governments of these states are important for a complete understanding of statehood, for the moment, it will suffice to discuss the four criteria used in defining statehood as extracted from Montevideo Convention, with a slight reordering to facilitate the discussion at hand.

The substantive provisions of the convention: The totality of statehood as an equation of balance oscillating between 'fixed' and 'fluid' concepts

The elements of the Convention may be grouped in two separate categories, so as to reflect the interactions between humans and the land on which they live. The first category is relatively 'fixed', reflecting a degree of permanence related to the territorial nature of statehood, and the other relatively 'fluid', reflecting a degree of variability related to specific actions taken in the actual management of that particular territory's municipal and international affairs.

The first grouping involves the relatively 'fixed' provisions of statehood—the 'defined territory' and 'permanent population' elements—in that the main issue at hand is related to external boundaries of a specifically-defined sovereign state, and the union of the inhabitants of that state to this specific territory. In a modern context, there exists no *terra nullius*, or so-called 'undiscovered' territory which has thus not been incorporated into the global system of sovereign states. Therefore, the totality of global territory is, with the exception of generally uninhabited Antarctica,[138] subject to the jurisdiction of one particular state. However, it is also the fact that, as stated in 1945 and a fact today, "very few states are completely free from disputes relating to territory, either along their frontiers or in their dependencies. Every continent contains an astonishing number of areas that either have been or are now in heated controversy".[139]

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[136] The admission of Israel as a Member-State of the United Nations in 1948 is an illustrative example, and Phillip Jessup, the US representative to the Security Council relied heavily upon the Montevideo criteria in making his case that Israel should be admitted. *Cf.* 3 UN SCOR, 383 Mtg., 2 Dec. 1948, No. 128, at page 10 [hereinafter Jessup]: "We are all aware that, under that traditional definition of a State in international law, all the great writers have pointed to four qualifications: first, there must be a people; second there must be a territory; third, there must be a government and, fourth, there must be capacity to enter into relations with other States of the world."

[137] For discussion, see J.B. Scott, *The Seventh International Conference of American States*, 28 AJIL 219, 226 (1934).

[138] Antarctica is a *sui generis* entity lacking any indigenous human population or government and is not subject to the direct sovereignty of any one state. It is primarily governed by the 1959 Antarctic Treaty, 402 UNTS 71 (entered into force on 23 June 1961), stating that Antarctica is to be used for peaceful (non-military and non-nuclear) purposes. Argentina, Australia, Chile, France, New Zealand, Norway and the United Kingdom all claim some measure of territorial sovereignty, including some overlapping claims, over some sectors of Antarctica, but in practice these amount to little more than mere claims to sovereignty rather than an actual manifestation of sovereignty *per se.* See A. Watts, International Law and the Antarctic Treaty System (1992), particularly at 111 *et seq*.

[139] N. Hill, Claims to Territory in International Law and Relations 28 (1945).

Territorial regions may happen to find themselves existing under contested sovereignty, as is the case in e.g. Jammu and Kashmir. Regions may find themselves under occupation by an administering power, as in the West Bank and Gaza Strip. Or, or due to controversial circumstances effectuated in the process of decolonisation, as in Western Sahara, territorial conflicts may exist. Furthermore, the numerous border disputes to be found in practically all regions of the globe may be of lesser comparable intensity, yet still qualify as regions dominated by territorial disputes.

The global prevalence of territorial disputes demonstrates how the frontiers of states are not immutable, and as such may be changed with the consent of those involved, provided that the threat or use of force is not invoked.[140] Nevertheless, it is inherent in statehood that some sort of frontiers must exist within a state, because states themselves are, in the first instance, territorially-defined entities. It is therefore reasonable to assume that the vast majority of states have been established in a contemporary sense within relatively static frontiers with a rational expectation of continuity. States exist to perpetuate their own existence and, broadly speaking, do so within defined and accepted, but somewhat adjustable, territorial limits.

Similarly, the permanent population of a state is an element which remains relatively fixed. Certain demographic requirements, such as the specific population of a territory, are largely irrelevant in this sense, given that there exist both highly populated states with populations of over one billion persons, such as China or India, as well as UN member-states with very small populations, such as Palau, a tiny group of islands off the coast of the Philippines with a population of 18,000, or Nauru, an equatorial Pacific island with a population of just 12,000. What is at issue here is the existence of such a population and not the size of that population *per se*.[141] Neither is the issue related to the granting of nationality at birth through *jus solis* or *jus sanguinis* or through naturalisation. Thus, the concept of a 'permanent population' invites a rational expectation of continuity as does the concept of a 'defined territory'.

Such expectations of continuity are less likely to be found in the separate criteria of government and of capacity to enter into international relations—broadly grouped in the sovereignty equation as 'effectiveness'—for it may be envisaged that a defined territory with a fixed population might, at some point, lose the latter two criteria. Such a proposition exists not only in the hypothetical realm, but in actual fact, as occurred most vividly in Rwanda, Sierra Leone and Somalia during the 1990s.[142] What is more speculative, yet nevertheless of interest to consider in the African context, is the possibility that the state itself is unable to project its own authority from its capital throughout the totality of its own territory, thus leaving certain regions under the perpetual circumstance of nugatory 'state governance', within the otherwise integral, territorially-defined sovereign state. For the moment, such a notion should be kept separate from the otherwise more clearly-identifiable legal elements at hand in the present discussion. It will, however, be addressed in chapter four of this study. Thus, the second grouping of the Montevideo criteria involves the provisions of statehood which are more 'fluid' and fall under the broad chapeau of effectiveness: the requirement that the territorial entity possesses a capacity to take certain actions on the municipal and international levels so as to be considered a state, thereby holding a specific title to exercise domestic sovereignty to govern itself as well as a licence to take

[140] *Cf.* UN Charter articles 2(3), 2(4), 33-38. See also I. Brownlie, International Law and the Use of Force by States (1963), at 380.
[141] See generally J.C. Duursma, Self-Determination, Statehood and International Relations of Micro-States (1996).
[142] Indeed, in the outset of the 21st century, it remains arguable whether Somalia, in particular, demonstrates the capacity for effectiveness in government and the capacity for international relations.

specific actions, on the international plane, by virtue of being instilled with international legal personality.

The relatively fixed provisions of statehood reflect the territorial nature of statehood

As is being asserted, statehood *per se,* as a legal concept, is a complicated entity. The four distinct Montevideo Convention criteria, imperfect as they are, do reflect the baseline criteria for statehood in international law. If one is allowed to assess the component parts of the most readily-accepted definition of legal statehood, it can be seen how certain components tend more towards the objective and other components tend more towards the objective. What is at hand is, indeed, the fact that, across many states, a permanent population and a defined territory may be readily observable, and yet, simultaneously, the obvious existence of a government and the capacity to enter into relations with other states may be more readily obscured. This apparent incongruity reveals the need for such delineation between the groupings of population and territory, and that of government and independence.

Defined territory as a prerequisite for a permanent population

Given that states themselves are territorially-defined entities, the requirement of having a defined territory is arguably the most important provision of statehood. In the words of Philip Jessup before the UN Security Council, with regard to the admission of Israel as a Member-State: "[T]he reason for the rule that one of the necessary attributes of a State is that it shall possess territory is that one cannot contemplate a State as a kind of disembodied spirit".[143]

There does appear, however, to be a certain amount of flexibility allowed in considering the territory of a state as having been 'defined'. Again, the US Restatement provides a foundation for deeper discussion, through the provisions of §201:

> An entity may satisfy the territorial requirement for statehood even if its boundaries have not been finally settled, if one or more of the boundaries are disputed, or if some of its territory is claimed by another state. An entity does not necessarily cease to be a state even if all of its territory has been occupied by a foreign power or if it has otherwise lost control of its territory temporarily.[144]

Prior to the formulation of the Montevideo Convention, some commentators were of the opinion that a fixed territory was not essential for the existence of 'statehood' *per se*,[145] a relatively understandable position given the roughly concurrent historical evolution away from empires into fixed states in some regions. A more nuanced view can be seen later on, in returning to Jessup's statement regarding Israel before the Security Council, namely that that strict definition of territorial limits has not been seen as an absolute prerequisite for the acceptance of statehood. He said:

> One does not find in the general classic treatment of this subject any insistence that the territory of a State must be exactly fixed by definite frontiers. We all know that, historically, many States have begun their existence with their frontiers unsettled. Let me take as one example, my own country, the United States of America. Like the State of Israel in its origin, it had certain territory along the seacoast. It had various indeterminate claims to an extended territory westward. But, in the case of the United States, that land had not even been ex-

[143] Jessup, *supra* note 136, at 12.
[144] Similarly, *Cf. Id.* at § 201, reporter's note 1, citing Israel in 1948, Kuwait in 1963 and Estonia, Latvia and Albania in 1919 as similar examples of highly contested 'states'.
[145] See e.g. H. Kelsen, Das Problem der Souveränität (1920), at 70-76, J. Salmond, Jurisprudence (7th ed., 1924) and C. Donati, Stato e territorio (1924) at 27-30.

> plored, and no one knew just where the American claims ended and where French and British and Spanish claims began. To the North, the exact delimitation of the frontier with the territories of Great Britain was not settled until many years later. And yet, I maintain that, in the light of history and in the light of the practice and acceptance by other States, the existence of the United States of America was not in question before its final boundaries were determined.[146]

Nevertheless, it must also be recognised that, at that time of his statement, great portions of the planet remained under colonial rule which, upon being broken up, solidified territorial definition, as internal colonial administrative boundaries were transformed into international frontiers. In a more historical framework, the process of 'civilising the uncivilised', through the incorporation of lands seen as *terra nullius* into the European positivist international legal system, brought those territories into the domain of fixed territoriality in the first instance.

One would be hard-pressed to identify any particular territory in a contemporary context which has yet to be 'discovered' and subsequently 'occupied' *per se:* the odds of any new, habitable land mass on the planet suddenly emerging for the first time seem remarkably low. A reflection of this is the use of cession during times of colonialism as an often-repeated tool for territorial incorporation. Simply put, the practical effects of global colonialism and decolonisation cannot be ignored, and all bits of territory on the globe have now been 'discovered'. Thus Jessup's comment regarding the historical allowance of the birth of states with unsettled frontiers seems not inaccurate, but relegated primarily to a historical perspective.[147] In a contemporary perspective, to do so would necessitate putting an acceptable claim of statehood to the international community for an entity with an open-ended territorial definition; as such, an entity would be, in nomenclature and actual fact, 'undefined'. But it is difficult to see how this would be possible, if all global territories have, in some manner or other, been heretofore 'defined'. Jessup's point regarding the lack of certainty of delimitation of American, versus French, versus British, versus Spanish claims to territory must be seen as of decreased relevance in a contemporary context, because to allow such extreme definitional latitude is akin to providing an open invitation for perpetual allegations of violations of the purported territorial limits (and, therefore, the sovereignty and statehood itself) of the purported 'state'.

That is not to say, however, that such a contemporary preclusion of the existence of 'open-frontier' statehood would apply to circumstances involving relatively more definition of the territorial limits of the state than observed, in the historical cases of the United States or Israel. Such would be the case involving, for example, a border dispute, or, perhaps, a dispute involving something less than the totality of the territory of the entire state. Under such circumstances, the dictum of the Germano-Polish Mixed Arbitral Tribunal, dating from 1929, is seen as authoritative in determining the appropriate rule, as later confirmed by the ICJ in the *North Sea Continental Shelf* cases:[148]

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[146] Jessup, *supra* note 136, at 12.

[147] It is true that both the existing state of Israel and a future Palestinian state lack defined borders at present. However, these are the examples which prove the rule, as the circumstance arises, due to a highly specific local conflict. The lack of similar states with undefined borders to such a great magnitude further reinforces this assertion.

[148] *Cf.* North Sea Continental Shelf Cases (Federal Republic of Germany *v.* Denmark; Federal Republic of Germany *v.* the Netherlands), 1969 ICJ Rep. 3, 32: "The appurtenance of a given area, considered as an entity, in no way governs the precise delimitation of its boundaries, any more than uncertainty as to boundaries can affect territorial rights. There is for instance no rule that the land frontiers of a State must be fully delimited and defined […]." The question of Albania's external borders and its entry into the League of Nations is mentioned herewith; for greater discussion, see Question of the Monastery of Saint-Naorum (Albanian Frontier) (Advisory Opinion), PCIJ Ser. B No. 9, 10. Similarly, see also Article 3, Paragraph 2

> Whatever may be the importance of the delimitation of boundaries, one cannot go so far as to maintain that as this delimitation has not been legally effected the State in question cannot be considered as having any territory whatever. The practice of international law and historical precedents point to the contrary. In order to say that a State exists and recognised as such […] it is enough that this territory has a sufficient consistency, even though its boundaries have not yet been accurately delimited, and that the State actually exercises independent public authority over that territory. There are numerous examples of cases in which States have existed without their statehood being called into doubt […] at a time when the frontier between them was not accurately traced.[149]

Thus, as regards the defined territory criterion, it can be concluded that, at the moment of the pronouncement of 'statehood', there will exist a geographically-congruous political community reasonably capable of making such a pronouncement. Such a circumstance links the territorial requirement with the population requirement, existing within a reasonably well-defined territorial configuration, even though the territorial boundaries of such an entity might not be completely delimited. Furthermore, the successful establishment of a territorially-defined sovereign state is in many ways a *fait accompli*, in that future boundary or territorial disputes alone do not automatically raise questions of statehood, in that particular state.

Permanent population as inherent in the statehood equation

The Montevideo Convention governs interactions between humans and the land on which they live. Attention in this relationship must now be drawn from 'the land' to 'the humans'. Oppenheim wrote that the first criterion for statehood must be a 'people', although in the contemporary sense, this conceptualisation exists not to that which is granted a 'right of self-determination', but in something potentially quite the opposite: "A people is an aggregate of individuals of both sexes who live together as a community in spite of the fact that they belong to different races or creeds, or be of different colour."[150] Asbjørn Eide succinctly makes this distinction, as he states that "from the standpoint of international law, the 'permanent population' is synonymous with 'the nation'. From a social or anthropological perspective […] this is not always so".[151]

Perhaps what is most substantial about the permanent population criterion is that the population, whether large or small in number, is able to organise itself into some sort of coherent, stable political entity, so as to be able to make a specific claim to project that political community across the defined territory of the state. When this happens, and the state comes into existence, it is then able to confer upon this permanent population its own nationality, as nationality flows directly from the state to its citizens. To that end, it seems logically impossible to envisage a circumstance where a functioning state would be in actual existence while lacking a demonstrable permanent population; thus all states must have their own nationals.[152] Neverthe-

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of the Treaty of Lausanne (Frontier between Turkey and Iraq) (the Mosul Boundary Case), PCIJ Ser. B No. 12, 21.

[149] Deutsche Continental Gas-Geshellschaft *v.* Polish State (1929), 5 *Annual Digest of Public International Law Cases* (ILR) 5, 14-15 (1929-30). The case report went on to discuss, *Id.* at 15, the relationship between a state's capital and its *Hinterland*, stating that because the contentious issue of the case was manifested at Warsaw, and not, for example, along the eastern boundary of Poland, the measure was "in other words in a territory the national Polish character of which could not be doubted by anyone since the end of 1918. It was there that the new State was born; there was the seat of its governmental and public power."

[150] 1 Oppenheim, *supra* note 126, at 118.

[151] A. Eide, *Minority Protection and World Order: Towards a Framework for Law and Policy*, in A. Phillips and A. Rosas (eds.) Universal Minority Rights 96 (1995).

[152] A discussion along these lines can be observed in early Israeli jurisprudence. In A.B. *v.* M.B., as cited in 17 ILR 110-111 (1950), the presiding judge disregarded a previous decision in Re Goods of Shippers,

less, it is not an absolute requirement for a new state to extend nationality to its population, although in practice this generally does occur.[153] Moreover, there appears to be even a degree of flexibility in the extent to which the 'permanent population' is, in actual fact, permanent. While it seems clear that the permanent population of a state must demonstrate an active willingness to be normally resident within the defined territory of a state, the ICJ, in the Western Sahara advisory opinion, seems to take the position that a largely nomadic population does not inherently fall outside the requirements of a permanent population. In Western Sahara, such a way of life came, in large part, out of necessity, due to the "sparsity of the resources and the spasmodic character of the rainfall",[154] leading further to specific customs reflecting basic ways of life in the region,[155] which one commentator assesses as comprising "a method of linking people and territory in a legal relationship […] while the identity of the people was reflected to the almost feverish claim to territory".[156]

The relatively fluid provisions reflect the juridical weight of the principle of effectiveness

The main reason why the principles of statehood related to 'effectiveness' are relatively more fluid, *vis-à-vis* the relatively more fixed principles of territoriality and population, are because one must make distinctions between the states themselves and the governments of those states. There exists an important logical distinction between the two concepts. Consider Ian Browlie's commentary regarding incidence and continuity of statehood:

> *(a) Population:* This criterion is intended to be used in association with that of territory, and connotes a stable community. Evidentially it is important, since in the absence of the physical basis for an organized community, it will be difficult to establish the existence of a state.
>
> *(b) Defined territory:* There must be a reasonably stable political community and this must be in control of a certain area.[157]

Thus according to Brownlie's formulation, it is clear that some specific community must take certain actions *in the first instance* to organise itself as a state *per se*. The relatively 'fixed' character is thus defined, more or less, by the existence of its population to which nationality can be given, and the state's own territorial limits. Beyond that, the question turns more to the ongoing administration of that territory by the permanent population within the state. As will be seen, this is more of an open-ended question, as the requirements of international law with regard to

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cited *Id.*, which held that citizens resident from the termination of the Palestine Mandate until the 1952 enactment of the Nationality Law were stateless. The judge in A.B. *v.* M.B. basing his views on Oppenheim (Lauterpacht) and Schwarzenberger, stated that "So long as no law has been enacted providing otherwise, my view is that every individual who, on the date of the establishment of the State of Israel was resident in the territory which today constitutes the State of Israel, is also a national of Israel. Any other view must lead to the absurd result of a State without nationals—a phenomenon the existence of which has not yet been observed."

[153] *Cf.* Case Concerning Acquisition of Polish Nationality, 1923 PCIJ, Ser. B, No. 7, at 15: "One of the first problems which presented itself in connection with the protection of […] minorities was that of preventing […] States from refusing their nationality, on racial, religious or linguistic grounds to certain categories of persons, in spite of the link which effectively attached them to the territory allocated to one or the other […] States." Poland ultimately would cease to participate in the League's minority protection system, after the Permanent Court concluded that its minority rights obligations were integrated into its own independence and sovereignty. See Declaration of Polish Delegate Beck to the League Assembly, League of Nations OJ, Spec.Supp. 122 at 42 (1934).

[154] Western Sahara, *supra* note 89, at 42.

[155] *Id.* at 64.

[156] M. Shaw, *The Western Sahara Case*, 49 BYIL 119, 137 (1978).

[157] I. Brownlie, Principles of Public International Law 67 (1966).

the governance of a territory, and with regard to the actual independence of that territory, are vague. Again, the 'community' element is reflected in Brownlie's formulation:

> *(c) Government*: The shortest definition of a state for present purposes is perhaps a stable political community, supporting a legal order, in a certain area […] However, the existence of effective government is in certain areas either unnecessary or insufficient to support statehood […]. The relevant question may now be: in whose interest and for what legal purpose is government 'effective'?[158]

Similarly, with regard to capacity to enter into relations with other states, Brownlie writes:

> *(d) Independence:* The practice of states has been to ignore—so far as the issue of *statehood* is concerned—various forms of political and economic blackmail and interference directed against the weaker members of the [international] community. Whilst it is a matter of appreciation, there is a distinction between agency and control, on the one hand, and *ad hoc* interference and 'advice', on the other.[159]

Therefore, through the prism of Brownlie's analysis, the point being made at present can be more clearly observed—namely, that much greater latitude is offered in the legally-sanctioned administration of a territory than in the legally-sanctioned definition of that territory. Nevertheless, it follows that the definition and administration of such territories are co-dependent, that is, revolving around some specific community. Thus, the point at hand is not to imply that some states, lacking effective governance or practical independence in the conduct of their foreign affairs, are not exercising statehood *per se*; rather, it is to demonstrate that the requirements of the Montevideo Convention, and, therefore, the traditional criteria in international law for defining the existence of statehood, are substantially more flexible with regard to the administration of territory rather than the definition of territory. This leads to the question: at what point does this juridical allowance of such a wide spectrum of administrative flexibility serve, in actual fact, to cause actual harm to the territory and its associated population, in spite of the ongoing perpetuation of that entity as a specific state? (For example, if the administering entity did not actually possess effective control of the totality of its territory, or was practically incapable of exercising its own independence on the international plane, what, other than the specific appellation of statehood in the territory in question, ensures the continuity of that state *per se*?) Such a question might seem, at first glance, to be beyond the realm of juridical consideration, or confusing the law as it (perhaps) ought to be with the law as it is, but in actual fact, such a viewpoint is unsustainable in a contemporary context, for the existence of global human rights standards—including the universal right of all peoples to self-determination—cannot be denied.[160] Thus, in the course of this study, it will be important to bear the points made by Brownlie in mind, particularly when the discussion turns to the practical effects of post-colonial state creation in the African context, in chapter four. That said, one must now draw attention to a substantive discussion of the remaining Montevideo criteria.

Under the control of its own government

Clearly, then, some sort of administering entity is needed for there to be a state; obviously, such an entity is a government. Such an entity would be most commonly recognised by having

[158] *Id.*

[159] *Id.* at 68.

[160] In addition, in actual practice, it is not denied, because the realities of human rights diplomacy, in particular at the United Nations, reflect both the existence of universal rights and the assertions of practically all governments that their actions are being taken within the limits of international human rights standards. See e.g. A.C. Kiss, *Permissible Limitations on Rights*, in L. Henkin (ed.), The International Bill of Rights: The Covenant on Civil and Political Rights (1981), at 290 *et seq*.

specific organs for administration and legislation of the population of the territory.[161] From that, certain edicts in the form of laws are pronounced, which must be effectuated on the population. Thus a government is, in principle, an integrated bureaucratic system which manifests a legitimate use of power, in abstract and concrete forms, across its territory, to those on its territory. Associated with that notion is a sense of actual territorial sovereignty, which Crawford terms as "not ownership of, but governing power with respect to, territory".[162] This seems to be in conformity with the commentary of the US Restatement on the topic, at §201(c), that "there must be some authority exercising governmental functions and able to represent the entity in international relations". Indeed, to continue along those lines, although a state is not under any specific legal obligation to accord formal recognition to the government of any state, or to maintain diplomatic relations with any state, a state "is required to treat as the government of another state a regime that is in effective control of that state," except if that effective control came about through the threat or use of armed force, as prohibited by the UN Charter.[163] Thus the effectiveness criteria for the government of a state begin to emerge, in that the integrated bureaucratic system must be able to broadcast its power throughout the territory for the government in question to be considered 'effective'.[164]

Such a perspective seems to reflect the will of the Commission of Jurists on the Åland Island Dispute, which was appointed by the League of Nations in 1920, following the 1917 civil war and secession from the Russian Empire. The Ålanders were Swedish-speaking, and following the secession of Finland from the Russian Empire, asked to be reunited with Sweden. Finland itself was unresponsive to the request and made a counteroffer of an autonomy arrangement, but this was deemed unacceptable to Ålanders. Therefore, the issue was referred to the newly-formed League of Nations. The Jurists appointed by the Council of the League were of the opinion that Finland's statehood only began following the establishment of an effective government. Their opinion stated that:

> [f]or a considerable time, the conditions required for the formation of a sovereign State did not exist. In the midst of revolution and anarchy, certain elements essential to the existence of a State, even some elements of fact, were lacking for a fairly considerable period. Political and social life was disorganized; the authorities were not strong enough to assert themselves; civil war was rife; further, the Diet, the legality of which had been disputed by a large section of the people, had been dispersed by the revolutionary party, and the Government had been chased from the capital and forcibly prevented from carrying out its duties; the armed camps and the police were divided into two opposing forces, and Russian troops, and after a time Germans also, took part in the civil war. […] It is therefore difficult to say at what exact date the Finnish Republic, in the legal sense of the term, actually became a definitely constituted sovereign State. This certainly did not take place until a stable political organization had been created, and until the public authorities had become strong enough to assert themselves throughout the territories of the State without the assistance of foreign troops. It would appear that it was in May 1918, that the civil war was ended and that the foreign troops began to leave the country, so that from that time onward it was possible to reestablish order and normal political and social life, little by little.[165]

Their opinion also seems well-rooted in historical perspective, as earlier writers, such as

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[161] *But cf.* H. Kelsen, Law and Peace 145 (1942): "A legal community which has a court and an administration is a state, but a central organ of legislation is not a requisite of a state." He explains why he believes this to be so, *Id.* at 146-8: "As soon as the position of chief becomes a permanent institution […] the chief appears as judge, not as legislator."
[162] Crawford, Criteria, *supra* note 131, at 116.
[163] Restatement (Third), at §203.
[164] See Higgins, *supra* note 133, at 20-25.
[165] League of Nations, Commission of Jurists on Aaland Islands Dispute, League of Nations OJ, Spec.Supp. 4, at 8-9 (1920).

James Lorimer, had long since asserted that "in order to be entitled to recognition, a State must presumably possess: (a) the will to reciprocate the recognition which it demands; and (b) the power to reciprocate the recognition which it demands".[166] Thus, a government must both absorb and reflect the symbols of state legitimacy, and it seems clear that, in effectuating its secession from the Russian Empire, Finland did not have the capacity to do so until some time after it began that process.

Thus, it seems increasingly clear that the effectiveness criteria is one of the dominant factors in the discussion and evaluation of the existence of a government, and that, in theory at least, until such a time that a stable political organisation makes itself known, and asserts itself throughout the territory of the state, disconnected from the activities or assistance of foreign troops, the entity does not exist as an independent, sovereign state. It therefore follows, as Crawford suggests, that "there is thus a strong case for regarding government as the central criterion of statehood, since all the others are dependant on it".[167] However, without negating the co-dependent nature of statehood between administration and territory, such a formulation can equally be seen in the inverse: that *territoriality* is actually the central element, in the first instance and that all other criteria follow from *it*.

This could be so because the standard of effective government appears to be demonstrably less stringent due to the granting of independence in a more contemporary context than was observed with the independence of Finland from the Russian Empire. Such an assertion is guided, again, by the US Restatement, at §201, reporter's note 2: "Some entities have been assumed to be states when they could satisfy only a very loose standard for having an effective government, e.g. the Congo (Zaire) in 1960 […] A state may continue to be regarded as such, even though, due to insurrection or other difficulties, its internal affairs become anarchic for an extended period of time."

The reason why such a loose standard for effective government was accepted by the international community was because of the political necessity of the recognition of decolonising territorial entities as independent states following the end of the second world war and the translation of the notion of self-determination from a multifaceted conception to an ongoing 'right of peoples'. Such was the practical implication of allowing an emerging, universal principle of self-determination to manifest itself as universal political reality as colonial possessions by European states began to fall out of political favour. This will be demonstrated most clearly in considering how, due to political expediency, colonial possession came to be disallowed, first, in political sentiment and, subsequently, in legal fact, through the emergence of a 'right of peoples to self-determination'. For the present discussion, however, it will be of interest to see how the colony of the Belgian Congo became an universally-recognised independent state, in spite of the fact that, at the time of its independence from Belgium, within the territory of the colony emerging into nascent statehood through the decolonisation process, "anything less than effective government it would be hard to imagine".[168]

The decolonisation of the Belgian Congo was marked by: (a) the formation of an indigenous, albeit fractured, political opposition to colonial rule; (b) the shift in global political mentality away from the sanction of colonial rule; (c) the emerging temporal reality that the perceived absurdity on the part of the international community in favour of the wholesale abandonment of colonial possessions by European states was being replaced by the nascent es-

[166] J. Lorimer, The Institutes of the Law of Nations 109 (1883).
[167] Crawford, Criteria, *supra* note 131, at 116.
[168] *Id.*

tablishment of a wholly different 'perceived absurdity', this time for the continued recognition of colonial possessions by European states; (d) the practical effect, in some colonial territories, that self-government was practically untenable due to the ongoing colonial preclusion of such measures and the speed in which such measures were to be abandoned by colonial powers (particularly during the 1950s and 60s); (e) the demonstrated, fundamental lack of ability for self-government in some of the previously colonised territories to which ex-colonial independence would be granted in general measure—as manifested in particular by the Congo; and (f) the establishment of an ongoing pattern of economic and political interactions between the newly independent states and their colonisers.[169] Most significant, however, was the lack of any substantial attempt by African states at the wholesale replacement of the inherited legal systems and judiciaries. The European systems which were the products of hundreds of years of societal development became African systems overnight.

This all constituted was an obvious *démarche* by the international community, away from the fundamental importance of the juridical principle of effectiveness (*i.e.,* 'effective' government), so apparently manifested in the secession of Finland from the Russian Empire, to the secession of the Belgian Congo (*i.e.,* the 'State of Congo'; *i.e.,* 'Zaire'; *i.e.,* 'the Democratic Republic of Congo', or 'Congo-Kinshasa'), to the juridical principle of territorial integrity. The observation of such a *démarche* is of absolute and intrinsic importance to this study, for although it is logically inaccurate to state that such juridical principles are in inherent opposition to each other (that is to say that effectiveness and territorial integrity are not mutually exclusive), it *is* logically inaccurate to state that such juridical principles are synonymous. The principle of effectiveness implies that there exists a governmental entity with the capacity to project its authority through a reasonably well-defined territory. Nascent Finland, for example, was not able to demonstrate this requirement to the 'international community' at the time by virtue of the fact that it took a number of years, after the initial 'secession' of Finland from the Russian Empire, for such an action to be officially recognised. This was due to, *inter alia,* the existence of foreign troops on Finnish territory, as well as the lack of a universally-recognised political community operating in a putative Finnish state. Thus, circa 1920, actual effectiveness was a fundamental and unavoidable criterion for statehood.

If one could analytically fast-forward some forty years, to the secession of the Congo from Belgium in 1960, it may be observed how the conceptualisation of effectiveness was supplanted by the political reality of the urgency of global decolonisation (*i.e.,* the profoundly swift emergence of a right to self-determination, equated to decolonisation). When such decolonisation took place, the practical effect was that it took place largely within colonially-defined territorial borders. As will be demonstrated, this is due to the so-called *'habillement'* of the principle of *uti possidetis juris* from the earlier Latin American decolonisation experience to the later African experience. But what is fundamentally distinct between the more historical Finnish experience, as compared to the more recent African experience, is the fact that, in the latter circumstance, what 'mattered' was not necessarily the existence of a stable political community, as was the case in the more historical Finnish experience, but, instead, the existence of a defined territorial entity and an overriding sense of expediency for such actions, due to the sudden political unpalatability of ongoing colonial possessions by European state. Thus, with regard to the 'under the control of its own government' criterion of the Montevideo definition of statehood, the shift

[169] Arguably, this can be observed in the case of Côte d'Ivoire, which was widely considered to be an African success story following its decolonisation from France. However, in more recent years, it has fallen victim to many of the same types of civil conflicts observed in other African states. The diminishment of France's involvement in Côte d'Ivoire from the late 1990s leads one to believe that its postcolonial activities were in some way sustaining the postcolonial state.

from the primacy of the more historical principle of effectiveness to the more contemporary principle of territorial integrity is observed. Anything less is to fall into a logical conundrum to accept how such entities as Finland and Congo-Kinshasa could possibly have the same juridical appellation. It must also be reaffirmed at this point how such a reality contributes to the distinction of the 'effectiveness' (*i.e.,* administrative) aspects of the Montevideo Convention as being necessarily seen as more 'flexible' than the more territorial (*i.e.,* definitional) aspects of the same convention.

In light of the Congo example, Crawford has demonstrated a profound divergence in what is actually meant, and juridically required, for the 'effective government' criterion. He presents three possibilities: one, that Congo was never a State and was improperly recognised as such (which seems *prima facie* to be a possibility in light of its comparison with Finland forty years earlier, but cannot be accepted due to the fact that Congo has existed, in some juridical measure at least, as an independent state since 1960); two, that Congo was recognised as a state simply by virtue of such acts of recognition by other states; or three, that the requirement that a state is 'under the control of its own government' is "less stringent than has been thought".[170] The aforementioned analysis of the secession of Finland, *vis-à-vis* the Russian Empire and the secession of Congo-Kinshasa *vis-à-vis* Belgium, does nothing to reinforce the first two notions and does, in actual fact, reinforce the third. There must exist some sort of sliding scale, therefore, between effectiveness and territorial integrity to address the demonstrated ambiguity in the definitional criterion of government in the Montevideo provisions. Moreover, given the general acceptance by the international community of Congo as an actual state at the time of its independence from Belgium, there similarly must be the acknowledgement of a definitional shift away from the primacy of effectiveness, in the direction of the primacy of territorial integrity as incumbent within the definition of the governmental criterion.

Capacity to enter into relations with other States

On the surface, capacity to enter into relations with other states is one of the principal elements in defining statehood because were this not to be true, states in federal unions, provinces, cantons or other specific entities possessing their own legislative powers could be seen as states. Thus, on the surface, it seems logical to include this criterion in the Montevideo definition. But what is of particular interest and significance are the implications of the inclusion of such a provision, within the context of the three other Montevideo criteria. Under the earlier 'equation' of statehood, the grouping of the population and territorial aspects together is quite reasonable, although they cannot be integrated into one single variable, due to the fact that they are rooted in separate practical notions. However, with regard to the notion of 'effectiveness', as the third variable in the statehood equation, the duality of statehood manifests itself. A state must have a government: to do so is to exercise sovereignty on the municipal level. But a state must also have an element of control over its own foreign affairs: to do so is to exercise sovereignty on the global level. It is undoubtedly so that no state exists in a vacuum; that is, no state can act completely without regard to the existence of other states on the planet, and, over time, the corresponding political and legal actions taken by those states. Thus as it is impossible to completely sever the domestic from the municipal actions of a state, it seems logical to include a specific provision on having a capacity for international relations. As was seen earlier in this chapter, such a guarantee of a capacity for reciprocity with regard to legal actions taken by states undergoing the process of 'civilisation' was seen as paramount by European states in colonial times, yet colonising Europeans also kept the reciprocity principle flexible enough to enter into

[170] Crawford, Criteria, *supra* note 131, at 117.

agreements seemingly of sufficient legal validity to term them 'treaties of cession', when these treaties were not strictly speaking between two or more different states *per se*.

The capacity for international relations requirement does involve "a conflation of the requirements of government and independence",[171] and, thus, it follows that the implications of a requirement for capacity to enter into international relations involves the demonstration of some practical measure of *independence*—a notion which is nuanced in its conception, in that both 'formal' and 'actual' components can be identified. The classic formulation of this idea is taken from the 1931 Customs Regime between Germany and Austria Case, whereby Austria, having already in the 1919 Treaty of Saint Germain and a 1922 protocol[172] agreed to remain economically independent from Germany, agreed to a customs union with Germany. The Council of the League of Nations requested an advisory opinion on whether such a union would violate Austria's previous pledges for economic independence, and the Permanent Court found that it would not. However, the judgement was highly controversial and Judge Anzilotti's Separate Opinion has become exemplary in defining the concept of 'independence'. He writes:

> With regard to [the meaning of 'independence'], I think the foregoing observations show that the independence of Austria within the meaning of Article 88 is nothing else but the existence of Austria, within the frontiers laid down by the Treaty of Saint-Germain, as a Separate state and not subject to the authority of any other State or group of States. Independence as thus understood is really no more than the normal condition of States according to international law; it may also be described as *sovereignty (suprema potestas)*, or *external sovereignty*, by which is meant that the State has over it no other authority than that of international law. The conception of independence, regarded as the normal characteristic of States as subjects of international law, cannot be better defined than by comparing it with the exceptional and, to some extent, abnormal class of States known as 'dependent States.' These are States subject to the authority of one or more States. The idea of dependence therefore necessarily implies a relation between a superior State (suzerian, protector, etc.) and an inferior or subject State (vassal, *protégé*, etc.); the relation between the State which can legally impose its will and the State which is legally compelled to submit to that will. Where there is no such element of superiority and subordination, it is impossible to speak of dependence within the meaning of international law. It follows that the legal conception of independence has nothing to do with a State's subordination to international law or with the numerous and constantly increasing states of *de facto* dependence which characterize the relation of one country to other countries. It also follows that the restrictions upon a State's liberty, whether arising out of ordinary international law or contractual engagements, do not as such in the least affect its independence. As long as these restrictions do not place the State under the legal authority of another State, the former remains an independent State however extensive and burdensome those obligations may be.[173]

One question to be borne in mind in the progression of the present discussion involves the question of the distinctions between 'formal' or 'actual' independence, whereby 'formal' independence is related to the juridical instillation of governmental power into the organs of a state, and 'actual' independence is related to the comparably less 'legal', but potentially important, question of the actual capacity of an entity to govern and enter into relations with other states. It will be argued later in this study that some circumstances in the African context demonstrate the outermost extremities of the disparity between the 'formal' and 'actual' aspects of independence, or the concepts of 'juridical' and 'empirical' statehood. Before undertaking that analysis in chapter four, however, it will be important to develop a more comprehensive legal framework. Therefore, chapter two will address the law of decolonisation and, in anticipation

[171] Crawford, Criteria, *supra* note 131, at 119.
[172] See 112 British and Foreign State Papers 317, 360, and 116 British and Foreign State Papers 851, Article 88.
[173] Customs Regime between Germany and Austria Case, (Anzilotti, separate opinion), Permanent Court of International Justice, PCIJ Ser. A/B (1931), No. 41.

of the incongruities between postcolonial states and their societies, chapter three will consider the question of collective groupings in international law.

Observations from chapter one

Statehood, as a pervasive element of international society, has many different meanings. This chapter recognises that statehood takes on a definitional multiplicity of forms, and suggests that conceptual delineations should be recognised between the territorial aspect ('inanimate statehood'), and the more broad-based conception of statehood, which emphasises the connections between a land and its peoples ('animate statehood'). Historically, animate statehood, which evolved from early European societies, was the product of centuries of social development, while inanimate statehood is an important legal precept that forms the backbone of the modern territorial state, and by extension, the principles of sovereignty and effectiveness. This is why it would be more accurate to replace the notion of the 'nation-state' with a basic formula of 'territory + population + effectiveness (≈ territorial integrity) = sovereignty (≈ statehood)'. Doing so would allow for greater accuracy in defining the state and will allow for a deeper level of analysis in the present study.

The growth of European empires was a profound manifestation of global hegemony, which blended colonialism and positivism, and brought colonised territories into the European legal framework. Decolonisation made them sovereign state members of the 'international community' in the blink of an eye. This was completely contrary to the state-building experience in the original European model. Concurrent with the decolonisation of African societies was a "coexistence of old and new patterns"[174] of international law. The old pattern, equated with a 'statist' perspective has had the new pattern, equated with a 'universalist' perspective, superimposed onto it.[175] The situation which remains is the appearance that some newly-decolonised states may sustain questionable ability to participate fully in both 'statist' and 'universalist' conceptions of state existence. The findings of such an assertion would be particularly troubling in sub-Saharan Africa, given the tangible and widespread dysfunction in modern territorial statehood that is to be continually observed in the least-developed countries. In modern territorial statehood, levels of socio-economic development, particular geographic factors and the difficulties in consolidating governing power, over distance, may be factors of significance which were largely irrelevant at positivism's apex. By consequence, questions may then emerge as to the extent to which these circumstances have contributed to regional strife and internecine conflict, produced serious questions of governmental illegitimacy and have led to the perpetration of systemic human rights violations and violence directed against certain segments of African peoples by others.

[174] Cassese, *supra* note 17, at 18.
[175] *Id.*

CHAPTER TWO
'Self-determination of peoples' and the law of decolonisation

Self-determination became a 'political postulate' in the United Nations context. This meant a 'people' had a right of access to its own government. In the first instance this meant decolonisation. But self-determination was counterbalanced by the *uti possidetis juris* principle which transformed colonial administrative boundaries into the boundaries of modern territorial states. Therefore, the principal law of decolonisation is that the formation of postcolonial states through a peoples' right to self-determination is an imperative. That this was done without modification to colonial boundaries has been affirmed as a rule of general scope, particularly in Africa. It also has been implied that the 'people' comprises the entire population of a territory. But self-determination of peoples is also confirmed as an ongoing right. Following decolonisation, it takes an 'internal' form, requiring a government representing the whole people without distinction of any kind, particularly as to race, creed or colour. A primary question concerning the interplay between 'self-determination' and the primacy of existing, or indeed inherited, borders in territorial statehood is formed through the concept of 'internal self-determination', whereby it is conceivable that a territory may choose self-association within an existing postcolonial state ('postcolonial internal self-determination'), a territory may attempt recognition as an independent entity ('postcolonial external self-determination'), or a territory could pursue a more assimilated precept of self-determination which would hold all ethnic and cultural groupings to be bound to a territorially-based definitional form. The conceptual dominance of the lattermost form can now be seen to have been mitigated to such an extent that a 'people' may also be seen to comprise a territorial unit smaller than the entire population of a state. Thus, it is a chiefly historical notion in public international law that a 'people' must by necessity comprise the amalgam of the individuals found within a postcolonial state's boundaries. Furthermore, based upon the Friendly Relations Declaration, 'peoplehood' has been seen as having a racial or religious component, an important consideration to be borne in mind when refocusing the discussion on some of the more contemporary realities of postcolonial statehood.

The globalised state and the non-European world: Addressing relations between state and society

The previous chapter addressed some of the historical antecedents of how the modern positivist legal state came to contemporary prominence throughout the world, including a conceptualisation of the formation of a global 'international community' comprised of such states. This community has certain universal expectations of behaviour, as a result of actions taken by its members. These actions are undertaken, in large part, through multilateral institutions of states' own creation, in particular the United Nations, but, similarly, through regional intergovernmental organisations. Such actions are voluntary in nature, in that norms within the international community are determined by varying levels of consent on the part of individual states within the community, in support of such norms.

As was introduced in the previous chapter, one of the most striking changes within the early post-war international community was the wholesale export of European state sovereignty from the colonialist powers to overseas territories, guided by the principle of European society as a superior form of civilisation. As colonised states earned their independence, the effects of the imposition of a form of statehood, rooted in positivist legal terms onto overseas territories, changed them forever. Few, if any, societies wholly abandoned the trappings of statehood inherited through colonialism and reverted to pre-colonial systems of administration. This chapter will therefore consider the practical implications of the decolonisation process, which was catalysed through United Nations.

The dramatic shift toward colonial independence was brought about as a result of the principle of self-determination's rise to importance the 20th century, particularly following the second world war. During that time, self-determination developed from a political hypothesis espoused by competing, self-interested world powers into a legal tool made available to all colonised peoples. This tool was created by the UN General Assembly, the most democratic of institutions within that intergovernmental organisation, and an organ which itself witnessed dramatic changes, as ever-greater numbers of newly independent states became UN member states. These newly decolonised states catalysed the decolonisation process in powerful ways, as they acted in concert to promote a right to decolonisation as having a global imperative. The framing of decolonisation within the context of a 'right to self-determination' will be seen as the most widely-accepted meaning of 'self-determination of peoples'.

Identifying the legal tool for decolonisation: The 'right of peoples to self-determination'

An underlying theme of the first chapter of this study was the assertion that the 'scientific' European positivism coincided with the imperial ambitions of the period, causing a significant change of circumstances in a system specifically designed to reaffirm voluntarist decisions by sovereign states. European sovereignties progressively integrated their overseas territorial possessions into their territorial control, and in so doing, brought a system of administration derived from the 'most civilised' society to comparatively 'less civilised' lands. As the underlying fabric of inter-societal relations was fundamentally changed through colonialism, in this chapter, it will be observed how colonised societies achieved their independence through decolonisation, formed from an emergent 'right of peoples to self-determination'.

As political independence was the result of the emergence of the legal principle of self-determination, the concept itself was also of evolutionary definitional formulation. In modern territorial statehood, self-determination first meant decolonisation, but has continued to exist as a legal principle following the widespread abandonment of colonial rule. In its most contemporary form, self-determination can even conceivably be seen to go so far as to provide juridical weight towards international enforcement of basic standards of governance in all states, from long-established to newly-formed, as governed by the bedrock international legal principle of the sovereign equality of all states.

In hindsight, however, it is difficult to specify with absolute precision the first origins of the concept of self-determination. Self-determination may be seen as a continuous individual longing for self-fulfilment rooted in natural law. It would not be an overstatement to say that one of the fundamental elements of the human condition is a desire for self-preservation and stability—elements that find themselves at the heart of self-determination as a normative concept. Yet immediately predating the emergence of this inherently human-oriented precept was the rise of legal positivism centred on the basic importance of the European state, which provides a certain counterbalance to such 'natural law' perspectives. The tension between states, as a positivist legal formulation, and the societies within those states can be tangibly observed, particularly in postcolonial states. Over time, as the law of statehood evolved to incorporate anti-colonialist perspectives, this very anti-colonialism, which took the form of 'self-determination of peoples', emerged as a legal precept in its own right.

The 'ought' and the 'is' of emergent anti-colonialism: Conceptualising pre-UN forms of self-determination

A recurring theme in this study revolves around the extent to which juridical themes, which may have been exclusively associated with the classical natural law perspectives of e.g. Saint Thomas Aquinas, were subsumed by the voluntarism of European society during the classical legal positivist period, and yet have witnessed a resurgence of sorts in the post-war international law developed through United Nations practice. Overlaps can be readily observed between the customary international human rights law of the year 2000 and the natural theology merging faith and reason in the 1200s. What is observed is an underlying inter-temporal tension between naturalism and voluntarism which lies inherent in international legal philosophy,[1] and is perfectly reflective of the importance of empiricism in forming international law. It is here that the dichotomy between the absolute separation between 'ought' and 'is' in classical legal positivism recurs, as this rigorous appellation is buffeted by the Aquinan classical naturalism and the modern hybrid naturalism of an international law, reinforcing a global community of sovereign states. In this sense, once the system of written public laws became sufficiently developed throughout European states to have general acceptance, the age of positivism began in earnest. Thereafter, in domestic law the 'ought' had become the 'is', and in international law the 'is' was considerably less defined than can be observed in contemporary terms, given the lack at that time of a universal polity and the assertiveness attached to a state's individual sovereignty, in the late 19th and early 20th centuries. Even if the unscientific 'ought' must be completely separated from the scientific 'is', this is not to say that the separate, conceptual *existence* of an 'ought' is to be wholly negated. An 'ought' can remain an 'ought' without having a particular binding force of law. In various societies, specific principles, whether moral precepts, political processes, or unwritten social expectations, can indeed become actual, positivist, enforceable, written law, through the course of a state's voluntary actions and law-making processes. Subject to the constraints of the law generally, there exists nothing to prevent a prior-day 'ought' from becoming a present-day 'is' through political action.[2]

If this conceptual premise is able to be accepted, then, in the case of self-determination, the necessity for specific actions giving practical effect to the theoretical concepts becomes apparent. Antonio Cassese, in his classic study on self-determination of peoples, terms this a "political postulate".[3] Through political actions, self-determination would progress, over time, from an 'ought' to an 'is'. The assertion of the existence of the European nation-state, in the aftermath of the Westphalian peace, was the first clear manifestation of this reality, and indeed, the actions taken by relatively unified, animate states, such as France and the American colonies, served to spawn the concept of self-determination. The 1776 American Declaration of Independence and the 1789 French Revolution (followed by the 1790 French Constituent Assembly with its 'rights of man' and 'rights of peoples') were political leaps of faith of a magnitude great enough to produce permanent legal consequences. Generally, these events are ~~seen in a limited context, in that~~ they were directed by 'nationals' against, in the case of the US,

[1] With, certainly, voluntarism continually profiting from a system based upon its perpetual reinforcement.

[2] *Cf.* P. Soper, *Some Natural Confusions About Natural Law*, 90 Mich. L.Rev. 2423 (1998): "The natural law dilemma results from starting at the opposite end from the positivist in constructing a model of law—focusing on the reasons for accepting the rules rather than on the rules that have been accepted. But the dilemma leads to the same point reached in considering the paradox of positivism; natural lawyers must confront political theory to determine the limits on the state's power to create obligations or justify punishment through (reasoned) fiat. Until they do so, they cannot rule out the possibility that social facts (in the positivist's sense) play the dominant role in establishing the connection between law and morality that has always been the natural law legal theorist's central concern."

[3] A. Cassese, Self-Determination of Peoples: A Legal Reappraisal 11 (1995) [hereinafter Cassese].

context, in that they were directed by 'nationals' against, in the case of the US, England, and in the case of France, the monarchy. They share the requirement of interaction and accountability between a government and its subjects in a territorially-defined state.

By the 19th century, the concept of self-determination had evolved towards the formation of a system of globalised states emanating from the European tradition.[4] Although it was only after the second world war that self-determination came into general acceptance,[5] the establishment of the Soviet Union and the rise of the United States as a world power earlier in the 20th century had galvanised world attention towards the topic and began substantively to develop its content. In hindsight, it seems clear that these two (eventual) superpowers would prove to be champions of self-determination rights, based upon the fact that their own separate creations represented relatively radical departures from the *status quo* of the times. However, given their competing political ideologies, it would similarly be unsurprising to observe that their interpretations of self-determination were conceptually distinct and, in large measure, taken with one eye on the essence of the concept and the other on what 'the other guy was doing'. Vladimir Lenin was the Soviet Union's greatest promulgator of the concept, while Woodrow Wilson articulated its American interpretation.

The Soviet Union and Lenin's Decree of Peace: Self-determination to the point of secession

The Bolshevik Revolution in 1917, and Vladimir Lenin's taking power from the initial moderate, provisional government, led to significant developments vis-à-vis self-determination. The establishment of a large, centralised Union of Soviet Socialist Republics witnessed Lenin espousing the right of self-determination chiefly for tactical reasons. Lenin's views on self-determination were chiefly orientated towards the right to secede, as first described by Stalin, who in 1913 wrote that

> [A] nation can arrange its life according to its own will. It has the right to arrange its life on the basis of autonomy. It has the right to enter into federal relations with other nations. It has the right to complete secession. Nations are sovereign and all nations are equal.[6]

The underlying cause for this recognition of secession was a supposed guarantee of protection from oppression and prejudice by the centralised state. It was supposed to mean empowerment for the disenfranchised. As from 1916, Lenin advocated self-determination for all colonial countries, or 'semi-colonial' states—chiefly so that they would be persuaded to join the communist economic system.[7] As such, Hurst Hannum's statement must be borne in mind that "it should be underscored that self-determination in 1919 had little to do with the demands of the peoples concerned, unless those demands were consistent with the geopolitical and strategic interests of the Great Powers".[8] Lenin's motivations notwithstanding, he did manage to infuse great rhetorical power into the embryonic international debates on the role of self-determination. In that sense, he identified a number of specific courses for the practical manifestation of self-determination. He was all the while hoping, of course, that such oppressed na-

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[4] *Cf.* I. Brownlie, *Rights of Peoples in International Law*, in J. Crawford (ed.) The Rights of Peoples 5 (1988): "In the course of nineteenth-century European history the principle of nationality was influential and it was the *alter ego* of the principle of self-determination."
[5] *Id.*
[6] J. Stalin, *Marxism and the National Question*, in J. Stalin, Marxism and the National and Colonial Question 19 (1942).
[7] See generally V.I. Lenin, Selected Works, at 159 *et seq.* (1969).
[8] H. Hannum, Autonomy, Sovereignty and Self-Determination: The Accommodation of Conflicting Rights 28 (1990) [hereinafter Hannum].

tions would find solace in communism. Therefore, his formulation of self-determination retained the possibility of secession as a necessary final guarantor of the existence of the right. Secession of one part of the Soviet Union was (theoretically, at least) a possibility guaranteed in the Soviet Constitution.[9] Lenin wrote that

> [w]e demand the freedom of self-determination, *i.e.,* independence, *i.e.,* the freedom of separation of oppressed nations, not because we dream of economic particularization, or of the ideal of small states, but on the contrary, because we desire major states, and a rapprochement, even a merging, of nations, but on a truly democratic, truly international basis, which is unthinkable without the freedom of secession.[10]

Perhaps Lenin's most significant perspective, vis-à-vis self-determination and secession, was his 1917 Decree of Peace. In this, he writes that,

> [i]f any nation whatsoever is retained within the boundaries of another state by coercion, and despite its expressed desire it is not granted the right by a free vote […] with the complete withdrawal of forces of the annexing or generally more powerful nation, to decide without the slightest coercion the question of the form of state existence of this nation, then it is an annexation [interpolation is unnecessary at the end of a quotation].[11]

Lenin clearly aimed at self-determination as a concept forming a means to make radical changes to the international landscape. Cassese identifies three components of Soviet self-determination: (a) something involving national or ethnic group invocation to decide their own destiny; (b) a principle to be applied during the aftermath of conflict between states; and (c) a measure for anti-colonialism.[12] These components, which the Soviet Union advocates with unwavering dedication throughout the evolution of self-determination, from rough concept to collective right, will now be contrasted with the American interpretation of the concept, which was subjected to fierce internal dissension from the outset.

The United States and Wilsonian idealism: Self-determination as self-government

Woodrow Wilson is typically seen in American history as a highly idealistic individual, who is remembered more for his forward-looking visions than his administrative ability. His inclination was to transfer the Monroe Doctrine to global relevance. In his 1917 address on 'A League for Peace', President Wilson said that he was

> proposing [the League of Nations], as it were, that the nations should with one accord adopt the doctrine of President Monroe as the doctrine of the world: that no nation should seek to extend its polity over any other nation or people, but that every people should be left free to determine its own polity, its own way of development, unhindered, unthreatened, unafraid, the little along with the great and powerful".[13]

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[9] In 1990, the USSR Supreme Council adopted the "Law on the Resolution of Issues of Secession of Union Republics from the USSR" which, in the dissolution of the Soviet Union, gave practical effect to these provisions. See *Zakon o poryadke resheniya voprosov, svyazannikh s vykhodom soyuznoy respubliki iz SSSR*, (Law on the resolution of issues of the secession of the Union Republics from the USSR). Records of Congress of People's Deputies of the USSR Supreme Council, No. 15, Moscow, 1990 (in Russian).
[10] R. Pipes, The Formation of the Soviet Union: Communism and Nationalism 1917-1923 45 (1964), quoting Lennin.
[11] Documenty Vneshnei politiki SSSR, vol. I, Moscow, Gospolitizdat 11 (1957), as quoted in R. Müllerson, International Law, Rights and Politics: Developments in Eastern Europe and the CIS 58 (1994) [hereinafter Müllerson].
[12] Cassese, *supra* note 3, at 16.
[13] See citation in B. Vukas, States, Peoples and Minorities, 231 Rec. des Cours , at 364, 365-366 (1991) [hereinafter Vukas].

Wilson was skilful in formulating a distinctly American perspective to serve as a direct counterbalance to the Soviet formulation of self-determination. He particularly favoured ideas similar to those of Lenin's Decree of Peace—the substantial difference being as follows: that self-determination meant true self-government, rather than pre-determined incorporation in a larger, centralised communist state. In his famous 'Fourteen Points' speech, he stated that "peoples and provinces must not be bartered about from sovereignty to sovereignty as if they were chattels or pawns in a game".[14] He therefore asserts that the population of a territory should have some particular say in choosing their sovereign, although in a peaceful, non-violent manner only. And yet, the introverted idealism of Wilson's perspective is revealed, as Wilson also rejected the idea of formal internal self-determination (particularly notions of minority protection) and, therefore, 'peoples' finding themselves in especially difficult circumstances with ineffective non-violent responses would tend to find only limited realisation of self-determination.

Cassese again provides a concise analysis of Wilsonian self-determination by moulding it into four elements:[15] (a) there exists a right of people to determine forms of government; (b) the Ottoman and Austro-Hungarian Empires should be divided; (c) territorial settlement at the end of the first world war was to be done with the interests of the populations affected in mind; and (d) self-determination had a relevance in settling colonial claims—in this case in conformity with the interests of the great (*i.e.,* colonial) powers.

President Wilson found himself facing both the wrath of his closest advisers and the American public for his perspectives. His Secretary of State, Robert Lansing, wrote in 1918 that

> the more I think about the President's declaration as to the right of 'self-determination', the more convinced I am of the danger of putting such ideas in the minds of certain races. It is bound to be the basis of impossible demands on the Peace Congress and create trouble in many lands […]. The phrase is simply loaded with dynamite. It will raise hopes which can never be realized. It will, I fear, cost thousands of lives.[16]

The concept of self-determination was also attacked in a well-publicised article in *The Saturday Evening Post* by Lansing,[17] who resigned as Secretary of State over the implications of the concept. In the article, he writes that "the assumption that self-determination is a right inherent to mankind is a menace to peace in the world, because it excites false hopes and produces political unrest that may develop into open resistance to established authority".[18] Further, Lansing asserted that, at the Paris peace negotiations, President Wilson had "by his acts denied the existence of the right other than the expression of a moral precept, as something to be desired but generally unattainable in the lives of nations".[19] This served to persuade Lansing that "self-determination is in truth 'a mere phrase', which as the declaration of a fundamental right of human society, as the declaration of 'an imperative principle of action,' should be discarded, be-

[14] See W. Wilson, War and Peace, Presidential Messages, Addresses and Public Papers (1917-1924) Vol. I, eds. R.S. Baker and W.E. Dodd, at 182 (1927).
[15] See Cassese, *supra* note 3, at 20.
[16] R. Lansing, The Peace Negotiations: A Personal Narrative 87 (1921).
[17] R. Lansing, *Self-Determination: A Discussion of the Phrase*, The Saturday Evening Post 3 (May 1921) [hereinafter Lansing, Self-determination]. Lansing's criticisms of the concept were indeed striking, yet they were by no means reflective of all elements of American society. *Cf.* P.M. Brown, Editorial Comment: Self-Determination in Central Europe, 14 AJIL 235-239 (1920), who advocated the peaceful construction of a confederacy of peoples from the old Austro-Hungarian Empire, through self-determination of 'common consent'.
[18] Lansing, Self-determination, *supra* note 17, at 8.
[19] *Id.* at 9.

cause it cannot be practically applied".[20] He launched into a litany of criticisms of Wilsonian idealism, the most reflective of which was that "the phrase, even if it could be considered to state a right possible of practical application, has never been limited as to the character of the territorial or political unit which may demand that it be applied".[21] His conclusions in this article were that: (a) uniform application of the principle would necessitate constant border shifts as populations migrated for economic reasons, thereby causing instability; (b) the lack of qualifications for 'successful' self-determination may cause support for "a cause which [recognising states] otherwise would have hesitated to do, since it seemed contrary to the desire of the world for universal peace",[22]; and (c) an inherent right to self-determination should be "denounced by all nations [and] forgotten. It has no place in the practical scheme of world affairs. It has already caused enough despair, enough suffering and enough anarchy".[23]

In the end, President Wilson became aware of the limitations of his own formulations of the concept. Quite simply, he promulgated a sense of self-determination propelled by an unrealistic expectation that societal liberalisation would develop in lands dominated by outsiders as something flowing inherently from within, guided by the now well-defined *corpus* of positivist international law. His comments in addressing the Senate Foreign Relations Committee in 1919 are illuminating: "You do not know and cannot appreciate the anxieties that I have experienced as a result of many millions of people having their hopes raised by what I have said."[24]

The pathway from 'ought' to 'is': The challenges to European power in law and morality

The inconsistency between classical legal positivism and the more contemporary hybrid positivist/naturalist legal form should become more apparent in the sense that two absolute distinctions to be upheld in classical international law—positively defined legalities, *i.e.,* the 'is' and the 'law'—find inherent overlap in modern international law with that which was previously to be disregarded in classical international law, namely concepts of morality and 'the law as it ought to be'. Such a watershed shift in underlying meaning and expectation of practical functionality was not the result of some preordained and coordinated global policy development, as much as it was a reflection of the ascendancy of the bipolar political rivalry between Soviet Union and the United States. These emerging global powers themselves lacked the same fondness for overseas territorial possession as did the overtly imperial European powers and, as such, developed the concept so as to support their own underlying motivations.

While not a primary focus of the present study, arguably one of the greatest challenges to unbridled European imperial power was the creation of the League of Nations and establishment of its Mandate System, which was designed to uphold a 'sacred trust of civilization' to prevent exploitation of colonised peoples and to promote their well-bring and development. As seen from Article 22 of the Covenant of the League of Nations, the High Contracting Parties undertake concrete and specific obligations with regard to formerly-colonised territories, and applied different standards of expected behaviours in geographic regions of comparatively different levels of 'civilisation'. The article creates three classes of mandate, in decreasing level of perceived competence of self-administration: 'A' mandates, the highest level of autonomous administration, allocated to the UK and France over ex-Turkish Empire lands, from which in-

[20] *Id.* at 11.
[21] *Id.* at 14.
[22] *Id.* at 15.
[23] *Id.* at 16.
[24] See H.M.V. Temperley, A History of the Peace Conference of Paris, vol. IV, 429 (1969), as cited in Cassese, *supra* note 3, at 22, note 33.

dependence would be readily expected; 'B' mandates, of ex-German territories in Central Africa, allocated to the UK, France and Belgium, and 'C' mandates, allocated to South Africa, in the case of South-West Africa and to Australia, New Zealand and Japan, over certain South Pacific Islands, all of which were to be administered integrally within these states, yet prepared for eventual independence.[25] Article 22 states:

> To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant.
>
> The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League.
>
> The character of the mandate must differ according to the stage of the development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances.
>
> Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory.
>
> Other peoples, especially those of Central Africa, are at such a stage that the Mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals, the prohibition of abuses such as the slave trade, the arms traffic and the liquor traffic, and the prevention of the establishment of fortifications or military and naval bases and of military training of the natives for other than police purposes and the defence of territory, and will also secure equal opportunities for the trade and commerce of other Members of the League.
>
> There are territories, such as South-West Africa and certain of the South Pacific Islands, which, owing to the sparseness of their population, or their small size, or their remoteness from the centres of civilisation, or their geographical contiguity to the territory of the Mandatory, and other circumstances, can be best administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population.
>
> In every case of mandate, the Mandatory shall render to the Council an annual report in reference to the territory committed to its charge.
>
> The degree of authority, control, or administration to be exercised by the Mandatory shall, if not previously agreed upon by the Members of the League, be explicitly defined in each case by the Council.
>
> A permanent Commission shall be constituted to receive and examine the annual reports of the Mandatories and to advise the Council on all matters relating to the observance of the mandates.

[25] See e.g. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), notwithstanding Security Council Resolution 276 (1970), advisory opinion, 1971 ICJ Rep. 16, at 32.

It will be of interest to consider the final aspects of Article 22, given that Mandatories were required to report to the League on specific matters related to their territorial administration. Such requirements reflected the sense of duty-bound obligation inherent in the preservation of the 'sacred trust of civilization' and membership in the League of Nations itself. The establishment of the Permanent Court of International Justice (PCIJ), alongside the League, served to demonstrate the inclusion of the new element of multilateralism in the established, formalised positivist international law. Inherent within this multilateralism was the reality that the League was meant to "establish that the Mandate System was not a form of veiled colonialism and that it could effectively protect native peoples, promote their interests and guide them toward self-government".[26]

In short, a major shift in world opinion, catalysed by the first world war, occurred between the Berlin Conference of 1885 and the apex of the League's Mandate system in the 1920s, the effects of which would manifest themselves in defining statehood for a good fifty years further. This shift would serve to move the previously quarantined 'law' and 'morality' closer towards each other, creating a complicated legal landscape fuelled by the tentative intergovernmentalism of the League of Nations and the definitional bulk, which became associated with the concept of self-determination, as a specific legal construction.

The meaning of self-determination: Access to government

It is clear that the concept of self-determination was hardly free of controversy from its outset. The specific formulations of 'self-determination of peoples' flowing from the first world war was much more an 'ought' than an 'is' at this stage, legally speaking, although it was, nevertheless, an 'ought' with a certain inherent, dynamic potential to change the *status quo*. Through the prism of Lansing's comments and Wilson's backtracking from his original enthusiasm for the concept, the conceptual necessity of somehow 'balancing' self-determination with other considerations also becomes clear, as the American and Soviet conceptions were quite undeveloped. For example, Lansing was unwilling to perpetuate self-determination claims by oppressed peoples in distant lands in spite of the fact that they, themselves, were born into a society founded by those wanting to control their own destinies. Although such mentalities conformed to the dominant imperialist European cultures of the times, as European colonial empires began to crumble, it would prove much more difficult for such absolutist *status quo* mindsets to retain credibility.

Furthermore, it seems similarly unlikely that giving credibility to each and every self-determination claim would be a positive force for international peace and security. Yet this is what Lenin's own formulation of the self-determination concept aimed to do, as a seceding entity would naturally be expected to perform a subsequent embrace of a communist socio-economic societal structure. In sum, self-determination was applied in a wholly haphazard manner following the first world war. However, recalling the discussion from the previous chapter, the principle did take on greater legal definition, through its invocation in the *Åland Islands case* between Sweden and Finland in 1920, whereby Finland, having become independent from Russia, was seen by a commission of three jurists established by the League of Nations to retain sovereignty of the Swedish-speaking islands.[27] It also was obliged to promote the islands

[26] A. Anghie, Imperialism, Sovereignty and the Making of International Law 140 (2004).
[27] *Cf. Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of The Aaland Islands Question*, Official Journal of the League of Nations, Special Supplement No. 3, at 5 (October 1920): "Positive International Law does not recognize the right of national groups, as such, to separate themselves from the State

autonomy in accordance with already-enacted domestic legislation.[28] However, as Cassese points out, as "in 1919-20 self-determination was not part of positive international law",[29] a Commission of Rapporteurs appointed to determine future action on the Åland Islands case was only conceptually willing to consider self-determination claims on a purely exceptional basis.[30]

The point under examination in the present analysis remains: that sixty years later, self-determination of peoples was indeed to be found at the heart, through voluntarist means, of the law of nations. By the end of the cold war, an 'age of rights' will have taken hold within positivist international law generally, and self-determination will have proven to be a cornerstone of this law. Or, as Russel Barsh proposed in 1988:

> The most dynamic issue in international law today is the right to self-determination. All other human rights are considered to flow from this one, because the protection of human rights against government abuses depends entirely on who governs. It follows that you can assure the protection of human rights and individual freedoms if you have your own government.[31]

Much ground has been covered since the outset of this study. To recapitulate the discussion heretofore, the following framework is offered: (a) in their purest form, many societies demonstrate inherent tendencies towards self-regulation; (b) external powers have greatly influenced many such societies through their sovereign acts; and (c) the internal tension therein has the capacity to be negated by modern territorial statehood, of which international human rights law forms a component part.

Fusing the anti-colonial 'ought' and the juridical 'is': Decolonisation and the United Nations

Returning to the time period of the United Nations' formation, the haphazard development of self-determination as a specific legal concept was met with a counterbalancing measure from the outset, in its unique codification. Whereas self-determination was originally seen as something akin to *national* self-determination, with a particular eye on the Central and Eastern European states emerging from empires, in the UN context, self-determination was equated with *global decolonisation*—a notion which was quite ambivalent towards the various nationalities found within decolonising states. In Africa, this would have proven to have dramatic effects,

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of which they form part by the simple expression of a wish […] [Taking such matters beyond the domestic jurisdiction of the states involved] would amount to an infringement of the sovereign rights of a State and would involve the risk of creating difficulties and a lack of stability which would not only be contrary to the very idea embodied in the term 'State', but would also endanger the interests of the international community." See also discussion *supra* chapter one of this study.

[28] See Official Journal of the League of Nations 701-702 (September 1921) for the terms of the Aaland Island autonomy guarantees.

[29] Cassese, *supra* note 3, at 30.

[30] *Cf.* League of Nations, *Report presented to the Council of the League by the Commission of Rapporteurs,* Council Doc. B7/21/68/106, at 28 (16 April 1921), as quoted in Cassese, *supra* note 3, at note 58: "The separation of a minority from the State of which it forms a part and its incorporation in another State can only be considered as an altogether exceptional solution, a last resort when the State lacks either the will or the power to enact and apply just and effective guarantees."

[31] R. Barsh, *Indigenous Peoples and the Rights to Self-Determination in International Law*, in B. Hocking (ed.), International Law and Aboriginal Human Rights 69 (1988).

as large swathes of the continent would be subjected to protracted armed conflict to which a constructivist source could be identified.[32]

Crystallisation: The organisation's establishment and the Belgian thesis

Notions of self-determination were enhanced following the second world war, as the geopolitical system saw the entrenchment of the loose bipolar system between the US and the USSR. 'The West' had an interest in removing Soviet control from the so-called 'buffer states' of Eastern Europe, while 'the East' had an interest in encouraging decolonisation and eventual incorporation into the communist framework. The strong anti-colonial stance of the United States further hastened the process. Through the political manifestation of the Soviet notion of national liberation and decolonisation, as means to the formation of new socialist states and the wishes of the peoples of Afro-Asian colonies for an end to colonialism, a principle of self-determination began to emerge in positivist international law, as guided by the United Nations, and Article 1 of its Charter.

Following the League of Nations period, which included some provisions for minority rights protection, but little in the way of self-determination,[33] the establishment of the United Nations perpetrated a renaissance of the concept of self-determination, albeit with an avoidance of the topic of minority rights. The pathway taken to arrive at this reality was circuitous. The initial Dumbarton Oaks proposals did not include a passage on self-determination; however, the Soviet Union persuaded the United States, the United Kingdom and France to consider the concept, and Belgium came to propose a compromise agreement,[34] which tried to clarify whether 'the peoples' right of self-determination' would refer to states or to national groups. No consensus came from the Belgian proposal,[35] and in the end the original Soviet proposal was included in the Charter. This established self-determination of peoples as one of the purposes of the organisation and included respect for the principle of self-determination as a grounding point in the field of economic and social cooperation.

The UN Charter, which came into force in October 1945, refers to the principle of self-determination explicitly only twice, and it can also be stated that there is no inherent right of self-determination that can be seen to flow directly from the Charter. In Article 1, paragraph 2, self-determination of peoples is identified as one of the purposes of the organisation. Given that, in the constitutive document of an international organisation, specific mention of a purpose of the organisation is given, it is hard to question the legally-binding nature of the principle of self-determination in the Charter. This is not, however, to say that the content and scope of self-determination is exclusively defined by Article 1, para 2. Herein lays a repetitive point in the present study, that self-determination straddles the line of voluntarism and naturalism. To reinforce the point at hand, consider that self-determination is also mentioned explicitly as a principle to be upheld under the Charter, at Article 55. This article is more declaratory than constitutive in

[32] *Cf.* R.H. Jackson, Quasi-states: Sovereignty, International Relations and the Third World 78 (1990) [hereinafter Jackson]: "Since most of the new states also do not provide minority rights and internal autonomies to compensate ethnonationalities and indeed often deliberately withhold them, they tend to provoke civil discord along ethnic lines as did the old multinational empires of Europe."
[33] For discussion, see P. Thornberry, International Law and Minorities (1991) at 38 *et seq.* This is particularly in evidence in Central and Eastern Europe following the first world war, as minority rights provisions were included in peace treaties, specific declarations made by new League of Nations member-states upon entry into the organisation, special treaties concluded between the organisation and a number of individual states.
[34] For discussion, see UNCIO, Vol. VI, Committee I/1, Sixth mtg., at 296 (1945).
[35] See A. Cassese, International Law in a Divided World 113 (1986) [hereinafter Divided world].

nature, in that it seeks the "creation of conditions of stability and well-being". Indeed, as a result, it may readily be *prima facie* assumed that the principle of self-determination must be subordinate to Article 2(4) and Chapter VII of the Charter. This is to say that 'states' are 'states' when they are called 'states', and accepted as 'states' *per se* by other states.

Were the Belgian amendment to have been accepted by the General Assembly, considerable weight would have been allocated towards juridical arguments, lending credence to a 'self-determining' people as forming something both *geographically* contiguous and *conceptually* inherent. Unsurprisingly, geography is the dominant variable between the two, in that it is generally assumed that a properly-defined 'people' must form a logical and obvious geographical perimeter—that is to say that a 'people' must neither be fabricated or gerrymandered—vis-à-vis an externality. Of course the Belgian amendment was not accepted, and the consequence was a continuation, in the lack of clarity of what was exactly meant by 'self-determination'. While there is considerable weight leading towards the dominance of the uniform application of statehood *per se* across territories to which sovereignty was proclaimed or assigned by 'states', it would be both unfair and unrealistic to view positivist statehood as the monolithic, universally equivalent instrument for which its 19th and 20th century applications have shown extraordinary appreciation, in certain quarters.

Is sovereignty monolithic? Is statehood static? Can divergent populations be administratively acknowledged under such universalisms? May the needs of such populations be met under such circumstances? Were the international affairs of the late 1800s and early 1900s sufficiently coherent so as to coherently transfer actual capacity to govern through effective administration throughout a territory? What about a portion thereof? Alas, the early promulgators of self-determination's evolution into a tangible legality were intrinsically unconcerned with such irrelevancies. Soviet Foreign Minister Molotov, however, did offer 'the only forthright statement' on the phrase, as asserted by Thomas Musgrave, that "we must first of all see to it [...] that dependent countries are enabled as soon as possible to take the path of national independence [by facilitating] the realization of the principles of equality and self-determination of nations".[36]

Despite the inclusion of the Soviet perspective of self-determination in the Charter's framework, modifications were made from Lenin's original formulation, with secession as the ultimate guarantor of the concept. Automatically equating self-determination with secession has long been a challenging task, and perhaps unsurprisingly, the Sixth Committee at the San Francisco Conference in 1945 sought to limit the scope of self-determination. In its final report, the Committee stated that

> [c]oncerning the principle of self-determination, it was strongly emphasized on the one side that this principle corresponds closely to the will and desires of peoples everywhere and should be clearly enunciated in the Charter; on the other side, it was stated that the principle conformed to the purposes of the Charter only insofar as it implied the right of self-government of peoples and not the right of secession.[37]

This focus, on self-determination as self-government, forms the core in determining the concept's juridical meaning in the United Nations context. This was further developed in the 1948 Universal Declaration of Human Rights. Although no specific mention *per se* of self-determination is to be found, some aspects characteristics of the self-government aspect of self-

[36] See T.D. Musgrave, Self-Determination and National Minorities (1997), at 64 [hereinafter Musgrave], quoting R.B. Russell, A History of the United Nations Charter 811 (1958).
[37] UNCIO, doc. 343, I/1/16, Vol. 6 296 (1945).

determination are to be found at Article 21.[38] While it is generally accepted that the main substantive provisions of the Universal Declaration have now gained force as customary international law, particularly prohibitions on genocide, slavery or slave trade, the murder or causing the disappearance of individuals, torture or other cruel, inhuman or degrading treatment or punishment, prolonged arbitrary detention, systematic racial discrimination or consistent patterns of gross violations of internationally recognised human rights,[39] 'self-determination of peoples' finds no certain place within even nascent customary international human rights law. However, a fundamental tension is also revealed in that the very notion of a juridical existence of a 'customary international human rights law' was fundamentally bolstered by the entry into force of the two main human rights covenants—and at their core sits the common article one pledging great support to self-determination.[40] As such, the underlying role played by self-determination, regardless of its more contradictory and tumultuous past, cannot go overlooked. Indeed, further foreshadowing of the future legal basis for self-determination can also be observed from a phrase from the UDHR Preamble ('*Whereas* it is essential to promote the development of friendly relations between nations…'), in that, by the 1970s, 'friendly relations' *per se* was to become an explicitly-defined component of the United Nations' work programme, and such a programme would have to be effectuated through its Member-States, which had voluntarily accepted the responsibility to uphold a newly-defined set of universal standards of expected behaviour, of which self-determination of peoples was the cornerstone.

That said, none of this was likely to have been initially self-evident. If it were to be accepted that that which would separate a 'people' from a 'minority' was geography, in the sense that 'peoples' must be geographically conterminal, whereas 'minorities' need not necessarily be—but may nevertheless conceivably overlap with the definition of a 'people'—the assumption that a 'people' must inherently correspond to the aggregate population of land inhabiting a state's own territorial boundaries seems to bow rather graciously towards the dominance manifested by the 'scientific' positivism of the late 1800s. In early UN practice, the 'peoples' mentioned in Articles 1(2) and 55 were seen in a fundamentally broader context than that which would have been likely to have been envisaged by positivists, should the concept ever have conceivably transpired. One commentator, in an authoritative study on UN practice on self-determination, prominently cited an internal UN Secretariat memorandum,[41] and observed that

> the Secretariat's memorandum thus gave the word 'peoples' the widest meaning. It could cover states, nations and any groups of human beings that could be organised in a state, or form a nation or just be a group. Therefore self-determination applied to peoples as well as

[38] Article 21 of the UDHR states: "(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives; (2) Everyone has the right of equal access to public service in his country; (3) The will of the people shall be the basis of the authority of government; this shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures".
[39] See US Restatement (Third) at § 702, and comments reflecting the customary scope of such rights since 1987 "and whose scope and content are generally agreed". See further at § 701, Reporters' Note 6 that the list is neither necessarily completed, nor is it closed.
[40] See International Covenant on Economic, Social and Cultural Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, in accordance with Article 27; and see also International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49.
[41] The memorandum stated that "there appears to be no difficulty in the juxtaposition [of 'friendly relations among nations' and 'self-determination of peoples'] since 'nations' is used in the sense of all political entities, states and non-states, whereas 'peoples' refers to groups of human beings who may, or may not, comprise states or nations". UNCIO, doc. WD381, CO/156, Vol. 18 657-658.

nations and states.[42]

It will be continually difficult to ignore the question of 'what exactly *is* a people' *per se.* In the following two chapters, the question will therefore be subjected to deeper critical examination. For the moment, however, it is hard to argue with Ian Brownlie's 'core of reasonable certainty' in addressing the question, which is based largely on race or nationality.[43] One would, of course, point out that even that formulation leaves much open to speculation. This reality must be simultaneously observed with the number of weaknesses, identified by Cassese, concerning the approach taken towards inclusion of self-determination in the UN Charter, namely: (a) the lack of a legally-binding obligation; (b) that self-determination was seen chiefly as 'self-governance' and not independence; (c) that colonial empires were allowed to survive through the Trusteeship Council; (d) that it was implied that self-determination was to be set aside when it would give rise to tension and conflict; and (e) that the principle was to be upheld as long as it did not infringe upon the existing territorial integrity of states (*i.e.,* there was no possibility of secession to be drawn only from the Charter).[44]

The Trusteeship System of the United Nations must be addressed at this point. This system has its theoretical origins in the mandate system of the League of Nations, in that the entrusted powers had the duty to guide the peoples under colonial power to independence and thereby strengthen self-determination. In the Charter context, however, colonialism is explicitly legitimised,[45] and Chapter XII of the Charter deals with mandated territories which were separated from the so-called 'enemy powers' during the second world war. It can be seen that the Trusteeship Council is a response to a duty set forth upon the international community to further the goal of decolonisation.

While a full discussion of the Trusteeship System and the declaration on non-self governing territories other than trust territories in Chapter XI, XII and XIII of the Charter is beyond the scope of this study, reference is made to Articles 73 and 74 of the Charter, particularly at Article 73(b), which required eventual self-government (taking 'due account of the political aspirations of the peoples') for non-self-governing territories administered by UN member states.[46] It is highly ironic, however, to observe the overt references to self-determination in Articles 1 and 55 of the Charter, and only implicit references when dealing with the Trusteeship System itself. In 1950s General Assembly discussion on the matter, Belgium attempted to bridge the gaps be-

[42] A. Rigo-Sureda, The Evolution of the Right to Self-Determination: A Study of United Nations Practice 100 (1973).
[43] *Cf.* I. Brownlie, *Rights of Peoples in International Law,* in J. Crawford (ed.) The Rights of Peoples 5 (1988): "This core consists in the right of a community which has a distinct character to have this character reflected in the institutions of government in which it lives. The concept of distinct character depends on a number of criteria which may appear in combination. Race (or nationality) is one of the most important of the relevant criteria, but the concept of race can only be expressed scientifically in terms of more specific features, in which matters of culture, language, religion and group psychology predominate. The physical indicia of race and nationality bay evidence the cultural distinctiveness of a group but they certainly do not inevitably condition it. Indeed, if the purely ethnic criteria are applied exclusively many long-existing national identities would be negated on academic grounds—such as, for example, the United States."
[44] Divided world, *supra* note 35, at 133.
[45] See UN Charter at Article 76: generally to promote decolonisation "as may be appropriate to the particular circumstances of each territory and its peoples […] and as may be provided by the terms of each trusteeship agreement".
[46] While the UN itself was not authorised by Chapter XI of the Charter to supervise this self-government process, such administering member states were required to report certain information to the Secretary-General concerning the situations on the ground, in these territories.

tween Chapters XI, XII and XII of the Charter. In the General Assembly, its delegate stated that there existed

> [a] great deal of documentation to prove that a number of States were administering within their own borders territories which were not governed by the ordinary law; territories with well-defined limits, inhabited by homogeneous peoples differing from the rest of the population in race, language and culture. Those populations were disenfranchised; they took no part in national life; they did not enjoy self-government in any sense of the word. Some of them were still unconquered. Entry into many of those territories was prohibited. He could not see how anyone could claim that the States administering such territories were not what the Charter called States "which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government".[47]

These concepts of what was to be known as the 'Belgian thesis'[48] found practical implementation in General Assembly resolution 637A (VII) of 16 December 1952, entitled 'The right of peoples and nations to self-determination'. In this resolution, at operative paragraph 1, the Assembly recommended that "the States Members of the United Nations shall uphold the principle of self-determination of all peoples and nations"—particularly "colonial peoples and nations". Further, at operative paragraph 2, the Assembly stated that peoples of non-self-governing and trust territories had the right to self-determination and invited member states to recognise and promote the realisation of that right. During this time, one simultaneously witnessed the growth in concern for human rights,[49] and self-determination issues became integrated in this general framework, particularly following the General Assembly's resolution 421D(V) of 4 December 1950, which, at operative paragraph 6, called 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, and to prepare recommendations for consideration by the General Assembly at its sixth session".

Implementation: The right of peoples to decolonise guaranteed by the UN General Assembly

In 1952, the General Assembly built upon the mandate given in resolution 421D(V), with resolution 545(VI) which "recognized the right of peoples and nations as a fundamental human right". The issue of secession was hotly debated in that year's Commission on Human Rights, and, in a 33-12-13 vote,[50] the heretofore alluded-to article one common to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural rights was established. This article states the following:

> 1. All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

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[47] GAOR 9th Sess. 4th Ctte. 419th Mtg. Para. 20 (1954).
[48] The document was originally published as Belgian Government Information Service (New York), The Sacred Mission of Civilisation: The Belgian Thesis (1953). See also M.M. Whiteman, 13 Digest of International Law 697
[49] In General Assembly resolution 543(VI) of 5 February 1952, the notion of a single human rights covenant was split along ideological lines such that one would deal with civil and political rights and the other would deal with economic, social and cultural rights. These 'twin' covenants were in some measure unified by the 1993 World Conference on Human Rights, as the two 'sets' of rights were recognised as having been artificially split when the Vienna Declaration and Programme of Action, proclaims all rights to be "universal, indivisible, and interdependent and interrelated". Vienna Declaration and Programme of Action, UN document A/Conf.157/23 at Sec. I, para. 5 (1993) [hereinafter VDPA].
[50] For discussion, see Musgrave, *supra* note 36, at 68.

> 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based on the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.[51]
>
> 3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

The inclusion of these provisions in the main international human rights treaties is significant, particularly in a post-decolonisation context, as the Covenants themselves were opened for signature on 19 December 1966, and entered into force at the time of the ratification or accession of the thirty-fifth UN member state. It must not go overlooked that this occurred on 23 March 1976, at a time in which the decolonisation process was nearly complete. Nevertheless, the enshrinement of the principle as a cornerstone of promising international treaty law concerning the status of the individual within the state (as opposed to treaty law concerning the aggregated acts of states themselves) has served to establish the principle in international law.

To reassess, during the late 1950s and early 1960s, the UN General Assembly played a highly significant role in bringing the notion of external self-determination to fruition. That such actions may have tangible applicability in modern territorial statehood would be manifested through Article 38 of the Statute of the International Court of Justice, which is commonly referred to as determining principal or subsidiary means of determining valid international law. It is indeed true that neither this reference, nor the UN Charter itself, confers power upon the General Assembly to 'determine' (except for internal UN matters) international law *per se*, but the General Assembly's actions and activities towards the codification and development of a 'right of peoples to self-determination' cannot be utterly without consequence. Alternatively, a resolution or decision of the General Assembly is a restatement of international law if it is in conformity with international law (and, indeed, usually 'affirms' a particular law and is adopted by consensus).[52] The roles played by the General Assembly, in more technical conjunction with the relevant bodies of the Economic and Social Council, form tangible *traveaux préparatoires* to that which may even be accepted as a *Gründnorm* of modern territorial statehood.

This insight is of primary importance in the (re-)consideration of the first substantive basis for self-determination of colonial peoples. From the period 1945-1966, at the very least, the right of self-determination applied to states and peoples of non-self-governing and trust territories. Two resolutions of the General Assembly in 1960 highlight this.[53] In its resolution 1514(XV), adopted by a vote of 89-0-9 on 14 December 1960, the General Assembly proclaimed a 'Declaration on the granting of independence to colonial countries and peoples'. The following day, the General Assembly also adopted its resolution 1541(XV) by a vote of 69-2-21.[54] This

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[51] The inclusion of this provision by Chile caused the United States to side with the United Kingdom and France and vote against the inclusion of this article into the twin covenants.

[52] *Cf.* (H.P.S.& S.) Int'l Law 3d. Ed. ACB-6 129 (1993) [hereinafter Int'l Law]: "These resolutions, declarations may be considered by governments and by courts or arbitral tribunals as evidence of international custom or as expressing (and evidencing) a general principle of law […]. The fact that a law-declaring declaration has been adopted without a negative vote or abstention is usually regarded as strong presumptive evidence that it contains a correct statement of law […]. The size and composition of the majority, the intent and expectations of states, the political factors and other contextual elements are pertinent in judging the effect."

[53] For a highly analytical, contextual analysis of these resolutions (rather different in focus than this survey exercise), see Vukas, *supra* note 13, at 384 *et seq.*

[54] Portugal and South Africa were the states which cast a negative vote.

resolution included an annex entitled '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'. The interplay between these two resolutions is important, and both will now be analysed in turn.[55]

The 1514 resolution "has become the definitive statement of the General Assembly with regard to colonial situations".[56] The Assembly, at its preambular paragraph 9, believes "that the process of liberation is irresistible and irreversible and that, in order to avoid serious crises, an end must be put to colonialism and all practices of segregation and discrimination associated therewith". This is further met with a declaration in operative paragraph 1 that "the subjection of peoples to alien subjection, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation", while paragraph 2 of the resolution which was a verbatim restatement of what was to become Article 1(1) of the twin human rights covenants.[57] Clearly independence was the goal of the resolution—so much so that it stated that "the inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence". In direct language, at operative paragraph 5, the Assembly further declares that

> [i]mmediate steps *shall* [emphasis added] be taken, in Trust and Non-Self-Governing Territories *or all other territories which have not yet attained independence* [emphasis added], 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.

Hurst Hannum's commentary about operative paragraphs 6 and 7 of the resolution is essential for a clear understanding of certain limits placed on self-determination in a colonial context. He writes:

> Paragraph 6 of the declaration sets forth another fundamental principle, without which one almost never (at least in UN forums) finds a reference to self-determination: "Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations". The seventh and final paragraph reiterates "the sovereign rights of all peoples and their territorial integrity".[58]

James Crawford further points out that this final paragraph, establishing territorial integrity for the colonial unit, was included to guarantee that the Declaration would be "on a par with the Universal Declaration of Human Rights and the Charter itself".[59]

This anti-colonial Declaration by the General Assembly certainly marked a shift from the previously accepted notion of self-determination, in that it gives a form of legal approval to the change in the intended beneficiaries of self-determination. Strictly speaking, it serves to shift the emphasis from the colonisers—which had implicit legal authority for their actions through the

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[55] Considering the effect of these declarations and resolutions at the time they were adopted by the Assembly, and the small number of negative votes associated therewith, one would have to assume that the otherwise 'soft law' of the GA had found a rather stable *terra firma* vis-à-vis the necessity of decolonisation and the importance of incorporation of principles of 'self-determination' in this process.
[56] Musgrave, *supra* note 36, at 70.
[57] These provisions, however, were only to be seen in a colonial context, while the covenants must be seen in a context of continuity.
[58] Hannum, *supra* note 8, at 34.
[59] J. Crawford, The Creation of States in International Law 357 (1st ed., 1979). See also J. Crawford, The Creation of States in International Law 606-612 (2nd ed., 2006).

Trusteeship System—to the colonised, which found a legal foothold in the Declaration, albeit one which did not provide for piecemeal independence of colonised territories.

The effect of the Declaration was considerably buffeted by a second resolution, 1541, adopted the following day, which by contrast upholds the provisions in the Charter which the 1514 resolution sought to renounce in that by developing principles for reporting data to the Secretary-General on territories under control of the Trusteeship System, it continues to fully identify self-determination with decolonisation, but does not overturn the colonially-imposed political unit. In this resolution, a large number of 'principles' were enumerated to determine whether member states would be required to submit information called for under Article 73(e) of the Charter. It should be pointed out that Principle I specifies that territories—as opposed to peoples (and without any ethnic distinctions)—which "were then known to be of the colonial type" should be those for which information is required to be submitted. This territorial reference was maintained in Principle II, which observed that the obligation for member states to report under Article 73(e) of the Charter ends when "a territory *and its peoples* [emphasis added] attain a full measure of self-government". Principle IV establishes the so-called 'saltwater barrier', in that self-determination could only apply to territories separated from their metropolitan parent by oceans or high seas. It serves to ensure that a specific information transmission obligation would persevere between geographically separate regions administered by the same sovereignty. Such a 'saltwater barrier' presumed the existence of a "territory which is geographically separate and distinct ethnically and/or culturally from the country administering it". Principle V further incorporates elements of, *inter alia*, "an administrative, political, juridical, economic or historical nature".

Principle VI is very important, as it lists ways in which self-determination can be effectuated—essentially it identifies the practical measures necessary for the realisation of the right to external self-determination. This involves "a full measure of self-government" by: (a) emergence as a sovereign independent State; (b) free association with an independent State—which must have a democratic measure, according to Principle VII; or (c) integration with an independent State—which was subject to Principles VIII and IX, the bases of equality and the achievement of an advanced state of self-government.

In sum, although there may well be contradictions between the underlying meanings of these two resolutions, their amalgamated practical effect serves to point in one direction: the eventual, universal sovereign independence of any remaining territorial possessions still continuing to be held by colonising entities, meaning the fundamental rejection of the legal validity of colonial rule.[60]

[60] *Cf.* Cassese, *supra* note 3, at 72-73: "This right only concerns external self-determination […]. The right belongs to the people as a whole: if the population of a colonial territory is divided up into various ethnic groups or nations, they are not at liberty to choose by themselves their external status. This is because the principle of territorial integrity should here play an overriding role […]. It is apparent […] that developing countries, with the full support of socialist States and without any opposition from Western countries, firmly believed that colonial boundaries should not be modified, lest this would trigger the disruption of many colonial countries, as well as serious disorder as a result of the carving up of old States into new. In short, the principle of *uti possidetis* was regarded as paramount. These geopolitical considerations led States actually to deny the right of self-determination to individual ethnic groups within colonial territories."

A monumental achievement, making European statehood permanent

The British, Dutch and Spanish were the swiftest and arguably most successful in decolonisation, while the Belgians, French and particularly Portuguese had serious difficulties in its implementation. To simplify matters considerably, self-determination came to be recognised as a pathway to which the independence of colonies might be achieved, with the inevitability of the concept continuing to linger persuasively regardless of circumstance. This incongruous reality had the knock-on effect of drawing attention away from the development of any possible parallel right of secession as an inherent part of a peoples' right to self-determination. Moreover, perhaps, rightly so, as decolonisation and its aftermath were not without acute moments of confusion and discord, certainly the fluidity afforded to a piecemeal and organic dismantling of these European models of social order would have proven profoundly confounding for all parties involved. So for the colonising states to allow their colonial subjects the possibility—and indeed a right—of self-determination, was one way for 'the end of the empire' to take place; that is, by the colonising states in a way which understandably was aimed at the promotion of intersocietal stability, inasmuch as it preserved the *status quo*. This simultaneously led to the adoption of an imprecise principle of self-determination into the Charter of the UN and of the organisation's subsequent practice. For example, when China and the Soviet Union made overland acquisitions of territory, these territorial gains were excluded from consideration in the established legal framework of colonial acquisition and decolonisation. Self-determination, as manifested in 'saltwater barrier' circumstances, permanently served to lock into place the territorial definition of a newly ex-colonial state into a form bearing profound similarities even to the earliest of imperial delineations and demarcations. The problem is that the actual populations are practically never as monolithic as the international legal structures which have, by now, begun to crystallise around such territories and populations (and, it would be argued, indeed, 'peoples'). Hence postcolonial states are not to be equated with nation-states.

Yet if one were to consider Africa, a continent which the borders of its states, today, make sense only to the European colonialists that divided the continent, it can be observed that these borders held during African decolonisation, as in 1963, at the level of head of state and government, the OAU pledged in the Cairo Declaration to "respect the frontiers existing on their achievement of independence".[61] The reason behind this was, again, to prevent land grabs and to prevent conflict, following the legal principle of *uti possidetis juris*, originally established in the Latin American decolonisation experience. *Uti possidetis* is a significant counterweight to self-determination of peoples.

While it was possible to state authoritatively that a right of self-determination had been established for colonised areas during this period, James Engers' perspective summarises the period quite well: (External) "self-determination [was] not a universal doctrine but rather a specific concept relating to the international law of decolonisation".[62]

The ongoing 'is', after the fact: An observation on the modern law of self-determination

As will be discussed, the biggest distinction between the right of self-determination in a colonial versus postcolonial context is the relevance of the concepts of internal versus external self-determination. Internal self-determination will be seen to retain the essential core of self-government, which forms the core in determining the concept's juridical meaning in the United Nations context. It will do so as a means to ensuring good governance within established territo-

[61] See generally discussion *infra* chapter four.
[62] J.F. Engers, *From Sacred Trust to Self-Determination*, 24 Neth. Int'l L. Rev. 88 (1977).

rial states through measures of legitimacy and accountability. External self-determination involves the sovereignty of a territory. In its most uncontroversial form, it is applied exclusively in a decolonisation context. As Cassese comments, "unlike external self-determination for colonial peoples—which ceases to exist under customary international law once it is implemented—the right to internal self-determination is neither destroyed nor diminished by its having already once been invoked and put into effect".[63] More controversial will be questions of external self-determination for non-colonial peoples, and the extent to which those claims are validated by international law, as possible remedies for violations of internal self-determination.[64]

The Friendly Relations Declaration as the conceptual basis for internal self-determination

In 1960, the Assembly undertook its Decolonisation Declaration in the form of General Assembly Resolution 1514(XV). Ten years later, its Friendly Relations Declaration reinforced the anti-colonial message of ten years earlier, in a General Assembly Declaration designed to practically develop the future work plan for the Organization. This momentum was further buffeted by the adoption of the ICCPR and ICESCR in 1966. Although the covenants did not enter into force for another decade, they did serve to reinforce anti-colonialism, particularly given their common article 1 concerning self-determination. In particular, as the decolonisation process began in earnest and the practical effects of this process began to be recognised with the admission of newly independent states to the United Nations, the General Assembly allocated a portion of its own programme of work to evaluating the work of the organisation, which culminated in a significant declaration by the General Assembly, twenty-five years after the creation of the United Nations. In resolution 1815(XVIII) in 1962, the General Assembly authorised a study of the principles of the organisation and their duties imposed on member states. A committee was established the following year in resolution 1966(XVIII) to undertake this study, the result of which was the 1970 Declaration on Friendly Relations, which was adopted by consensus as General Assembly resolution 2625 (XXV).[65]

Although the Declaration has come to be closely identified with ideas of self-determination, no overt reference to the 1514 resolution is to be found. The Declaration is written in forward-looking language, the most salient parts of which, as identified by Hurst Hannum, are quoted below:

> The use of force to deprive peoples of their national identity constitutes a violation of their inalienable rights and of the principle of non-intervention [...]
>
> By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.
>
> Every State has the duty to promote [...] realization of the principle of equal rights and self-determination of peoples [...] in order:
>
> (a) To promote friendly relations and co-operation among States; and

[63] Cassese, *supra* note 3, at 101.
[64] Although the Soviet Union has ceased to exist and an unfettered right to secession was definitively blocked in United Nations practice, the intellectual underpinning of external self-determination, as a final guarantor of the manifestation of that right, cannot be overlooked.
[65] For discussion, see R. Rosenstock, The Declaration of Principles of International Law Concerning Friendly Relations: A Survey 730 (1971).

> (b) To bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned; and bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle [of self-determination], as well as denial of fundamental human rights, and is contrary to the Charter [...]
>
> 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*.[66]
>
> Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country [...]
>
> The territorial integrity and political independence of the State are inviolable.[67]

From this, certain observations may be made. In the 1514 and 1541 resolutions, independence from colonial situations was identified as one of the primary focuses of self-determination. By 1970, the Declaration states that "independence [was] only one of several equally legitimate alternatives, declaring that the right of self-determination could be implemented by the establishment of an independent state, association or integration with an independent state, or *'the emergence into any other political status freely determined by a people'*".[68]

The scope of 'prohibition of discrimination' within the Friendly Relations Declaration

Cassese gives considerable attention to the concern expressed by Member States in the formulation of the Declaration that the principle of territorial integrity was "considered sacred",[69] particularly as it followed the 1514 resolution, and as such he terms paragraph 7 as the Declaration's saving clause, which served to reinforce directly the concept of external self-determination as viewed through the decolonising framework, further implying that internal self-determination would be a notion only indirectly addressed by the Declaration. Cassese makes clear that any question of secession based upon paragraph 7 of the Declaration would be immediately suspect, owning to the weight in international law allocated to the principle of territorial integrity.[70]

The clause can be seen as giving rise to a form of legal recourse to post-decolonisation separatism, including the possibility of secession, or at least it can be said not to explicitly prohibit it. While no right to secession can be found in the Declaration alone, secession can neither be seen specifically lawful nor unlawful *per se*. Cassese himself does not reject secession claims out of hand, but claims that "[o]ne thing is made very clear: any licence to secede must be interpreted very strictly".[71] This precariously balanced interpretation does very little to instil greater clarity on an already confounding legal topic. Although it is clear that the Declaration reaffirms

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[66] This paragraph (emphasis added) is number 7 in the Declaration, and can be said to be the most important continuing element from the Friendly Relations Declaration. This language was expanded in the Vienna Declaration and Programme of Action as "without distinction of any kind", drawing reference to Article 2 of the Universal Declaration of Human Rights. See General Assembly Resolution 48/121, confirming the VDPA as originally published in UN document A/CONF.157/24 (Parts I and II).
[67] GA Res. 2625 (annex), UN Doc. A/5217 (1970) [hereinafter Friendly Relations Declaration], as quoted in Hannum, *supra* note 8, at 35.
[68] Musgrave, *supra* note 36, at 76 (emphasis added).
[69] Cassese, *supra* note 3, at 112.
[70] See *Id.* at 112.
[71] *Id.*

the continual nature of self-determination, the contrasting identity to which a peoples' self-determination is directed has shifted from the colonising state to the postcolonial state. The *collectivité* undertaking self-determination will be a portion of the postcolonial state, as opposed to the entire territory of the colony undergoing decolonisation.[72] Therefore, identity-based constructions of a 'people' operate on a more complicated level in the postcolonial state than during colonial times,[73] particularly when territorial delimitations, which were the product of the imposition of the European state on Africa, could come under question. This could be most readily observed if Lenin's formulation of the necessity of recourse to external self-determination as a fundamental means of guarantee of self-determination were to retain its intellectual currency, albeit as an obscure juridical source.

Cassese concludes that "secession is not ruled out but may be permitted only when very stringent requirements have been met", as "the possibility of impairment of territorial integrity *is not totally excluded*, [and therefore] logically admitted".[74] However, his remarks are viewed through his desire to read the Declaration with a strong inclination toward upholding the principle of territorial integrity. Such an inclination serves to negate the importance of ethnic, cultural and linguistic criteria in the state's formulation. Obviously, individuals meeting such criteria are rarely found in precisely defined geographies intrinsically conterminal with the territorial boundaries of a state. Nevertheless, Cassese makes claims for considerable juridical weight to be allocated to the principle of territorial integrity, as a consequence of the advocacy, through his reading of the *travaux préparatoires* of the Declaration, for a restrictive effect to have been caused by adding the phrase 'race, creed of colour' to paragraph 7.[75] Thus, Cassese concludes that the level of representation required to satisfactorily evaluate the level of access to government by a group would not necessarily be definitive.[76] He argues that internal self-

[72] *Cf.* R. Higgins, Postmodern Tribalism and the Right to Secession: Comments, in C.M. Brölmann *et al* (eds.), Peoples and Minorities in International Law 32 (1993). See also R. Higgins, V General Course on Public International Law, *International Law and the Avoidance, Containment and Resolution of Disputes*, 230 Rec. des Cours, at 154 *et seq.* (1991). Higgins conceptually links territorial statehood with the overall concept of 'government' *per se*, thereby implying a deep presumption that the territory of a 'people' is inherently co-terminal with the territory of a state. Although it may be observed that such a perspective reinforces the absolutism of territorial integrity as a matter of primacy, one must recall how even Cassese allowed for the conceptual possibility of a diversion from such a primacy to be legitimately juridically construed. By implication, the equivocation of 'peoplehood' with that exclusively defined by 'governmentalism' must never go critically unevaluated. The pivot point of this equation will be formed by the interactions between the theoretical concepts of 'territorial integrity', 'governance' and 'effectiveness', as contrasted with the more explicit provisions of historical treaties dictating the circumstances of territorial transfer of title from colonised entities to such proponents.

[73] *Cf.* Cassese, *supra* note 3, at 114-115: "By limiting self-determination to racial and religious groups, the draftsmen made it clear that self-determination was not considered a right held by *the entire people* of an authoritarian State. The existence of a government which tramples upon its citizens' basic rights and fundamental freedoms does not give rise to a right of internal self-determination. However, even those groups that *are* afforded rights under the Declaration are not as well off as one might expect, for it is *equal access to government* which they are entitled, *not equal rights*. The Declaration does not require States to grant racial and religious groups a menu of rights, nor does it prohibit the imposition of invidious measures. It simply demands that States allow racial and religious groups to have access to government institutions. The draftsmen undoubtedly assumed that once these groups were granted equal access to government, they would be in a position to ensure that all attempts to pass discriminatory legislation would be defeated—an assumption that is only partially correct."

[74] *Id.* at 118-119.

[75] See *Id.* at 115-118.

[76] *Cf. Id.* at 117: "The insertion of the phrase 'race, creed or colour' was intended to *qualify*, that is, to *restrict*, the general thrust of [an] Italian compromise text. Indeed, without those words, the scope of the clause would have been very sweeping: any national, linguistic, ethnic, racial, or religious group not 'rep-

determination is conferred "only on *racial* or *religious* groups which are denied access to the political decision-making process; *linguistic* or *national* groups *do not* have a concomitant right".[77]

It could be assumed that the most extreme form of self-determination outside the colonial context—secession—produces a confounding set of problems for the systematic functioning of international law, particularly that the validity of such actions will largely be determined by the level of political recognition afforded by other states in the 'international community'.[78]

This may be why there exists such a fixation on the seemingly unchallenged presumption that the territorial integrity of all states is as uniform and as constant as the sovereign equality of all states. Without negating the reality that the territorial integrity does, indeed, form a fundamental basis for statehood, and thus the system of public international law, it must be also stated that the importance of the non-territorial aspects of a state's composition can not go overlooked, for the primary test of self-determination itself is, of course, access to government.

In this sense, David Raič has undertaken a critical evaluation of Cassese's premise which is worth considering.[79] Raič observes Cassese's synonymous equation of the terms 'race' and 'colour',[80] and asserts that "the term 'race' should not be limited to the notion of 'colour'".[81] This stands to reason, as e.g. Hispanics can be of any race and colour. Raič writes:

> [I]f Cassese's argument is accepted, internal self-determination would, as far as subgroups are concerned, be confined to one specific, narrowly defined subgroup only. It is submitted, however, that this point of view cannot be maintained upon closer analysis and that the subject of internal self-determination includes ethnic groupings other than Cassese's narrowly defined subgroups.[82]

This leads him to conclude that the term 'race', as used in the Declaration, is formulated in such a way so as to preclude distinctions from being made amongst such groups. In recalling the text from paragraph 7 "*without distinction as to race, creed or colour*", a "differentiation between groups, even on the basis of race, is not prohibited under international law, [and] the reference to the term 'distinction' must be interpreted as referring to the practice of *arbitrary* distinction, that is, discrimination".[83] Raič links this assessment to Article 1 of the 1966 Convention on the Elimination of All Forms of Racial Discrimination, which states that "the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin […]", and goes further to assert that the actual underlying motivation behind paragraph 7 aims towards the universal application of such provisions as opposed to mere commentary on specific situations.

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resented' in the government would have had a right to self-determination. In addition, the populations of States with authoritarian and despotic governments would probably also have been entitled to claim the right." For the proposed Italian text to the General Assembly preparatory committee, see UN Doc. A/AC.125/L.80, particularly that "states enjoying full sovereignty and independence, and possessed of a government representing the whole of their population shall be considered to be conducting themselves in conformity with the principle of equal rights and self-determination of peoples as regards that population". For a further critique of the notion that claims to the right of self-determination cannot be made by 'the populations of States with authoritarian and despotic governments', see *infra* chapter four of this study.

[77] Cassese, *supra* note 3, at 114.

[78] For discussion, see J. Dugard and D. Raič, *The role of recognition in the law and practice of secession*, in M. Kohen (ed.) Secession: International Law Perspectives (2006), at 94 *et seq*.

[79] See D. Raič, Statehood and the Law of Self-Determination (2002), at 250 *et seq* [hereinafter Raič].

[80] See Cassese, *supra* note 3, at 112.

[81] Raič, *supra* note 79, at 251.

[82] *Id.*

[83] *Id.* at text accompanying footnote 100.

Raič is thus led to conclude that internal self-determination must not only be limited to "'racial' groups (defined in terms of physical appearance) and religious groups",[84] and that "if, with respect to internal self-determination, racial groups would be considered to have a special position under international law in comparison to other subgroups it is at least remarkable that no other such special position is referred to in common Article 1 of the Human Rights Covenants or any other instrument containing provisions on self-determination".[85]

Raič then finds himself in a position to take issue with Higgins' assessment that a 'people' must mean either "the entire people of a State or […] all the persons comprising distinctive groupings on the basis of race, ethnicity and perhaps religion",[86] and asserts that 'subdivisions', or 'subgroups' within a state, are the true beneficiaries of internal self-determination, and such groups may be both racial and ethnic in composition.[87] He writes that "the main objective or purpose of the concept of self-determination is the protection, preservation, strengthening and development of the identity or individuality of a 'people'",[88] and thus "the applicability of self-determination therefore presumes the distinctiveness of that 'people'".[89] This leads Raič to begin to offer hypothetical criteria for 'peoplehood' under this more forward-looking formulation. He suggests objective criteria of: (a) a (historical) territorial connection, on which territory the group forms a majority; (b) a common history; (c) a common ethnic identity or origin; (d) a common language; (e) a common culture; and/or (f) a common religion or ideology,[90] as well as a subjective criteria of "the belief of being a distinct people distinguishable from any other people inhabiting the globe, and the wish to be recognized as such, as well as the wish to maintain, strengthen and develop the group's identity", expressing the will for a common future.[91]

The implications of Raič's analysis are sweeping, in that they clearly demonstrate the shift in meaning of self-determination, from the decolonisation to the newly-independent state period. As such his meticulous conclusion merits serious consideration:

> [I]f a specific subgroup within a State can be qualified as a people in an ethnic sense on the basis of the abovementioned criteria, that subgroup would be a holder of the collective 'right' of internal self-determination. This does not mean, however, that the composition of a State's government must necessarily reflect all that State's peoples *qua* peoples. A people may be of the opinion that its collective identity is sufficiently protected by the applicability of, and respect for, specific minority rights […]. Under these circumstances there is no immediate further legal obligation on the side of the State to provide for specific and extra guarantees. […] It may also be envisaged that a subgroup as such does not exercise its right of internal self-determination on the central level of decision-making but that it does exercise this right freely through some form of autonomy. In such a case […] there is at least a presumption that the right of internal self-determination is respected.[92]

Delimiting the extent of 'prohibition of discrimination': Approaching the secession question

The requirements for the recognition of secession seem to be rooted in the developing human rights law. As already mentioned, the establishment of the 'International Bill of Rights',

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[84] *Id.* at 255.
[85] *Id.*
[86] R. Higgins, *International Law and the Avoidance, Containment and Resolution of Disputes*, V HR 9, 170 (1991).
[87] Raič, *supra* note 79, at 258.
[88] *Id.* at 261.
[89] *Id.*
[90] *Id.* at 262.
[91] *Id.* at 262-263.
[92] *Id.* at 264.

of the UDHR as well as the ICCPR and ICESCR, has witnessed the birth and growth of a true international human rights *régime*. The twin covenants, with their common article 1 on self-determination, entered into force in 1976, instilling another legal element. For viewing the 'principle', in terms of 'rights' allowed, the 'saving clause' of the Friendly Relations Declaration may be viewed as a strictly construed implicit authorisation for secession. The requirements for this to happen have been outlined by Cassese, who contends that international human rights law and the Friendly Relations Declaration serve to link external self-determination with internal self-determination, in exceptional circumstances:

> When the central authorities of a sovereign State persistently refuse to grant participatory rights to a religious or racial group, grossly and systematically trample upon their fundamental rights, and deny the possibility of reaching a peaceful settlement within the framework of the State structure [...] In addition, there must be gross breaches of fundamental human rights, and, what is more, the exclusion of any likelihood for a possible peaceful solution within the existing State structure [...] A racial or religious group may secede—thus exercising the most radical form of external self-determination—once it is clear that all attempts to achieve internal self-determination have failed or are destined to fail.[93]

Although this discussion has focused, in the main, on United Nations activities in the field of self-determination, it must also be mentioned that self-determination was a cornerstone of the 1975 Helsinki Final Act,[94] which, as a 'gentleman's agreement', has more political impact than would be found in proper treaty law. Nevertheless, the Act served to clarify principles established in the Friendly Relations Declaration, particularly regarding the self-determination of peoples within a sovereign state beyond basic minority rights. In particular, its Principle VIII, which states broadly that all peoples determine their own internal and external political status, does not provide as coherent a delineation between the realms of internal and external self-determination.[95]

By the late 1970s, the world was witnessing the end of decolonisation, and with the continuity of the principle of self-determination being reaffirmed as a human right, the UN Commission on Human Rights instructed its Sub-Commission on the Prevention of Discrimination and Protection of Minorities to undertake a comprehensive study on the right to self-determination.[96] Without going into unnecessary detail, Hector Gros Espiell, in his study, retraces self-determination from its origins in a UN context, and generally establishes that self-determination, in its essence, means the free choice of peoples. Of particular importance are his observations on self-determination in a postcolonial context. He writes:

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[93] Cassese, *supra* note 3, at 119-120. *Cf.* ICCPR at Article 27, providing "in those States in which […] minorities exist" a measure of guarantee of basic minority rights.
[94] See I. Brownlie, Basic Documents on Human Rights (3d. ed.) 391-449 (1993).
[95] *Cf.* Conference on Security and Cooperation in Europe (CSCE), Helsinki Final Act (1975) at Principle VIII, Equal rights and self-determination of peoples: "The participating States will respect the equal rights of peoples and their right to self-determination, acting at all times in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States. […] By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development. […] The participating States reaffirm the universal significance of respect for and effective exercise of equal rights and self- determination of peoples for the development of friendly relations among themselves as among all States; they also recall the importance of the elimination of any form of violation of this principle."
[96] H. Gros Espiell, Special Rapporteur of the United Nations Subcommission on the Prevention of Discrimination and Protection of Minorities, in The Right of Self-Determination: Implementation of United Nations Resolutions, UN Sales Publication E.79.XIV.5 (1980) [hereinafter Gros Espiell].

> The right of self-determination, as it emerges from the United Nations system, exists for peoples under colonial and alien domination, that is to say, who are not living under the legal form of a State. The right to secession from an existing State Member of the United Nations does not exist as such in the instruments or in the practice followed by the Organization, since to seek to invoke it in order to disrupt the national unity and territorial integrity of a State would be a misapplication of the principle of self-determination contrary to the purposes of the United Nations Charter.[97]

This statement appears *prima facie* to be in conformity with one made by former UN Secretary-General U Thant, who stated in 1970 that

> [a]s far as the question of secession of a particular Member State is concerned, the United Nations attitude is unequivocal. As an international organization, the United Nations had never accepted and does not accept and I do not believe it ever will accept a principle of secession of a part of a Member State.[98]

Still, Gros Espiell mitigates that assertion significantly, by continuing:

> [However,] if the national unity claimed and the territorial integrity invoked *are merely legal fictions* which cloak real colonial and alien domination, resulting from actual disregard of the principle of self-determination, the subject people or *peoples are entitled to exercise, with all the consequences thereof their right to self-determination.*[99]

The problem, of course, is in finding objective proof that a people, in an independent state, actually do live in colonial or alien domination. This is a situation which shall be considered in greater detail in the following two chapters, particularly in light of subsequent jurisprudential development of the relationship between self-determination and secession, through the Canadian Supreme Court decision regarding Quebec's secession. Returning momentarily to Gros Espiell's study, however, it should be further mentioned that a 1978 resolution of the UN Commission on Human Rights stated that self-determination, in this traditional sense (*i.e.,* external self-determination), is a peremptory norm of international law having the status of *jus cogens*.[100] Gros Espiell himself concluded that self-determination does indeed have this status in his study as well.[101] Other writers, such as Brownlie[102] and Cassese,[103] arrive at a similar conclusion, while others, like Hannum, err on the side of caution and do not make an overt pronouncement on self-determination's status as a peremptory norm.[104]

The rise of self-determination as a principle, and its establishment in soft law and treaty law as a right of peoples has earned it a certain place in the corpus of international law. Still, its invocation in case law has been less substantial. Although a number of decisions of the International Court of Justice (ICJ) have made implicit or explicit reference to self-determination,[105] it

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[97] *Id.* at para. 90.
[98] 2 United Nations Monthly Chronicle 36 (1970). By 2007, this perspective had become chiefly historical. *Cf.* Report of the Special Envoy of the Secretary-General on Kosovo's future status, UN Doc. S/2007/168, 26 March 2007, at para 5: "The time has come to resolve Kosovo's status. Upon careful consideration of Kosovo's recent history, the realities of Kosovo today and taking into account the negotiations with the parties, I have come to the conclusion that the only viable option for Kosovo is independence, to be supervised for an initial period by the international community."
[99] Gros Espiell, *supra* note 96, at para. 90 (emphasis added).
[100] See Official Records of the Economic and Social Council, 62d session, supplement No. 4, UN Document E/1978/32, at paras. 121-122 (1978).
[101] Gros Espiell, *supra* note 96, at para. 78.
[102] See I. Brownlie, Principles of Public International Law (4th ed.), at 513 (1990).
[103] See Divided world, *supra* note 35, at 136.
[104] See Hannum, *supra* note 8, at 45.
[105] See Case Concerning the Right of Passage Over Indian Territory (Portugal *v.* India), 1960 ICJ Rep. 6 and Case Concerning the Northern Cameroons (Cameroon *v.* United Kingdom), 1960 ICJ Rep. 53, im-

was only in the 1975 ICJ Western Sahara advisory opinion[106] that the Court confirmed that the right of peoples to self-determination was recognised in international law,[107] although the Court further recognised the right of peoples to self-determination, in the 2004 Construction of a Wall advisory opinion.[108]

As alluded to earlier, by 1993, the World Conference on Human Rights also made reference to self-determination in its Vienna Declaration and Programme of Action, when it stressed the importance of the realisation of the right of peoples to self-determination, that the denial of self-determination was considered to be a violation of human rights (balanced by the now-familiar territorial integrity guarantees, serving to generally suggest a presumption that external self-determination outside the colonial context is unacceptable).[109] This restatement in the intergovernmental arena came on the heels of the academic assertion—again by Franck—of an "emerging right to democratic governance",[110] which seems to provide a theoretical basis for the implementation of some type of self-determination in a contemporary context. Franck identifies four indicators for determining the legitimacy of rules: (a) pedigree, or the rule's root in historical processes; (b) determinacy, or the rules ability to communicate content; (c) coherence, or the rule's consistency with other rules; and (d) adherence, or the rule's vertical connectedness to higher normative principles.[111]

Finally, reference must be made to the 1995 *East Timor* case before the ICJ, which, *inter alia*, declared self-determination to have an *erga omnes* character emanating from the Charter and from state practice, and is "irreproachable [as] one of the essential principles of customary international law".[112] In 2004, the Court considerably reinforced this conceptualisation, in the Construction of a Wall advisory opinion, by noting the following:

> 155. The Court would observe that the obligations violated by Israel include certain obli-

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plicitly discussing self-determination, Barcelona Traction, Light and Power Company Limited Judgement, 1970 ICJ Rep. 3, separate opinion of Judge Ammoun, affirming the law-making nature of, *inter alia*, GA resolution 1514, and Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), advisory opinion, 1971 ICJ Rep. 16, extending the "sacred trust" of the League of Nations mandate system and the UN Trusteeship System to "all territories whose peoples have not attained a full measure of self-government". *Id.* at 31.

[106] 1975 ICJ Rep. 12 [hereinafter Western Sahara case].

[107] *Cf.* Musgrave, *supra* note 36, at 86: "The Court reiterated the position it had set out in the *Namibia* case in 1971, to the effect that self-determination was applicable to all non-self-governing territories. In this regard the Court linked the explicit references to self-determination contained in Articles 1 and 55 of the Charter to Chapter XI […]. After referring to certain key provisions of Resolutions 1514(XV), 1541(XV) and 2625(XXV), the Court concluded that it was necessary, in the process of self-determination, 'to pay regard to the freely expressed will of the peoples'."

[108] See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ Rep. 136 [hereinafter Wall advisory opinion], particularly at para. 87 *et seq*. and para 122, whereby the Court found that the route chosen by Israel in the construction of the wall served to impede the Palestinian peoples' right to self-determination.

[109] See VDPA, *supra* note 49, at para. 2.

[110] See T.M. Franck, The Emerging Right to Democratic Governance, 86 AJIL 46 (1992) [hereinafter Franck].

[111] See *Id.* at 65 *et seq.*

[112] Case concerning East Timor (Portugal *v.* Australia), 1995 ICJ Rep. 102. But consider that the Court went on to state that it "considers that the *erga omnes* character of a norm and the rule of consent to jurisdiction [of self-determination claims before the ICJ] are two different things. Whatever the nature of the obligations invoked, the Court could not rule on lawfulness of the conduct of a State when its judgement would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case. Where this is so, the Court cannot act, even if the right in question is *erga omnes*."

> gations *erga omnes.* As the Court indicated in the *Barcelona Traction* case, such obligations are by their very nature "the concern of all States" and, "In view of the importance of the rights involved, all States can be held to have a legal interest in their protection" *(Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970,* p. 32, para. 33). The obligations *erga omnes* violated by Israel are the obligation to respect the right of the Palestinian people to self-determination, and certain of its obligations under international humanitarian law.
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> 156. As regards the first of these, the Court has already observed […] that in the *East Timor* case, it described as "irreproachable" the assertion that "the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character" *(I.C.J. Reports 1995,* p. 102, para. 29). The Court would also recall that under the terms of General Assembly resolution 2625 (XXV) […], "Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle…"[113]

The specific case of Kosovo's secession

Following the settlement of overt hostilities in the Balkans, Kosovo, itself an autonomous province of Serbia, made a unilateral declaration of independence in February 2008. The law and politics of the former Yugoslavia reflects a complicated reality, the extent of which is beyond the scope of this study, but broadly speaking, given the facts that (a) the former Yugoslavia was a patchwork of different ethnicities and territorial governances; (b) international and regional intergovernmental organisations have been allocated certain tasks related to the sovereignty of ex-Yugoslav territories following the cessation of overt hostilities in the region, particularly through UN Security Council Resolution 1244 (1999), which laid a framework for the UN to administer Kosovo in anticipation of the eventual resolution of its final political and legal status; and (c) the effect of mediated negotiations between Serbia, Kosovo, the EU, Russia and the US was inconsequential,[114] the Parliament of Kosovo pledged compliance with international mediation efforts, and also declared that 'Kosovo' was to be "an independent and sovereign state".[115]

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[113] Wall advisory opinion, *supra* note 108, at paras. 155-156.

[114] See International Civilian Office, Report of the EU/US/Russia Troika on Kosovo, available on www.ico-kos.org, accessed May 2008.

[115] *Cf.* BBC News, Full text of Kosovo Declaration, http://news.bbc.co.uk/1/hi/world/europe/7249677.stm:

> Regretting that no mutually acceptable status outcome was possible, in spite of the good-faith engagement of our leaders […] Confirming that the recommendations of UN Special Envoy Martti Ahtisaari provide Kosovo with a comprehensive framework for its future development and are in line with the highest European standards of human rights and good governance,
>
> We, the democratically elected leaders of our people, hereby declare Kosovo to be an independent and sovereign state. This declaration reflects the will of our people and it is in full accordance with the recommendations of UN Special Envoy Martti Ahtisaari and his Comprehensive Proposal for the Kosovo Status Settlement. […] We declare Kosovo to be a democratic, secular and multiethnic republic, guided by the principles of non-discrimination and equal protection under the law. […] We shall adopt as soon as possible a Constitution that enshrines our commitment to respect the human rights and fundamental freedoms of all our citizens, particularly as defined by the European Convention on Human Rights. […] We welcome the international community's continued support of our democratic development through international presences established in Kosovo on the basis of UN Security Council Resolution 1244 (1999). […] With independence comes the duty of responsible membership in the international community. We accept fully this duty and shall abide by the principles of the United Nations Charter, the Helsinki Final Act, other acts of the Organization on Security and Cooperation in Europe, and the

Responses from the international community were, perhaps, able to be anticipated on political grounds, with the US and certain EU states quickly recognising an independent, sovereign Kosovo, and other states, Serbia and Russia in particular, asserting that Security Council resolution 1244, by reaffirming the "sovereignty and territorial integrity of the Federal Republic of Yugoslavia",[116] was meant to imply that Kosovo was to remain territorially integrated into Serbia. Despite the lack of *stare decisis* in international law generally, as well as the fact that declaratory and constitutive theories of new state recognition are of importance, but political considerations do play significant roles in recognition decisions, Russian Foreign Minister Lavrov made a statement which seemed to imply that if Kosovo were to be recognised as an independent state, the existing international order would begin to crumble in its wake. [117] FM Lavrov's comments seemed to be based on his governments own concerns, saying on 12 February 2008 that:

> We are speaking here about the subversion of all the foundations of international law, about the subversion of those principles which, at huge effort, and at the cost of Europe's pain, sacrifice and bloodletting have been earned and laid down as a basis of its existence. We are speaking about a subversion of those principles to which the Organisation for Security and Cooperation in Europe rests, those principles laid down in the fundamental documents of the UN.[118]

Certainly the question to which FM Lavrov refers is to that of the circumstances whereby borders of established states (*i.e.,* Serbia and Montenegro, holding Kosovo as integral therein) are to be accepted as being modified by the international community. Although it could be argued that the changing of borders is only to be sanctioned by mutual agreement amongst negotiating entities, such a position fails to consider the implications whereby the negotiation position between such entities is institutionally skewed. That is to say that in the face of massive human rights violations—which no right thinking analyst could ever deny transpired in Kosovo—such consensual "Czechoslovakian" dissolution may not be possible. Indeed, in the face of the most severe violations of individual human rights, warfare in particular, nothing in modern territorial statehood obliges an otherwise self-administering territory to remain part and parcel of the *status quo* when such an existence, formulated on the basis of recent practice, would only seem to lead to the repetition of repressive policies effectuated by the fulcrum of state power, to the detriment of its peripheries. Recognition of a new state will always be at the outset inherently political, and fused with passionate charges reflecting the impressions of those asserting an interest in the local situation.[119]

It must also be observed that the recognition of other ex-Yugosav states as independent

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international legal obligations and principles of international comity that mark the relations among states. Kosovo shall have its international borders as set forth in Annex VIII of the Ahtisaari Plan, and shall fully respect the sovereignty and territorial integrity of all our neighbours. […] We hereby undertake the international obligations of Kosovo, including those concluded on our behalf by the United Nations Interim Administration Mission in Kosovo (UNMIK) and treaty and other obligations of the former Socialist Federal Republic of Yugoslavia to which we are bound as a former constituent part, including the Vienna Conventions on Diplomatic and Consular Relations.

[116] See UN Security Council Resolution 1244 (1999), at preambular paragraph 1.

[117] See e.g. BBC News, Legal furore over Kosovo recognition, accessed from http://www.news.bc.co.uk/2/hi/europe/7244538.htm.

[118] Russian FM Lavrov's comments, as cited in BBC News reportage, *Id.*

[119] *Cf.* U.S. Recognizes Kosovo as Independent State, statement of Secretary of State Condoleeza Rice, Washington DC (18 Feb 2008), via http://www.state.gov/secretary/rm/2008/02/100973.htm: "The unusual combination of factors found in the Kosovo situation—including the context of Yugoslavia's breakup, and the extended period of UN administration—are not found elsewhere and therefore make Kosovo a special case. Kosovo cannot be seen as precedent for any other situation in the world today."

entities under similarly violent circumstances (and, to be certain, Montenegro's admission as the 192nd UN member-state), as well as the willingness of the Security Council to consider the possibility of Yugoslav secessions during the 1990s, also contribute to the nebulous legal circumstance under which Kosovo declared its independence. In critically evaluating the action taken by the Kosovar Assembly, it may be questioned whether the unlaterial declaration of independence decision is seen to be sufficiently representative of all aspects of the population, as well as whether the declaration of independence is in some way equivalent to a referendum on the topic.

As of autumn 2008, these questions remain, as Serbia has refused to acknowledge the Kosovar declaration of independence. To this end, Serbia in August 2008 sought redress before the UN General Assembly to petition the ICJ for an advisory opinion on the legality of Kosovo's independence.[120] Other actions related to Kosovo's unilateral declaration of independence, including admission to the United Nations, remain momentarily outstanding.

Recapitulation of the development of self-determination

Self-determination is a complicated, multifaceted topic with many different interpretations and implications. This traditional concept of self-determination has come to be known as 'external self-determination', given its nature. In the 1970 Friendly Relations Declaration, it is also mentioned that, bearing these considerations in mind, the most extreme form of external self-determination—that is, the creation of a new state entity—would not be acceptable in a state "possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour". This, by implication, leads to a more radical interpretation of the principle of self-determination, in that it "embraces a right to internal democracy for all peoples irrespective of the status of the territory […] it is a right of self-government for all peoples".[121] There is also an implication that there is no general right of secession *per se* (*i.e.*, under all circumstances) in international law, and that an excessive, unrestrained exercise of external self-determination in a postcolonial context could threaten peace and security.[122] And yet, as may be observed in Kosovo, the conceptual impossibility of postcolonial external self-determination, that is to say, to ignore the possibility of remedial secession may similarly degrade peace and security in a particular geographic area.[123]

In the main, states and peoples should seek to avoid such extreme measures by employing concepts of the so-called 'internal self-determination'. Yet despite some elements of juridical reinforcement through state practice,[124] it remains relatively uncontroversial to observe that in-

[120] See Serbia Requests ICJ Opinion on Legality of Kosovo Independence, VOA News, available from http://voanews.com/english/2008-08-15-voa58.cfm. The General Assembly communicated this request to the ICJ in UN document A/63/L.2 (2008).
[121] Int'l Law, *supra* note 52, at 308.
[122] See e.g. B. Boutros-Ghali, *An Agenda for Peace*, UN Doc. S/24111, at para. 17 (1992) [hereinafter Agenda for Peace].
[123] For discussion, see M. Kohen, *Introduction,* in M. Kohen (ed.) Secession: International Law Perspectives (2006), at 19, noting "[…] in some cases, international law prevents secession, in other cases authorises it, and in yet others—the remaining situations only—it neither permits nor interdicts secession". And *cf.* C. Tomuschat, *Secession and self-determination*, in *Id.*, at 41: "Within a context where the individual citizen is no more regarded as a simple object, international law must allow the members of a community suffering structural discrimination—amounting to grave prejudice affecting their lives—to strive for secession as a measure of last resort after all other methods employed to bring about change have failed."
[124] See e.g. UN General Assembly Resolutions 45/150 (1991) and 46/137 (1991) stressing the importance of "periodic and genuine elections".

ternal self-determination *per se* possesses comparatively less definition, in international legal terms, than does external self-determination.

However, it certainly appears that Raič has shown considerable innovation in accentuating the juridical development of internal self-determination in the postcolonial sense, and his conclusions do serve to mitigate the restrictive approach found by Cassese's interpretation of the Friendly Relations Declaration's *traveaux préparatoires*.

Overall, self-determination may be seen as a variable, ongoing right, dependant upon circumstances. It is balanced by the territorial integrity requirements in international law. Secession may be seen as the outer limit of possibilities of self-determination, but secession and self-determination are not one and the same. That is to say, secession is not automatic but may be possible. Secession—at least on the theoretical plane—exists as a real option in selected circumstances. Determining the legitimacy of self-determination claims will be the challenge for the future. A luminous guidepost is to be found in an Editorial Comment in the *American Journal of International Law* by Frederic Kirgis, who states that "one can discern degrees of self-determination, with the legitimacy of each tied to the degree of representative government in the state".[125] Kirgis presents a graph demonstrating the degree to which a self-determination claim is destabilising and the degree to which government that is representative induces a negative propensity against legitimate self-determination. It is these types of considerations which will have to be considered in assessing the question of secession in contemporary international law. Before that can be done, however, due attention must be paid to the overall boundaries of states themselves, and for that, the discussion must return to the principle of *uti possidetis*.

Self-determination held in check: The principle of *uti possidetis juris*

Self-determination, as a variable positively defined with decolonisation, is neither universal nor arbitrary across a geographic region. It is simultaneously defined by the delimitation of the territorial frontiers of a state. If it were to be applied, it would have to be done in such a way as to serve its primary goal—obtaining the independence of colonised peoples—with as minimal disruption of the international system as possible. In many respects, it would appear that this goal was achieved: with the independence of colonial peoples comes the natural increase in the number of sovereign states. Yet these sovereign states, for the most part, came into being within the colonial boundaries prescribed by Europeans. The self-determination of colonised peoples was allowed to take place, based on the transference of the legal principle of *uti possidetis juris*—the 'as you possess, so may you possess' principle—from a Roman law precept, based on individual property rights to a contemporary international legal principle, based, in turn, on the aggregated transfer of title from a colonising power to its subjects.

To that end, then, the international system was indeed minimally disrupted: sovereignty over colonised lands was transferred to its subjects quite simply, as the stopgap principle of *uti possidetis* transferred internal administrative frontiers to external borders at the point of a 'critical date'. Once accepted as a political reality by colonising powers, decolonisation was a relatively simple legal process. In the name of promoting stability, *uti possidetis* aimed at by preventing land grabs by those emerging from years of colonial rule as a sort of countervailing balance over local realities. This furthermore had the practical effect of ensuring self-determination was to be effectuated in European terms, inasmuch as self-determination was to be effectuated under the rubric of the sovereign state. Thus the juridical slurry which purports to define the sub-state

[125] F.L. Kirgis, *Editorial Comment: The Degrees of Self-Determination in the United Nations Era*, 88 AJIL 304 (1994) [hereinafter Kirgis].

components formed by a collective right to self-determination as part of modern territorial statehood—namely, that which has been deferred to the presumptive dominance of the principle of territorial integrity—is in fact bolstered to some degree as a result of the definitional clarity provided to a specific situation as a result of its territorial circumstances. A 'people' actively demonstrating through the course of its collective manifestations a capacity for self-administration across a specific geographic area may have the greatest claim for internal self-determination in the postcolonial era. What is most significant is that the territorial form examined between that of a 'state' and of a smaller geographic group could easily have been affected or influenced by the location of a municipal boundary or international border as a result of historical colonial activity. This also serves to imply a relevance to the effectiveness of such geographic regions within such states—this presumption, of course, being necessary for any semblance of real 'territorial integrity' to have credibility.

The widespread employment of *uti possidetis juris* formed a tangible counterbalance to the self-determination principle as a general matter. That this also reinforced the sensibilities of the dominant positivist legal system also does not go overlooked. By maintaining that the integrity of the territorial unit was not to be seriously questioned, *uti possidetis* thereby reinforced the notion that all states were not to interfere in the sovereign domains of other states. That is to say, the actions of European colonialists became a true *fait accompli*, and indeed while such a reality was more of a pragmatic response reflective of the fast-changing political realities of the time than of a specific logical plan to address the societal changes inflicted upon local populations by colonialist actions. Perhaps then it comes as little surprise that it is impossible to deny that the latter half of the twentieth century has witnessed swathes of Sub-Saharan Africa being plunged into previously unfathomable levels of chaos, as will be considered later in this study.

However, before progressing to that level of analysis, *uti possidetis juris* will have to be considered in greater depth. The principle can be seen in two conceptual frameworks: that which concerns territory and the avoidance of *terra nullius*, and that which concerns the development of the legal principle through its invocation in juridical forums.

Practical assessment: The legal doctrine restated

The colonial *uti possidetis* has its origins in Roman law, as found in the declaration by a praetor between two contending parties that "*uti eas oedes de quibus agitur, nec vi, nec clam, nec precario, alter ab altero possidetis, quominus ita possideatis vim fieri veto*", which means roughly: "as you possess the [properties] referred to, without having obtained possession thereof, one from the other, by force, or clandestinely, or by sufferance, I forbid that you be hindered in continuing so possessed". This Roman law provision is more commonly known as "*uti possidetis, ita possideatis*", or "as you possess, so may you possess".[126]

As Ratner comments, *uti possidetis*, in its Roman origins, avoided taking up "the final disposition of the property; instead, it shifted the burden of proof during the proceedings to the party not holding the land. This represented an advantage for the possessor, who became the defendant in the case, even if he had wrongly removed the plaintiff from the land".[127]

It is thus clear that *uti possidetis* presumes from the outset the preservation of the possessory status—the maintenance of the *status quo*, even if there is a measure of injustice therein. As

[126] See J.B. Moore, Costa Rica-Panama Arbitration: Memorandum on *Uti Possidetis* (1913), at 5-8.
[127] S.R. Ratner, *Drawing a Better Line:* Uti Possidetis *and the Borders of New States*, 90 AJIL 590, 593 (1996) [hereinafter Ratner].

Malcolm Shaw writes, "it is not unusual for legal concepts over time to alter their meaning or emphasis as new circumstances arise,[128] and this has undoubtedly happened with regard to the doctrine of *uti possidetis*".[129] The current *uti possidetis*, indeed, has little in common with its Roman law origins, yet saw itself generally transferred—and particularly vis-à-vis the preservation of the *status quo* of possession—to the Latin American experience, first in South America in 1810, and in Central America in 1821. This was generally accepted, probably as much to preclude the possibility of further European colonisation on the *terra nullius* basis, as the willingness to adapt an ancient private law concerning individuals to a (then-)modern law concerning the emergence of new states in international law. Two practical effects of the redevelopment of this principle were as follows:

> Despite [the] general acceptance of the principle, the precise contours and effects of *uti possidetis* remained unclear. First, Latin states accepted the possibility that their final border might differ from the *uti possidetis* line, though they did not plan major revisions of the Spanish administrative borders. Second, and more important, the acceptance of *uti possidetis* in principle could not rectify confusions stemming from shifting territorial arrangements under the Crown, the absence of clearly demarcated boundaries due to ignorance of the local geography, or political tensions among the new Latin states. *These factors led to warfare among them, as well as peaceful resolutions through boundary treaties or agreements to arbitrate.*[130]

So *uti possidetis*, while indeed a preventive diplomacy and conflict resolution measure, was not a panacea.[131] The preference for continuity in the establishment of boundaries of states was confirmed by the arbitral decision of the Swiss Federal Council of 1922, which stated:

> *Lorsque les Colonies espagnoles de l'Amérique centrale et méridionale se proclamèrent independents, dans une seconde moitié du dix-neuvième siècle, elles adoptèrent un principle de droit constitutionel et international auquel elles donnèrent le nom d'*uti possidetis juris *de 1810, à l'effet de constater que les limites des Républiques nouvellement constituées seraient les frontières des provinces espagnoles auxquelles elles se substituaient.*[132]

In short, provided a sufficiently strong territorial claim could be made by a colonising entity particularly through the demonstration of effective control on a territory, international law will broadly seek to reinforce the absence of *terra nullius*. In states emerging from colonialism, a colonising entity has widely been seen by the ICJ to be required to manifest its sovereign authority on a colonial territory, so as to validate territorial title directly derived from *uti possidetis*. This was primarily employed to prevent states from laying claim to territory through occupation in the immediate postcolonial era. Although in the face of competing claims for territorial sovereignty between two states, the Court found that, despite the territorially impeded state's "non-assertion of its rights and by acquiescence in acts of sovereignty alleged to have been exercised"

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[128] *Cf.* the evolution of self-determination in international law, for example.
[129] M.N. Shaw, *Peoples, Territorialism and Boundaries,* 3 EJIL 478, 492 (1997) [hereinafter Shaw, Peoples].
[130] Ratner, *supra* note 127, at 594. (emphasis added)
[131] It was, however, a logical first step to statehood. *Cf.* C.C. Hyde, International Law, Chiefly as Interpreted by the United States (2d. ed.) 499 (1947): "When the common sovereign power was withdrawn, it became indispensably necessary to agree on a principle of demarcation, since there was a universal desire to avoid resort to force, and the principle adopted was a colonial *uti possidetis*; that is, the principle involving the preservation of the demarcations under the colonial regimes corresponding to each of the colonial entities that was constituted as a State."
[132] M.G. Kohen, *Possession contestée et souveraineté territoriale* 427 (1997) [hereinafter Kohen, Possession], quoting I R.S.A. 228 (1922). Author's translation: "When the Spanish Colonies of Central and South America and proclaimed their independence in the second half of the nineteenth century, they adopted a principle of constitutional and international law to which they gave the name of *uti possidetis juris* in 1810, for the purpose of noting that the limits of the newly formed Republics would be formed from the borders of the Spanish provinces to which they were substituted."

by another state, such claims for territorial sovereignty were nonetheless insufficient to necessitate territorial transfer away from the first state.[133] This is significant because it demonstates how *uti possidetis* is not a monolith, but rather a specialised rule of law serving as a stopgap measure for a particular purpose.

With the principle that the boundary of one territory is simply the end of that territory and the beginning of another, firmly established through the Latin American experience, the world witnessed the so-called African *"habillement"*[134] of the principle in the next major decolonisation process: Africa in the mid-to-late 1900s. From the outset of the process, African and world leaders chose to maintain the precedent set in the Latin American experience. This decision was taken in spite of the wretched societal disruptions perpetrated by European imperialism against its southern neighbours, a theft of trade, land, greed, raw materials, labour and cultures. The achievement of independence for Africans was a dubious one at best: "the European powers who snatched 85 percent of Africa during the course of 20 years abandoned 80 percent of it in the 25 years from 1955 to 1980".[135] Many ethnic groups in West Africa, in particular, suffered the profound injustice of having their populations separated and cultures subsequently altered by direct colonial effect (viz. Gambia and Senegal, Ghana, Togo and Benin) or had differing populations grouped in such an arbitrary and artificial manner, so as to promulgate conflict from the outset of the nascent state (viz. Nigeria and Sudan).

Still, one of the first collective African decisions in the post-colonisation period seemed to recognise that the regrouping of territorial boundaries on 'proper' ethnic or other lines would invariably lead to conflict greater than the maintenance of the *status quo*. The decision was taken to accept the "straight lines traced on the drawing board with little relevance to the physical circumstances on the ground",[136] as permanent frontiers. This serves to show that *uti possidetis* in the African context moves a step further from its Latin American origins. In Latin America, there was but one sole colonial power, Spain, to the exclusion of Brazil (Portugal).[137] In Africa, there were seven colonial powers and but two independent states at arguably the height of overall colonialism on the continent in 1913; indeed, the picture seemed similarly dominated by European imperialism and the League of Nations mandate system until the late 1950s and early

[133] See Sovereignty over Certain Frontier Land (Belgium *v.* Netherlands), 1959 ICJ Rep. 209, 227.
[134] *Id.* at 428.
[135] D. Smith, The State of War and Peace Atlas, 107 (1997).
[136] See Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya *v.* Chad), 1994 ICJ Rep. 6.
[137] But Brazil accepted *uti possidetis juris* in principle and *uti possidetis de facto* nationally, so, in reality, it seems this distinction is a bit artificial. While this discussion will generally refer to the Latin term "*uti possidetis*" as all-encompassing in the interest of clarity, it should be mentioned that there exists a distinction between *uti possidetis juris* and *uti possidetis de facto*. As Marcelo Kohen points out, typically when parties refer to *uti possidetis* they are referring to the *uti possidetis juris*, the terminology of which has its explicit distinction as a legal precept in the arbitration between Guatemala and Honduras (1932), in contrast with the *uti possidetis de facto* which was Brazilian 'interpretation' of the principle. Kohen refers to a former Brazilian Minister of Foreign Affairs who in 1904 stated that Brazil considered the doctrine of *uti possidetis juris* to be applicable to the other Hispanic decolonising states, while *uti possidetis de facto* applied to Brazil. Brazil, however, also did not reject *uti possidetis juris* as such, but as the original treaties which delineated the Latin American frontiers did not involve Brazil, the principle of *uti possidetis juris* did not have direct application (and therefore the *de facto* indication). It should be mentioned that *uti possidetis de facto* has been invoked as indicative of practice in international tribunals, as well. It seems that invocations of this sort typically come when it is difficult or impossible to accurately determine the precise location of former colonial administrative borders, due to inadequate cartography or other developments. For further discussion, see M.G. Kohen, L'uti possidetis *révisité : L'arrêt du 11 septembre 1992 dans l'affaire El Salvador/Honduras*, 4 *Revue Générale de Droit Internationale Public*, at 950-954 (1993) [hereinafter Kohen, L'uti possidetis révisité].

1960s. Thirteen countries[138] achieved their independence only through war. And yet, the legitimacy of the colonial borders was allowed to stand, particularly on the basis of colonial administration following an initial transfer of territory through e.g. territorial cession.

The reasons for this are in large measure due to the sense of urgency associated with the departure of the colonisers. The basis for this is to be found in provisions of the 1514 and 1541 resolutions of the General Assembly. By the time of the adoption of the Friendly Relations Declaration in 1970, the decolonisation process was well on its way. Two important events cemented the '*habillement*' of *uti possidetis* in Africa: the establishment of the Organisation of African Unity (OAU) in 1963, and the juridical confirmation of the principle by the International Court of Justice some twenty years later.

The Cairo Declaration of the OAU was taken at the highest political level by OAU Member-States, which committed themselves "to respect the frontiers existing on their achievement of independence".[139] The Declaration "stated that colonial frontiers existing at the moment of decolonisation constituted a tangible reality, which all member States pledged themselves to respect",[140] but this affirmation should not be seen in absolutist terms.[141] While this reality came much to the chagrin of Pan-Africanists and other dissenters,[142] it seems clear that the pragmatic decision to accept the imposition of *uti possidetis* was a wise one, as several territorial conflicts along ethnic lines were already brewing.

The appellation of *uti possidetis* as a rule of general scope was directed squarely at Africa; in Asia, the principle was similarly accepted, yet largely adapted from the African context. In the end, however, *uti possidetis* was seen as logically valid worldwide.[143] This brings the discussion to the next event of juridical importance, the 1986 *Frontier Dispute* case. The Court, having before it a dispute between Burkina Faso and Mali, concluded in dictum that

> [t]he essence of the principle lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved. Such territorial boundaries may be no more than delimitations between different administrative divisions or colonies all subject to the same sovereign. In that case, the application of the principle of *uti possidetis* resulted in administrative boundaries being transformed into international frontiers in the full sense of the term.[144]

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[138] Morocco, Algeria, Tunisia, Eritrea, Central African Republic, Cameroon, Guinea-Bisseau, Kenya, Burundi, Angola, Namibia, Zimbabwe, and Mozambique

[139] See OAU Resolution 16(1), OAU Doc. AHG/Res.16(1) (1964), as quoted in M. Shaw, Title to Territory in Africa: International Legal Issues 185-187 (1986).

[140] M.N. Shaw, *The Heritage of States: The Principle of* Uti Possidetis Juris *Today*, 67 BYIL 103 (1996) [hereinafter Shaw, Heritage].

[141] Brownlie, for example, believes that the resolution crystallised a generally-accepted view which led to a rule of regional customary international law, the implication being that the principle would be of less juridical weight in Africa than in Latin America. See I. Brownlie, African Boundaries – A Legal and Diplomatic Encyclopaedia 11 (1979).

[142] See Ratner, *supra* note 127, at 595 and Kohen, Possession, *supra* note 132, at 429.

[143] *Cf.* Brownlie, General Course on Public International Law, 225 Rec. des Cours 70 (1995) [hereinafter Brownlie, Hague Academy Course]: "The principle of stability of boundaries was affirmed in the *Temple* case (Merits) and the essence of *uti possidetis* was recognized in the Award of the Tribunal in the Rann of Kutch Arbitration. Moreover, the Chamber in the case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali)* stated that *uti possidetis* is 'a principle of general kind which is logically connected with this form of decolonisation wherever it occurs'."

[144] Frontier Dispute (Burkina Faso *v.* Republic of Mali), 1986 ICJ Rep. 554, 589 [hereinafter Frontier Dispute].

In terms of practical effect, the Court stated that *uti possidetis* "freezes the territorial title; it stops the clock but does not put back the hands".[145] In terms of legal significance, the Court's decision greatly served to increase the *opinio juris* in favour of *uti possidetis* being employed as a customary norm; indeed, the Court itself pronounced that *uti possidetis* is a "general principle" as applies to decolonisation.[146] The Court also found that the Cairo Declaration "deliberately defined and stressed the principle of *uti possidetis juris* [so the principle] must be seen not as a mere practice contributing to the gradual emergence of a principle of customary international law, limited in its impact to the African continent as it had previously been to Spanish America, but as the application in Africa of a rule of general scope".[147] The Court found this to be declaratory of existing principle rather than constitutive. Furthermore, although the parties to the case did not agree to the inclusion of the principle of *ex aequo et bono* ('according to what is equitable and good'), the Court was, at times, forced to develop interpretative methods based on evidence of colonial activity as may correspond to the law in force. In practice, this implied the possibility of equitably dividing claims for territory between contesting parties in the event that insufficient territorial claim to title and subsequent manifestation of colonial *effectivités* were not both in evidence. The Court reasoned that this principle of equity *infra legem* would be a sufficient solution to a circumstance whereby colonial *effectivités* were manifested without clear claim to territorial title.[148]

Further juridical insight into the *uti possidetis* principle is to be found in the 1992 El Salvador/Honduras case before the ICJ, which builds upon its previous pronouncements in applying *uti possidetis juris* not only to situations of land boundaries, but also to the islands and waters of the Gulf of Fonseca.[149] In terms of juridical significance, the Court first declared that its definition of *uti possidetis* from the Burkina Faso/Mali case constituted an authoritative statement and indicated that "*uti possidetis juris* is essentially a retrospective principle, investing as international boundaries administrative limits intended originally for quite other purposes".[150] The Court also asserted that "there can be no doubt about the importance of the *uti possidetis juris* principle as one which has, in general, resulted in certain and stable frontiers throughout most of Central and South America".[151] Such an acknowledgement may be seen as a strong endorsement of the usefulness of the principle, particularly considering the Court's willingness to employ it in situations beyond land boundaries. However, it must simultaneously be recognised that *uti possidetis* found its place in law only as a response to situations of colonial activity.[152] As such, as the Court held, in dictum, that "a key aspect of the principle [of *uti possidetis juris*] is the denial of the possibility of *terra nullius*",[153] it demonstrated clearly how the principle is grounded in the necessity of evidence of demonstrable governmental activities, where original title to territory has been in some way obtained.

In addition, it must also be observed how the exercise of postcolonial effective control by a state can be indicative of legitimate claims for territorial administration and sovereignty, as de-

[145] *Id.* at 568.
[146] *Id.* at 565.
[147] *Id.* at 565-566.
[148] *Id.* at 567-68.
[149] Land, Island and Maritime Frontier Dispute (El Salvador *v.* Honduras: Nicaragua intervening) case, 1992 ICJ Rep. 386 [hereinafter El Salvador/Honduras].
[150] *Id.* at 388.
[151] *Id.* at 386.
[152] *Cf. Id.* at 558-559: "It should be recalled that when the principle of the *uti possidetis juris* is involved, the *jus* referred to is not international law but the constitutional or administrative law of the pre-independence sovereign, in this case Spanish colonial law […]."
[153] *Id.* at 387.

cided by the Court. For example, as the Court was asked to delimit a disputed boundary that was inconsequentially referenced in the 1980 General Treaty of Peace between El Salvador and Honduras,[154] it relied heavily upon postcolonial *effectivités* in circumstances whereby internal administrative frontiers were either undefined or unintelligible, and territorial title, while influenced by *uti possidetis*, was also most readily validated, in circumstances whereby clear manifestations of territorial sovereignty, despite such definitional ambiguities, was indeed a sufficient form of legal reasoning for the Court to award disputed territory to a claimant state.[155] This is significant for the broader purposes of this study, because it signifies on a conceptual level how the manifestation of *effectivités* is of fundamental juridical importance as a means to allocating disputed territory between claimant states. From a perspective of transference, it may be observed how there exists a certain juridical value in the manifestation of *effectivités* in a territory *per se* without specific regard to original title to territory, particularly when, as observed in the Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia *v*. Malaysia) case, such *effectivités* are of a particularly "legislative or regulatory character".[156] This may also be the case when particular claims for autonomy or secession are being made, by collective groupings, on the basis of factual circumstances—a notion which will be further developed in the course of this study.

More recently, in one of the most complicated cases to pass before the ICJ,[157] the Court allocated sovereignty to the Bakasi Peninsula and a territorial region bordering Lake Chad to Cameroon from Nigeria, as it fixed certain boundaries on the basis of colonial treaties of cession. The Court readily upheld the legal validity of such treaties, including the 1929-1930 Thomson-Marchand Declaration (to which the UK and France had actively agreed),[158] particularly as colonial *effectivités* were readily manifested at this time.[159] Additionally, in the Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua *v*. Honduras) judgement,[160] in delimiting a maritime boundary, the Court found unanimously that Honduras held sovereignty over four disputed islands. In doing so, the Court clearly reaffirmed that evidence of original title was required for the invocation of *uti possidetis*;[161] however, even in circumstances where evidence of original title can be shown,[162] colonial *effectivités* must also be clearly manifested in order to fully demonstrate sovereignty.[163] As a result of the inability for the

[154] See *Id.* at 357.
[155] See *Id.* at 565.
[156] See Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia *v*. Malaysia), 2002 ICJ Rep. 625, 683.
[157] See Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon *v*. Nigeria, Equatorial Guinea Intervening), 2002 ICJ Rep. 303 [hereinafter Cameroon/Nigeria].
[158] See *Id.* at para. 34 *et seq.*
[159] See also discussion *infra* chapter five, at part C.
[160] See Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua *v*. Honduras) [hereinafter Nicaragua/Honduras], available from http://www.icj-cij.org/docket/files/120/14075.pdf, accessed 8 October 2007.
[161] *Cf. Id.* at para 158: "The Court observes that the mere invocation of the principle of *uti possidetis juris* does not of itself provide a clear answer to sovereignty over the disputed islands. […] The Court recalls that *uti possidetis juris* presupposes the existence of a delimitation of territory between the colonial provinces concerned having been effected by the central colonial authorities. Thus in order to apply the principle of *uti possidetis juris* to the islands in dispute it must be shown that the Spanish Crown had allocated them to one or the other of its colonial provinces."
[162] In this context, see Gámez-Bonilla Treaty of 7 October 1894, affirmed by Award of the King of Spain of 1906. See also Arbitral Award of the King of Spain (Nicaragua *v*. Honduras), 1960 ICJ Rep. 205.
[163] *Cf.* Nicaragua/Honduras, *supra* note 160, at para 165: "[The] test of 'colonial *effectivités*' has been defined as 'the conduct of the administrative authorities as proof of the effective exercise of territorial jurisdiction in the region during the colonial period'," referring to Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, 1986 ICJ Rep. 586, para. 63, and Frontier Dispute (Benin/Niger), Judgment, 2005 ICJ Rep. 120, para. 47.

Court to render judgement in this case on the basis of *uti possidetis juris* without subsequent territorial *effectivités* evidenced by colonial administration,[164] the Court looked for evidence of post-colonial *effectivités* in the disputed territories to decide the case. This approach may be seen as differing from that employed in deciding the Nigeria/Cameroon case a few years earlier, whereby the Court, citing the Fisheries Case (UK *v.* Norway),[165] accepted that the notion of 'historical consolidation' was of conceptual acceptance.[166] 'Historical consolidation', as a particular notion, essentially comprises the amalgam of demonstrated *effectivités* not particularly attributed to a colonial (*i.e.,* 'civilised') or postcolonial entity. However, in this case, the Court rejected its application due to the controversiality of the precept,[167] and, indeed, the case itself is more readily known for its tendency to uphold original title as a primary means of determining disputed sovereignty. Although the concept of 'historical consolidation' will be further considered in detail at the conclusion of this study,[168] the Cameroon/Nigeria case was illuminating, in that demonstrative territorial transfer from colonised to colonising entities was readily established as the principal means of determining statehood in the postcolonial state. In particular, as was noted:

> Nothing in the Court's case law suggests that historical consolidation allows land occupation to set aside an established conventional territorial title. Regarding the legal relationship between *effectivités* and titles, the Court recalled its earlier findings that preference should be given to the holder of the title over another state administering a disputed territory. Although policing, the administration of justice, and the organization of health and education facilities could typically be considered as *actes à titre de souverain*, or manifestations of sovereignty, the pertinent legal test was whether Cameroon had acquiesced in the passing of its preexisting title from itself to Nigeria. In the Court's view, the evidence showed that Cameroon had not so acquiesced: in addition to its modest administrative activity (including tax collection) and exercise of control, Cameroon had firmly protested Nigeria's diplomatic note of April 14,1994, in which Nigeria first claimed sovereignty over Darak.[169]

Self-determination and uti possidetis*: Conflict at the junction of 'freedom' and 'stability'?*

Uti possidetis certainly has had its place confirmed in law. But the question remains as to how it interacts with self-determination, which the Court, itself, noted could be *a priori* in conflict with *uti possidetis*.[170] Self-determination had evolved to be a 'right of peoples' while *uti possidetis* has constituted a general principle invoked to preserve the balancing norm identified by Shaw. The Court, in the *Frontier Dispute* case, took a pragmatic approach in comparing the two legal principles, in that the virtue of *uti possidetis*, as a balancing norm, allowed it to prevail over self-determination in the event of conflict between the two principles. The Court stated that "this

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[164] *Cf. Id.* at para 167: "[…] the Court concludes that the principle of *uti possidetis* affords inadequate assistance in determining sovereignty over these islands because nothing clearly indicates whether the islands were attributed to the colonial provinces of Nicaragua or of Honduras prior to or upon independence. Neither can such attribution be discerned in the King of Spain's Arbitral Award of 1906. Equally, the Court has been presented with no evidence as to colonial *effectivités* in respect of these islands. Thus it has not been established that either Honduras or Nicaragua had title to these islands by virtue of *uti possidetis*."

[165] See 1951 ICJ Rep. 116.

[166] *Cf. Id.* at 130. *Cf. Id.* at 137, whereby the Court acknowledged particular maritime delimitations which were broadly uncontroversial. To this end, it specified the existence of "a well-defined and uniform system […] which would reap the benefit of general toleration, the basis of an historical consolidation which would make it enforceable as against all States".

[167] See Cameroon/Nigeria, *supra* note 157, at para. 65.

[168] See *Id.* at § 7.3. See also discussion *infra* chapter five, at part C.

[169] P.H.F. Bekker, International Decisions: Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon *v.* Nigeria: Equatorial Guinea Intervening), 97 AJIL 389 (2003).

[170] Frontier Dispute, *supra* note 144, at 554.

essential requirement of stability in order to survive, to develop and gradually to consolidate their independence in all fields [led Africa] judiciously to consent to the respecting of colonial borders, and to take account of it in the interpretation of the principle of self-determination of peoples".[171] The final practical result was that the 'incorrect' territorial boundaries that were to be found in Africa were *ex post facto* seen as valid, and allowed to possess the authority of legitimacy in conformity with international law.[172]

What remains, however, is the reality that *uti possidetis* concerns itself primarily with the drawing of lines. The practical effects are huge, and have direct effect on the ongoing territorial integrity of the new state. "A simple line determines which state, subject to international law, can prescribe and apply laws and policies relating to the full range of attributes of persons and property, whether citizenship, taxation or educational opportunities", as Ratner writes. Jurisdictional separation, immigration standards, customs duties, export and import quotas and controls on circulation of people, goods and intangibles are other considerations.[173] Bearing this in mind, as well as the ICJ's perspective in the Burkina Faso/Mali case, that *uti possidetis* concerns itself primarily with securing respect for borders *at the moment of independence*, in considering the connection between *uti possidetis* and other rules concerning territorial integrity, one must consider, as Kohen proposes, "the critical date"[174] in which the internal administrative frontiers will be held as fixed, in order to evolve into international frontiers. Ratner comments: "If, as the World Court said in the *Frontier Dispute* case, *uti possidetis* turns on a 'photograph of the territorial situation,' then those analyzing the image and 'plugging it into' the *uti possidetis* equation must know two core things—what the photograph shows and when it was taken".[175]

Kohen's perspective on the 'critical date', as it applies to the two ICJ cases raised in this discussion is worth examination. He writes:

> *Pour l'arrêt de 1986* [Burkina Faso/Mali]*, "*l'uti possidetis *gèle le titre territorial", il consiste à établir le "legs colonial, c'est-à-dire de 'l'instante territorial' à la date critique". En 1992* [El Salvador/Honduras]*, la Chambre parle de la date critique, se réfère partout à 1821 comme l'année pour la determination de* l'uti possidetis juris *et argumente également sur la possibilité de plusieurs dates critiques dans un seul et même différend.*[176]

[171] *Id.* at 567.
[172] *Cf.* Shaw, Peoples, *supra* note 129, at 495: "It is important to recognize *uti possidetis* for what it is, and not to overemphasize it. It is a transitional mechanism and process which concerns the transmission of sovereignty from a previous sovereign authority to the new state. It is, therefore, part of the larger principle relating to the stability of territorial relationships. It provides the territorial delineation for the process of establishment of a new state by positing, absent special factors, the continuation of the pre-existing line, whatever provenance that line previously claimed. It is limited both temporally and conceptually to this situation. Once the new state is established, the principle of *uti possidetis* will give way to the principle of territorial integrity, which provides for the international protection of the new state so created. While it 'freezes' the territorial situation during the movement to independence, *uti possidetis* does not prescribe a territorial boundary which can never be changed. It is not intangible in this sense."
[173] Ratner, *supra* note 127, at 602.
[174] Kohen, L'uti possidetis révisité, *supra* note 137, at 961.
[175] Ratner, *supra* note 127, at 607.
[176] Kohen, L'uti possidetis révisité, *supra* note 137, at 961. Author's translation: "For the judgment in 1986 [between Burkina Faso and Mali], '*uti posstidetis* sets the territorial title' consisting of the establishment of the 'colonial legacy, that is, the exact moment of the "critical date".' In 1992, the Chamber spoke of the critical date, referring broadly to 1821 as the year for the determination of the *uti possidetis juris* and also argues for the possibility of several critical dates under similar circumstances."

This perspective is important to bear in mind, as the future state will be 'built' from this moment.[177] Further, GA resolution 1514 (XV), at paragraph 6, prohibits the unilateral secession of a component part of a territorial entity, through its insistence of the overall territorial integrity of the colonial unit. Here a great truth of *uti possidetis* is revealed, particularly as the classical doctrine of *uti possidetis juris* is considered primarily in a context of decolonisation: as self-determination is "generally defined in terms of territorial criteria",[178] *and this territorial criteria is presumed to be a territorially whole unit to be accepted in aggregate*, it can be said that *uti possidetis* is a legal precept which guides the preservation of the territorial integrity of an 'self-determining' entity through the entire process.[179] That is to say that the colonial entity sees its sovereignty shift from being held by the overseas power, to being held by the new state. *Uti possidetis* further provides guidance, with particular effect, from the point of determination of the 'critical date' from which the 'photograph of the territorial situation' is taken (*i.e.,* the final determination of what the boundaries of the new sovereign entity will be over which it will preserve its sovereignty and territorial integrity). This is to imply, furthermore, that *uti possidetis* and territorial integrity are mutually reinforcing. Therefore, *uti possidetis* unleashes its juridical power at the time of independence, in defining boundaries and reaffirming that the territorial integrity of the self-determining entity.

The effectiveness of the determination of the *uti possidetis* line thus revolves around the critical date determination—if this can be effectively determined at all, that is.[180] One is thus minded to recall Shaw's earlier suggestion to avoid overemphasis of *uti possidetis*, thus implying that consent, international recognition, acquiescence, decisions by international courts or the interests of peace and security can subsequently modify the *uti possidetis* line.[181]

Cassese's assessment of *uti possidetis* covers the most salient parts of this discussion. He writes:

> It is plain that [*uti possidetis*], in that it is designed to "freeze the territorial title" and to "stop the clock" at the time of a colonial country becoming independent or at the same time of the secession of a region from a unitary State (or a member State from a federated State), is in sharp contrast with that of self-determination. This is because the population living on or around the borders of the newly independent State may wish to choose a different sovereign or even opt for independent status or some sort of autonomy. We are here confronted with an area in which historical and political considerations were regarded by States as of such paramount importance as to make it necessary to set aside the right of peoples to self-

[177] This concept seems rather generally accepted in international law. *Viz.* the transition process from national European currencies to the Euro as part of the European Monetary Union process—at the 'critical date' of a country joining Euroland, its national currency is permanently 'fixed' at a rate of exchange vis-à-vis the Euro in preparation for its eventual incorporation into the supranational currency.
[178] Musgrave, *supra* note 36, at 181.
[179] Given that the lines between *uti possidetis juris* and *uti possidetis de facto* have become blurred and that the overall notion of *uti possidetis* has been so repeatedly confirmed in international law, *uti possidetis* would be generally recognised and assumed as the proper *prima facie* assumption for determination of new borders.
[180] *Cf.* Shaw, Heritage, *supra* note 140, at 130: "The critical date as a legal concept posits that there is a certain moment at which the rights of the parties crystallize, so that acts after that date cannot alter the legal position. It is a moment which is more decisive than any other for the purpose off the formulation of the rights of the parties in question. In some cases, there is self-evidently a "critical date" in this sense […] in many cases [however] there will be no such self-evident "critical date", and one should be wary of searching for one in all cases and in all situations."
[181] See *Id.* at 141-150.

> determination. In this area, the principle of self-determination, instead of influencing the content of international legal rules, has been "trumped" by other, overriding requirements.[182]

Cassese goes further to state that self-determination also enters into the equation in the event of post-colonial or secessionist modification of borders by legal means, such that the local populations should have recourse to plebiscite or referendum to determine the free will of those affected.[183] Particularly after the East Timor independence process (and, separately, those in Bosnia and Kosovo), it seems difficult to imagine how any future such actions would be legitimised without a referendum, or other sort of grass-roots polling instrument to demonstrate effective will on the part of a nascent self-governing political community.[184]

Uti possidetis and self-determination, in their most extreme forms, can be seen as opposite poles along a sliding scale of the state-creation paradigm. This is not, however, to say that *uti possidetis* is a completely separate notion from self-determination, as it seems perfectly clear to imagine natural overlaps between the two principles (that is to say that the *uti possidetis* 'photograph' may conceivably correspond perfectly to the self-determination desires of the peoples on the ground). Conflict between the principles, then, can be seen to exist when there is no such common ground; that is to say, when the 'powers that be' in the international community (which will largely determine the specifics of *uti possidetis* to be employed in the new state creation) determine the territorial boundaries, without due regard for the genuine wishes for the majority of the population affected, or, indeed, when the resulting new state entity would be effectively precluded from exercising its own territorial integrity due to the nature of the composition of the state.[185] Clearly, then, the line between law and politics becomes greatly blurred, as the political interests of states may subjugate a pure legal perspective.[186]

Interpreting the role played by *uti possidetis* in maintaining territorial integrity and avoiding *terra nullius*

Territory is the most tangible aspect of statehood; it is what one sovereign state possesses to the exclusion of another sovereign state. It is also one of the fundamental criteria for deter-

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[182] Cassese, *supra* note 3, at 192-193.
[183] *Id.* at 193.
[184] This is particularly significant in view of the growing importance of the democratic governance concept in international affairs generally. *Cf.* B. Roth, Governmental Illegitimacy in International Law 250 (1999): "For a political community to be self-governing, it must, at minimum, be governed in the name of the whole."
[185] Here the discussion returns to the definition of a state from the Montevideo Convention. Therein lies the requirement for the "defined territory" and "permanent population" to be *under the control of its own government.* Yet some states—termed 'failed states' by scholars and practitioners—continue to exist (either *de facto* or *de jure*) in spite of their 'failed' status. These are states for which their government does not exercise effective control (e.g. the eastern part of the Democratic Republic of Congo, or perhaps, as is the case of Somalia, there is no government at all). See e.g. G.P.H. Kreijen, *Somalia and Withdrawal of Recognition,* in Kreijen (ed.), State, Sovereignty and International Governance 45 (2002). The operative point that remains is that, in new state creation, the insistence of the employment of the *uti possidetis* standard, in situations which would tend to preclude the effective control of the territory of the state by the government, and therefore preclude the territorial integrity of the state, would be an impediment to the oft-mentioned presumption in favour of the continuity of the state.
[186] Certainly, however, diplomatic practitioners and international lawyers will have differing opinions (even if they are not expressed *per se*) as to the desirability of using political processes versus juridical doctrine, in taking decisions of recognition of new states.

mining statehood, and the sovereignty associated with the state, in international law.[187] Further, it has been indicated that the 'question of statehood' arises particularly in the following situations:

> (a) Break-up of an existing state into a number of states; (b) secession or attempted secession by part of a territory of an existing state; (c) cases in which foreign control is exercised over the affairs of a state, whether by treaty, unilateral imposition or delegation of authority; (d) cases in which states have merged or formed a union; (e) claims by constituent units of a union or federation to the attributes of statehood; (f) territorial or non-territorial communities which have a special international status by virtue of treaty or customary law and which claim statehood for certain purposes.[188]

Therefore, it can be observed that the limit of the sovereignty of a state corresponds to the sovereignty the state possesses over its territory, and so it follows that the territorial integrity of the state is the chief guarantor of the sovereignty of a state. Given that the chief function of states is to guarantee their own preservation, it seems clear that territories should be explicitly composed and particularly defined, so as to raise and determine "issues ranging from the nationality of inhabitants to the application of particular legal norms. [Territorial delineation] is the essential framework within which the vital interests of expressed and with regard to which they interact and collide".[189] Yet territories are formed in cubic units, while boundaries are merely linear entities. As Marcelo Kohen writes, "*Une frontière n'est que la fin d'un territoire soumis à une souveraineté et le commencement d'un autre soumis à une autre souveraineté*".[190]

Still, despite disputes by states over territories and their boundaries, the overall reality is that both 'states' (as a concept of societal organisation) and their 'borders'[191] (the boundaries within which the territories of states are to be found), have been accepted as reality, particularly in a contemporary context. As Hill comments,

> The need for defined borders really only arose as States developed in the post-Westphalian world and populations expanded into border areas and cross-boundary communication thereby increased significantly. Exact boundaries, however, could only really develop when map-making and geographic techniques were sufficiently advanced to facilitate such delimitation and demarcation.[192]

It may therefore be generally presumed that *uti possidetis*-defined borders have provided a contextual framework, albeit one with definitional imprecision, for the emergence of new territories as sovereign states. Shaw demonstrates that a certain measure of overall territorial stability has emerged through the development of this system. He asserts that "once created in accordance with international law, a boundary is protected and assumes finality and permanence. What is established on the bases of the consent of the States concerned can only be un-

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[187] *Cf.* Int'l law, *supra* note 52, at 309: "There is obviously no question as to which states have acquired sovereignty over the great bulk of the earth's habitable territory, and some of the issues presented in connection with acquisition of sovereignty of territory are of more historical than contemporary significance. Nonetheless scores of controversies as to sovereignty over territory remain, including issues as to what state should be regarded as exercising sovereignty over certain islands, land areas subject to boundary disputes, and polar regions."
[188] *Id.* at 243.
[189] Shaw, Heritage, *supra* note 140, at 75.
[190] Kohen, Possession, *supra* note 132, at 427. Author's translation: "A border is only the end of a territory subjected to a sovereignty and the beginning of another subjected to another sovereignty."
[191] In the context of this discussion, the terms 'boundary', 'border' and 'frontier' can be assumed to have the same generalised meaning.
[192] H. Hill, Claims to Territory in International Law and Relations 23 (1945).

done or modified by the exercise of such consent".[193] Borders constructed in this manner will, according to Shaw, incorporate the principles of: (a) consent of the affected parties to create binding obligations on the parties; (b) the 'objectivisation' of boundary treaties creating objective realities over time which will survive the demise of the treaties themselves; (c) the presumptive interpretation of boundary treaties in favour of the principle of stability; (d) the equation of equity with stability; and (e) the principle of stability as a balancing norm.[194] It is this last point to which attention is drawn in the course of this discussion.

The role of terra nullius *in modern international law*

Broadly speaking, given the colonisation and decolonisation of the planet, the question of *terra nullius* is largely moot, although it may be presumed that international law generally would discourage any situation that could conceivably lead to the existence of *terrae nullius*, given the dominance of the state in formulating legal personality and the presumption that all territories, except the *sui generis* continent of Antarctica, are to be attributed to a sovereignty. However, the question of *terra nullius* remains of potential interest in a more specialised legal context, such as when considering the situation in Australia, for example. A particular set of historical and geopolitical circumstances, not the least of which is the fact that it is simultaneously a state and a continent, coexist with a rise in importance of law of particular concern to aboriginal peoples.

Terra nullius, itself, is not in any sense conceptually suspended above the realm of challenging or shifting circumstances. This can be briefly observed from the Mabo Decision of the Australian High Court,[195] which inserted the legal doctrine of native title into Australian law. The 1992 judgement invalidated British colonial claims that Australian territory was *terra nullius* and recognised a specific form of native title. The Court, in its judgement, recognised both the traditional rights of the Meriam people in the eastern Torres Straight, and held that a native title existed for inhabitants of Australia prior to the establishment of New South Wales in 1788. It furthermore held that native title continues to exist in any territory that has not seen a legal rejection of such title.

Thus while the avoidance of circumstances of *terra nullius* have seemed to be favoured, for the purported stability it affords to the territorial situation, the fundamental reformulation of the underlying basis of Australian land law which resulted from the Mabo decision is certainly not without controversy, and indeed the consequent practical jurisprudence continues to build. More recently, in 2006, the Federal Court ruled in favour of the existence of native title by the Noongar in Western Australia, particularly in and around the wider Perth metropolitan area and the City of Perth, including settled communities on the banks of the Swan River.[196] Although Justice Wilcox found the existence of a single community, on the basis of laws and customs shared amongst the populations of the area, and evidence of disruption to the community as a result of settlement by populations of European extraction, the case is not largely seen as establishing *terrae nullius* in Western Australia. As of late 2007, the case remains on appeal.

As has been previously mentioned, the notion of stability as a balancing norm is a fundamental predicate of the incorporation of the *uti possidetis* principle in the decolonisation exer-

[193] Shaw, Heritage, *supra* note 140, at 82.
[194] See *Id.* at 84-97.
[195] See Mabo & Others *v.* State of Queensland (No 2), 175 CLR (1992). And see also Native Title Act 1993 (Cth), s 24AA, s 24MD, in which the Australian Parliament sought to clarify determinations of native title on Australian territory following the Mabo decision.
[196] See Bennell *v.* State of Western Australia, (2006) FCA 1243.

cise. As Shaw writes, balancing norms "may be regarded as a hierarchically superior proposition. This has become particularly apparent with regard to the possibilities of conflict between the norms of self-determination and territorial integrity (as expressing and protecting the boundary established in accordance with the principle of *uti possidetis juris*)".[197] This perspective will be important to bear in mind, as the balancing function of *uti possidetis* has been employed primarily with a view to preventing land grabs or other conflicts in the decolonisation process. In legal terms, *uti possidetis* was employed to recognise the frontiers of sovereign states. As such recognitions increased with each decolonising state, *uti possidetis* also came to serve a secondary purpose, namely to prevent situations of *terra nullius*.

Terra nullius, as opposed to the *res communis* (e.g. the high seas or outer space), is land which is not territorially sovereign *per se* but could conceivably be subjected to a unique sovereignty. From the outset of the colonial period in the 1800s, it has only been European states which were considered to be 'states' as such. From this perspective, the non-European 'state'—that is to say, the colony—was lacking in sovereignty and therefore lacked independent legal personality. From that, to recall the framework established by Antony Anghie, the international law of this period, 'defined, identified and categorised the uncivilised'.[198] Jurists of the time have used positivism to create a cultural gap between civilised and uncivilised European and non-European worlds—a gap which they then tried to bridge by 'civilising the uncivilised'.

The *Western Sahara* advisory opinion by the ICJ was the result of a 1974 request from the General Assembly to determine if Western Sahara was *terra nullius* at the time of colonisation by Spain, and if so, what legal ties existed between the territory, Morocco and Mauritania. Broadly speaking, the Court disaffirmed the widespread view at the time that non-European entities were generally *terra nullius*. The Court's reasoning revolved around a particular logic:

> [T]he expression '*terra nullius*' was a legal term of art employed with 'occupation' as one of the accepted legal methods of acquiring sovereignty over territory. 'Occupation' being legally an original means of peaceably acquiring sovereignty over territory otherwise than cession or succession, it was a cardinal condition of valid 'occupation' that the territory should be *terra nullius*—a territory belonging to no-one—at the time of the act to constitute the 'occupation' […] In the view of the Court, therefore, a determination that Western Sahara was a *terra nullius* at the time of decolonisation by Spain would be possible only if it were established that at the time the territory belonged to no-one in the sense that it was open to acquisition through the legal process of 'occupation' […] the state practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organisation were not regarded as *terra nullius*.[199]

The *Western Sahara* advisory opinion, among its many pronouncements, does serve to demonstrate that there is no *terra nullius* in the modern world.[200] Therefore, occupation of *terra nullius*, while an outdated notion in contemporary international law, was historically considered as one of the means by which territory and title to territory may be acquired,[201] particularly in the initial decolonisation period. The doctrine of *uti possidetis juris* is thus a fundamental correlative to the concept of *terra nullius*.

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[197] *Id.* at 93.

[198] See discussion *supra* chapter one, at text accompanying note 116.

[199] Western Sahara Case, *supra* note 106, at paras. 79-80. The Court went on to determine that Spain did not colonise the territory on the basis of *terra nullius*, but on the basis of agreements that had been entered into with the chiefs of local tribes.

[200] *Cf.* Ratner, *supra* note 127, at 615: "*Terra nullius* […] has no place in contemporary international law. In the most literal sense, it is anachronistic because nearly the entire global landmass is already under the accepted sovereignty of one state or another […]. Except for some oceanic rocks, a few disputed territories and Antarctica, today no land lies outside the territorial sovereignty of some state."

[201] The other means being prescription, conquest, accretion and cession.

The Badinter Commission, the referendum question and the continued relevance of a post-decolonisation uti possidetis juris

In 1991, the Arbitration Commission of the European Community's Conference for Peace in Yugoslavia (hereinafter the 'Badinter Commission', named after Robert Badinter, the Commission's chairman) was established pursuant to the EC Declaration of 27 August 1991 and EC Ministerial Joint Statement of 3 September 1991 to promote peace between the various Yugoslav peoples.[202] The Commission's decisions, which were not binding in nature, aimed "to resolve discrete issues through the application of legal principles".[203] Considering the implications of the first few opinions will serve to demonstrate the post-colonial nexus amongst self-determination, sovereignty, territorial integrity and *uti possidetis*. In the first opinion, the Commission (at paragraph 3) concluded that the Socialist Federative Republic of Yugoslavia "was in the process of dissolution",[204] and subsequently established a Declaration on the Guidelines of New States in Eastern Europe and in the Soviet Union,[205] which established respect for the "rule of law, democracy and human rights" as prerequisites for recognition (thereby instilling the basic requirement of internal self-determination as a requirement for recognition). While in its second opinion the Commission stated that self-determination cannot alter existing frontiers unless all parties agree, and, in its third opinion, the Commission stated that former boundaries become frontiers in international law, due to the acceptance of *uti possidetis* as a rule of general scope in the *Frontier Dispute* case,[206] while *uti possidetis* considerations seem to be largely abstract principles, what is most striking is the level of consultation with the population on the ground resulting from the Commission's fourth principle.[207] In assessing the situation in Bosnia-Herzegovina, the Commission concluded, at paragraph 4, that "the will of the peoples of Bosnia-Hercegovina to constitute the [Republic] as a sovereign and independent state cannot be held to have been fully established". Nevertheless, the Commission went further to state that this conclusion "could be reviewed if appropriate guarantees were provided by the Republic applying for recognition, possibly by means of a referendum of all citizens of the [Republic] without distinction, carried out under international supervision".[208] This is important, because, as Marc Weller writes, the Commission's opinion "can be understood as reflecting an additional criterion for recognition of statehood in cases of secession, based on the principle of self-

[202] For discussion, see e.g. P. Radan, The Break-up of Yugoslavia and International Law (2002) [hereinafter Radan], *Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia*, 31 ILM 1488 (1992); M.C.R. Craven, *The European Community Arbitration Commission on Yugoslavia*, 1995 BYIL 333 and A. Pellet, *The Opinions of the Badinter Arbitration Commission: A Second Breath for the Self-Determination of Peoples*, 3 EJIL 178 (1995).
[203] D.F. Orentlicher, *Separation Anxiety: International Responses to Ethno-Separatist Claims*, 23 Yale J. Int'l L. 1 (1998) [hereinafter Separation Anxiety].
[204] *Cf.* Vienna Convention on the Succession of States in Respect of Treaties (1978) which provides that treaties establishing boundaries are an exception to the general rule that successor states start with a clean slate in respect of treaties entered into by their predecessors.
[205] See 31 ILM 1486 (1992).
[206] See M. Pomerance, *The Badinter Commission: The Use and Misuse of the International Court of Justice's Jurisprudence,* 20 Mich. J. Int'l L. 31 (1998) [hereinafter Pomerance] at 51 *et seq.* for a sharp critique of the Commission, namely that it "extended the principle in ways that are neither legally warranted nor necessarily politically desirable".
[207] See *Opinion No. 4 on International Recognition of the Socialist Republic of Bosnia and Herzegovina by the European Community and its Member-States, 11 January 1992*, 31 ILM 1501 (1992).
[208] For detail greater than that which can be presented here, see discussion in Radan, *supra* note 202, at 183-190.

determination and on considerations of general international law, including human rights law".[209]

This revelation does seem to fly directly in the face of Brownlie's assertion[210] that a referendum would not be a requirement in new state creation. Nevertheless, this referendum requirement can be seen in the spirit of Franck's 'democratic entitlement' and lends credibility to perspectives which grant greater weight to self-determination claims in post-colonial situations. And yet, the *uti possidetis* side of the equation still remains valid. Shaw, for example, interprets the Badinter Commission's pronouncements on *uti possidetis* to be valid (and it must be mentioned that his opinion is but one in a spectrum of divergent perspectives). He writes, in referring to the Commission's handling of the Frontier Dispute case as follows:

> [T]he Chamber was seeking to underline that behind the application of *uti possidetis* to all decolonization situations lay a more general principle which relates to all independence processes. This is perhaps reinforced by looking at paragraph 20 of the judgement, where the Chamber emphasizes that the principle of *uti possidetis* "is a general principle […]". It is therefore felt that the Yugoslav Arbitration Commission, in so relying upon the *Burkina Faso/Mali* decision was not acting in error. It is not unreasonable to argue that the Commission, faced with the implosion of Yugoslavia and the need to apply appropriate legal principles, relied upon a legitimate interpretation of the Chamber's statement to conclude that *uti possidetis* was an abstract principle applicable to all independence situations. It is, indeed, quite a normal judicial process to move step by step from examining a set of facts, to inferring from them a legal principle expressed in generalizable form, to applying that principle to a set of facts deemed analogous to, but not identical with, the original scenario.[211]

This assessment, however, can be contrasted with that of Steven Ratner, who takes a different view—one which is wholly credible, based on the fact that the original *'habillement'* of *uti possidetis* was deemed desirable to govern a swift transition from colony to nascent independent state, with as little disruption to the international system as possible. In that context, the 'people' was the (theoretically, at least) unified political construction within the colonial territorial unit wishing for self-governance as a whole. In the Yugoslav situation, however, the 'peoples' were much harder to define, as they were much more deeply based on ethnicity and religion—traditional nation-state characteristics—yet they, for the most part (Slovenia being the clearest exception), were dispersed over areas inconsistent with the 'lines' derived from the employment of *uti possidetis* (the Krajina and Republika Srpska being the clearest examples). This is then, indeed, a more pragmatic logical approach than that of Shaw in the sense that it upholds the underlying essence of the principle's original *raison d'être* more than the emphasis on procedural matters seemingly espoused by Shaw. Ratner writes:

> The Commission, however, erred in its comprehension of the nature and purpose of *uti possidetis*. *Uti possidetis* is not simply an abstract legal formula to be pulled out and applied automatically every time an entity seeks statehood. Rather, whatever normative force *uti possidetis* has enjoyed depended on two core considerations: the universally agreed policy goal it was serving—orderly decolonization—and the lack of any competing norms of internal self-determination. With decolonization now historically complete (more or less) and the law

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[209] M. Weller, *The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia,* 86 AJIL 569, 593 (1992). Antonio Cassese lends support to such a view. *Cf.* Cassese, *supra* note 3, at 272: "It is apparent from the above that the Arbitration Commission regarded the holding of an internationally monitored referendum involving *the whole population* as an indispensable element for the granting of international recognition of Bosnia-Herzegovina as an independent State. The Committee thus elevated the referendum to the status of a basic requirement for the *legitimation of secession.*"

[210] *Cf.* Brownlie, Hague Academy Course, *supra* note 143, at 72, stating that "few writers express the opinion that a condition of the validity of a transfer of territory is the provision of opportunity for the expression of opinion concerning the transfer by the inhabitants".

[211] Shaw, Peoples, *supra* note 129, at 498-499.

> now cognizant of notions of internal self-determination and political participation, the foundations for *uti possidetis* are weak and the validity of the principle for noncolonial breakups suspect.[212]

As regards the Badinter Commission itself, then, some perspectives established in international law seem very broadly reinforced: that there be no changes to existing frontiers without consent; that the right of recognition of identities is along ethnic, religious or linguistic communities; that there exists a right of individuals to choose communities, and that the rights of minorities shall be preserved under all circumstances. And yet, it appears that great discrepancies exist in interpretation of the principles in light of each other, due to the variable nature of the concepts, and the challenges of expressing political pragmatism in juridical dogma, often leading to the inevitable questions of interpretation.

That said, the main point regarding *uti possidetis* emerges: in its practical application, the employment of *uti possidetis juris* will, by definition, be a counterweight to the consent principle, as to use Brad Roth's terminology,[213] consent is something derived through democratic practice by a 'self-governing political community'—that is, a community being 'governed in the name of the whole'. If *uti possidetis*, as a static precept, coincides with such a principle of consent at all, it does so only by mere coincidence. The realities of the Berlin Conference strongly cast doubt on the existence of such a coincidence in the African situation, for example. From here, the roots of the incongruity between state and society on the African continent are exposed. While decolonisation likely benefited from the ambivalence of *uti possidetis* towards national groups, minorities, peoples, ethnicities, races, religions, linguistic groups and all other assorted subdivisions of the human race, the inevitable post decolonisation reality, that such subdivisions actually are in existence and now separated into sovereign states demarcated by the *uti possidetis*—i.e., colonial—line, was difficult to face. In particular, going from 'indirect rule' to a 'self-governing political community' on the basis of an inherited colonial legal system, as might be expected, led to serious questions about possibilities of access to government for those holding a non-privileged position within these post-colonial societies. It is thus hardly surprising that such realities may result in a less animate form of statehood (i.e., a less naturally-configured form of statehood) than would otherwise tend to be found without the employment of *uti possidetis*.

Or, from one African perspective a bit further removed from the 'newness' of African decolonisation, new states were formed through a process of coercive homogenisation, as a result of European colonialist actions, which has led to a crisis in governance, an ongoing series of internecine armed conflicts throughout the African continent and, indeed, a crisis not only of legitimate governance, but legitimate statehood.[214]

Recapitulation of the development of *uti possidetis*

In assessing a legal significance for *uti possidetis*, Ratner makes a number of observations which bear repeating: (a) barring exceptional circumstances, the presumption existed for the transference of the colonial border into an international frontier; (b) the emergence of borders different from those of colonial rule is not prevented in the decolonisation process; (c) post-independence changes to borders by mutual consent are allowed, as *uti possidetis* is not a peremptory norm having the character of *jus cogens* in international law; (d) according to the Vi-

[212] Ratner, *supra* note 127, at 613-614.
[213] See *supra* note 184.
[214] See generally O.C. Okafor, Re-Defining Legitimate Statehood: International Law and State Fragmentation in Africa (2000), and discussion *infra* in this study.

enna Convention on the Law of Treaties (1969)[215] and the Vienna Convention on the Law of Treaties (1978), borders different from those of colonial administrative units are not automatically overridden by the *uti possidetis* standard.[216]

It cannot be stated, then, that in determining responses to future boundary issues and territorial disputes, *uti possidetis* is a rigid principle that is to be inflexibly applied, but it does seem clear that the *uti possidetis* is the *prima facie* determinant for territorial boundaries and questions related therein. Overall, it does seem that, as Ian Brownlie writes, "there is a complementarity between *uti possidetis* and the principle of self-determination. It is *uti possidetis* which creates the ambit of the putative unit of self-determination, and which in that sense has a logical priority".[217]

But nevertheless, self-determination is more than just a 'principle'. It has evolved into an ongoing a right of peoples that, at least in its classical form, may have the character of *jus cogens*. As this discussion continues toward its conclusion, further analysis must be directed on these interactions, particularly those in which the scope of the unit of self-determination would seem to have logical priority over the *uti possidetis* standard. As the 1514, 1541 and 2625 resolutions do (rightly and importantly) balance references to self-determination with the importance of national unity and territorial integrity, it would appear that areas with a dearth of national unity and territorial integrity in reality would be those in which the junctions of self-determination and *uti possidetis* would find their greatest levels of turbulence, greatest levels of ingrained conflict, and indeed their greatest levels of separatism. As Higgins writes:

> Again, the desire for secession from a State by certain groups—whether to form their own independent State or to join with another group or unit elsewhere—will be at its most intense when their human rights are being suppressed. Just as the desire of individuals to exercise their right to leave the country is strongest when their rights have been violated, so the desire of ethnic groups to break away is most noticeable when they are oppressed […]. Even if, contrary to contemporary political assumptions, self-determination is not an *authorization* of secession by minorities, there is nothing in international law that *prohibits* secession or the formation of new States. The principle of *uti possidetis* provides that States accept their inherited colonial boundaries. It places no obligation upon minority groups to stay a part of a unit that maltreats them or in which they feel unrepresented […]. Where no principle of *ex injuria jus non oritur* applies, international law will recognize new realities. And where secession has in fact occurred, and a new State has emerged with its own Government, not dependent on another, and functioning effectively over the territory concerned, then recognition will follow.[218]

Observations from chapter two

After having introduced the conceptual elements underpinning modern territorial statehood in the previous chapter, the analysis has now progressed to the procedural stage. The dynamic between self-determination of peoples and *uti possidetis juris* has proven simultaneously complicated and necessary, in that *uti possidetis* made claims for stability by seeking to preserve the existing *status quo* throughout the decolonisation process. This is not to presume automatically a *prima facie* bias that self-determination of peoples must necessarily be in conflict with *uti possidetis juris*. Indeed, it is entirely conceivable that a colonised entity could undergo decolonisation and assume the external frontiers inherited as a result of this exercise without excessive difficulty. The problem, however, is that it is similarly conceivable that the opposite could be true as well.

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[215] See at Article 62.
[216] Ratner, *supra* note 127, at 598-600.
[217] Brownlie, Hague Academy Course, *supra* note 143, at 72.
[218] R. Higgins, Problems and Process: International Law and How We Use It 169-171 (1994).

That there has been a tangible deference to the principle of territorial integrity in equating these two variables is not wholly surprising, owing to the dominant positivism of the era. What can be similarly observed is a definitional shift in meaning as self-determination's perpetual scope outgrows the constraints of its early intent. Before decolonisation, a 'people' was basically seen as the population of a colonial possession achieving sovereign independence, generally formed by inheriting colonial boundaries and borders. After decolonisation, a 'people' must necessarily comprise something less than the entire population of a territory, because that territory would already have experienced an act of self-determination as a whole. This serves to demonstrate a substantive legal framework for which self-identifying groups, formed particularly but not necessarily exclusively on the basis of race, creed or colour, could make claims for greater access to government through internal self-determination. The question which remains is the extent to which *uti possidetis* would continue to play a role in a circumstance of internal self-determination. It has been asserted, particularly after the curious application of *uti possidetis* by the Badinter Commission, that its role would be chiefly historical in such circumstances.

Thus, the discussion is now sufficiently developed to attempt a detailed analysis of the means of effectuating internal self-determination and considering international law's responses to circumstances whereby internal self-determination becomes an incredible proposition. A theoretical discussion on the legal status of collective groupings, including 'peoples' and 'minorities' in universal and regional contexts, presents particular focus on sub-Saharan Africa.

CHAPTER THREE
Territory, recognition and collective groupings

The concept of 'collective groupings' derives its specific legal validity from a body of state practice evidenced between the Economic and Social Council and the General Assembly subsequent to the creation of the United Nations Organization. International law is indeed the law of states, but when considered in view of the International Bill of Rights and the Friendly Relations Declaration, protections for individuals and levels of expected behaviours by states have also become established in law. The law of collective groupings was further reinforced by the General Assembly, which in its follow up to the Millennium Declaration, affirmed that all states have the responsibility to protect populations from egregious human rights violations. As it has become easier to observe that self-determination of peoples is not limited to instances of decolonisation, and territorial boundaries may be modified through the consent of the parties affected, the question of new state recognition may rise concurrently. Despite the reality that the international community of states unsurprisingly tends towards a restrictive view of postcolonial new state creation, the eventual question of territorial secession resulting from a lack of internal self-determination is not automatically disallowed in international law. This has been most recently observed by the reference question put to the Supreme Court of Canada regarding Quebec's unilateral secession. Furthermore, as observed in Bangladesh, when there are circumstances of widespread and systemic human rights violations targeted against a segment of the population, the process of effectuating self-determination can be seen to be rapidly catalysed in the direction of external self-determination. Collective groupings—'peoples', 'minorities', 'indigenous peoples' and other territorial *collectivités* with comparatively less legal definition—will almost invariably have some overlap in form and circumstance, but only will be likely to find adequate recognition of their claims by constructing them according to the various legal rules applicable to a particular set of circumstances, and being recognised as such by both national and international legal authorities.

Collective groupings as a product of the international legal system

As a result of activities undertaken primarily in the United Nations framework, 'collective groupings', seen as the amalgam of 'peoples', 'minorities' and 'indigenous peoples', have acquired a particular legal status. The implications for this are considerable, particularly as they are the product of the international human rights movement and a matter of practical concern in all states. This chapter seeks to demonstrate that attention should be given to the identification and acceptance of such collective groupings, as component parts of the international legal system. This is most readily observed by considering the pathway to legality as the product of a chronological, evolutionary process. This can be observed from a cursory survey of activities dating throughout the 20th century and into the 21st, which demonstrate an invariable and sustained erosion of the *suprema potestas* principle in the law of statehood. From the early establishment of international humanitarian law in the Hague and Geneva processes, to the creation of the United Nations Organization following the second world war and the adoption of the Universal Declaration of Human Rights and the international covenants on human rights, a core legal framework has been established to categorise collective groupings and the protections afforded to them. A large measure of substantive legal development has occurred with the Friendly Relations Declaration and the entry into force of the principal international human rights covenants, which has led to the notion of 'third-generation' rights reinforcing 'rights' with 'responsibilities' of states and, indeed, the responsibility for states to protect populations on their territories.

The core matter in considering 'collective groupings' is that which is formed by 'third generation rights'—that the existence of the phenomenon is circumstantial, and that when such

circumstances exist, the state in question must uphold obligations simultaneously to the international community and to the affected parties within the state; oftentimes, this is the 'people' in question by a 'peoples' right to self-determination, although it could also be classified as an individual who is a member of a minority population. In any event, international law now recognises both the existence of states as primary subjects of international law, and entities which *prima facie* may be deemed as having a status of a 'collective grouping': a 'people', a minority, or an 'indigenous people', most obviously. The most evident circumstances of 'state' and 'collective' interactions will not necessarily reflect circumstances whereby overt conflict between the entities is manifest, as juridical agreement between the legal recognition of a state and a 'collective grouping' can surely occur, both on a mutually consensual and peaceable basis, as well as a negotiated settlement following a potentially protracted armed conflict. In assessing any such circumstances, an impartial assessment of factual evidence is paramount.

The contextual examination of 'collective groupings': On identifying and implementing collective rights under varying factual circumstances

To recapitulate somewhat, the rubric of 'collective groupings' examined in this chapter is comprised of four main legal forms, namely the 'right of peoples' to internal and external self-determination, as well as 'minority rights' and 'indigenous peoples' rights'. Of these various forms, in the first instance, the territorial nature of a peoples' right to self-determination will appear most significant, due to the potential for the modification of existing state boundaries, which themselves were recognised and established through processes of new state recognition, delineation and demarcation.

'Self-determination of peoples', in and of itself, has undergone three main definitional evolutions, and the territorial element, that most closely associated with statehood, has remained constant throughout. The first main period of self-determination (*i.e.,* pre-1955 era) is largely formed from Wilsonian idealism, yet is also mitigated by the reality that self-determination also reflected Lenin's own form of idealism and was the product of Soviet law. As extrapolated to colonial forms, this also largely reflects the emerging discrediting of colonial possession-holding, particularly following the second world war. The second period (*i.e.,* circa 1980) is formed from the reality of self-determination of peoples being a right to decolonisation having the character of *jus cogens*, as indeed was affirmed by the UN Commission on Human Rights.[1] The third period is formed by the emergence of internal self-determination as a reflection of the fact that self-determination is an ongoing legal right, with a scope outlasting colonialism. By the end of the 1970s, it followed that the overseas territories of European colonising states were to be granted independence, if only by virtue of the fact that there were few such remaining possessions. But it may also be observed that from the 1980s and beyond, as self-determination meshed with concrete expectations, themselves primarily expressed in the Economic and Social Council and the General Assembly of the United Nations, certain concepts of economic, social and political development, democracy and the importance of effective self-administration became defined, as 'soft law' at the very least.[2]

[1] See Official Records of the Economic and Social Council, 62d session, supplement No. 4, UN Document E/1978/32, at paras 121-122.

[2] *Cf.* C. Tomuschnat, Human Rights: Between Idealism and Realism 48-49 (2003), drawing reference to the principal legal documents generally related to the concept of 'third-generation rights' or 'solidarity rights', specifically a right to development (see Declaration on the Right to Development, GA Res. 41/128, 4 December 1986), a right to peace (see Declaration on the Right of Peoples to Peace, GA Res. 39/11, 12 November 1984) and a right to a clean environment (see Rio Declaration on Environment and Develop-

Although the concept of internal self-determination developed a conceptual legal basis in the period following decolonisation, in practical terms, it is uncontroversial to assume that postcolonial states would be neither particularly capable of, nor generally minded towards, the provision of even limited measures of self-administration for portions of territory within a newly decolonised state. This leads immediately to the question of whether postcolonial self-determination must be exclusively internal in character, in that its external nature was in some way intrinsically linked to the necessity of anti-colonialism, and nothing more. Realistically, as has been suggested throughout the previous chapters, this cannot be so, as to do so is to presume the perfection of statehood as both a legality and a factual circumstance for social ordering. To do so is to imply that postcolonial states must fundamentally afford protection and benefit to their citizens. Surely this has not been the case in all postcolonial states, however, which logically suggests that subsequent acts of external self-determination may not be precluded, as internal self-determination may prove inadequate or impossible, even when a state actively negotiates in good faith on self-determination claims. As demonstrated by Dietrich Murswiek in 1993, "without a right to secession, there is no people's right of self-determination", and "if the right of self-determination included automatically the possibility of secession, there could not be any right of self-determination".[3]

Thus the discussion reveals the reality whereby the territorial unit implied by self-determination of peoples must be smaller than the entire territory of a state, and, further, that in the event of prolonged non-response to factual claims made by territorially and culturally contiguous administrative entities, the limits to (external) self-determination must be continually justified and observed. In this sense, external self-determination removed from the colonial context is limited in scope.[4] However, the overall conceptual framework may be examined by discussing general points of state practice with particular application to public international law, in contrasting factual circumstances. For example, the high-intensity inter-societal conflict which created the independent state of Bangladesh, will be contrasted with a low-intensity inter-societal conflict in Quebec, where an established and respected judiciary was able to make a certain judgement on a reference question put to it, regarding the legality of a postcolonial secession of part of the population of Canadian territory.

Self-determination can now be seen to take on differing roles in the postcolonial context,

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ment, 14 June 1992, in 31 ILM 876 (1992)).

[3] D. Murswiek, *The Issue of a Right of Secession – Reconsidered*, in C. Tomuschat (ed.) Modern Law of Self-Determination 21 (1993). *Cf. Id.* at 37: "The subject of the offensive right of self-determination is every people that first can clearly be distinguished from other peoples by objective ethnic criteria, particularly by culture, language, birth or history. Secondly, a people must settle in on a coherent territory, on which it forms at least a clear majority. Mere minorities are not subjects of the right of self-determination. […] But it is important to recognize that the terms 'minority' and 'people' do not totally exclude each other; rather they partly overlap: one group that is a minority in relation to the whole population of a State can, on the one hand be a national minority in the meaning of the law relating to minorities. But on the other hand, it can be a people in the meaning of the right to self-determination at the same time. This is the case if the group is the only population or if it forms a clear majority on a territory that is suitable for State-building and where the group has traditionally settled."

[4] *Cf.* J. Crawford, The Creation of States in International Law (2d ed., 2006) 391 [hereinafter Crawford, 2nd ed.], listing the cases of secession outside the colonial context as: Senegal; Singapore; Bangladesh; Latvia, Lithuania and Estonia; Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kirgizstan, Moldova, Tajikistan, Turkmenistan, Ukraine, Uzbekistan; Slovenia, Macedonia, Croatia, Bosnia-Herzegovina, FR Yugoslavia (Serbia and Montenegro); Czech Republic, Slovenia; and Eritrea. Montenegro became an independent state following a referendum on independence on 21 May 2006, in which 55.5 percent of the population, thus greater than the 55 percent threshold to validate the results, as set by the European Union, voted for independence.

because the question of territorial modification is now implied throughout, even though the answer to this question will be restrictive in all but the most extreme of circumstances. Under the *uti possidetis*-defined decolonisation, however, territorial modification was not something seriously considered. The general attitude taken by states towards recognition of new statehood has unsurprisingly become restrictive following the period of decolonisation. Returning to the chronological definitions suggested at the outset of this study, self-determination can legitimately be seen as, in its first evolution, the official banning by the international community of the otherwise widespread practice of colonialism. In its middle form, it reaffirmed the ongoing illegality of colonialism, particularly as would be manifested by former colonial powers. More recently, the concept of internal self-determination has gained both intellectual and juridical weight, broadly known to mean that access to government is available to all individuals within demarcated administrative frontiers, and is correlated with a separate legal regime of minority rights drawn primarily from the International Covenant on Civil and Political Rights.[5]

In considering the interplay between the two practical examples under examination in this chapter, it will be recalled that internal self-determination itself is a concept difficult to quantify and extrapolate. This is primarily so because of the difficulty in determining at what point a judiciary is deemed competent to make pronouncements on the validity of internal administrative matters or a legislature to recognise collective groupings *per se*. It is also difficult to determine because the most general law of collective groupings will pay particularly close attention to the self-determination of peoples due in particular to its territorialism. It will also prove indifferent to instances of recognised postcolonial self-determination, provided that access to government, *i.e.,* internal self-determination, has proven demonstrably futile. In this sense, in the evaluation of any situation involving circumstances of internal self-determination, an informal evaluation of the ability of the state will always be of analytical usefulness, if only to realistically assess the capacity for a collective grouping to be formed and recognised *per se* by the state and implement certain territorially-based measures for self-administration. To this end, the contribution by the Canadian Supreme Court to the jurisprudence on peoples' rights has become justly famous and provides guidance for the recognition of claims by new collective groupings, and, conceivably, the possibility of new postcolonial states.

The Canadian Supreme Court, the Canadian Parliament and Quebec's National Assembly: 'Clarity' towards situations incorporative of judicial redress?

The largest Canadian province in area, and second largest in population, Quebec has had an uneasy relationship within the larger context of the Canadian Federal Government. This has led to sporadic aspirations for independence. Although in the 1960s the question of amending the Canadian Constitution to recognise Quebec as a founding nation arose, the ongoing legal consequences of such actions were limited, at least until the *Parti Québecois* came to power in 1976 and held a referendum on independent sovereignty in 1980, which some 40% of the population supported. When the *Parti* regained power in 1994, it quickly set out to hold another referendum on independence. It did so in 1995, with independence from Canada receiving a 49.42% favourable vote.

As the Québécois are foremost a territorially-defined administrative entity, rather than a *collectivité* formed around a particular ethnicity,[6] all Canadian citizens resident in Quebec are

[5] On the interplay between self-determination and minority rights in a practical context, see *infra* chapter four of this study.
[6] It should be recalled, from the Introduction of this study, that *collectivités* are a self-identifying group of individuals, which need not take on any particular attributes beyond territorialism.

given this provincial appellation,[7] in the same way that residents of e.g. Toronto and Windsor are Ontarian and residents of e.g. Vancouver and Victoria are British Columbian. Certainly, then, there are considerable English-language minority communities, as well as groups of indigenous peoples, located throughout the province. By 1996, these circumstances had given way to a complicated reality approaching the level of a Constitutional crisis. This led the Governor in Council to send to the Supreme Court three questions related to the legality of a possible secession of Quebec from the Canadian state.[8] Thus, although external self-determination would be the practical result of such activities, the circumstance should be immediately contrasted with that of Bangladesh, in that Canada is known to afford basic human rights and fundamental freedoms to all of its citizens, and the level of targeted violence, repression or other major human rights violations against the Québécois, particularly when viewed in contrast to that directed by Pakistan against East Pakistan, is nil. It seems then, *prima facie*, that there would be ample room for the accommodation of internal self-determination concerns, given the federal structure and practical effectiveness of the state overall.

The reference questions put to, and the answer of, the Canadian Supreme Court

The three questions put to the Court were as follows:

> **Question 1:** Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?
>
> **Question 2:** Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec of Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?
>
> **Question 3:** In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?

The Court answered the first two questions in the negative and found no issue between international and domestic law to be addressed in the third question. It decided:

> We have also considered whether a positive legal entitlement to secession exists under international law in the factual circumstances contemplated by Question 1, i.e., a clear democratic expression of support on a clear question for Quebec secession. Some of those who supported an affirmative answer to this question did so on the basis of the recognized right to self-determination that belongs to all "peoples". Although much of the Quebec population certainly shares many of the characteristics of a people, it is not necessary to decide the "people" issue because, whatever may be the correct determination of this issue in the context of Quebec, 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 repre-*

[7] Or, indeed, the Anglophone equivalent of 'Quebecker'.

[8] An impetus for the questions comes directly from the *Bertrand Case* in the Superior Court of Québec, whereby a citizen of Quebec made legal challenges, both before and after the referendum itself, concerning the 1995 referendum on sovereignty. See Action for Declaratory Judgement and Permanent Injunction, and Motion for Interlocutory Measures, *Bertrand* v. *Bégin*, 10 August 1995, Quebec 200-05-002177-995 (Sup. Ct.), and *Bertrand* v. *Québec (A.G.)*, [1995] 127 DLR (4th) 408. In the judgement on preliminary exceptions of Judge Pidgeon, 30 August 1996, *Bertrand* v. *Bégin*, [1996] RJQ 2393, a number of constitutional issues similar to the three questions in the reference question were also considered.

> *sents 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.* Quebec does not meet the threshold of a colonial people or an oppressed people, nor can it be suggested that Quebecers have been denied meaningful access to government to pursue their political, economic, cultural and social development. In the circumstances, the National Assembly, the legislature or the government of Quebec do not enjoy a right at international law to effect the secession of Quebec from Canada unilaterally.
>
> Although there is no right, under the Constitution or at international law, to unilateral secession, that is secession without negotiation on the basis just discussed, this does not rule out the possibility of an unconstitutional declaration of secession leading to a *de facto* secession. The ultimate success of such a secession would be dependent on recognition by the international community, which is likely to consider the legality and legitimacy of secession having regard to, amongst other facts, the conduct of Quebec and Canada, in determining whether to grant or withhold recognition. Such recognition, even if granted, would not, however, provide any retroactive justification for the act of secession, either under the Constitution of Canada or at international law.[9]

The underlying legal questions involved concern the attitude of international law towards the phenomenon of secession generally. Although the Canadian Constitution does not specifically mention secession, the Court stated that a secession attempted in a manner inconsistent with existing constitutional arrangements would be illegal, and therefore, the Canadian Constitution would have to be amended in order for secession to be effectuated.[10] The Court also signalled that a "clear expression of a clear majority" would have to demonstrate the unambiguous willingness of the Québécois to secede from Canada, in effect recalling the democratic nature of the country itself.[11] By implication, this means that a decision would have to be taken by referendum, although the Court held that "in itself and without more, [the holding of a referendum] has no direct legal effect, and could not in itself bring about unilateral secession".[12] According to the Court, one way that manifestations of secessionist activity can find enhanced credibility is when other relevant governmental entities within a state refuse to negotiate with entities competent to make such claims, including e.g. referendum holders with affirmative results. The Court observed:

> To the extent that a breach of the constitutional duty to negotiate in accordance with the principles described above undermines the legitimacy of a party's actions, it may have important ramifications at the international level. Thus, *a failure of the duty to undertake negotiations and pursue them according to constitutional principles may undermine that government's claim to legitimacy which is generally a precondition for recognition by the international community.* Conversely, violations of those principles by the federal or other provincial governments responding to the request for secession may undermine their legitimacy. Thus, a Quebec that had negotiated in conformity with constitutional principles and values in the face of unreasonable intransigence on the part of other participants at the federal or provincial level would be more likely to be recognized than a Quebec which did not itself act according to constitutional principles in the negotiation process. Both the legality of the acts of the parties to the negotiation process under Canadian law, and the perceived legitimacy of such action, would be important considerations in the recognition process. In this way, the adherence of the parties to the obligation to negotiate would be evaluated in an indirect manner on the in-

[9] Reference re Secession of Quebec, [1998] 2 S.C.R. 217, paras 154 and 155. (emphasis added) [hereinafter Québec decision]
[10] *Id.* at para 84.
[11] See generally *Id.* at paras 92-100.
[12] *Id.* at para 87. This seems to be reinforced in practice by the general non-recognition by the international community of the results of a referendum on secession by the South Ossetia region of Georgia, in November 2006. See *OSCE: EU Statement on the so-called 'referendum' and so-called 'presidential elections' in South Ossetia on 12 November 2006*, Finnish Presidency of the Council of the European Union, 9 November 2006.

> ternational plane.[13]

On the question of secession, the Court stated that, although no specific authorisation or prohibition on secession exists in international law, the status of secession under international law is to be kept conceptually separate from "a prediction that the law will respond after the fact to a then existing political reality".[14] As such, the Court, in its examination of the concept of 'peoples', reiterated the imperfection in determining an exact definition of a 'people', although it did state "it is clear that 'a people' may include only a portion of the population of an existing state".[15] However, the Court also stated that it was unnecessary to determine whether the Québécois were a 'people' *per se*, even though the Quebec population includes characteristics indicative of a people, such as territoriality, culture and language.[16]

In the decision, particular attention was focused by the Court on the various roles played by self-determination, as applicable to colonial and oppressed peoples. The Court separated the right of self-determination into its anti-colonial and postcolonial forms,[17] based upon the Friendly Relations Declaration, and concluded that "when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession".[18] That said, referring to the *amicus* filings and expert opinions submitted to the Court, it furthermore concluded that:

> [t]he population of Quebec cannot plausibly be said to be denied access to government. Quebecers occupy prominent positions within the government of Canada. Residents of the province freely make political choices and pursue economic, social and cultural development within Quebec, across Canada and throughout the world. The population of Quebec is equitably represented in legislative, executive and judicial institutions. In short, to reflect the phraseology of the international documents that address the right to self-determination of peoples, Canada is a "sovereign and independent state conducting itself 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".[19]

In light of the above, the Court also concluded that:

> [t]he international right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. *In all three situations, the people in question are entitled to a right to external self-determination because their*

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[13] *Id.* at para 103 (emphasis added). *Cf. Id.* at para 88: "In Canada, the initiative for constitutional amendment is the responsibility of democratically elected representatives of the participants in Confederation. Those representatives may, of course, take their cue from a referendum, but in legal terms, constitution-making in Canada, as in many countries, is undertaken by the democratically elected representatives of the people. The corollary of a legitimate attempt by one participant in Confederation to seek an amendment to the Constitution is an obligation on all parties to come to the negotiating table. *The clear repudiation by the people of Quebec of the existing constitutional order would confer legitimacy on demands for secession, and place an obligation on the other provinces and the federal government to acknowledge and respect that expression of democratic will by entering into negotiations* and conducting them in accordance with the underlying constitutional principles already discussed." (emphasis added)

[14] *Id.* at para 110.

[15] *Id.* at para 124.

[16] *Id.* Probably this is why the notion of a comparatively less-defined territorial *collectivité* as a juridical concept holds appeal, as the overall notion allows for the reality that entities may hold a particular juridical appellation yet may not be adequately defined by such existing forms.

[17] *Id.* at para 132.

[18] *Id.* at para 134.

[19] *Id.* at para 136.

> *have been denied the ability to exert internally their right to self-determination.*[20]

The 'effectivity' principle: Considering the law's capacity to adapt to changing political reality

An *amicus curiae* was appointed to present the case of Quebec, as its government refused to play any role in the proceedings.[21] The Court's answer was made as a result of the expert opinions submitted to it by scholars of international law, with particular competence within the realm of 'collective groupings'.[22] Particularly germane to the present study is the expert opinion of Georges Abi-Saab. In his opinion, he claims that, although the law has no direct bearing on the process of new state creation, it is, however, "acting on probabilities and effectivity".[23] Statehood, Abi-Saab argues, is a factual circumstance as opposed to a legal action, and it is the reality, or effectivity, of the state that is being recognised. Although prior to an act of secession, the state concerned is squarely operating within the domestic realm of its own administration, Abi-Saab also alluded to implications for international law given situations of attempted secession. In his opinion, he wrote that

> [t]he primary fact, as captured and rationalized in the abstract model of the state by international law, is the triptych of population, territory and sovereignty […]. And it is the effectivity of these elements, and above all *their integration into an operative whole*, which constitutes the "primary fact" and determines its being taken into consideration by international law or, in other words, compels its acknowledgement as a state by international law regardless of the process that led to this result.[24]

Abi-Saab, in writing about the integration of the numerous variables of statehood into an operative whole, demonstrates that the process of 'integration' by definition is intertemporal, thus necessitating an adaptive legal framework. What is of particular interest is that although legal questions related to the possible secession of a part of a territory are internal in character until such time as the effectuation manifests itself, Abi-Saab's discussion of the elements of statehood as being 'integrated into an operative whole' conceptually allows for the modification of legal rules as this integration procedure is carried out. Implied in this procedure is the necessity for a means to approximate the points of differentiation between the laws of statehood reflective of fixed, established law and that in the process of development.

The Court addressed these circumstances in its judgement, primarily in the context of the possibility of a *de facto* secession by Quebec on the basis of effectivity, and, presumably, subsequent peer recognition by the international community of states. The Court reinforced its negative answer to question one by disavowing the principle of effectivity as a specific legality. It did so by separating the factual circumstances surrounding a possible secession from the law affecting the process, observing that "a distinction must be drawn between the right of a people to act,

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[20] *Id.* at para 138 (emphasis added).
[21] An English-language compendium of the reference question's documentation is to be found in A.F. Bayefsky, Self-Determination in International Law: Quebec and Lessons Learned (2000) [hereinafter Bayefsky], which presents a useful English-language compendium of documents related to the reference question, but, it should also be observed, little guidance as to what any obvious lessons actually would be.
[22] Indeed a number of reports by e.g. J. Crawford, G. Abi-Saab, T.M. Franck, A. Pellet, M.N. Shaw were submitted to the Court as expert opinions to accompany the Factums of the Attorney General of Canada and the *Amicus Curiae* acting on Quebec's behalf. See Bayefsky, *supra* note 21, at 29-304.
[23] *Report by Georges Abi-Saab: "The Effectivity Required of an Entity that Declares its Independence in Order for it to be Considered a State in International Law"*, in Bayefsky, *supra* note 21, at 69.
[24] *Id* (emphasis added).

and their power to do so",[25] and that "a power may be exercised even in the absence of a right to do so, but if it is, then it is exercised without legal foundation".[26] It furthermore found that "the alleged principle of effectivity has no constitutional or legal status, in the sense that it does not provide an *ex ante* explanation of justification for an act".[27]

However, the Court revisited the topic later in its decision and considered the relationship between factual circumstances and legality, in a more practical sense. Under this more operative framework, the Court stated that "it is true that international law may well, depending on the circumstances, adapt to recognize a political and/or factual reality, regardless of the legality of the steps leading to its creation".[28] It observed furthermore that

> [n]o one doubts that legal consequences may flow from political facts, and that "sovereignty is a political fact for which no purely legal authority can be constituted . . .". Secession of a province from Canada, if successful in the streets, might well lead to the creation of a new state. Although recognition by other states is not, at least as a matter of theory, necessary to achieve statehood, the viability of a would-be state in the international community depends, as a practical matter, upon recognition by other states. That process of recognition is guided by legal norms. However, international recognition is not alone constitutive of statehood and, critically, does not relate back to the date of secession to serve retroactively as a source of a "legal" right to secede in the first place. Recognition occurs only after a territorial unit has been successful, as a political fact, in achieving secession.[29]

The Court then went on to directly reject the notion that the legality of secessionist activity, were it to emerge from factual, rather than legal, circumstances, automatically must be the ultimate result of such activity, particularly by observing "that subsequent recognition of a state of affairs brought about by a unilateral declaration of independence could be taken to mean that secession was achieved under colour of a legal right".[30] The Court attempted to strike a delicate balance in its ultimate consideration of 'effectivity', holding that *ex post facto* recognition of an originally illegal act may lead to the acquisition of legal status on the basis of that recognition,[31] but only when the legitimacy of these actions are based upon a change in factual circumstances.[32] However, little further guidance is given on the effectivity principle, leading to the conclusion that such a change in factual circumstances will be largely reflective of the level of recognition successfully obtained by a territorially-defined *collectivité*.

The advisory opinion, in withholding an overt pronouncement on the status of the Qué-

[25] Québec decision, *supra* para 9, at para 106.
[26] *Id.*
[27] *Id.* at para 107. It continued, *Id.* at paras 107-108: "In essence, acceptance of a principle of effectivity would be tantamount to accepting that the National Assembly, legislature or government of Quebec may act without regard to the law, simply because it asserts the power to do so. So viewed, the suggestion is that the National Assembly, legislature or government of Quebec could purport to secede the province unilaterally from Canada in disregard of Canadian and international law. It is further suggested that if the secession bid was successful, a new legal order would be created in that province, which would then be considered an independent state. Such a proposition is an assertion of fact, not a statement of law. It may or may not be true; in any event it is irrelevant to the questions of law before us. If, on the other hand, it is put forward as an assertion of law, then it simply amounts to the contention that the law may be broken as long as it can be broken successfully. Such a notion is contrary to the rule of law, and must be rejected."
[28] *Id.* at para 141.
[29] *Id.* at para 142, quoting H.W.R. Wade, *The Basis of Legal Sovereignty*, 172 Camb. L.J. 196 (1955).
[30] *Id.* at para 144.
[31] *Id.* at para 146.
[32] *Id.* The Court continued: "It is, however, quite another matter to suggest that a subsequent condonation of an initially illegal act retroactively creates a legal right to engage in the act in the first place. The broader contention is not supported by the international principle of effectivity or otherwise and must be rejected."

bécois as a 'people' as defined by international law, does not codify a uniform and global black-letter rule of law on self-determination as it particularly applies to territorially-defined entities. But it certainly does make a significant contribution towards such legal definition, particularly in the sense that e.g. GA Resolution 1541 (XV), Principle IV and the Friendly Relations Declaration are reinforced by the juridical recognition that, in the eyes of the Canadian Supreme Court, a state "*is entitled to maintain its territory* under international law and to have that territorial integrity recognized by other states".[33] That the question of maintenance of a state's territorial integrity, in the time of the positivist international law of the late 1800s and early 1900s, could ever fundamentally conceivably come into question is starkly contrasted by the Canadian Supreme Court's statement of entitlement to preserve the *status quo* to states, in that the notion that a Court should ever find it necessary to make such pronouncements is anathema to classical legal positivist thought. On the basis of the Court's overall reasoning, Quebec's ability to appeal to the international community for external recognition was unhindered by the Court, provided the federal government was in some way negligent in its negotiations with Quebec, e.g. by not negotiating 'in good faith'.

Subsequent developments in light of the Supreme Court's advisory opinion

By maintaining both the notion that distinction is to be made with regard to secession between factional circumstances of law and "a prediction that the law will respond after the fact to a then existing political reality",[34] as well as the notion that law may also respond to an instance of 'secession in the streets', the Court attempted, and it would appear largely succeeded, to maintain a delicate balance between the responsibilities of a state to maintain ongoing good-faith negotiations on matters of self-determination with *bona fide collectivités* and the reaffirmation of the general understanding that there exists no unfettered right to unilateral secession in international law, but that factual circumstances may eventually lead to the occurrence of secession.

The notion of statehood in Canada is undoubtedly complicated, and the practical effects of the Court's answer to the reference question did not go unnoticed in Parliament. To recapitulate, as applies to the theoretical law of self-determination of peoples, the core principles of law as envisioned by the Court, are defined by the notion 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. [35]

In an attempt to lay the Quebec question to rest, following the Supreme Court's decision, Parliament sought to ensure that circumstances would not appear whereby Quebec would be seen to be denied self-determination, particularly through a tangible demonstration of the federal government's willingness to negotiate in good faith with Quebec. In 2000, it enacted what has colloquially become known as the Clarity Act.[36] Its main function is to respond to the perceived ambiguity in the wording of the question of the 1995 referendum and to ensure that any

[33] *Id.* at para 154. (emphasis added)
[34] *Id.* at para 110.
[35] *Id.*
[36] See Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference, Statutes of Canada 2000, c.26

future referenda do not undertake such perceived ambiguities.[37] In particular, the House of Commons granted itself the power to determine whether the size of a majority voting for secession was sufficiently large, whether voter participation was of a sufficiently high proportion, and, 'other matters' deemed worthy of consideration by the House.[38] Some commentators, such as Daniel Turp, have been deeply critical of the initiative, particularly with regard to the ability of the House of Commons to determine, itself, the technical aspects that would indicate whether a future referendum is to be successful or unsuccessful in reflecting a popular manifestation of independent sovereignty.[39] Unsurprisingly, the Clarity Act is unpopular with Québécois political parties, and an opposing response came swiftly—indeed two days after the bill proposing the Clarity Act was first presented in the House of Commons—from the Quebec National Assembly in the form of the Fundamental Rights Act,[40] which itself reasserted that a simple majority would be sufficient to demonstrate the will of the Québécois,[41] and asserts that Quebec, itself, holds an exclusive right to determine its political and legal form.[42]

Quebec's place within Canada continues to develop, as was observed in late 2006 when, in anticipation of a motion to be undertaken by the *Bloc Québécois* to 'define the Quebec nation', Prime Minister Stephen Harper surprisingly gave a one-line statement to the House of Commons, stating simply "that this House recognize that the Québécois form a nation within a united Canada",[43] although later clarification was provided that the use of the term 'nation' was used in a 'cultural-sociological', rather than in a legal sense.[44] Nevertheless, the House accepted

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[37] *Id.* at s 1(1)

[38] *Cf. Id.* at s 2(2) and s 2(3): "In considering whether there has been a clear expression of a will by a clear majority of the population of a province that the province cease to be part of Canada, the House of Commons shall take into account (a) the size of the majority of valid votes cast in favour of the secessionist option; (b) the percentage of eligible voters voting in the referendum; and (c) any other matters or circumstances it considers to be relevant. […] In considering whether there has been a clear expression of a will by a clear majority of the population of a province that the province cease to be part of Canada, the House of Commons shall take into account the views of all political parties represented in the legislative assembly of the province whose government proposed the referendum on secession, any formal statements or resolutions by the government or legislative assembly of any province or territory of Canada, any formal statements or resolutions by the Senate, any formal statements or resolutions by the representatives of the Aboriginal peoples of Canada, especially those in the province whose government proposed the referendum on secession, and any other views it considers to be relevant."

[39] *Cf.* D. Turp, *Québec's Right to Secessionist Self-determination: The Colliding Paths of Canada's* Clarity Act *and Québec's* Fundamental Rights Act, in J. Dahlitz (ed.) Secession and International Law: Conflict Avoidance – Regional Appraisals 173 (2003): "The idea that a referendum is won with a majority of 50 per cent plus one of the valid votes cast seemed also to have prevailed in all referendums organized with respect to the political and constitutional future in Quebec and Canada. Here too, ideas are in collision, since the intent of the *Clarity Act* is to give the House of Commons the power to decide that a majority of 50 per cent plus one of valid votes cast is not enough to compel the federal government to assume its constitutional and mandatory goal to negotiate. […] All [past] referendums in Canada have been held on the basis of majority rule. […] To cast doubt on the rule of 50 percent plus one is also to contravene the fundamental principle of the equality of voters. […] The *Clarity Act* breaks the democratic tradition in Canada that, up to now, had taken into account Québec's desire to freely decide its future."

[40] See An Act respecting the exercise of the fundamental rights and prerogatives of the Québec people and the Québec State, R.S.Q., c. E-20.2

[41] *Id.* at 2000, c. 46, s. 4.

[42] *Cf. Id.* at 2000, c. 46, s. 3: "The Québec people, acting through its own political institutions, shall determine alone the mode of exercise of its right to choose the political regime and legal status of Québec. No condition or mode of exercise of that right, in particular the consultation of the Québec people by way of a referendum, shall have effect unless determined in accordance with the first paragraph."

[43] See Statement by the Prime Minister to the House of Commons, 27 November 2006, available at http://www.pm.gc.ca/eng/media.asp?id=1412

[44] See CBC News, House passes motion recognizing Québécois as nation, 27 November 2006, available at

the notion by a 266-16 vote, although given the timing of the motion and the perceived motivation of Harper's statement, it may also be observed that the Canadian Federal Government continues to want to demonstrate that it is actively seeking to negotiate with Quebec, in good faith with regard to self-determination concerns, but simultaneously reiterate its position that the way for Quebec to manifest such self-determination is within the federal structure of the existing Canadian state. In short, what seems most 'clear' in the ongoing aftermath of the Quebec situation is that the low-level tensions within the federal state seem likely to persist, as political manifestations continue to play out in the face of what is, otherwise, a clear, balanced advisory opinion delivered by one of the world's most competent and respected Supreme Courts. Whether this necessarily leads to the 'inevitable collision course' suggested by Turp will only be able to be observed with certainty as the next chapters of Canada's history are written.

The law of new state recognition and its implications for collective groupings

Following the specificity of the Canadian Supreme Court's decision concerning the legality of Quebec's secession, the discussion concerning collective groupings now progresses to a more general level. It will be broadly asserted that some intellectual overlaps exist between claims for sub-state rights (particularly self-determination) and claims for new state creation. Self-determination is somewhat analogous to independent statehood, in that decisions taken will have to balance the will of 'people', as a *collectivité*, with the legitimate power ascribed to a the territory to which it will form a legitimate, administrative authority. The overlap between the concepts is rooted in the reality that both emerging states seek external recognition, and, to 'peoples' or 'minorities', although the possibility of eventual external recognition is not precluded, the recognition they seek in the first instance is fundamentally internal in basis. Therefore the potential for confrontation will always run high; however, it must also be recalled that such circumstances are not entirely dissimilar to those of decolonisation and the subsequent new state creation of recent times.

Whereas *uti possidetis juris* preserved definitional forms through the process of decolonisation, it should be recalled from the ongoing discussion that the role of *uti possidetis* is now largely historical, and cannot credibility be seen as eternally binding a territory to a population, as democratic actions taken by a *collectivité* within a state may lead, under certain occasions, to create new states. Under such circumstances, adherence to Montevideo criteria would be expected. Thus, if only by implication, these criteria lie as an omnipresent reality, and attention must be particularly applied to circumstances whereby Montevideo criteria could be modified as a result of state practice, as the general pattern of state practice in the period following the second world war, was generally contradictory.

Thus, an examination of the established doctrine on new state recognition is presented in the context of so-called 'modern territorial statehood', with 'modern' meaning 'post-colonial', 'territorial' a synonym for 'boundaries and borders', and 'statehood' incorporating the components of public international law corresponding to the individual and collective rights and responsibilities of citizens and their governments, and the protections and mutual expectations associated therewith. The interaction of 'modern territorial statehood' and the established theories of new state recognition thus primarily revolve around the ability to deliver a persuasive argument relevant to the situation on the ground. New state creation is certainly not a postcolonial necessity for *collectivités*, but it certainly is a definitional factor under all circumstances and may well prove to be reflective of a perceived best course of action in the most extreme of factual

http://www.cbc.ca/canada/story/2006/11/27/nation-vote.html

situations, *i.e.,* those of 'internal colonisation' or 'postcolonial colonisation'.

Examining the constitutive and declaratory theories of new state recognition

Recognition in international law is a complicated subject normally split into declaratory and constitutive theoretical premises. The decision to recognise a state *per se* is a decision taken by other states and, in so doing, such decisions are very much based upon their own political considerations and calculations. The discussion is introduced from a mainstream text:

> The question of whether an entity is a state and should be so treated has given rise to two opposing theories. One theory is that the act of recognition by other states confers international personality on an entity purporting to be a state. In effect, the other states by their recognition "constitute" or create the new state. On this "constitutive" theory an observer or a court need only look at the acts of recognition (or lack thereof) to decide whether an entity is a state.
>
> The opposing position is that the existence of a state depends on the facts and whether those facts meet the criteria of statehood laid down in international law. Accordingly, a state may exist without being recognized. Recognition is merely declaratory. The primary function of recognition is to acknowledge the fact of the state's political existence and to declare the recognizing state's willingness to treat the entity as an international person, with the rights and obligations of a state.[45]

It may well be the case that the theoretical underpinnings provide, if not little usefulness to the present discussion, then, certainly, somewhat less usefulness than when Sir Hersch Lauterpacht contended that the act of recognition by other states to an emerging state entity were what would serve to instil a state with legal personality. Lauterpacht himself took the constitutive path,[46] albeit one mitigated with his conclusion that states have a duty to recognise other entities meeting the qualifications of statehood.[47] This approach stands in further contrast with another constitutive theory advocate, Hans Kelsen,[48] who, while perhaps not anticipating the certain circumstances faced in an exploration of postcolonial self-determination, separated the process of recognition into separate political and legal acts, with the legal act having a specifically constitutive character that is not found in the separate political act.[49] Kelsen, furthermore, disagrees with Lauterpacht's assertion that there is an obligation to recognise entities fulfilling the requirements of statehood, viewing recognition as an empowerment, and not an obligation. He writes:

> Refusal to recognize the existence of a new state is no violation of general international law and thus constitutes no violation of the right of any other community. However, recognition of a community as a state, even though it does not fulfill the conditions laid down by international law, is a violation thereof. If, for instance, part of an existing state tries to separate itself by revolution, and another state recognizes this part of the state as a state before the conditions prescribed by international law are fulfilled, the recognizing state infringes upon

[45] Damrosch *et al*, International Law: Cases and Materials 252 (4th ed., 2001) [hereinafter Int'l Law] 252.
[46] *Cf.* P.K. Menon, *Some Aspects of the Law of Recognition*, 66 *Revue de droit international et de droit comparé* 161, 163 (1989) [hereinafter Menon]: "Prominent among the exponents of this view are Anzilotti, Bluntschli, Kelsen, Lauterpacht, Lawrence, Le Normand, Liszl, Oppenheim, Redslop and Triepel."
[47] See H. Lauterpacht, Recognition in International Law (1947), at 6 *et seq*.
[48] *Cf.* H. Kelsen, Principles of International Law 270 (1952): "[A] state violates international law and thus infringes upon the rights of other states if it recognizes as a state a community which does not fulfill the requirements of international law."
[49] *Cf.* H. Kelsen, *Recognition in International Law: Theoretical Observations*, 35 AJIL 605 (1941): "Political recognition may be conditional or unconditional. However, these questions are unimportant from a legal point of view, since the declaration of willingness to enter into political and other relations with a state or government does not constitute any concrete legal obligation."

> the right of that state against which the revolutionary attempt at secession is directed.[50]

Although Kelsen's observations are of interest, it appears clearly that even greater juridical weight is on the side of the declaratory theorists.[51] What seems undeniably clear is that state practice does not in any way accept that the mere proclamation of the existence of a state from a part of a particular population instils within it international legal personality, and therefore makes it a subject of international law. What is primarily at issue is the capacity to uphold the rights and duties of statehood concurrent with the expectation that a territorial entity seeking self-administration has the capacity to invoke, successfully, international legal personality. Surely the most tangible manifestation of such capacity is through peer recognition by the international community of states as a state *per se*, although recognition, itself, is an *ex post facto* activity, as applicable to the determination of the start of a specific moment of legality. As J.L. Brierly writes:

> The better view is that the granting of recognition to a new State is not a 'constitutive' but a 'declaratory' act; it does not bring into legal existence a State which did not exist before. *A state may exist without being recognized, and it does exist in fact, then, whether or not it has been formally recognized by other States, it has a right to be treated by them as a State.* The primary function of recognition is to acknowledge as a fact something which has hitherto been uncertain, namely the independence of the body claiming to be a State, and to declare the recognizing State's readiness to accept the normal consequences of that fact, namely the usual courtesies of international intercourse.[52]

Recognition in the practical context: Framing the theories in a context relevant to modern statehood

The overarching concept to be borne in mind when considering the practical aspects of statehood is that it is a binary proposition, in that an entity either will or will not be instilled with international legal personality, from where it will take on all of the associated rights and responsibilities commensurate with the doctrine of sovereign equality of states. The problem with the declaratory theory is its relative imprecision vis-à-vis the constitutive theory, in that the legal act of recognition by other states is an innately more precise instrument than is the identification of the particular moment whereby an emerging state becomes a state *per se*.[53]

Even within the declaratory theory framework, Kelsen's identification of separate legal and political acts is worthwhile, as if statehood were a mere legality, and yet not sufficiently tangible to manifest sovereign equality *per se* without specific legal recognition,[54] the role played by

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[50] *Id.* at 610.
[51] *Cf.* Menon, *supra* note 46, at 163.: "Adherents to the view include Baty, Brierly, Cobbett, Erich, Goebel, Halleck, Jaffe, Lorimer, Moore, Nys, Phillimore, Scelle, Vattel, Westlake and Williams." See also Int'l Law, *supra* note 45, at 252, citing the following in further support of the declaratory theory: 2 Annuiare de l'Institut de Droit Int'l 300 (1936); Inter-American Convention on Rights and Duties of States, Art. 3 (1933); Charter of the Organization of American States, renumbered Art. 13 (1948, amended by Protocols of 1967-1993); and the *ad hoc* Arbitration Commission established by the EC Conference on Yugoslavia, Opinion No. 1, 31 ILM 1494 (1992). See also Québec decision, *supra* note 9, at para 142.
[52] J.L. Brierly, The Law of Nations (6th ed., Waldock, 1963) 139, as cited in Menon, *supra* note 46, at 171.
[53] *Cf.* T.C. Chen, The International Law of Recognition 16 (1951) [hereinafter Chen]: "The most important part of departure between the constitutive and the declaratory theories lies in the question whether the legal personality of a State exists prior to recognition, that, is to say, whether the unrecognized State can be a subject of international law, having capacity for rights and duties. On this point, there is no doubt that these writers [Rivier, Fauchille, and De Louter—that is, those chiefly critiqued by Lauterpacht in his analysis] are in support of the declaratory theory."
[54] See *Id.* at 63.

recognition under the declaratory theory is largely "an assurance given to a new State that it will be permitted to hold its place and rank, in the character of an independent political organism, in the society of nations".[55] It furthermore serves "as an estoppel against any subsequent denial of the existence of the State".[56] Thus under the declaratory theory, it is possible that an entity taking the form of statehood, and therefore possessed with international legal personality, may go unrecognised, for it is dubious whether Lauterpacht's assertion under the constitutive theory framework that states have a duty to recognise entities which satisfy the criteria of statehood is, in fact, valid under a declaratory system, and this would be largely a political act on the part of non-recognising states, in that the withholding of legal recognition of the new state has occurred.

Indeed what seems the most likely arbiter of the constitutive/declaratory dichotomy in the modern age is a state's admission to an intergovernmental organisation, the United Nations in particular.[57] Although it could be argued that using membership in an intergovernmental organisation is little more than a repackaging of the constitutive theory, in that recognition is collectivised into the multilateral form of membership in an intergovernmental organisation, to do so is to overlook the point that, under the declaratory theory, it is possible that a state can exist, and thus have international legal personality, without achieving full recognition across the international community of states.[58] Thus the obvious reality of the deliberate non-recognition of states is presented. What is most at issue here is not necessarily to further delineate between the two theories of recognition, but rather to observe the roles played by recognition in an era of a rapid increase in states concurrent with the decolonisation process, fuelled by the United Nations itself. However, such is the level of controversy associated with recognition that the International Law Commission—founded by the United Nations in 1947 to promote the progressive development of international law and its codification—has little to say on the topic. As James Crawford, a former ILC member himself, states:

> The Commission has spent much of its time on international transactions and obligations (the law of treaties, State responsibility, liability for injurious consequences, the law of international watercourses, etc.) and very little time on questions of sovereignty. Of the 14 topics on its first work program, "recognition of States and Governments" is the only one which the Commission has never tackled and I doubt will ever tackle. The only work it has directly done on sovereignty issues was its work on state succession. That was an offshoot of the law of treaties: state succession is an area of intersection between the fields of sovereignty and obligation. In the end one might say that the implications so far as sovereignty were concerned proved overwhelming, and the work on succession is regarded as only moderately successful.[59]

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[55] *Id.* at 77, citing Hyde, Moore and Rivier.
[56] *Id.*
[57] Articles 3 and 4 of the UN Charter establish that membership is only open to States, and indeed UN membership has been instrumental in validating the independent statehood of postcolonial states in particular. See generally J. Dugard, Recognition and the United Nations (1987) [hereinafter Dugard], *but cf.* D. Raič, Statehood and the Law of Self-Determination (2002), at 39-47 [hereinafter Raič].
[58] *Cf.* Chen, *supra* note 53, at 17: "There is another group of writers, described by Professor Cavaré as *mi-constitutive, mi-declarative*. These writers, in an effort to reconcile positive rules of law and social necessity, advance the argument that recognition is declaratory as regards certain minimum rights of existence, but constitutive as regards more specific rights. Such a view is in reality a rejection of the constitutive view, in so far as it regards States as capable, even in the absence of recognition, of enjoying rights, however limited, under international law."
[59] J. Crawford, *Responsibility to the International Community as a Whole*, 4th Snyder Lecture, delivered 5 April 2000, available from lcil.law.cam.ac.uk (footnotes omitted), citing Report of the International Law Commission on the work of its 48th Session, 6 May-26 July 1996, UN Doc. A/51/10, at para. 162 & Annex II. *But cf.* International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, at Articles 40 and 41, in Report of the International Law Commission, 53d

The question of 'illegality' and the (collective) non-recognition of states

The remaining issue is that of the non-recognition of states in international law. John Dugard has directed considerable focus in this direction to the question of entities which have achieved the requirements of statehood as set forth in the Montevideo Convention, but where "it is absurd to contend that any of these entities [e.g. Rhodesia, Transeki, Bophuthatswana, Venda, Ciskei and, perhaps the Turkish Republic of Northern Cyprus] has achieved international legal personality or acquired the status of 'State'".[60] While not specifically concerned with the examples put forth in Dugard's own analysis, the underlying premise of entities having the trappings of statehood but lacking recognition *per se* is to be considered. Indeed it may be the case that would-be 'peoples', claiming self-determination to the extent of recognition as external entities by other states, will have to justify their alteration of the *status quo* to the international community on the basis of the tangible contributions such actions would make towards the preservation of human life and dignity. It is therefore instantaneously debatable whether the examples put forth at the outset of Dugard's analysis are those which inherently pursue such objectives: Rhodesia clearly did not, while Bangladesh should be seen as having done so.

What is at issue is the standard of government that would be assumed by the new state. Even before the entry into force of the international human rights covenants, scholars such as J.E.S. Fawcett were asserting what Dugard terms as a 'new' criterion of government,[61] not particularly dissimilar from the additional recognition criteria established more clearly in the European context, resulting from the Declaration on the Guidelines of New States in Eastern Europe and in the Soviet Union, by the Arbitration Commission of the European Community's Conference for Peace in Yugoslavia.[62] Drawing upon this, what is at issue is the right to societal existence, equality amongst different groups within a state, and a willingness to allow recourse to postcolonial external self-determination in circumstances whereby internal self-determination has proven insufficient, and is likely to remain so. This reflects the fact that the question of contested secession remains omnipresent in dealing with self-determination cases; however, the desirability or the achievability of such actions remains more in doubt.

Session, GAOR 50th Session, Supplement No. 10, UN Doc. A/56/10: Article 40 states, "this chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation." Article 41 states, "States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation. This article is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this chapter applies may entail under international law."

[60] Dugard, *supra* note 57, at 123.

[61] *Cf.* J.E.S. Fawcett, The Law of Nations 38-39, as cited in Dugard, *supra* note 57, at 127: "The criterion of organized government is that there must be a central government having effective control over the national territory, for the purpose of making and executing all those decisions that good government entails. Here we may bring in the idea of self-determination. If there is a systemic denial to a substantial minority, and still more to a majority of people, of a place and say in the government, the criterion of organized government is not met." Rhodesia's denial of its citizens' right to political participation, and the "virtually unanimous condemnation of the unilateral declaration of independence by the world community" further reinforce the distinction between what could be easily termed as discriminatory claims for statehood, and thus *frivolous* claims for statehood, as opposed to those formulated as antithetic to such claims; that is, those claims which genuinely reflect both the core of customary international human rights law and the notion of horizontal societal preservation, in the face of excessive vertical state consolidation. See also further discussion *infra* chapter five.

[62] See 31 ILM 1486 (1992) and discussion *supra* chapter two.

Before explaining this premise further, it would be helpful to clarify matters somewhat by returning momentarily return to Dugard's analysis, for he draws reference to the principle of *ex factis jus oritur*, or a function designed to bring the law into line with a factual situation, which is a counterbalance to the principle of *ex injuria jus non oritur*, wherein no legal title can be derived from an illegal act.[63] Dugard states that prior to the codification of the principle of *jus cogens* in the 1969 Vienna Convention on the Law of Treaties, doctrine greatly favoured a policy of non-recognition of new states, and, indeed, the type of states under question being denied recognition were those exemplified by Rhodesia, the *apartheid*-era homeland states of South Africa and the Turkish Republic of Northern Cyprus.[64] Were other states to subsequently recognise the states under examination being denied recognition, the principle of *ex factis jus oritur* would take precedence, and the legality of such states would go uncontested. What the principle of *ex injuria jus non oritur* does is to allow for a sort of vetting process against such initiatives, which hardly could be seen as accurately reflecting the genuine intent of the notion of internal self-determination as derived from modern international law. But Dugard views the non-recognition of such apparently illegitimate states as a sanction against their claims for independence put forth to the international community. In recalling his initial assertion that while these entities may satisfy the Montevideo Convention guidelines for statehood, they could not be seen as having international legal personality, he is able to conclude that "the principle of *ex factis jus oritur* has ceased to be seen as a necessary corollary to non-recognition".[65] He then begins a detailed analysis of the roles played by peremptory norms and recognition, first concluding that states have a customary duty of non-recognition of new states when there has been a violation of a *jus cogens* norm.[66] He furthermore states that the *ex factis jus oritur* principle retains validity as a general principle (or as a hybrid general principle/customary rule) for the basis of non-recognition of circumstances "where the illegality has been confirmed by the political organs of the United Nations",[67] casting an eye to the 1971 Namibia Opinion before the ICJ.[68] Finally, Dugard refers to actions of the Security Council, and, in particular, Article 25 of the Charter, obliging member States to carry out the Council's resolutions and decisions, again formulating his argument primarily in the context of Namibia.[69]

One substantive observation that should not go overlooked is that the type of state being addressed by Dugard in the course of his analysis, and that which is under present examination is completely different. This discussion is leading toward the assertion that persistently and continually threatened groups have a right to societal existence, either as collective groupings or as a new independent state. As such, there must be a specific measure of equality amongst citizens and citizen-groups within the state. Perhaps most significantly, the effectuation of this right is not expressly delineated by the make-up of existing state boundaries. Dugard's analysis focuses mainly on questions whereby the international community of states is proscribed, or at least inhibited, from recognising the governmental actions claiming sovereignty over territorial entities as independent states, due to their dubious and, perhaps, illegal, policies and actions which bring about the question of statehood. More recently, Dugard and David Raič have reprised the question of collective non-recognition in a more modern formulation, as they succinctly state the following:

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[63] *Cf.* [Recapitulation of the development of *uti possidetis*] section, *supra* chapter two.
[64] See Dugard, *supra* note 57, at 130-132.
[65] *Id.* at 135.
[66] *Id.* at 135-136.
[67] *Id.* at 136.
[68] See 1971 ICJ Rep. 16.
[69] Dugard, *supra* note 57, at 137.

> Today, it is accepted that there are certain basic norms upon which the international order is founded and that these are peremptory and may not be derogated from under any circumstances. The modern law of non-recognition takes cognisance of this development. An act in violation of a norm having the character of *jus cogens* is illegal and is therefore null and void. This applies to the creation of States and to the acquisition of territory. States are under a duty not to recognise such acts under customary international law and in accordance with the general principles of law. […] In accordance with this doctrine, the United Nations has directed States not to recognise claimant States crated on the basis of aggression (e.g. the Turkish Republic of Northern Cyprus), systematic racial discrimination and the denial of human rights (e.g. South Africa's Bantustan States) and the denial of self-determination (e.g. Katanga and Rhodesia).[70]

Furthermore, the ILC has addressed the non-recognition of states in its 2001 Articles on Responsibility of States for Internationally Wrongful Acts,[71] at Articles 40 and 41:[72]

> Article 40 – Application of this chapter
>
> 1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.
> 2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.
>
> Article 41 – Particular consequences of a serious breach of an obligation under this chapter
>
> 1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.
> 2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.
> 3. This article is without prejudice to the other consequences referred to in this part and to such further consequences that a breach to which this chapter applies may entail under international law

What is at issue here are circumstances whereby claims are sent out to the international community for political independence and territorial sovereignty on the basis of dubious, and usually coercive illegal, actions taken by the central government of an existing state against a segment of its population, usually in its *Hinterland*.[73] To that end, even if one were to declare self-determination of peoples as a peremptory norm, an appropriate rejoinder would follow: what *kind* of self-determination? When Héctor Gros Espiell, in the late 1970s, proclaimed self-determination to 'necessarily' have the character of *jus cogens*,[74] he was using his seminal study to refer to self-determination as having the form of decolonisation, for that was initial legal form taken by self-determination of peoples in the United Nations context. Most likely, such a formulation served to negate the possibility of ex-colonialists to change their minds and re-colonise newly independent states. But it is much less certain that self-determination of peoples, in all its modern forms and permutations, holds up as splendidly now as it did to the *jus cogens* test. A similar ambivalence is reflected in the present analysis with regard to self-determination being an obligation *erga omnes*, as reference must be made to the 1995 *East Timor* case before the ICJ,

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[70] J. Dugard and D. Raič, *The role of recognition in the law and practice of secession*, in M.G. Kohen (ed.) Secession: International Law Perspectives 101 (2006).
[71] See J. Crawford, J. Peel and S. Olleson, The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: Completion of the Second Reading, 12 EJIL 963 (2001).
[72] See Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (UN Doc. A/56/10)
[73] The question of peremptory norms is much clearer in the first example than in the latter, and therefore the present thesis is concerned with peremptory norms only in an ancillary sense.
[74] See H.G. Espiell, The Right of Self-Determination: Implementation of United Nations Resolutions, UN Doc. E/CN.4/Sub.2/405/Rev.1 (1980), at para 74.

in which the Court *inter alia* declared self-determination to have an *erga omnes* character emanating from the Charter and from state practice and termed it as "irreproachable [as] one of the essential principles of customary international law".[75]

Indeed, the aim at present is certainly not to refute attempts to give self-determination, including the eventual possibility of postcolonial external self-determination, the status of a peremptory norm. Rather, it is to say that the nature of the analytical form—that is, the would-be independent state—is completely different than that put forth by Dugard, in his book on *Recognition and the United Nations*, in that such a form of external self-determination would be effectuated to promote, rather than hinder, the promotion and protection of human rights. To that end, the principle of *ex factis jus oritur* may be of use, for when the underlying factual circumstances involve primarily the existence of massive and systemic human rights violations targeted against a specific segment of the overall population of a state, such circumstances may contribute to the recognition of a new entity. So, while it is now relatively uncontroversial, post-Rhodesia, to state that "it appears then that a new rule has come into existence, prohibiting entities from claiming statehood if their creation is in violation of an applicable right to self-determination",[76] it is still controversial to advocate independent statehood for entities claiming statehood, on the basis of violations of an applicable right to (internal) self-determination. Nevertheless, these are precisely the types of situations most apparent under circumstances of postcolonial self-determination.

One way to recapitulate the ideas presented herewith is through the analysis provided by Stefan Talmon in his interesting thesis on recognition of governments (as opposed to recognition of new states). Given that states and governments are virtually indistinguishable at the outset of the process of new state creation—which, in the African context, is a phenomenon that is often self-perpetuating well beyond the initial period of new state creation—some of his comments with regard to secession, decolonisation or partition of states may prove illustrative. Talmon uncontroversially assigns a juridical weight to the legal act of recognition.[77] More controversially, however, there may well be territorial entities with indigenous political structures which reflect genuine governmental control. This is to say that such governmental control serves to negate coercion as a matter of practice. Thus, it may also appear that 'effective' governance need not necessarily emanate from a political capital and capitol, nor be necessarily dispersed, in a Weberian sense, throughout the land, and as such, to all corners of a state conceived as much of arbitrariness as of societal harmoniousness. 'Effective' governance can, indeed, be formed in much more localised territorial elements, and as such, as exceptional measures, it may well be the case that there are functional governments, and judiciaries, and legislatures, which go unrecognised by other sovereign states, in as much as those states are unwilling to make the political determination of new state creation, as well as the fact that the principle of *uti possidetis juris* may trap otherwise self-governing entities into administrative, political and judicial structures which actually contribute to their repression, rather than their development.

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[75] Case concerning East Timor (Portugal *v.* Australia), 1995 ICJ Rep. 102. But consider that the Court went on to state that it "considers that the *erga omnes* character of a norm and the rule of consent to jurisdiction [of self-determination claims before the ICJ] are two different things. Whatever the nature of the obligations invoked, the Court could not rule on lawfulness of the conduct of a State when its judgement would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case. Where this is so, the Court cannot act, even if the right in question is *erga omnes*."

[76] J. Crawford, The Creation of States in International Law 106 (1st ed, 1979).

[77] *Cf.* S. Talmon, Recognition of Governments in International Law: With Particular Reference to Governments in Exile 95 (1998) [hereinafter Talmon]: "As long as the sovereignty and independence of a (new) State have not been recognized its government cannot be regarded as a sovereign authority and therefore cannot be recognized *de jure*."

But in mitigation, in a world whereby universal standards of human rights is the norm, *ex factis jus oritur* is not without its possible employment in circumstances whereby a paucity of human rights can be readily observed. It may even be the case that, in postcolonial circumstances, factual circumstances can make contributions to the reality of governance in a particular territory, even if such activities are not products of recognised governmental authority *per se*.[78] To accept the notion at hand is to accept that e.g. certain *effectivités*, rooted in international human rights preservation, can be territorially manifested regardless of whether such manifestations come directly from the state, or whether they emerge from agents acting under the colour of state authority, or indeed, whether they are reflective of actions taken by state, or non-state, agents operating in peripheral geographic areas. Although such activities may be effectuated by individuals or groups not formally instilled with governmental authority *per se*, local populations may derive benefit from such activities in a way that compliments such governmental authority, or indeed supplements deficiencies in governmental administration. Such a reality further serves to demonstrate how the administration of modern territorial statehood is anything but monolithic.

The non-recognition of a self-administering territorial entity: The uniqueness of the Somaliland example

Although the British were active in colonising the Horn of Africa and the northern territory of Somaliland, after occupying Egypt, Somalia's previous colonising power, the integration of Somaliland into the state of Somalia is something of an anomaly. The southern part of the current state of Somalia itself was an Italian colony, and indeed, following the second world war, in which Italian Somaliland was briefly conquered from the British, the two territories became independent within days of each other, and in 1960 were thereafter merged into the present territorial form, the state of Somalia. The state had a decentralised, weak governmental form from the outset, and by 1969, a *coup d'état* by the army commander Siad Barre was followed by a brief period of social development, particularly in the reaffirmation of the Somali ethnicity, but inherent deficiencies in the state led to long periods of brutal military dictatorship, armed conflict with neighbouring Ethiopia, and eventual civil war. By the 1990s, a circumstance of perpetual conflict, without obvious reason or solution, had become the *status quo*, and Somalia became widely viewed as the *sine qua non* of a 'failed' state due to its anarchy in the complete absence of a government. Despite intervention by the international community through the United Nations in particular,[79] the anarchical situation prevailed under the difficult circumstances on the ground. Although a transitional regime has been officially enacted since 2002, the effectiveness of the government is highly questionable, and clan-based violence continues to be perpetuated as a matter of course on Somali territory. As one commentator writes:

> At the beginning of 2003, Somalia, after more than a decade, remains—and this is despite the last round of peace talks in Eldoret, Kenya, in October 2002 (where the [transitional government] had the doubtful honour of being considered as merely one of many Somali factions)—the "only country in the world totally devoid of a functioning central government and no less than twenty unsuccessful national-level peace initiatives since 1991" on its record. It appears that in the near future Somalia will remain a 'black hole' where 'regional authorities', armed factions, and warlords continue to create chaos and instability, as a result of their contest for power.[80]

[78] See discussion *infra* chapter five in this study.
[79] See Security Council resolution 751 (1992), creating a United Nations Operation in Somalia (UNOSOM), and Security Council resolution 814 (1993), which expanded the mission's mandate.
[80] G. Kreijen, State Failure, Sovereignty and Effectiveness 71 (2004), quoting research by the International

This has led another commentator to note that:

> [N]o entity—except for an entity within 'Somalia', namely Somaliland in the north—has claimed any Somali territories, and thereby effectively challenged its 'undiminished' statehood on the international plane. Somalia's statehood has rather been *presumed* in accordance with international law doctrine, particularly since efforts for the reinstitution of effective (central) governance have not yet been abandoned and there remains some hope that central authority will eventually be re-established.[81]

Nevertheless, as Schoiswohl suggests, the territory corresponding to the former British Somaliland has manifested certain *effectivités* despite the chronic ineffectiveness of the Somali state and has set a clear pathway advocating its own existence as an independent state. This is clear when considering Somaliland has drafted, implemented and revised a National Charter,[82] which was overwhelmingly approved by a referendum held on 31 May 2001,[83] and whereby article one of which proclaims the existence of a "sovereign and independent country known as 'The Republic of Somaliland'. Furthermore, although Somaliland is not an ethnic monolith, it has been largely spared the warlord violence so prevalent throughout the rest of Somalia. Indeed, Somaliland appears to present most of the criteria for statehood as per the Montevideo Convention, including the 'more fluid' aspects of statehood related to governance. According to Schoiswohl, this includes a two-house parliament, political parties, periodic elections, central, regional and local government, a functioning judiciary, as well as both a police force and national armed forces.[84] However, Somaliland undoubtedly finds itself firmly located within the larger Somali state, following the post-independence merger of the former British and Italian colonies.

To remedy this circumstance through, conceivably, an act of postcolonial external self-determination would essentially imply a reversal of this merger. Schoiswohl initially posits that this would imply recognition of the very brief time—five days—in which Somaliland was an independent state prior to the formation of the current state, a retroactive rejection of the merger, particularly in light of the absence of government elsewhere in the state and the invocation of the doctrine of *rebus sic stantibus*, in that the expectations of the merged states in terms of effective administration had not nearly been met and so constituted a fundamental change in circumstances from what was expected at the time of merger.[85] However, Schoiswohl goes on to observe that any *rebus sic stantibus* argument is flawed, as the fundamental change of circumstances would be the remedy of 1969 *coup d'état*, which led to the tyranny of Said Barre being waged in both Italian and British Somaliland. By the time Barre went into exile, and subsequently died in 1991, "Somaliland's alleged right to restoration thus could, if at all, only be asserted against the suppressive regime itself, but not against the south as such. Once Barre's regime had finally been

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Crisis Group.

[81] M. Schoiswohl, Status and (Human Rights) Obligations of Non-Recognized *De Facto* Regimes in International Law: The Case of 'Somaliland' 132 (2004) [hereinafter Schoiswohl].

[82] Document available on www.somalilandgov.com, accessed May 2005.

[83] See Schoiswohl, *supra* note 81, at 133, citing the Initiative and Referendum Institute, Final Report of the Initiative and Referendum Institute's Election Monitoring Team, 27 July 2002, available on www.iandrinstitute.org/international/FinalSomalilandReport7-24-01combined.pdf, accessed August 2004.

[84] See *Id.* at 134-38.

[85] See *Id.* at 152-54. He continues, *Id.* at 155, footnotes omitted: "[…] the Somali Republic, though lacking unambiguous legal foundation, proceeded on the basis of a '*de facto* union'. [A historical] observation is most crucial in evaluating the assertion that the act of unification was invalid and that Somaliland would thus have a (historic) title to restoration: despite any legal uncertainties and initial opposition manifested in the turnout and results of the referendum, no corresponding claim to independence had been advanced […]."

ousted in 1991, Somaliland lost its 'oppressor' and, with him, the only possible addressee of any doubtful right to restoration".[86] The remaining legal options for effectuating Somaliland's claims for sovereignty would be principally through the self-determination pathway, as Somalia acceded to the ICCPR on 24 January 1990. Although this may indeed lead to increased levels of autonomy within the Somali state, Somaliland's referendum on its National Charter is purposeful and unambiguous and raises the question of Somaliland's secession from the existing Somali state. The problem with collective groupings claiming postcolonial external self-determination is that the claimants most likely to achieve this ambitious goal are those that have demonstrably presented evidence showing they are, in fact, being harmed by the preservation of the *status quo*, generally due to being the recipient of targeted attacks by the state itself. The Somali situation, as it is relatively uncontroversial to observe that the Somali state is a 'failed state', presents a paradox, because in view of the dominant declaratory theory of recognition, Somaliland does appear to fulfil all relevant criteria of statehood, except for the most overarching of all: actual acts of recognition by peer states as an independent state *per se*. What this serves to demonstrate most clearly is that regardless of doctrinal theory, in practical terms new state recognition is driven primarily by the political motivations of states, and the non-recognition of a territorial entity, which would 'otherwise' effectively manifest sovereignty and uphold territorial integrity, is largely inconsequential as a compulsory matter.

The evolution of territorially-defined collective rights in light of the Montevideo criteria

Although minority rights are of a tremendous significance, whereby individual citizens are made to achieve parity with other individual citizens of a state, the territorial definitional nature of 'peoples' *per se* may lend itself to a somewhat different interpretive significance, which will feature more prominently in the present analysis.[87] As well as comprising a dominant variable in the equation of statehood, territorialism is also a predominant feature of a 'people' that collectively seeks to assert, define, advocate and implement collective self-government within the established framework of an existing sovereign state, at least in the first instance. Such procedures are likely to prove contentious, and difficulties in their implementation may be widely evidenced. Particularly in the newer, postcolonial states, where human and financial capital may be limited and infrastructures are likely to be considerably underdeveloped, the achievement of full measures of 'self-determination' is a particularly challenging, perpetual task.

It must be stated, however, that although statehood is a most specific legality, both universal in scope and widely accepting of definitional criteria rooted in, the Montevideo Convention, in particular, the phenomenon of universal statehood certainly evidences the capacity for it to prove discordant with local realities. Governance, government, hegemony, acquiescence and effectiveness are all socio-juridical terms with particular meanings and practical implications. Although many, perhaps even most, states arising from colonial situations in the period following the two world wars have emerged into nominally effective and tangibly functional, if not underdeveloped, territorial state entities, the sustainability of these circumstances may be limited. To this end, it may be recalled that the postcolonial entities under consideration surely could not be considered 'nation-states' *per se* in the same manner as colonising states could lay greater claim to such composition.

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[86] *Id.* at 157.

[87] In the following chapter, the 'minorities' concept is more fully integrated into the overall legal analysis, in that the evaluation of the 'collective groupings' to be found in certain geographic regions, such as sub-Saharan Africa, may also be found within established postcolonial state borders.

There is an expectation in international law that states will uphold the requirements of sovereign equality associated with statehood, in particular the concepts of independence, territorial integrity, effectiveness, *pacta sunt servanda* and, increasingly, an expectation of some measure of accountability in terms of a state's administrative procedures. By this measure, again largely shaped through an understanding that Montevideo Convention criteria, are the most readily established criteria of statehood, a large percentage of ex-colonial territories have emerged into independent states and will be able to demonstrate continually the fulfilment of these criteria, and, as such, the question of statehood will not arise. As discussed in the previous chapter, a state recognised by other states and fulfilling the general legal criteria for statehood is, quite simply, a state.

The question, however, of collective groupings is complicated by a certain amalgam of circumstances, whereby a geographically-contiguous 'people' has a right to internal (and potentially external) self-determination, a 'minority', not typically being subject to internal territorial definition or demarcation has a right to parity with the majority, and an 'indigenous people' has direct access to a particular set of rights and privileges systemically designed to preserve particular traditions and patterns of behaviour. In those circumstances where the tension between the 'state' and its component parts becomes extreme, particularly in those circumstances whereby the postcolonial context produces a reality fraught with a complicating set of social, economic and geopolitical pressures, coercive governmental behaviour may be directed against potions of its citizenry, as matters of policy, or of evidenced practice.[88]

Under such circumstances, the 'collective groupings' being examined in this chapter find their most obvious definition through the commonality of an inherent desire to rectify these situations and to achieve, in the main, a measure of self-administration (*i.e.,* self-determination of peoples, to which the internal and postcolonial external forms share a common juridical pedigree), parity with other citizens (*i.e.,* minority rights), or recognition as an established, differentiated group with distinct linguistic, cultural and social characteristics (*i.e.,* indigenous peoples' rights).

The ability to invoke successfully collective rights by collective groupings is practically limited by the capacity of the collective grouping to define persuasively and advocate its claims. In short, the collective grouping must be recognised, primarily within the state in question, and, with ancillary measure, by the international community of states. This study has focused in the main on sub-Saharan Africa as its practical reference point because, as will be elaborated in chapter four, sub-Saharan Africa is a widely diverse and dynamic region for the consideration of collective groupings generally. What can be said with certainly is that, in the sub-Saharan African context, the legacy of colonialism is shared by the likes of the administrative structures formed in e.g. Accra, Ghana and Dakar, Senegal as well as those in e.g. Khartoum, Sudan and Kinshasa, DR Congo. Although such situations would reflect profoundly different sets of circumstances in terms of economic development, social stability and effective territorial admini-

[88] As a reference point, it should not go overlooked that this study is written from a perspective generally seeking to incorporate the effects of postcolonial circumstances into an analytical legal framework. As observed by one commentator: "As with the end of slavery, the end of colonial rule seemed a hopeless venture at the start and an inevitable outcome by the end. The precipitous end of colonial rule resulted partly from the devastating civil wars among the European colonial powers from 1914 to 1945, which literally bled the colonial powers, exhausted from economically, and discredited them morally. Still, the triumph was one of mass political action and the awakening of vast publics around the world to the ideals of self-rule. Without glossing over the tragic violence, cynicism, political failure, and despotism that often replaced imperialism, we can marvel at the phenomenal and positive spread of the Enlightenment ideal of government by consent." *Cf.* J.D. Sachs, The End of Poverty 362-363 (2005).

stration, the underlying point is that the universalism of statehood is projected not only into inter-temporal European and post-colonial circumstances, but also develops with a similar dynamism, as colonialism becomes more of a historical relic and postcolonial statehood is increasingly forced to address substantive claims of collective rights. Thus, while fundamentally rejecting racism and *négritude* outright, it cannot go overlooked that the smaller and more integrated, rather prosperous capitals of Accra and Dakar are faced with considerably less complicated factual circumstances, in terms of territorial administration, than in Khartoum and Kinshasa. It seems likely that geography plays a formative role in this comparison, in that one pan-African commonality, however, is a definitional form largely shaped by a tendency towards profound economic underdevelopment, sprawling geographic reach and certain evidence of discordance in municipal affairs,[89] but the scope and extent of such malfeasance is considerably more tangible, and therefore more juridically significant in the latter of such circumstances.

There are, therefore, obvious, workaday circumstances of administrative deficiency, coupled with the quintessence of systemic dysfunction which may well lend credibility to claims of collective rights under the aforementioned three main forms of 'collective groupings' (under which 'self-determination' is loosely grouped with 'minority rights' and 'indigenous peoples' rights'). Self-determination is particularly relevant in postcolonial states, in particular, those having long since been the subject of speculation on the forms functional incorporation into the global state system.[90] Although this formulation lends credence to the notion that collective groupings may be judicially formed in both complicated and uncomplicated factual circumstances alike, care should be taken when formulating an overall conceptual picture to avoid assuming factual circumstances in situations on the ground, which are, in fact, worse than they may otherwise appear at first glance. As one commentator has stated:

> [T]here remains the possibility that a particular people may be treated systematically by the central government in such a way as to become, in effect, non-self-governing with respect to the rest of the state. By analogy with GA Resolution 1514 (XV), Principle IV, if they are arbitrarily placed in a position of subordination, the question of external self-determination is surely raised. Measures grossly discriminating against the people of a territory on grounds of ethnic origin or cultural distinctiveness may effectively single out and thereby define the territory concern as non-self-governing according to existing criteria, reinforcing or even constituting the case for external self-determination by the people of that territory.
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> *But situations of internal colonization are very much the exception.* In the normal case it is clear that ethnic or cultural distinctiveness of groups within the state, whether or not it qualifies those groups as 'peoples' for the purpose of the principle of self-determination in international law, does not entitle them to secede from the state of which they are part. Despite this, there is a growing acceptance that, for real equality to be achieved for such groups within the state, measures of a collective kind may be necessary. These can include measures of local autonomy, provisions for separate representation in legislative and executive bodies at central or regional levels, land rights (especially in the case of indigenous groups with historical links to areas of land) and so on.[91]

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[89] Indeed while the Ghanan and Senegalese circumstances are comparatively preferable, the fragility of this reality is unquestionable, as Côte d'Ivoire certainly would have otherwise been viewed as a paragon of stability in the decades immediately following its independence from France.

[90] *Cf.* W.V. O'Brien and U.H. Goebel, *United States Recognition Policy Toward the New Nations*, in W.V. O'Brien (ed.), The New Nations in International Law and Diplomacy 98 (1965) [hereinafter O'Brien and Goebel]: "… [t]he emergence of so many states, virtually all in Asia and Africa, has naturally caused speculation on the effect of all of these non-Western states on international law and diplomacy. One side of this subject, and possibly the most important in the long run, concerns the behavior of the new nations themselves. It is still rather early, however, to develop this side in depth."

[91] J. Crawford, *The Right of Self-Determination in International Law: Its Development and Future*, in P.

Thus, although neo-colonialism is unlikely to be widespread, the possibility for the phenomenon to exist, or for evidence to exist that factual circumstances have been driven by that phenomenon, cannot necessarily be excluded. Surely such circumstances would be of greater practical and administrative dysfunction than would be otherwise observed in postcolonial states lacking sustainable economic and social development, but otherwise exhibiting a level of social cohesion sufficient so as to continue to reinforce the validity and legitimacy of the state itself. The juridical examination of modern territorial statehood undergoes a perpetual state of critical evolution, as law is both defined by, and dependent upon, human behaviour, particularly in circumstances whereby *collectivités* submit credible claims for recognition to the states of which they are citizens. Such claims need not necessarily be minded to have been invoked in response to circumstances of neo-colonialism *per se*, although they may well serve to document substantial and fundamental violations of individual and collective human rights.

It may be the case that neo-colonial circumstances, or situations of 'internal colonisation' would correspond most closely with situations likely to be found on the outermost cultural and geographic extremes of postcolonial states, e.g. South Sudan and Darfur, the eastern part of the Democratic Republic of Congo, easternmost Chad, and in many of the northernmost regions of the West African states.[92] The sub-state entity may be faced with a power structure concentrated around the apparatus of a central government in a distant capital. The collective grouping will in theory be making claims to this government, from which, again theoretically, a response will be forthcoming. In practice, however, the capacity for such inter-societial administrative functionality will be limited. Indeed in the case of Darfur or the eastern part of the DR Congo, such formalities are purely fictional. To complicate matters further, the international law governing collective groupings is particularly definitional in character, with an implication of subsequent vagueness revolving around the notion of sub-state collective rights as human rights, while human rights litigation is the subject of municipal law in the first instance, before emerging onto the international plane, following the exhaustion of local remedies.

When collective rights are unlikely to be recognised as such by the encompassing state in question, and the international community as a whole and by extension, the concept of 'internal self-determination' fails the test of sustainability. This is a different phenomenon than that of a regional or national government, e.g. Quebec, asserting that the central government has failed to negotiate in good faith on its claims for (external) self-determination. Rather, it is more akin to the circumstance whereby particular measures of internal self-determination prove insufficient to achieve an effective level of self-administration. In the most extreme of circumstances on the

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Alston (ed.), Peoples' Rights 64-65 (2001), emphasis added.

[92] The situation in Darfur is particularly challenging as it may eventually be proven to have a genocidal character; however, the Security Council, following an International Commission on Inquiry, concluded that genocidal intent could not be definitively linked to the central government. See Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, 25 January 2005, not issued as a UN document, available from http://www.un.org/News/dh/sudan/com_inq_darfur.pdf, at para 640. *But cf.* Sudan 'backs' Janjaweed fighters, BBC News, 18 October 2006, available from http://news.bbc.co.uk/1/hi/world/africa/6060976.stm: "A man identified only as 'Ali' told the BBC's Newsnight programme that Sudanese ministers gave express orders for the activities of his unit, which included rape and killing children. 'The Janjaweed don't make decisions. The orders always come from the government,' he said. 'They gave us orders, and they say that after we are trained they will give us guns and ammunition.' 'Ali' - who is now seeking asylum in Britain - said the men who had trained them were wearing the uniforms of the Sudanese military, adding that Interior Minister Abdul Rahim Muhammad Hussein was a 'regular visitor'." See also Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo *v.* Belgium 2002 ICJ Rep. 3.

ground, a tangible measure of 'internal self-determination' could even be measured by a cease-fire or other cessation of hostilities, particularly involving activities directed against civilian populations. As such, the positive definition of a 'collective grouping' is largely dependent upon the argument underlying a collective grouping's self-identification, and the general political climate governing the interactions between governmental capital and political *Hinterland*. It seems to be unlikely that in the most extreme factual situations (*i.e.,* those most akin to 'internal colonisation'), the achievement of group rights by collective groupings will come to fruition without a fundamental change in factual circumstances on the ground. Internal self-determination, then, could well be a difficult proposition to imagine. Indeed, it may be an utterly incredible proposition, as should be seen from Darfur. Yet, in addition, the notion that external self-determination would act as a panacea when the attainment of internal self-determination appeared unlikely or problematic, seems similarly difficult to comprehend. As Christian Tomuschat writes:

> It is abundantly clear, therefore, that international practice from Africa, the continent where the greatest number of incongruities between ethnic lines and State boundary lines can be observed, strongly speaks against acknowledging a right of secession being enjoyed by ethnic groups. In fact, in countries like Nigeria, where roughly 250 linguistic and ethnic groups exist, and Cameroon, where the number of indigenous languages rises to more than 120, the application of that legal proposition would lead to nonsensical results through infinite fragmentation which could hardly be stopped at any given point if no additional criteria were introduced, such as the viability of a potential State entity. Yet, the available texts do not mention such additional requirements—quite obviously because it was never thought that the assertion of self-determination could end up in such a chaotic state of affairs. This, again, confirms that the presumed premise—the existence of an unlimited right of secession for every ethnic group—must be wrong.[93]

A situation develops whereby, in the most extreme postcolonial circumstances, the achievement of any measure of internal self-determination seems farcical, yet the threshold to external self-determination is held restrictively high. The point remains that *collectivités* will continue to bring an onus on the state, supported if need be, through actions by the international community,[94] determining that these circumstances do exist and that a remedy is required. The greatest problem with this formulation is that the potential for the most extreme factual situations on the ground to retain that status is considerable.

However, an emerging point worthy of greater consideration is the reality that notions of sovereignty have considerably and tangibly evolved since the historical period of absolute sovereignty associated with classical legal positivism. Indeed, as can be easily observed, one of the most significant developments, at the outset of the 21st century, has been action by the United Nations to reinforce the linkages between rights and responsibilities, both between states and individuals.

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[93] C. Tomuschat, *Secession and self-determination*, in M.G. Kohen (ed.), Secession: International Law Perspectives 29 (2006).

[94] U.S. Secretary of State Colin Powell testified before the Senate Foreign Relations Committee on 9 September 2004 that genocide was occurring in Darfur, although whether this action has served the Darfur people well is perfectly questionable, in that it has proven to be of little practical effect in the years following its pronouncement. This action further follows that taken in the House of Representatives in H.Con.Res. 467 (21 July 2004), resolving that Congress "declares that the atrocities unfolding in Darfur, Sudan are genocide".

The responsibility to protect populations and the methods of accommodating collective groupings

The effectuation of postcolonial, and indeed post-cold war,[95] self-determination never occurs in a vacuum. Particularly for *collectivités* hoping to achieve the status of a 'people' and the level of self-administration associated therewith, questions of potential territorial modifications and the associated questions of administration may also arise. The foremost initial challenge for a newly independent state, a self-determining 'people' or a minority group is to evaluate the merit of an entity's particular claims. Many states will devote considerable effort toward denying the factual existence of a substantive claim by collective groupings. Indeed, as well, many collective groupings will lack sufficient resources to be able to advocate their claims sufficiently. Alternatively, states may strongly respond that no established procedure exists to attempt rectification of the situation. However, (*viz.* Greenland's autonomy from Denmark and the devolution of powers in the British Isles) internal self-determination may also be achieved on the basis of mutual consent, as allocation of certain powers away from a central governmental establishment need not be necessarily contested.

It is never straightforward to ascribe a particular legal status to postcolonial collective groupings beyond the usual categorisation into the established forms of 'self-determination of peoples', 'minority rights' and 'indigenous peoples' rights'. Accordingly, the underlying question, and thus the primary focus of this chapter, is how collective groupings become 'recognised' by both municipal and international legal frameworks and once 'recognised' *per se*, how those entities are able to function, not as independent states, but as, primarily, self-administering territorial regions within established states.

As the frameworks both for 'peoples' rights' and 'minority rights' are defined primarily in the context of international law and international human rights law in particular, this is a circumstance whereby international law itself has a direct and relevant role to play in the territorial administration of an entity, in that it defines the form and function of a 'people' or 'minority'. Such a process, from the perspective of public international law, involves evaluating specific circumstances allocating established legal principles according to their connection to particular facts and implementing decisions taken on this basis.[96] The fundamental juridical problem is that the set of circumstances between the official recognition of claims by collective groupings and the official recognition of claims by 'new-state entities', as it were, share both similar circumstances and different legal definitions. The 'similar circumstances' are that an emerging entity seeks acknowledgement from more established entities. The 'different legal definitions' reflect that fact that, concerning newly emerging states, their definitional form is exclusively based on external, Montevideo criteria, whereas for collective groupings, definitional criteria, while being not wholly dissimilar, are also significantly more relativist and therefore dependent upon individual circumstance, given the conceptual overlap between the separate regimes of 'self-determination' and 'minority rights'.

This dilemma reflects a problem common to entities seeking a specific legal recognition, either as independent entities or as component parts of a municipal, recognised 'state'. Although the concept of 'recognition' as a legal concept *per se* is certainly set in the context of peer-state recognition, many of the same underlying processes are also transferable to sub-state situations.

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[95] *Viz.* the unification of Germany, the separation of Czechoslovakia and the dissolution of Yugoslavia.
[96] *Cf.* Crawford, 2nd ed., *supra* note 4, at 117: "It will be seen that in each of these cases the problem of identification [of the units of self-determination] has been solved in practice by processes of agreement or at least acquiescence."

Whenever collective groupings present, through established legal channels, coherent arguments for the legal recognition of specific claims made within the frameworks of 'peoples' and/or 'minority' rights, states will be called upon to provide a similarly coherent procedural framework for the evaluation and eventual effectuation of such claims, both within their own territories as well as for the recognition of such claims, on the international plane.

This line of argumentation has been afforded significant structural enhancement by the United Nations' 2000 Millennium Declaration, which makes clear that states have a concrete obligation to respect claims for collective self-administration and individual equality by their citizens.[97] These obligations were given considerable further definition in the 2005 World Summit, in UN Doc. A/RES/60/1 (24 October 2005), which reaffirmed the 2000 Declaration five years after its proclamation. This is most evident with regard to paragraphs concerning human rights and conflict prevention, but what is particularly notable is the groundbreaking 'responsibility to protect populations', now colloquially referred to as 'R2P', mentioned in paragraphs 138 and 139 of the GA resolution (with emphasis added):

> **Human rights.** 121. We reaffirm that all human rights are universal, indivisible, interrelated, interdependent and mutually reinforcing and that all human rights must be treated in a fair and equal manner, on the same footing and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, all States, regardless of their political, economic and cultural systems, have the duty to promote and protect all human rights and fundamental freedoms.
>
> 122. We emphasize the responsibilities of all States, in conformity with the Charter, to respect human rights and fundamental freedoms for all, without distinction of any kind as to race, colour, sex, language or religion, political or other opinion, national or social origin, property, birth or other status. […]
>
> 127. We reaffirm our commitment to continue making progress in the advancement of the human rights of the world's indigenous peoples at the local, national, regional and international levels, including through consultation and collaboration with them, and to present for

[97] *Cf.* United Nations Millennium Declaration, UN Doc. A/RES/55/2 (18 September 2000), para 6: "We consider certain fundamental values to be essential to international relations in the twenty-first century. These include:

Freedom. Men and women have the right to live their lives and raise their children in dignity, free from hunger and from the fear of violence, oppression or injustice. Democratic and participatory governance based on the will of the people best assures these rights.

Equality. No individual and no nation must be denied the opportunity to benefit from development. The equal rights and opportunities of women and men must be assured.

Solidarity. Global challenges must be managed in a way that distributes the costs and burdens fairly in accordance with basic principles of equity and social justice. Those who suffer or who benefit least deserve help from those who benefit most.

Tolerance. Human beings must respect one other, in all their diversity of belief, culture and language. Differences within and between societies should be neither feared nor repressed, but cherished as a precious asset of humanity. A culture of peace and dialogue among all civilizations should be actively promoted.

Respect for nature. Prudence must be shown in the management of all living species and natural resources, in accordance with the precepts of sustainable development. Only in this way can the immeasurable riches provided to us by nature be preserved and passed on to our descendants. The current unsustainable patterns of production and consumption must be changed in the interest of our future welfare and that of our descendants.

Shared responsibility. Responsibility for managing worldwide economic and social development, as well as threats to international peace and security, must be shared among the nations of the world and should be exercised multilaterally. As the most universal and most representative organization in the world, the United Nations must play the central role."

> adoption a final draft United Nations declaration on the rights of indigenous peoples as soon as possible. […]
>
> 130. We note that the promotion and *protection of the rights of persons belonging to national or ethnic, religious and linguistic minorities* contribute to political and social stability and peace and enrich the cultural diversity and heritage of society. […]
>
> **Democracy.** 135. We reaffirm that democracy is a universal value based on the freely expressed will of people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives. We also reaffirm that while democracies share common features, there is no single model of democracy, that it does not belong to any country or region, and reaffirm the necessity of due respect for sovereignty and the right of self-determination. *We stress that democracy, development and respect for all human rights and fundamental freedoms are interdependent and mutually reinforcing.*
>
> 136. We renew our commitment to support democracy by strengthening countries' capacity to implement the principles and practices of democracy and resolve to strengthen the capacity of the United Nations to assist Member States upon their request. […]
>
> **Responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.** 138. Each individual State has the *responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it.* The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.
>
> 139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, *we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.* We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.[98]

The willingness manifested by the General Assembly to assume responsibility to protect their populations, of which collective groupings may form a part, from genocide, war crimes, crimes against humanity and ethnic cleansing (itself a term with a less-developed juridical pedigree than the other three), is of critical importance in how the international community views the seriousness of implementing international human rights law, particularly in the most challenging of regional situations. When the level of urgency with which collective groupings make specific legal claims *per se* is so high that genocide, war crimes, ethnic cleansing and crimes against humanity are considerable possibilities, it can readily be assumed that the state involved has an obligation to respond expeditiously to such claims, with an established procedural framework capable of providing an effective result. As such, arguments are not necessarily formed—as submissions to courts of high standing, in a framework whereby international law is sufficiently developed—so as to assert, clearly, the universal equality of citizens, within a state, as well as the right of such citizens to have access to universal standards of individual and collective

[98] See also Security Council Resolution 1674 (2006), 28 April 2006, which reaffirmed these provisions.

human rights.[99]

Therefore, by affording particular and specific rights to collective groupings under the substantive and procedural rubric framed by indigenous peoples' rights, a people's right to self-determination and minority rights enacted by the territorially administering state, states have explicitly recognised the conceptual validity of collective groupings with specific rights formed from international law. 'Recognition' as considered in the present context, is greatly dominated by the established practice of states recognising entities professing 'statehood', under the established criteria for such a status. But, in the more extreme of factual circumstances, such as those observed when attempting to view statehood through its more 'modern', *i.e.,* postcolonial reality, established practice may be lacking, and the underlying evaluative criteria may be highly subjective.

The 'responsibility to protect' is quite a new development in the international legal framework, and it remains to be seen how it will manifest itself in practice. Some indications on the future course of this legal development may be obtained from an article written by the UN High Commissioner for Human Rights, Louise Arbour, prior to the expiry of her mandate.[100] In it, she observes that responses by the international community to severe violations of human rights and fundamental freedoms, such as genocide, are now widely viewed as reasonable expectations by influential sectors of world opinion, which serves to intrude into "the fortress of State sovereignty".[101] This sense, she writes

> [i]s not, as some have suggested, a leap into wishful thinking. Rather, it is anchored in existing law, in institutions and in lessons learned from practice. Its vitality flows from its inherent soundness and justice, as well as the concept's comparative advantages over formulations of humanitarian intervention. […] Rooted in human rights and international humanitarian law, the norm squarely embraces the victims' point of view and interests, rather than questionable State-centred motivations. It does so by configuring a permanent duty to protect individuals against abusive behaviour. Such duty is a function of sovereignty and should be

[99] See also Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN GA Resolution 60/147 (16 December 2005), whereby the Assembly states in the operative paragraphs one and two of the resolution that "The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law emanates from (a) Treaties to which a State is a party; (b) Customary international law; (c) The domestic law of each State," and that "If they have not already done so, States shall, as required under international law, ensure that their domestic law is consistent with their international legal obligations by (a) Incorporating norms of international human rights law and international humanitarian law into their domestic law, or otherwise implementing them in their domestic legal system; (b) Adopting appropriate and effective legislative and administrative procedures and other appropriate measures that provide fair, effective and prompt access to justice; (c) Making available adequate, effective, prompt and appropriate remedies, including reparation, as defined below; (d) Ensuring that their domestic law provides at least the same level of protection for victims as that required by their international obligations."

Furthermore, the Assembly lists the scope of the obligation as including "the obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, *inter alia*, the duty to (a) Take appropriate legislative and administrative and other appropriate measures to prevent violations; (b) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law; (c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation; and (d) Provide effective remedies to victims, including reparation, as described below."

[100] See L. Arbour, *The responsibility to protect as a duty of care in international law and practice*, 34 Rev. Int'l Studies 445 (2008).

[101] *Id.* at 446.

> fulfilled primarily by the State concerned. Absent that State's ability or willingness to discharge such obligations, the onus of protection falls by default upon the broader international community, which is then called upon to step in and help, or compel and—through appropriate authorisation and in accordance with international law—even coerce States to put in place the requisite web of protection. At its core, the norm asserts a broad international public interest predicated on universal human rights, while appealing to the practical wisdom of confronting threats and ongoing abuses before a crisis unravels and unfolds with unforeseeable consequences.[102]

More specifically, although the responsibility to protect is formulated in a manner affording protection to individuals, particularly when given the serious nature of the types of crimes deserving of protection, there is nothing *per se* logically inconsistent about viewing a group of individuals otherwise fulfilling the characteristics of a 'people' (or other collective grouping) as being worthy of protection. Indeed R2P's existence may lead to increased credibility in the regional acknowledgement of the claims of a collective grouping.[103] When viewed against e.g. the situation in Darfur—a situation to which Arbour herself draws reference—[104] the theoretical interplay between collective groupings and R2P must be acknowledged.

Conceptually speaking, however, as defined by this study, 'collective groupings', as a general legal concept, may be viewed in the context of an increasingly developed body of international law with direct applicability to domestic legal systems. In particular, collective groupings seeking 'recognition' *per se* will likely find the greatest measures of success when formulating their arguments along the lines of established legal principles. For example, a 'people' hoping for self-determination (*i.e.,* territorial self-administration) would be likely to gain credibility in its lines of argumentation by employing principles derived directly from international law, such as Montevideo criteria and a demonstrated commitment to upholding the international human rights core. Given the explicit responsibility by states to protect populations within the ambit of their territorial administration, from the most extreme governmental and non-governmental actions targeted against specific populations, as decided by the 2005 World Summit, the interconnectivity between the international and domestic planes is further reinforced. The question remaining will be the extent to which, by definition, a geographically-congruent 'people' can be formed as a result of collective decision-making, in opposition to the *status quo*. Indeed, it will be increasingly asserted that a 'people' can take specific form from such an inherently negative composition. This analysis will then be concluded, with a view to anticipating relevant aspects under examination in the following chapter, where specific provisions of the African Charter on Human and Peoples' Rights are examined in light of factual circumstances readily observed on the ground.

Translating international law to municipal application: Interactions between the law of collective groupings and the juridical phenomenon of statehood

As was the case with decolonisation, the effect desired by collective groupings will tend to revolve around the advocacy of a case that a specific factual circumstance exists, in that it coincides with one or more rules of self-determination or minority rights, and that such rules will afford a mutually-agreed negotiated solution between otherwise separate entities under common

[102] *Id.* at 448.
[103] *Cf. Id.* at 454: "[…] the opinion [in Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina *v.* Serbia and Montenegro), General List, no. 91, 26 February 2007] appears to put an additional onus on those States that are nearer to the theatre of a crisis and that, due also to their capacity to wield influence and their possession of information, are better positioned to prevent genocide."
[104] See *Id.* at 458.

administration.

To this end, much as colonial independence could be contested, and indeed resisted by administrators on the ground, the obtaining of a particular juridical 'status' through practice, and the implementation of procedures most appropriate to the situation at hand, will show similar potential for complication, in that between e.g. the period 1950-1980, anti-colonialism became a political force of such intensity that universally-recognised legal consequences were readily derived. The remaining question, to be addressed, therefore, in e.g. the period 1980-2010, is the extent to which new states created by anti-colonialism are able to implement the fundamental building blocks of modern society, particularly with regard to the expectations of modern territorial statehood, incorporating territoriality, as well as the complicated nexus of political participation, sustainable development and individual security formed by the core precepts of international human rights law.

Surely the legal recognition of new state entities has a long and developed juridical pedigree, whereas the recognition of collective groupings as a legal concept *per se* would stem primarily from the development of international human rights law itself, dating in particular from the late 20th century. Postcolonial new state recognition emerges thereafter from the practices established from the saltwater barrier-defined decolonisation process of the earlier era. However, the definitive step of recognising the decolonising entity as an independent sovereign state is always a specific legal action handled through established and particular diplomatic and ministerial channels.

'Recognition' of new statehood in the postcolonial era remains an essentially extraordinary activity, in the sense that an act is undertaken by states for specific, and indeed, even remedial, reasons. In a postcolonial era, it is conceivable that newly independent states could emerge further onto the world stage, and it seems likely that such emergence would be caused by specific circumstances, particularly within the realm of international human rights law and directed squarely towards the remedying of specific circumstances within a state. But whether the particular legal act consummating the 'recognition' of collective groupings within a municipal state finds itself subject to the same conceptual, or procedural, restrictions as those defining new state recognition is questionable, in that new states will have to earn peer recognition from nearly 200 such entities, whereas sub-state recognition will be primarily fixated on its recognition *per se* by precisely one state within the framework of its own legal system. Clearly, a deeper level of analysis between the state and collective groupings would be useful to determine how the roles they play may overlap, under the rules of so-called 'modern' statehood—*i.e.,* that which merges classical Montevideo and postcolonial criteria under a common legal framework.

That said, it is difficult to argue that claims for recognition of specific authority follow wholly dissimilar intellectual lines of conceptual argumentation, as entities presenting claims to the international community for recognition as independent states, and as entities presenting claims as established collective groupings to an established government, draw from a common pool of circumstances and similar procedure –, namely that a specific case for the modification of the territorial *status quo* is developed, from 'identification' to 'evaluation' to 'implementation'. The implementation mechanism is most obvious in practical circumstances, whereby human rights concerns are not so profoundly acute so as to invoke violation of the right to life. Scotland, for example, has achieved tangible measures of internal self-determination, due the UK's devolution of powers from London to the regions at the end of the 20th century. That Scotland has achieved such measures under the established framework of the territorial United Kingdom of Great Britain and Northern Ireland demonstrates that the criteria for devolutionary recognition within the specific UK context has now become more richly defined than in the past, and there-

fore may not be viewed as existing within a conceptual vacuum.[105] Thus in the Scottish circumstance, the bridge between 'independent state' and 'sub-state' is quite clearly demarcated, in that Scotland would have to demonstrate, most obviously, tangibly, that systemic human rights violations have the most certain claims of independent statehood, yet to have achieved. In addition, many of the same objectives of independence, by common consent between London and Edinburgh. This is because 21st century society is no longer subjected to the phenomenon of colonialism and its juridical realities, and the onus of identifying the breaking point between imperial administration and local governance has been squarely formed to protect the self-identifying, particular administrations within a state.

This reality demonstrates a credible affront to the established doctrine of a foregone era, whereby the expectation of uniform standards of human behaviour—e.g. the product of modern international human rights law—was not yet intellectually conceived. Statehood, in the earliest period of decolonisation, was a tangible reality, in a world otherwise largely defined by latent imperialism. The dominant, yet fading, European positivism of the time, and its obvious actions, inherent in a civilising mission meant that to hold administrative actions together in a coherent form, reveals this burgeoning dichotomy of purpose between classical and modern forms. Indeed, as international human rights law has now become part and parcel of modern international law, 'statehood', as a legal subject *per se*, is confounded by a duality of circumstances in that statehood in its original form is arbitrary and rigid, and in its more modern form must pay close attention to its internal administration, in particular. This parallel reality has caused a puncture in the monolith form of sovereign equality. Indeed, now, the laws of statehood may also serve to play a tangible, and perhaps indisputable, role in determining whether one state will go so far as to recognise the independence and emergence of a new state entity, particularly as a remedial measure.

To that end, although circumstances of neo-colonialism or 'internal colonisation' are relatively rare, as the level of coercive subordination to which a population would be subjected would be practically intolerable, with widespread, protracted and systemic violence purposefully targeted against a population, they are not inconceivable. Again, with geographic and temporal sights locked on sub-Saharan Africa at the outset of the 21st century, the circumstances found in the eastern DR Congo and Darfur, Sudan are paradigmatic, in that they are found within exceptionally large states, with large, territorially-defined populations being subjected to extremely coercive behaviour, directed from far-away seats of power. Under these most extreme circumstances, it would appear that the primary rule for the evaluation of collective groupings' claims would be based upon the need to obtain evidence of the factual situation on the ground by all sources most appropriately placed to provide such information (*i.e.,* from intergovernmental, governmental and non-governmental sources alike). It may also be entirely conceivable that the most credible claims of a collective grouping would be those seeking to mitigate the most acerbic and troubling aspects of a collective existence, most readily, but not necessarily, to be observed in the developing world.[106]

The question again returns to that of recognition, in that a nuanced formulation of recognition of new state entities by the international community of states, particularly through the

[105] Regional devolution of powers is not wholly without prejudice to the potential external independence from a state *per se*, whether the practical circumstance is the eventual independence of e.g. Scotland, Catalonia or indeed Somaliland. The point being made, however, is that the cause of definitional clarity may be well-served by the effectuation of a decentralised territorial administration.
[106] See e.g. D. Kurban *et al*, *Zorunlu Göç ile Yüzleşmek: Türkiye'de Yerinden Edilme Sonrası Vatandaşlığın İnşası* (Confronting Forced Migration: The Construction of Citizenship in the Aftermath of Internal Displacement in Turkey) (2006).

United Nations, is likely to retain its peculiar hybrid restrictive and permissive character. In light of the present discussion, it is clear that e.g. Montenegro became the 192nd UN member state in 2006, whereas in 1945, the UN had only 51 member states. Thus, there is no static cap fixing the number of independent states that may be recognized by the international community. However, in practical circumstance, new state creation is a relatively rare phenomenon and is likely to remain an exceptional action, due to the permanence of the entity created. Although great care needs to be taken when implementing lasting decisions undertaken largely on the basis of geography, the point being made thereto is that, despite inherent restrictions, postcolonial new state creation is not a matter for automatic or out-of-hand preclusion or rejection. A similarly restrictive approach should be seen *prima facie* in place when considering the roles played by collective groupings for achieving recognition as such. These entities will have to demonstrate factual circumstances not dissimilar to those of a decolonising entity, showing particular regard to the levels of political participation, social cohesion and economic stability observed across a territorial region. Claims for recognition of new states on the international plane, as well as claims for collective rights domestically, are not meant to be treated with insouciance by either the international community of states, or a specific state faced with particular claims by a collective grouping on its territory.

'Claims' and their refutations: The ability to encapsulate the situation 'on the ground' under the established legal frameworks

As a general matter, the existence of a claim from a collective grouping is a genuine cause for concern by a state's government, due to its implications for territorial administration, a certain amount of attention must be paid to the evaluation of claims put by *collectivités* to encompassing states directly, and the international community of states by extension. As the practice of international law generally depends upon, and exerts pressure towards, the maintenance of the *status quo*, a similar tone is set to consider, conceptually, the recognition of postcolonial states formed by acts of secession in a similar light to the recognition of claims for collective rights. The chief distinction that should be made between these concepts, however, is that the theoretical capacity of the international legal system to incorporate and accommodate a relatively limitless number of states seems practically vast, whereas the overall capacity of a state to accommodate the various collective groupings within its boundaries will always be comparatively more constrained. The existence of recognised micro-states in international law and the expansion of intergovernmental organisations, *viz.* the UN and the EU, in particular terms of state practice, conceptualises how the global system is able to adapt to evolving circumstances. However, the domestic capacity of a state to absorb, theoretically, and to incorporate conceptually, accommodate practically and legally recognise the particularities of an internal situation, is defined by a more immediate sense of practical urgency, particularly in least-developed countries, than could the case when on the larger international plane.

By combining the variables of effectiveness, parity amongst citizens, independence, self-administration and territoriality, claims may be made to achieve legitimacy, through specific municipal legal recognition. The arguments put forth by collective groupings effectuated from the established courses of action (e.g. territorial self-administration, minority parity with the majority), the ability to associate freely with others, as much as the ability to be left alone and, perhaps most importantly, the ability to achieve legitimacy as a result of specific acts of territorial administration will become increasingly reinforced so long as the argument continues to be made in similar fashion, over time. It would be expected that, as the strength of the argument is reinforced over time, a progressively greater expectation of (re-)evaluating the situation by the government of the municipal state would be seen to occur, and that the question of potential

remedies would grow increasingly larger, based upon the factual situations on the ground.

Should the question go so far as to escalate to the point of remedial, postcolonial secession, and the question of statehood would be placed before the international community of states, it would appear that entities fulfilling the Montevideo criteria would be most likely to win approval for actions deemed appropriate by the international community as a whole. As there is no blanket prohibition on secession in international law, it is generally the case that once a tangible, critical mass forms around entities endowed with a capacity to govern, and indeed such entities pledge themselves to upholding the basic core of international human rights law, new states *per se* may be admitted into the existing postcolonial community of states, particularly in circumstances whereby the act of new state creation would not be likely to cause further destabilisation in regional peace and security.[107] Likewise, revolving particularly around the factual variables of situational necessity and administrative capacity, new collective groupings may also be municipally recognised by a state, under analogous factual and intellectual circumstances to those of new state creation. Although sovereign state status and the independence of government associated therewith, would appear to be an object of nearly universal attraction, particularly in the most polarised situations, it may also be the case that a collective grouping can achieve its administrative objectives while remaining a component part of an existing state. The guiding principle in evaluating claims for internal and external self-determination, minority rights and 'peoples' rights, as well as for devolutionary regimes, federations and confederations and other, less clearly-defined administrative programmes, should be that which reinforces the effective capacity of local territorial administration to meet international standards.

In sum, this serves by association to reinforce the generally accepted notion that definitional overlaps can exist between citizens of states. 'Peoples', self-identifying primarily on the basis of race or religion, will have more obvious claims to geographically-contiguous territorial administration, and 'minorities' will be self-identifying as individuals with a common claim to parity with the majority, although their claims cannot always be definitively separated, as both collective groupings are also citizens of a state, and thus, also broadly protected by the core of international human rights and humanitarian law. The point being presently considered is limited to the means for affording a recognised status to a collective grouping. Although this is primarily a question for the municipal legislative and legal systems of the state in question, it may also be observed from an international legal perspective that claims from those seeking such status, particularly in the case of 'peoples' rights', and corresponding as closely as possible with existing Montevideo criteria, will have the greatest legal credibility. This is noticeably because clearly-defined territorial and population limits, coupled with an independent government, are indisputably important in reinforcing effectiveness, whether within or outside an existing state. If there exists a conceptual similarity between the recognition of new states by the international community and the recognition of specific claims by collective groupings, collective groupings will have the responsibility to delineate the limits of transference of the separate, but overlapping, principles. Thus, postcolonial states faced with the prospect of major claims for self-determination, or, similarly, dynamic minority rights claims, will have to ascertain the threshold for the acknowledgement and official response to such claims.

To this end, the practical examples of Bangladesh and Quebec under discussion in this chapter should be seen as being definitional in character, as they demonstrate contrasting situations whereby postcolonial states have coped with such complicated circumstances and have responded to questions of self-determination, both external (in Bangladesh) and internal (in

[107] See F.L. Kirgis, *Editorial Comment: The Degrees of Self-Determination in the United Nations Era*, 88 AJIL 304 (1994).

Quebec) in character. These examples are chosen particularly because of their contrasting natures, in that Bangladesh was an acute situation, which quickly evolved into a case of external self-determination, whereas the circumstances in Quebec are considerably more organic and long-standing. What will be most significant in the Bangladeshi circumstance is the influence of effectiveness, or, at the very least, the perception of effectiveness, in determining the validity of a 'post-'postcolonial state.

Bangladesh's secession from Pakistan: Massive human rights violations and the implications for the continuity of the state

Bangladesh earned its independence not from a centralised government in London, but rather from one in Islamabad, itself established there after having moved in 1958 from Pakistan's first postcolonial capital, Karachi. Thus, although the United Kingdom granted independence to its South Asian colonies in 1947, East Pakistan declared its independence from West Pakistan on 26 March 1971 following a chaotic and deadly period, with massive human rights violations as the norm. By 16 December 1971, the independent state of Bangladesh was officially created, when the Pakistani Army retreated from what the then-East Pakistan. Although it may be observed that the state faltered greatly in its own self-administration in the years following independence, Bangladesh's secession from Pakistan was a clear case of postcolonial external self-determination. This is most evident particularly because the only real commonality between East and West Pakistan was religion. The kind of governance observed in the Bangladeshi example makes a definite contribution towards the realisation that a state is not unlimited in its actions vis-à-vis its own diverse populations. Given the presumption in favour of the continuity of the state generally in international law, postcolonial external self-determination remains very much the exception rather than the rule. However, similarly there is nothing in international law that compels a territory to remain intrinsically fixed to its prescribed administrative delimitation. Bangladesh in the early 1970s defines this reality.

Surrounded on all sides by India, with the exception of a small border with Burma (Myanmar), Bangladesh is something of an anomaly in that following its independence from Britain, the then-East Pakistan was administered in a form not dissimilar to some of the worst imaginable excesses of colonial rule. While not *strictu sensu* falling under the usual understanding of colonialist administration, chiefly because there was no European power dominating the relationship, factual parallels to such a predatory system of administration were abundantly evidenced. Furthermore, the state of India acted as a barrier not of saltwater but of land, separating West and East Pakistan. In East Pakistan itself, the majority Bengali population was routinely exploited by the non-Bengali rulers. This led to a palpable quest for independence beginning in 1971, following a relatively democratic election in East Pakistan which was rejected by Pakistani president Yahiya Kahn. By March 1971, the Pakistani army had turned itself against the Bengali populations of East Pakistan, which led to a declaration of independence by the Bangladeshi military leader Major Ziaur Rahman.[108] India, sandwiched as it was between the two separate

[108] *Cf.* statement published in Shadeen Bangla Betar and The Statesman of Delhi, 27 March 1971: "Major Zia, Provisional Commander in Chief of the Bangladesh Liberation Army, hereby proclaims, on behalf of Sheikh Mujibur Rahman, the independence of Bangladesh. […] I also declare, we have already framed a sovereign, legal Government under Sheikh Mujibur Rahman, which pledges to function as per law and the constitution. The new democratic Government is committed to a policy of non alignment in international relations. It will seek friendship with all nations and strive for international peace. I appeal to all Government to oblige public opinion in their respective countries against the brutal genocide in Bangladesh. The Government under Sheikh Mujibur Rahman is sovereign legal Government of Bangladesh and is entitled to recognition from all democratic nations of the world."

territories, did not remain neutral and provided military and humanitarian assistance to the Bangladeshi population. The Pakistani army became little more than an occupation force, and by 16 December 1971 it quit the newly-independent country.[109]

Furthermore, although the form of self-determination effectuated by Bangladesh quickly passed from internal to external forms, recognition of a newly independent Bangladeshi state was not readily forthcoming.[110] The United Kingdom actively withheld recognition on 28 June 1971, plainly stating "there is no State of Bangla Desh which fulfils our normal criteria for recognition".[111] As has been indicated, however, that reality would prove fluid, and the situation will have significantly evolved in the following year. Although the UN Security Council was unable to adopt a resolution at the height of the conflict,[112] acting under the 'Uniting for Peace' resolution, on 8 December 1971, the General Assembly adopted Resolution 2793, which called for an immediate cease-fire and the withdrawal of all foreign troops. This resolution was subsequently endorsed by the Security Council,[113] which was likely to have contributed to the progressive recognition of Bangladesh as an independent state, having seceded from West Pakistan, in an act of postcolonial external self-determination. As David Raič writes, "[a]lthough India's assistance did thus not play a significant role in the decision to secede, it proved essential for the subsequent success of the secession of Bangladesh. Between January and May 1972, Bangladesh was recognized by some 70 States".[114]

The creation of the state: Effectiveness and the transition from East Pakistan into Bangladesh

Of deeper interest are issues related to measures for autonomous government for the then-East Pakistan, leading to the questions of territorial integrity, with regard to Bangladesh's secession from Pakistan. Thereafter, the factual circumstances will be better placed to be viewed through the form of territorial administration expected in modern statehood, specifically whereby measures of equality, justice and reason are expected as matters of practice.

Prior to Bangladesh's actual secession, in December 1970, general elections took place in Pakistan which validated claims for autonomy put forth by Sheikh Mujibur Rahman of the Awami League, with which Ziaur Rahman was associated. The League, which was founded in 1949 on the basis of a 42-point programme for provincial autonomy, demanded recognition of Bangla as a state language of Pakistan, equal voting rights and constitutional democracy through

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[109] A comprehensive discussion of the factual circumstances involved, with ample references to journalistic reporting at the time, is to be found in V.P. Nanda, *Self-Determination in International Law: The Tragic Tale of Two Cities—Islamabad (West Pakistan) and Dacca (East Pakistan)*, 66 AJIL 321 (1972) [hereinafter Nanda].

[110] *Cf.* Talmon, *supra* note 77, at 307: "India, which maintained *de facto* relations with the Provisional Government, did not think it fit formally to recognise a Provisional Government of Bangla Desh in exile. Neither did any other State." However, India was subsequently to become the first state to recognise an independent Bangladeshi state, on 6 December 1971, as the Bangladeshi power structure began to establish itself with the decline of Pakistani martial law.

[111] 820 HC Debs., WA, *col.* 26, 28 June 1971, as cited in Talmon, *Id.*

[112] See UN Doc. S/RES/303 of 6 December 1971.

[113] See UN Doc. S/RES/307 of 21 December 1971.

[114] *Cf.* Raič, *supra* note 57, at 339. He continues, *Id.*, referring to Bangladesh's first application, of 20 August 1972, to become a UN Member State. In it, with support from Pakistan claimed that Bangladesh had failed to demonstrate it was peace-loving, and its ally, China, which vetoed the resolution introducing the application, asserted that Bangladesh did not comply with past Security Council resolutions. See 26 UN Ybk. 215-220 (1972). Bangladesh eventually achieved membership to the United Nations through General Assembly resolution 3203 (XXIX), on 17 September 1974.

a parliamentary system of government. By the 1970 election, the Awami League was able to form a nearly 100% majority in East Pakistan Provincial Assembly, and a 53% majority in the Pakistani National Assembly, holding 167 seats out of 313.[115] The League agreed to participate fully in the Assembly, not by trying to impose its own East Pakistani will on the West, but, rather, to develop a means to guarantee political autonomy for the East vis-à-vis the West. To that end, it made four proposals to further the political process: (a) the withdrawal of martial law; (b) the return of troops to barracks; (c) an enquiry into killings which had taken place; and (d) transfer of power to the elected representatives of the people.[116] Shiek Mujibur Rahman was then arrested by military police, followed by the postponement of the Constitutional Assembly because a draft constitution formed on the basis of such a unified showing of political power in East Pakistan was seen as a grave threat to the dominance held by those in the West. Subsequently, the Awami League formed a government-in-exile in April 1971, guerrilla attacks began against the Pakistani army and the internecine conflict escalated in gravity and then subsided somewhat. When the conflict escalated to such a point that it threatened to include India, the international community urged Pakistan to exercise restraint. However, a month-long international armed conflict between Pakistan and India broke out in December 1971, which coincided with the official creation of the state of Bangladesh and the withdrawal of Pakistani military forces.

The question then turns towards the veracity of the government-in-exile's claims to be the legitimate political leadership of, as they were to be called, Bangladesh. When the Awami League went into exile, ostensibly at the time to India, despite its undeniable status as a legitimate political entity, it could hardly have had the ability to become an established entity *per se*, as it lacked any semblance of actual effectiveness. Or, in the vernacular asserted at the outset of the present thesis, the 'relatively fluid' provisions of statehood were profoundly established such that, a not-entirely-farcical analogy to a delta land was comprised of rivers flowing freely from the Himalayas. The synonymous meaning of 'capacity to enter into international relations' with 'independence' in the formulation of statehood is observed anew, for it was with great speed that the excessive fluidity of the self-declared independent Bangladeshi state was able to be solidified with the progressive departure of the West Pakistani military and the transference of East Pakistani militias into what would become the Bangladeshi armed forces. It would therefore appear that competence to undertake governing actions—acts of state—were allowed to begin slowly and to increase in constitutionality and effectiveness, in anticipation of East Pakistan's eventual official recognition as the sovereign state of Bangladesh in early 1972.[117]

Furthermore, the Bangladeshi example reinforces concepts put forth by William O'Brien and Ulf Goebel in 1965 in analysing United States policy towards recognition of decolonising countries. A restatement of their argument is worthwhile:

> The traditional question is, "Does a state exist?" (In the case of recognition of a new government, the question is, "Does it have effective control of the population and territory of the state?") To [Sir Hersch] Lauterpacht, these conditions were substantially "definite and exhaustive." However, as subjective criteria gained importance, the question became increas-

[115] See particularly A. Naqvi, *West Pakistan's Struggle for Power*, 4 South Asian Rev. 213 (April 1971), at 224 *et seq*.
[116] See Keesing's Contemporary Archives, 1-8 May 1971, at 24566, as cited in C.N. Okeke, Controversial Subjects of Contemporary International Law: An Examination of the New Entities of International Law and their Treaty-Making Capacity 132 (1972) [hereinafter Okeke].
[117] *Cf. Id.* at 139: "The conclusion might therefore be that neither constitutional origin, nor functioning in conformity with a particular constitution are necessarily required in order that a body that claims to be a government in exile should be competent in international law to act on behalf of a state. […] [T]his is an area in which the law is still in process of formation in a situation of some fluidity."

> ingly, "*Should* this state, which seems to enjoy a real existence in the material sense, exist as an international person?" The "should" could be couched in the context of the political, legal, or even moral norms. Thus the U.S. refused recognition for sixteen years to the [government of the] Soviet Union, despite its clear establishment as an independent entity by, at the latest, the early 1920's.[118]

At issue here is a circumstance formed in the inverse of the Soviet Union example. The nascent Bangladeshi government had nothing close to effective control of the population and territory of the state; indeed, the 'state' *per se* existed only in the minds of those declaring it as such, which, at the time, were seen as little more than treasonous East Pakistani citizens by the government in the West. Yet over the span of roughly nine months, the League went on to succeed in its quest to form a new state, demonstrating the innate subjectivity in determining factual situations under such circumstances. Returning to O'Brien and Goebel for the moment, however, they then go on to discuss the American policy of 'anticipatory recognition'—essentially a measured disbursement of pragmatism, in view of a rapidly evolving factual situation on the ground.[119] The United States, aware of the fact that it had advocated independence for European colonies, in the face of, particularly, Anglo-French resistance, had taken the decision to be realistic in terms of its established recognition policy to newly-emerging states, particularly in Africa. Thus, the shift from 'does' to 'should' takes effect, which demonstrates that a 'legality' has been formulated, in permutation *ad infinitum*, in response to evolving inter-societal realities.

To that end, O'Brien and Goebel continue their argument to track the evolution of judicial criteria for state recognition in the postcolonial context:

> The U.S. has justified [the aforementioned] policies by adding to the traditional criteria for recognition the requirement that the entity's government be able and willing to abide by international law. The very positing of this criterion, of course, makes possible at least a threefold breakdown of international entities:
>
> 1. Full international persons, entities possessing the elements of a sovereign state *and* evidencing an ability and willingness to comply with international law.
> 2. Occupants of a legal limbo, entities possessing the elements of a sovereign state, but failing to evidence an ability and willingness to accept the obligations of international law.
> 3. Less than full international persons, entities not possessing the traditional prerequisites for statehood.[120]

Implications for recognition: Does the state exist, or should the state exist?

What is most important here are the implications for the distinction between 'does' and 'should'; indeed, in the case of Bangladesh, the answer was indisputably that the state *should* exist. The question then turns to *why* this should be so, and to that end, what seems most likely is that a massive, systemic violence directed against civilians was sufficient to cast sufficient doubt against the side of perpetuity of the postcolonial Pakistani state. To that end, then, Nanda has

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[118] O'Brien and Goebel, *supra* note 90, at 106.

[119] See generally *Id.* at 114-223.

[120] *Id.* at 106. They continue, *Id.*: "It is true that, thus far, the weight of authoritative opinion and the practice of states seem to deny the validity of 'willingness' to accept international obligations as a criterion for international personality and that insistence upon it has been almost entirely confined to the practice of the United States. Moreover, Lauterpacht is probably right in suggesting that the 'ability' to meet international-law obligations is properly a part of the 'effective control' that is the necessary characteristic of the independent government of a sovereign state. But this criterion remains embedded in the practice of the most powerful state in the West. Thus far it has been applied mainly to the question of recognition of new governments than to the recognition of new states. But there is no reason to believe that its application might not preclude recognition of a new state that otherwise clearly met the standards of statehood."

identified six special features of the East Pakistani conflict, reproduced herewith:

> (a) physical separation of the two regions and the political domination by West Pakistan over East Pakistan; (b) the nature of the linguistic, cultural and ethnic differences between the two geographic areas of Pakistan; (c) the problem of regional disparity in economic growth which is heavily weighted in favor West Pakistan; (d) The December 1970 elections in Pakistan which gave the Awami League an overwhelming mandate for the autonomy of East Pakistan; (e) The brutal suppression by the West Pakistani Army of the League opposition in East Pakistan and the reported murders of political leaders and intelligentsia in East Pakistan, giving rise to accusations of "genocide" and "selective genocide"; and (f) the impact of an independent East Pakistan on Pakistan and the rest of the world community.[121]

A number of his observations can be overlooked as superfluous in regard to the present discussion. For example, the geographic distance between East and West Pakistan, while profoundly incongruous, does not inherently draw the state into question. In the same manner that nobody would seriously suggest that the separation between Kalingrad and metropolitan Russia would inherently necessitate secession between the two territorial entities, due to Lithuania and Poland's accession into the European Union—itself a form of internal and external self-determination—there is no inherent encumbrance to upon maintaining West and East Pakistan.[122] Furthermore, its linguistic, cultural and ethnic differences do not themselves present the question of statehood, for multi-ethnic states are commonplace; indeed, this is why the dismissal of the term 'nation-state' has been advocated in the course of this discussion.[123] The political domination of West Pakistan and the comparative problem of economic underdevelopment in East Pakistan, however, while increasingly problematic, are still hardly factors, intrinsically, to calling the state into question—not because economic, social and cultural rights are aspirational, but, rather, immediate in character.

Thus, while admittedly awkward, and undoubtedly structurally lopsided without substantial inter-temporal governance reform, the territorial integrity of the state was not by definition called into question until such time as the outcome of the Pakistani national elections were met with such a harsh response by the West Pakistan Army. What is particularly significant, then, is the fact that agents of the state were acting in a manner contrary to the effective solidification of the nascent postcolonial state of West/East Pakistan. The combination of postcolonial political control and extraordinary high population density must then be seen as an irresistibly volatile combination for systemic repression and, indeed, coercive hegemony. What is more questionable, however, is the extent to which the autonomising actions proposed by the provincial assembly that instigated the armed conflict between East and West Pakistan. The election of the Awami League to the National Assembly and the negative effects afforded by the central government are, in themselves, not dissimilar to e.g. actions taken by central governments in Angola and Algeria following the outcome of national, majoritarian electoral processes. Nanda encapsulates the autonomy provisions advocated by the Awami League to include the following criteria: (a) a federal constitution, parliamentary form of government and 'autonomous and sovereign' constituent units; (b) federal governmental competence only provided externally, *i.e.,* for defence and foreign affairs; (c) separate currencies between East and West Pakistan, or alternatively, measures to prevent capital flows from East to West; (d) local autonomy in forms

[121] Nanda, *supra* note 109, at 328.
[122] *Cf.* Raič, *supra* note 57, at 335: "In the case of Pakistan, this geographical feature was, against the background of the other features involved, not as such a source of conflict but more a factor which complicated rather than helped the political and economic cooperation and integration of the communities in the East and the West."
[123] *Cf.* Nanda, *supra* note 109. at 329: "Islam and hatred of India were perhaps the only unifying factors between East and West Pakistan […] Consequently, Pakistan has never been a cohesive national entity."

of fiscal policy, taxation and revenue collection; (e) separate trade linkages and foreign exchange between East and West Pakistan; and (f) separate militia or paramilitary forces.[124]

Such actions should be viewed as attempts to exhaust the local remedies for a people effectuating a form of internal self-determination. In this case, these measures were cast aside by the West Pakistani power apparatus, and a serious denial of internal self-determination led to the widespread recognition of Bangladesh as an independent state on the part of other states, themselves. Clearly, internal self-determination, in this form, was too much to ask of such a fragile postcolonial state and must serve to negate somewhat the previous assertion herein, that the incongruous nature of the Pakistani state's construction did not inherently foretell its own demise. For, although the concept did not find juridical existence *per se*, at the time, acquiescence, even to an initially limited degree, on the part of the West Pakistani authorities, to East Pakistani rule, would have reflected a profound measure of internal self-determination to the East Pakistani population. Indeed, given the clear territorial delimitation and demarcation, as well as unified political structure, on ethnic or religious grounds (*i.e.,* not merely linguistic), this is the East Pakistani *people*: the Bangladeshi people, a people which solidified itself politically, and as a result came to know what it was in negative definition against the dominant state. Thus when the level of targeted violence became too great to overlook,[125] the question of an independent East Pakistan, thereafter Bangladesh, can be seen to have appeared, once the level of such human rights violations crossed a critical threshold.

In sum, the secession of East Pakistan from West Pakistan was effectuated primarily on the basis of equality, justice and reason—concepts which should guide any evaluative analysis of the interactions between collective groupings and the modern international law of territorial statehood. These criteria for evaluation will be useful to recall in the assessment of other credible claims for postcolonial internal and external self-determination. Equality came about by virtue of the Pakistani National Assembly choosing to support the Awami League's political platform. Justice was synonymous with reason, in that in the face of such obviously systemic human rights violations, they were given a practical form of redress: the expulsion of the West Pakistan Army, and its replacement with an indigenous military force. Such actions, of course, led to a severance of the dominance of the West Pakistani political apparatus over the East Pakistani territory and population. Beyond a certain point, it can be logically concluded that there was no other rational recourse to a complicated postcolonial problem than for its constituent elements to govern themselves in their own fashion (and, as it is now undoubtedly established, to universal standards). Viewed in hindsight, the separation of India and Pakistan, both East and West, was inevitable upon decolonisation from Britain. Moreover, as it can be observed, the secession of Bangladesh from Pakistan, while not as necessarily inevitable, was manifested as a direct result to the political forces, in West Pakistan, repressing legitimate expressions of autonomy on the part of genuine societal leadership in the East. That leads to the baseline conclusion, for the moment at least, that a territorial people, faced not only with a denial of self-administration, but also observed with focused, tangible governmental activities directed

[124] See Nanda, *supra* note 109, at 331.

[125] *Cf. Id.* at 332, citing journalist *réportage* in Indian and Foreign Rev., 1 Jul. 1971 23, and press release of International Commission of Jurists, 16 Aug 1971 4-5: "What I saw and heard with unbelieving eyes and ears during my 10 days in East Bengal in late April made it terribly clear that the killings are not the isolated acts of military commanders in the field. 'We are determined to cleanse East Pakistan once and for all of the threat of secession, even if it means killing off two million people and ruling the province as a colony for 30 years,' I was repeatedly told by senior military officials in Dacca and Comilla. The West Pakistan army in East Bengal is doing exactly that with a terrifyingly thoroughness. I saw Hindus, hunted from village to village and door to door, shot off-hand after a cursory 'short-arm inspection' showed they were uncircumcised."

against it, may indeed be existing within the type of neo-colonial, or 'internally colonial' circumstances seen, at the outset of this chapter, to be conceivable, if not extraordinary.

Observations from chapter three

The outset of the 21st Century has witnessed a dramatic evolution in the concept of state sovereignty, whereby the core principles of international human rights law have been solidified and reiterated by the international community. The globalised system of public international law has observed considerable progression from the positivist form of statehood. From the conceptual rejection of colonialism by the international community of states, to the consideration of practical circumstances whereby the secession question—that which lies dormant under practically all situations of self-determination—can be addressed, these inter-temporal evolutions, within the concept of state sovereignty, are profound. It is obviously consequential that, in addition to human rights promotion, in general, each individual state now has the *responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity*, in particular the *prevention of such crimes, including their incitement, through appropriate and necessary means.*

What has been observed in this chapter is that the question of recognition, both within the municipal framework of a state, and on the international plane, that of collective groupings such as 'peoples' is, in large measure, dependent upon factual circumstances. Bangladesh is an oft-considered example, not only because it is the most readily-referenced evidence of state practice, whereby a secession has transpired following the independence of a former colony. It is also significant because the level of targeted violence against a specific population within a state became so critically high that the maintenance of the postcolonial *status quo* became practically unthinkable, as the conditions on the ground eclipsed the worst abuses of colonial rule. Quebec, on the other hand, has borne no evidence to the level of targeted human rights violations— in particular, the right to life –, as observed in Bangladesh. It is, however, a good contrasting example to demonstrate how the natural political processes in democracies may complicate the long-term resolution of questions of self-administration.

Surely, within that general framework, there is a considerable balance to be achieved in assessing claims for territory by collective groupings. Given the duty not to recognise illegal acts, including attempts for new state creation, states will take a basically restrictive view as well as a disapproving view toward the most furtive attempts to frame new state creation, inappropriately. But the challenges of getting *recognised* as having collective rights is probably one of the greatest challenges in international law overall. The concept must be a practical possibility, for otherwise it would not exist as law, but it must be buffeted against the parallel reality that there must be a compelling need for such actions to occur. In this sense, the next chapter will focus primarily on the African continent, a region where post-colonialism and complicated, and violent, inter-societal engagement tend to coincide. Greater definition to the 'peoples' concept may thus be found when viewed, with relation to the separate legal regime of minority rights and actions that may be undertaken, when a state acts with negligence in the protection of its constituent populations.

CHAPTER FOUR
Interpreting 'government' and 'equality' in a practical context

Following the establishment and entry into force of the ICCPR and the ICESCR, the rights of 'collective groupings' had become juridically tangible, as the near-universal ratification of these covenants is based upon voluntary actions taken by states. In practice, all 'peoples' having an integrally territorial component will be expected, in the first instance, to seek collective redress for claims related to their status as a 'people' *per se*, through the governmental and administrative machinery of their state. Simultaneously, however, 'minorities' seeking parity with the majority, are viewed individually, without specific regard to collectiveness and territoriality, as formulated by international human rights law. When considering practical situations involving the collective groupings of 'minorities' and 'peoples', in postcolonial statehood, attention can be most obviously drawn both to Asia and Africa. However, Africa holds an obvious advantage over Asia, regarding the depth of legal analysis, given the existence of its regional intergovernmental organisation, the African Union. The African Charter on Human and Peoples' Rights has affirmed that all peoples have a 'right to existence', which demonstrates how regional insight can aid in understanding of the concept of collective groupings, as the conceptually separate legal regimes governing the rights of 'minorities' and those of 'peoples' may have the potential to overlap. In the African context, as the concept of 'peoples' has additional, regionalised meanings, it may be unclear whether a collective grouping should be defined as a 'people' or 'minority'. Surely, circumstances of armed or civil conflict are likely to exist within the localised regions in question. In the most extreme situations, it could very well be that a 'people' may be observed to have formed in opposition to the most extreme actions of a state, particularly when such actions are repeatedly and consciously targeted against a specific segment of its own citizenry. It appears that greater insight into the postcolonial state could be derived from further deconstructing the tensions between state and society on a conceptual level.

Introducing the delineations formed between 'peoples' and 'minorities' by international human rights law

Traditional international law has been, and in large part continues to be, the law of states: that which is created by states to serve states' interests. Undoubtedly, however, the actions of states also contribute to lawmaking, as state practice is indicative of custom in international law. The horrors of the second world war gave rise to the notion of an 'enlightened self-interest' and the conception that a state's actions towards individuals—nationals and aliens alike—within those states was not unlimited. International law underwent a substantial evolution with the emergence of a nascent international human rights law followed by the incorporation of such law into the broader general public international law, particularly from 1976, when the ICCPR and ICESCR entered into force. International human rights law, particularly when viewed as a subset of a larger 'international law' set, is traditionally concerned with addressing the rights of individuals within states. That the individual is even a matter of legal concern in modern international law reflects a great deal of progressive development, primarily through codification, since the era of the great positivists. States continue to retain their powerful force as the greatest repositories of international legal personality, however, and a state's sovereign acts are consequential. States manifest their sovereignty primarily through administrative actions on their own territory. But all the while, supranational authority has also been continually reinforced, particularly through international human rights law, so as to shift the scope of sovereignty by a state from a practical *carte blanche* to a circumstance whereby all states have, through their voluntary actions, agreed that the protection of individuals, within a state, is of critical importance. Furthermore, when global international law is further developed by regional or localised enforcement measures, the depth of its application can only be increased.

As was introduced in the previous chapter, during the early stages of the development of international human rights law, this reality was of comparatively less significance, as the emphasis was more on standard-setting than enforcement of human rights norms. But with the entry into force in 1976 of the twin human rights covenants, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, despite the contrasting motivations for their advocacy and indeed owing to political realities following the second world war showing favour to reconstructive activity, the unavoidable reality emerged that a particular set of human rights are evolved from post-war statehood and are sufficiently developed, so as to fuse the protections afforded by the state (through e.g. international human rights law generally) and the protections afforded to entities, such as peoples or minorities (*i.e.,* collective groupings) throughout a state. It is therefore apparent that international law, itself, is concerned with protecting something greater than the rights of individuals, alone. Group rights may exist, but they are to be protected in the first instance through the provisions of international law most readily associated with individual rights.

This phenomenon may be observed by following the chronological pathway of the UN's own establishment as a law-making process, since the initial identification of 'human rights' as a topic of concern was conceptually followed by a particular codification process fuelled by the loose bipolar structure which defined international relations following second world war. The delineations formed between so-called 'competing' groups of rights—'civil and political' and 'economic, social and cultural'—developed concurrently in the early-to-mid 1970s, with the formulation of a 'peoples' right of 'access to government' (*i.e.,* as the Friendly Relations Declaration has been interpreted to mean), and the emergence of a particular set of 'minority rights', with the entry into force of the ICCPR and ICESCR (*i.e.,* the International Bill of Rights, within which 'peoples' find definition in Article 1 ICCPR and 'minorities' find definition in Article 27 ICCPR).[1]

By way of background, it is further recalled that civil and political rights are so-called 'first-generation' rights, economic, social and cultural rights are so-called 'second-generation' rights, and 'third-generation human rights' are collective rights, or rights of solidarity. This latter set of rights has inherent differences in terms of standard setting and enforcement as compared to the human rights of individuals.[2] However, when viewed in a manner cognisant of the constraints the postcolonial statehood framework, for which sub-Saharan Africa, seen as a whole, is exemplary, it is here where the 'peoples' and 'minorities' concepts may be seen to overlap.

'Collective rights', as defined by individuals, geographically-defined groups and the totality of a state's inhabitants

Certain analytical parameters should be established to guide the interpretation of state practice concerning collective groupings. Most importantly, it should be observed that the

[1] The conceptual independence of these phenomena should be noted as at the time the UN human rights programme was squarely within the realm of the more 'functional' Economic and Social Council, whereby the Friendly Relations Declaration emanated from the more 'quasi-parliamentarian' General Assembly.

[2] The term 'third-generation rights' emanates from the intellectual synergies formed between the International Institute of Human Rights in Strasbourg and UNESCO in Paris as the two main human rights covenants entered into force. The term was first used by Karel Vasak in *Human Rights: A Thirty-Year Struggle: the Sustained Efforts to give Force of law to the Universal Declaration of Human Rights*, UNESCO Courier 30:11 (November 1977). For a complementary analysis from this period, see also S.P. Marks, *Emerging Human Rights: A New Generation for the 1980s?*, 33 Rutgers L.R. 435 (1981), and K. Vasak and P. Alston (eds.) The International Dimensions of Human Rights (2 vols., 1982).

question of meaning permeates practically all discussion about third-generation rights. Indeed, questions of definition have been a factor since the outset of this study. In terms of definitional hierarchy, 'collective' or 'third-generation' rights may be sought by *collectivités*, which itself is a catch-all phrase serving to include all potential beneficiaries of third-generation rights, which could mean 'the entire population of a state', as in *uti possidetis*-defined formulations of the first postcolonial external self-determination acts, or beneficiaries of more modern collective rights, such as the Right to Development. Additionally, 'peoples' and 'indigenous peoples', which are genuine collective rights, given principal definition on the basis of territoriality, may be grouped with 'minority rights', which are individual rights with similar goals as those sought by organised *collectivités*, under the chapeau of 'collective groupings'.

Group rights, when taken at a more basic level, do not necessarily find a specific corollary with the rights pursued by 'collective groupings' *per se*. In the context of this study, the notion of 'collective groupings' has heretofore been seen as an untidy amalgam of the legal concepts of 'peoples', 'minorities' and 'indigenous peoples'. It will also be observed, however, that the 'right to development' is exemplary of a collective right, which assumes the definitional form of the entire population of a state, as the seeker of a 'right to development' is not, strictly speaking, seeking particular access to government, parity with a majority or cultural autonomy based on tradition. Thus although it is uncontroversial in international law to observe that 'peoples' are to be afforded access to government, 'minorities' are to be afforded parity with a definitional majority, and 'indigenous peoples' are to be afforded a mechanism for their societal preservation, within the context of a modern territorial state, on the basis of subsequent law concerning collective groupings, it may also be observed that 'collective rights' need not be limited to peoples, minorities and indigenous peoples to find validity in law.

For example, the 1986 Declaration on the Right to Development is widely known to be a legal instrument with a scope greater than on the individual level alone;[3] however, it appears that the collective element, inherent in this right, is disbursed across all populations on a territory.[4] It therefore is evident that the Declaration makes particular claims in a collective form, but it is also the case that the Declaration does not necessarily do so on the basis of the heretofore established juridical conceptualisations of collective groupings—that is, something based on,

[3] See Declaration on the Right to Development, General Assembly resolution 41/128 (4 December 1986). As applies to the analysis at hand, it must clearly be observed that the Declaration formulates the majority of its provisions in such a way as to make the state the primary subject of the Declaration, but does so in a way which addresses particular attention to the rights of a state's citizens and residents.

[4] *Cf. Id.* Article 1 states that "[t]he right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized", and "[t]he human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources". (emphasis added)

Article 2 continues by stating that "[t]he human person is the central subject of development and should be the active participant and beneficiary of the right to development", and "[a]ll human beings have a responsibility for development, individually and collectively, taking into account the need for full respect for their human rights and fundamental freedoms as well as their duties to the community, which alone can ensure the free and complete fulfilment of the human being, and they should therefore promote and protect an appropriate political, social and economic order for development". Furthermore, Article 2 states that "[s]tates have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom".

primarily, the 'peoples' and 'minorities' criteria, which, themselves, are developed from separate legal pedigrees, yet find considerable overlap due to a circumstance whereby a factual situation may either be interpreted as 'minority' or 'peoples' rights. To be certain, however, differences exist, in form (e.g. minority rights seek equality with a majority, whereas peoples rights seek self-government), geographical composition (e.g. a minority may be scattered throughout a territory, whereas a people should be largely geographically contiguous) and functional definition (e.g. minorities may be defined on the basis of language, whereas peoples are not).

That said, the principal legal examination considered heretofore has been relatively straightforward, concerning itself with the assertion that a truly globalised system of territorially-defined statehood has emerged through the imposition of a European model. As has been demonstrated, the monolith of juridical statehood is in practice a highly variable entity, when examined by the standard criteria of self-determination's 'access to government' provisions and the 'civic equality' sought through minority rights regimes. But by the 1970s, through particularly the Friendly Relations Declaration and the ICCPR, international human rights law began to develop sufficient capacity so as to be, some thirty years later, broadly in force in practically all states worldwide.

Again, once the Right to Development emerged as a matter of legal consideration as a Declaration by the General Assembly in the 1980s; it did so without particular concern for the language of self-determination and 'minority rights' *per se*. Nevertheless, the collective nature of the declaration is obvious, as the social and economic development of individuals does not occur in a vacuum. It is logical to observe that every citizen, and to a certain extent foreign nationals legally resident within a state, are the intended beneficiaries of such a right, if only due to the fact that large-scale variations on the validity of this right may run contrary to other rights-based expectations, particularly with regard to equality before the law (e.g. *inter alia* ICCPR Articles 14, 25 and 26 and ICESCR Articles 3, 5, 6, 9, 11 and 15).

It is important to make these distinctions explicit for the purpose of this study, which has tended to favour the phrase 'collective groupings' in its intellectual framework to incorporate all groups that seek to employ the provisions of international law corresponding to 'peoples', 'minorities' or 'indigenous peoples' and appear, *prima facie*, to be able to make such claims successfully, under at least one of these legal forms. However, once the notion of a global 'right to development' had emerged in the intergovernmental law-making bodies of the United Nations, it became clear that there were no absolute delimitations with regard to the extent of international law's definitional capacity for *collectivités*. Although 'peoples' and 'minorities' had emerged as legal subjects as a result of separate formative regimes, there is no preclusion to using a collectivist banner over both of the two main forms of juridical 'collective groupings',[5] nor is there the expectation that collective rights, in international human rights law, must be formed explicitly by one and only one of the terms 'peoples', 'minorities' or 'indigenous peoples'. And thus, it does appear that, when considering the topic of 'third-generation rights' generally, the question of definitional overlap is inescapable.

[5] Questions regarding the rights of indigenous peoples are complicated in their formulation, undoubtedly because the goals of indigenous peoples' rights are conceptually opposed to notions of 'civilisation' in the positivist legal sense. The juridical rights of sovereignty emerging from such 'civilising' actions may be, in the face of overwhelming evidence of the right of an 'indigenous people' to claim such rights, juridically mitigated by the recognition of 'indigenous peoples' rights', on the territory of an otherwise sovereign state. That such circumstances, in terms of practical example, are most likely to be observed in postcolonial states, should not go overlooked.

An observation on the topics of 'consent' and 'consensus' as applied to the postcolonial state

A second conceptual observation should be made to set the tone for the rest of the chapter. Leaving aside the question of peremptory norms in international law, it should also briefly be recalled that the vast majority of the *corpus* of international law has been formed by the consent or acquiescence of states to be bound to a particular legal concept, and by subsequent state practice. Therein lies the implication of consent: by virtue of active membership within a group, its members give, at minimum, tacit consent to allow the aggregation of one's individual actions to a collective, or group level, in order to promote that associated aggregated, collective or group interest.[6] When considering the concepts of 'government' and 'equality' in a postcolonial context, the levels of 'consent', in evidence, may be of uncertain composition, as the municipal legal systems in force will, largely, have been inherited through colonialism, and the government may not be formed through democratic processes. Thus, as postcolonial states operate the machinery of statehood through their governments, their diplomatic positions, taken at intergovernmental forums such as the United Nations, may be influenced by a lack of access to government or civic equality. The notion, then, of modern international law being formed by specific processes such as multilateral treaty-making and operating on the basis of consensus, becomes viewed through an additional layer of complexity.

'Consent' for a structured system of societal operations at a more global level, such as through an international community of states, surely predates the United Nations and its multilateral treaty-based system of global governance.

As Georg Schwarzenberger states, two conditions are required for the formulation of international law: a reciprocated equality of status and a level of contact which necessitates regulation of conduct;[7] this is, presumably, followed by voluntary actions by parties involved to manifest their agreed wills. It can subsequently be observed how a functional system of statehood has emerged on the international arena. The integrity of this system is derived from the sovereignty of each of its members and the lack of a higher authority to which the individual states might be bound. This implies that it is the structures within the individual states themselves which perpetuate this system; moreover, that it is the acceptance of statehood *per se* by those within individual states, which makes statehood a desirable societal condition. Kalevi Holsti provides a theoretical construction of this in contemporary statehood by proposing that a state's legitimacy is based on something akin to consensus.[8]

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[6] *Viz.* Thucydides *et al*, History of the Peloponnesian War, Book One, The Dispute over Corcyra 433 (Penguin, 1986) at 54: (as representatives of Corcyra spoke to Athenians) "Athenians, in a situation like this […] we have come to ask you for help, but cannot claim that this help is due to us because of any great services we have done to you in the past or on the basis of any existing alliance. We must therefore convince you first that by giving us this help you will be acting in your own interests; and then we must show you that our gratitude can be depended upon. If on all these points you find our arguments unconvincing, we must not be surprised if our mission ends in failure."

[7] See G. Schwarzenberger, A Manual of International Law, Book 1, (4th ed., 1960), at 3.

[8] *Cf.* K.J. Holsti, The State, War and the State of War (1996) 98: In a diagram, he purports that a contemporary state's legitimacy is based upon: "an implicit social contract, consensus on political 'rules of the game', equal access to decisions and allocations, clear distinction between private gain and public service, effective sovereignty, ideological consensus/pragmatic politics, civilian control of military and international consensus on territorial limits and state legitimacy".

Consensus is something more than consent.[9] Whereas consent, as such, is something that seems more focused on an individual and his or her embrace or acquiescence to something, consensus implies a dose of collective measure towards a more active participation in the affairs of the state. Consensus, as a procedural consideration, is at the heart of many UN policy-making bodies, particularly its General Assembly and Economic and Social Council. This is particularly the case in the area of standard-setting with regard to international human rights law, as opposed to special procedures and fact-finding, as well as intergovernmental enforcement.[10]

To illustrate this phenomenon in a wider context, it may be recalled from earlier in this study how European states began to form more or less organically, following the Peace of Westphalia. As the *Hinterlands* of European states came under fuller control of the capitals—often whether one liked it or not in the first instance—the consensus principle contributed to the territorial definition of European statehood.[11] This is not automatically to equate consensus with modern notions of democratic governance; indeed, quite often the opposite was true. But this did signify a growth in importance of incorporating the totality of a population into the affairs of the state. It was a deliberate and active process of cultural integration, undoubtedly witnessed more in places like France and less in the lands of the former Holy Roman Empire. Nevertheless, an important formula transpired, as European statehood simply did not 'happen'. It was the natural outpouring and growth of its own complicated processes of societal evolution and development.

As concerns the implementation of 'third-generation rights' generally, it stands to reason, that actions encouraging the development of a consensus-based municipal state are to be conceptually welcomed, particularly in view of the eventual discord between state in society within the postcolonial state. Such formulations reaffirm that the notion of collective rights may apply to the entire population of a state, individuals within a state and groups of self-associating individuals. For example, the right to political participation is universally expected, in a state-party to the ICCPR, and this may be effectuated both on an purely individual level, through e.g. voting, in addition to actions taken through official interactions with local government institutions.

However, what is more appropriate for a study—predicated on the idea that the superimposition, of the European state onto colonised lands, has had, in some cases, a destabilising effect on certain postcolonial populations— is to acknowledge the conceptual overlap between the concepts of 'peoples' and 'minorities' on the one hand, and to attempt to identify conceptual delineations, between the separate legal concepts, on the other. Furthermore, as the topic of self-determination of peoples has been extensively discussed on a general level in previous

[9] *Cf.* Concise Oxford English Dictionary (10th ed., 1999): Consent is a noun meaning 'permission' or a verb meaning 'give permission' or 'agree to do something'. It dates from Middle English and can be traced back to Old French and Latin. Consensus, however, is a noun meaning 'general agreement' dating only back to the 17th Century from Latin antecedents.

[10] *Cf.* D. Kennedy, *A New Stream of International Law Scholarship*, 7 Wisc. Int.L.J. 39: "By 1975, the fashionable international institution made up its mind by consensus. By exactly translating political reality into institutional action, consensus keeps the institution in step with all states. The minority feels attended to, respected: neither the big powers nor the blocs are able to control the majority any more. Consensus is the perfect form of international deference. Moreover, consensus permits the institution to make powerful decisions and ensures compliance with such decisions as are taken. The very experience of coming to consensus builds community. Finally, as we might expect, by 1980, the blooms was beginning to be off consensus—and the results were familiar. The institution was hostage to one hold out autonomous state—and the individual sovereign felt bullied into agreement by a powerful consensus building plenary practice."

[11] *Cf.* Frontier of Walfisch (Walvis) Bay between Germany and Great Britain, XI Recueil des Sentences Arbitrales 306 (1911) for the *Hinterland* doctrine: "[…] it requires for its application the existence or assertion of political influence over certain territory, or a treaty in which it is concretely formulated."

chapters, it will be useful to develop the 'peoples' concept into a more specialised, regional context—in this case employing the provisions of the African Charter on Human and Peoples' Rights—to attempt to emphasise aspects of the postcolonial state which would benefit from the greater effectiveness which is to be assumed with increased juridical provisions for 'collective groupings'.

Identifying minority protection and peoples' rights through the ICCPR and the practice of the Human Rights Committee

Minority protection was a subject of public international law even before the entry into force of the ICCPR in 1976. Despite the absence of its specific mention in the Covenant of the League of Nations, the protection of minorities was a central feature of the League, itself, due in large part to the realities of multiple ethnic, linguistic and religious minorities being distributed—often quite arbitrarily—across new state boundaries following the first world war.[12] The League developed a system formed on the basis of special treaties between the League and a number of member-states,[13] whereby minorities alleging violations of their rights could petition the Council of the League, and have potential recourse to the Permanent Court of International Justice for advisory opinions on specific legal questions related to such petitions.[14] It would be, however, appropriate to observe that the United Nations has shown more concern for avoidance of the concept of minority protection than its incorporation into the nascent organisation's programme of activities.

Given the loose bipolar period between the Soviet Union and the United States, many potential minority concerns were subsumed into the ideological contest between the superpowers. With the end of the Cold War, however, and the lack of such a confining global *politique*, it has proven increasingly difficult to ignore such concerns, particularly as they often manifest themselves in the form of a 'new nationalism', involving the sorts of postcolonial internal armed conflicts most obvious in sub-Saharan Africa at the outset of the 21st century.

The International Covenant on Civil and Political Rights provides the best example of the interplay between the concepts of 'people' and 'minority', as it is the only treaty-based international human rights instrument, which makes overt references to both of the concepts, although it does not go so far as to link them directly. Specific reference is made to the distinctions between these conceptualisations in Article 1 of the Covenant,[15] which grants 'all peoples' the right to self-determination. In contrast, Article 27 of the Covenant affords certain basic protections to minorities within their own states; indeed, it is the only explicit reference to the rights of persons belonging to minorities in treaty-based international human rights law. It states:

> 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.

[12] See H. Hannum, Autonomy, Sovereignty and Self-Determination (1990), at 51 *et seq*.
[13] For a representative example, see Treaty between the Principal Allied and Associated Powers and Poland, signed at Versailles (29 June 1919), whereby Poland granted special rights to ethnic, religious or linguistic minorities and agreed (at Article 12) that these rights constituted international obligations to be guaranteed by the League of Nations.
[14] For discussion, see e.g. J. Robinson, From Protection of Minorities to Promotion of Human Rights, 1948 Jewish Yb.Int'l.L. 115.
[15] See citation *supra* chapter two, at text accompanying note 40.

The language used in the article is restrictive, as it affords the possibility for states to claim they are not one in which minorities do exist; furthermore, it must also be observed that minority rights protection is not an element deeply rooted in the UN Charter framework.[16] An additional complication is the fact that a precise definition of what actually constitutes a minority is not apparent.[17] Indeed, the most that can be inferred from Article 27 is, in the words of Zelim Skurbaty, an action "*to avoid conferring an international legal personality* on *groups* (or *collectivitiés*)".[18] However, the restrictions of Article 27 must also be read in conjunction with the most significant attempt by the United Nations General Assembly to build upon the terms of its provisions, the 1992 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities,[19] which affords more positively-formulated protections to minorities, or, more accurately, to *persons belonging to such minorities.* Nevertheless, the declaration similarly leaves the definition of minorities substantively undefined.[20]

Attempts to define a 'minority' by the United Nations have only met with limited success, despite the appointment in 1971 of Francesco Caportorti as Special Rapporteur, mandated to study the issue and the development of the concept generally, and indeed more specifically through the 1992 Declaration by the General Assembly. This is, in large part, because the minority concept, itself, is "complex, vague and imprecise".[21] Whether this is the cause or effect of the general unwillingness of states to fully consider the concept is similarly obscure. Nevertheless, the inherent definitional imprecision does not negate the existence of minorities.[22] The same can be said of the 'peoples' concept. This reality leads to an inherent bias toward 'circumstantialism' in both definition and interpretation, a situation acknowledged by one of the most authoritative sources on minority issues, the former OSCE High Commissioner on National Minorities, Max van der Stoel.[23] One should also observe that, although there has been more

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[16] For discussion, see M.N. Shaw, *The Definition of Minorities in International Law* 20 IYHR 13 (1991).
[17] *Cf.* F. Caportori (Special Rapporteur of the UN Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities), Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, UN Doc. E/CN.4/Sub.2/384 95 (1979) [hereinafter Caportori study]: "When it comes to determining what groups constitute minorities, all kinds of difficulties arise. We have seen that, religious minorities apart, relatively few States expressly recognize the existence in their populations of groups described as 'ethnic or linguistic minorities' and that, while a considerable number of States have introduced measures granting special rights to various ethnic and linguistic groups, the majority prefer not to apply the term 'minority' to them."
[18] Z. Skurbaty, As If Peoples Mattered 295 (2000) [hereinafter Skurbaty]. (Emphasis supplied.)
[19] See Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, UN General Assembly Resolution 47/135 (18 December 1992) [hereinafter Minorities Declaration]. For discussion, see A. Phillips and A. Rosas (eds.) The UN Minority Rights Declaration (1993).
[20] *Cf.* Report of the Working Group on the Rights of Persons Belonging to National, Religious and Linguistic Minorities, UN Doc. E/CN.4/1991/53 (1991), at para. 9: "Delegates expressed the view that the present declaration did not necessarily have to contain a definition of the term 'minority', as such a definition was absent in other human rights instruments […]. It was also stated that the declaration could function perfectly well without precisely defining the term as it was clear from its classical meaning to which groups the term referred in concrete cases."
[21] O. Andryesk, *Report on the Definition of Minorities* 8 *SIM* Special, as cited in J. Packer, *On the Definition of Minorities* in J. Packer and K. Myntti (eds.) The Protection of Ethnic and Linguistic Minorities in Europe 13 (1993).
[22] *Viz.* Caportori study, *supra* note 17, at 95: "The problem of defining the term 'minority' has never been an obstacle to the drawing-up of the numerous international instruments containing provisions on the rights of certain groups of the population to preserve their culture and use their own language. The terminology used to refer to such groups varies from one instrument to another."
[23] *Cf.* M. v.d. Stoel, *Keynote Address to the Human Dimensions Seminar, Case Studies on National Minorities Issues, Warsaw, 24-28 May 1993*, as reprinted in 1 CSCE ODHR Bulletin 22 (1993): "What is a minority? I do not pretend to improve upon the work of many experts who over the years have not been able

definitional development on the concept of minorities in a regional European setting, the extent to which this development can be extrapolated to a universal level is limited.[24]

Some attempt must be made to offer delineation, however fluid, between the concepts of 'people' and 'minority'. Article 27 actually provides little in the way of nuanced understanding between the separate legal concepts, as the article is negatively-formulated ('[…] minorities shall not be denied the right […]'), thereby leaving positive state obligations open to considerable interpretation. The negative formulation of Article 27 has been altered by subsequent UN practice, in that the 1992 Minorities Declaration for the first time frames the protections afforded to minorities in terms of positive obligations to UN member-states, particularly at Articles 1, 2 and 4.[25]

In Article 1, the General Assembly declares that states "shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity" and "shall adopt appropriate legislative and other measures to achieve those ends".

Article 2 affords a positive right to minorities "to enjoy their own culture, to profess and practise their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination". Furthermore, "the right to participate effectively in cultural, religious, social, economic and public life", and "the right to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live, in a manner not incompatible with national legislation", as well as "the right to establish and maintain their own associations" are established. This article concludes by granting "persons belonging to minorities […] the right to establish and maintain, without any discrimination, free and peaceful contacts with other members of their group and with persons belonging to other minorities, as well as contacts across frontiers with citizens of other States to whom they are related by national or ethnic, religious or linguistic ties".

Article 4 provides that "States shall take measures where required to ensure that persons belonging to minorities may exercise fully and effectively all their human rights and fundamental freedoms without any discrimination and in full equality before the law" and that "States shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, except where specific practices are in violation of national law and contrary to international standards".

It should, therefore, not go overlooked that these articles must also be read in the context of Article 8 of the Declaration, which most significantly includes a usual reaffirmation of the principles of sovereign equality, territorial integrity and political independence of states, to which minorities, as citizens of states, are also subject.

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to agree on a definition, so I won't offer you one of my own. I would note, however, that the existence of a minority is a question of fact and not of definition […]. I would dare to say that I know a minority when I see one."

[24] For an interesting discussion from the European perspective greater than that allowed by the confines of this study, see K. Henrard, Devising an Adequate System of Minority Protection: Individual Human Rights, Minority Rights and the Right to Self-Determination (2000), at 17-30 [hereinafter Henrard]. She concludes, *Id.* at 30, that "there is no general agreement on a definition of 'minority', either at the international or at the European level".

[25] See Minorities Declaration, *supra* note 19.

The nature of the concepts reflects a peculiar dynamic, in that it involves, on the one hand, rights possessed by individuals but, on the other hand, these individual rights can only be effectuated in concert with other such individuals (as does a 'people').[26] In spite of this peculiarity, states themselves are generally quite comfortable to work within this ambiguity. Thus the present discussion is left with a definition, which is viewed by many observers as acceptable intellectually, if not having specific legal force:

> A "minority" is a group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members being nationals of the State, possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity directed towards protecting their culture, traditions, religion or language.[27]

This definition is supplemented by that provided in 1985 by Jules Deschênes, a member of the Commission on Human Rights' (then-) sub-Commission. Although this definition was not accepted in the intergovernmental forum of the Commission on Human Rights, the Deschênes definition, read in conjunction with that of Caportori, does not make substantive revisions to its meaning, although Deschêne's definition goes a bit further than that of Caportori.[28] Deschênes defines a minority as:

> A group of citizens of a State, constituting a numerical minority and in a non-dominant position in that State, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one another, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law.[29]

In the European context, this 'working definition' is further developed by principles identified with the final report of the Steering Committee on Human Rights to the EC Council of Ministers in September 1993, which was mandated to propose legal standards related to the protection of national minorities.[30] These concepts, as extracted by Karen Henrard, include the following:

> The group should be less numerous than the rest of the population of the state, the members of the group should reside in the state and have either the nationality of or close and long lasting ties with that state, they should have ethnic, religious or linguistic features differing from the rest of the population and finally, they should have expressed the wish to be recognized as a minority in the sense that the members of the group should have the will to

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[26] *Cf.* Caportori study, *supra* note 17, at 35: "Although the expression 'rights of minorities' is used in common parlance, it is persons belonging to minorities, in community with the other members of their group, who are regarded in article 27 as having the right to enjoy their own culture, to practise their own religion and to use their own language." See also Minorities Declaration, *supra* note 19, at Article 3, which states that "persons belonging to minorities may exercise their rights, including those set forth in the present Declaration, individually as well as in community with other members of their group, without any discrimination", and that "no disadvantage shall result for any person belonging to a minority as the consequence of the exercise or non-exercise of the rights set forth in the present Declaration".

[27] Caportori study, *supra* note 17, at para. 568. But *cf.* A. Eide, New Approaches to Minority Protection 5 (1993, rev. ed. 1995) [hereinafter Eide], stating that as regards the numerical component in defining minorities, it may be the numerical majority which is in a non-dominant position vis-à-vis the population of the rest of the state. This certainly could be seen as being the case in Rwanda, as the Tutsi ethnic group constitutes a minority of the population as a whole, yet has historically exhibited a dominant position over the more numerous Hutu ethnic group (as well as the comparatively minuscule Twa group).

[28] For discussion, see also G. Gilbert, *The Legal Protection Accorded to Minority Groups in Europe*, 1992 Neth. YB Int'l L. 71.

[29] J. Deschênes, Proposal concerning a Definition of the term "Minority", UN Doc. E/CN.4/Sub.2/1985/31, para. 181.

[30] CDDH (93) 22, Strasbourg, 8 September 1993, feddh 93.22, as cited in Henrard, *supra* note 24, at 27.

> preserve collectively their distinctive collective identity.[31]

Still deeper insight into the concept is given through the perspectives of Asbjørn Eide. In his report to the sub-Commission, in his capacity as Special Rapporteur on the Protection of Minorities,[32] and in a subsequent edited sales publication,[33] he states generally that whether a 'minority' exists or not depends largely on whether it is recognised as such by both a government and a specific group.[34] Questions regarding the rights of minorities, within a larger state structure, become problematic only when some groups within that state directly endanger other groups within the same state. This is because if basic rights are fully respected amongst all members of a population, a minority would have very few specific wants or needs within that population (such as the protection of its specific religion, culture or language, etc.). Eide additionally points to the existence of a constitution within a state as a demonstrative entitlement of specific rights into a legally invocatory framework.[35] Nevertheless, persons belonging to minorities, within the framework of a specific state, must have all normal rights attributed to all persons within that state, as well as some additional rights specific to that minority. This is because, as James Crawford writes, "by definition, a 'minority' implies the existence of a 'majority' (not necessarily a coherent one, since it could be made up by a collection of other minorities)".[36] This reasoning is best expressed by the Permanent Court of International Justice in its *Minority Schools in Albania* advisory opinion, dating from 1935:

> The idea underlying the treaties for the protection of minorities is to secure for certain elements incorporated in a State, the population of which differs from them in race, language or religion, the possibility of living peaceably alongside that population and co-operating amicably with it, while at the same time preserving the characteristics which distinguish them from the majority, and satisfying the ensuing special needs.[37]

A further unique feature of collective rights is the expectation of a tangible measure of exclusivity and compulsiveness. It is difficult to say that, universally, an individual must be either a member of a specific minority or not a member of that minority, or, for that matter, a specific people, for this overt dogmatism hardly reflects the realities of the intermingled, complex mosaic of individuals worldwide. It is fair to say that, once accepted as a member of a specific group, the individual is compelled to identify with that specific group, although the question of whether there can be a 'minority' within a 'minority', or a 'people' within a 'people' is to be left conceptually open, on the theoretical plane, as such pronouncements would be most clearly made in response to certain factual questions put to a court or other recognised source of law.

With a general framework in place, accepting of the notion that, particularly in postcolonial states, factual circumstances may be simultaneously and satisfactorily expressed in the separate legal frameworks of 'peoples rights' and 'minority rights', it now becomes necessary to differentiate between a 'people' and a 'minority', so as to provide definition to what are, indeed, separate legal concepts. Remaining aware of the definitional variability of the concepts, as well

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[31] *Id.*
[32] See Possible ways and means of facilitating the peaceful and constructive solution of problems involving minorities, UN Doc. E/CN.4/Sub.2/1993/34 and Addenda.
[33] See Eide, *supra* note 27. Deeper definitional insight is provided in A. Eide, *Minoritetsvernet, stebarn i det internasjonale menneskerettighetsvern?* (1983), which includes an English-language summary.
[34] It should be recalled that the importance of collective groupings seeking 'recognition' *per se* was discussed in detail, in the previous chapter.
[35] *Id.* For discussion, from the US perspective, see also L. Henkin, The Age of Rights (1990), at 118-124 and 127-140.
[36] J. Crawford, *The Rights of Peoples: 'Peoples' or 'Governments'*, in J. Crawford (ed.) The Rights of Peoples 60-61 (1988) [hereinafter Crawford].
[37] *Minority Schools in Albania*, Ser. A/B. No 64 Advisory Opinion 17 (1935).

as their lack of generally-accepted definitions, the discussion will examine a number of relevant individual communications to the Human Rights Committee, the treaty-monitoring body of the ICCPR, to which states are required to submit periodic reports discussing the progress made towards implementation of the provisions of Covenant, into their domestic legislation.

Delineations between 'people' and 'minority' from ICCPR communications

As Patrick Thornberry writes, "self-determination and the rights of minorities are two sides of the same coin".[38] Although distinct, the specific appellations of 'people' and 'minority' are not to be seen in a vacuum. It is true that there is a fundamental difference between the concepts, in their practical application, in that minority rights are afforded to individuals, and peoples' rights are afforded to collective entities. Beyond this specific distinction, however, it can be observed that the concepts are not completely independent of each other. As they both involve some measure of collectiveness, it follows that, in some form, the mere membership of an individual within that group will automatically constrict some of that individual's own personal choices to those defined by the overall group; in both cases, there are essential elements of group membership. Nevertheless, it cannot be denied that such a formulation, in some way, goes beyond what was intended in the initial substantive development of the concepts in the United Nations.[39] As was reported in 1955 by the General Assembly's Third Committee to the Plenary:

> Much of the discussion on Article 1 had related to the question of self-determination to the colonial issue, but that was only because the peoples of non-self-governing and Trust Territories had not yet attained independence. The right would be proclaimed in the Covenants as a universal right and for all time. The danger of misreading the article had been exaggerated. It was true that the right could be and had been misused, but that did not invalidate it. It was said that the article was not concerned with minorities or the right to secession, and the term 'peoples' and 'nations' were not intended to cover such questions.[40]

However, such a strict separation is increasingly difficult to sustain. The simple reality which exists in the 21st century is that it is possible, if not uncontroversial, that a 'people' may have characteristics similar to those of a 'minority', and it is similarly possible that a 'minority'

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[38] P. Thornberry, *Self-Determination, Minorities, Human Rights: A Review of International Instruments*, 38 ICLQ 867 (1989) [hereinafter Thornberry].

[39] Debate from the General Assembly's Third Committee demonstrates that Western countries were adamant that self-determination was to be executed, as a universal principle, but other states were afraid of the possibility of universal self-determination leading to fragmentation. *Cf.* Draft Resolution of the Third Committee in UN Doc. A/C.3/L.299 (25 November 1952) with Draft Resolution of the Third Committee in UN Doc. A/C.3/L.294. The first document is a United Kingdom amendment on state obligations regarding self-determination of peoples to a draft resolution presented by the Economic and Social Council itself to the Third Committee which broadly states that self-determination should be recognised "in a manner appropriate to the particular circumstances of each territory or nation and the interests of the peoples concerned". The second document is a United States proposal calling for self-determination of "all peoples and nations". However, at the insistence of some Asian, Latin American and Middle Eastern states, the concept was condensed to 'all peoples', the 'and nations' formulation having been dropped out of the concern that minorities might wish to formulate themselves as a nation, and therefore have recourse to the emerging right to self-determination. See Draft Resolution of the Third Committee in UN Doc. A/C.3/L.304 (28 November 1952), and as amended by India in UN Doc. A/C.3/L.297/Rev.1 to clarify that while self-determination was to have a universal scope, no fragmentation was to occur in determining 'the people'. Thus broad consensus emerged that minority groups were to be kept separate from formulations of 'peoples', and that the 'peoples' concept incorporates "peoples in all countries and territories, whether independent, trust or non-self-governing". See UN Doc. E/CN.4/SR.253.

[40] UN Doc. A/3077, para. 39 (1955).

may choose to identify itself as a 'people'. Although such overlaps may be possible, they are, by no means, necessary. Given this reality, as Thornberry suggests, a considerable level of confusion has developed as "minorities appropriate the vocabulary of self-determination whether governments or scholars approve or not",[41] a phenomenon conceivably mirrored by indigenous peoples, as well.

Article 27 of the ICCPR has been invoked in a number of cases demonstrating the interplay between indigenous peoples' rights and the rights of minorities, in e.g. Canada and Sweden. The first communication of importance received by the Human Rights Committee was that of Sandra Lovelace, a Canadian First Nation woman who married a non-indigenous man. In 1983,[42] the Committee received as admissible a communication from her, under the first optional protocol of the ICCPR, claiming that, due to her marriage, she was unable to continue residing on an Indian reservation, pursuant to section 12(1) of the Canadian Indian Act.[43] The Committee's response was that this provision was not in conformity with Article 27 of the Covenant, and Canada changed the Indian Act to reflect this fact. What is significant is that the communication's admissibility was only to be found under Article 27 and not under Article 1 of the Covenant: Lovelace was a member of a minority and not a member of a self-determining people. This has been made clear, when examined with a later General Comment made by the Human Rights Committee in 1994 regarding the scope of Article 1, and particularly regarding the admissibility of individual communications under that article.[44] In this comment, the Committee stated that self-determination, being a right of peoples, prevents an individual from presenting an admissible communication to the Committee, because the Optional Protocol allows only claims of violations of human rights from individuals to be received. It should also be noted that a prior General Comment on Article 1 of the Covenant, from 1984,[45] indicated an unwillingness on the part of the Committee to consider cases of self-determination beyond the decolonisation context.[46]

In 1990, a communication was accepted by the Committee from a group of Cree Indians, known as the Lubicon Lake Band.[47] While clearly comprising the definitional form of an indigenous people, the group claimed a violation of Article 1 of the Covenant, because the Canadian Government's exploration for oil and gas on their traditional lands would prevent them from continuing their aboriginal lifestyle. The Committee chose to classify the communication not under self-determination of peoples, but, rather, as a protection of minorities question under Article 27 of the covenant.[48] This formulation perhaps reflects the wish of the Committee to

[41] Thornberry, *supra* note 38, at 868.
[42] See UN Doc. CCPR/C/DR[XII]R6/24 (31 July 1983).
[43] Revised Statutes of Canada c.I-6 (1970).
[44] See General Comment No. 23(50) of the Human Rights Committee, Regarding Article 27, GAOR, 49th Sess., Supp. 40, UN Doc. A/49/40 (1994), Vol. I 107. *Viz. Id.* at para. 3.1: "The Covenant draws a distinction between the right to self-determination and the rights protected under article 27. The former is expressed to be a right belonging to peoples and is dealt with in a separate part (Part I) of the Covenant. Self-determination is not a right cognizable under the Optional Protocol. Article 27, on the other hand, relates to rights conferred on individuals as such and is included, like the articles relating to other personal rights conferred on individuals, in Part III of the Covenant and is cognizable under the Optional Protocol."
[45] General Comment No. 12(21) of the Human Rights Committee, Regarding Article 1, GAOR, 39th Sess., Supp. 40, UN Doc. A/39/40 (1984) 142.
[46] For discussion, see M. Scheinin, *The Right to Self-Determination under the Covenant on Civil and Political Rights*, in P. Aikio and M. Scheinin (eds.), Rights of Indigenous Peoples (2000), at 187 *et seq.*
[47] See UN Doc. A/45/40, Vol. II, App. A (1990) [hereinafter Lubicon Communication].
[48] For discussion greater than that which can be provided here, see D. McGoldrick, *Canadian Indians, Cultural Rights and the Human Rights Committee,* 40 ICLQ 658 (1991).

avoid making overt pronouncements on contentious political situations, because the Chief of the indigenous group, Bernard Ominayak, did not have the authority to speak for his entire people and therefore did not have the authority to bring a 'people'-based communication to the Committee. This was the approach taken by the Government of Canada, which was accepted by the Committee.[49] A similar situation may be observed in a 1985 individual communication to the Committee, submitted by a Swedish Saami, Ivon Kitok, in which he claimed violations of both Articles 1 and 27 of the Covenant. Sweden maintained that the Saami were not an indigenous people under the meaning of Article 1. The Committee's reasoning focuses upon the difficulties in categorising 'third-generation' rights, particularly when allegations of violations of such rights are brought by individuals. In its findings:

> [T]he Committee observed that the author, as an individual, could not claim to be the victim of a violation of the right of self-determination enshrined in Article 3 of the Covenant. Whereas the Optional Protocol provides a recourse procedure for individuals claiming that their rights have been violated, Article 1 of the Covenant deals with rights conferred upon peoples, as such.[50]

In the above-mentioned cases, the Committee found that members of indigenous peoples were individually enforcing their rights. In *Lovelace*'s case, for example, by virtue of the change in her status, due to the nature of her marriage, she went from 'minority' to 'majority' as per the terms of the Canadian Indian Act. Nevertheless, her individual concern was primary: to maintain membership in a minority group. This, however, is contrasted with the ongoing experiences of a 'people' as a whole. Thus, an essential distinction must be made between the concepts of 'minority' and 'people', because the collective outweighs the individual, due to the circumstances that constructed the 'people'.

Furthermore, the concept of 'peoples' is more substantially developed than that of the concept of 'minority', at least in terms of identifying generally-accepted law, if only because the 'peoples' concept of 'access to government' is formed on the basis of a the Friendly Relations Declaration of the UN General Assembly, which, itself, is a manifestation by the international community providing definition to public international law, by virtue of having been adopted at a higher political level than a General Assembly Resolution, whereas the 'minority rights' concept is formed primarily through Article 27 of the ICCPR which has nearly, but not completely, universal accession through voluntary actions by states.

The underlying reality is that, in a sense, an opposing pole has been presented, through the negative formulation of what constitutes a 'minority'. A minority in a state is not an aggregate grouping, as such; it is the collective entity to which an individual belongs in order to differentiate itself from the majority population as a whole. From there, a 'person belonging to' a minority can make specific claims based upon the specific rights afforded to him or her through whatever minority rights regime is in operation in a state (indeed, assuming one exists at all). This then begs the question of what happens when *enough* such individuals present similar or overlapping claims to the governing minority rights regime within a state: where does the individual element end and the collective element begin?

A dichotomy between the concept of 'people' and 'indigenous people' will have appeared

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[49] *Cf.* Lubicon Communication, *supra* note 47, at para. 23.1: The Canadian Government asserted to the Committee that "working through a single individual who is said to retain some ties with the Band but who has not lived in the community for 40 years, these agents are said to try to induce other native individuals to strike their own private deals with the federal Government. Most of the individuals identified by the agents do not appear to be affiliated with any recognized aboriginal society".
[50] See UN Doc. CCPR/C/DR/R6/197 (Communication No. 197/1985), 27 July 1988.

by this stage of the analysis. Although it may conceptually appear that indigenous peoples would find some overlap with 'peoples' (because the operative noun is repeated in both terms), such assertions are unlikely to be seen as juridically valid. Indeed, following the United Nations Decade of the World's Indigenous People,[51] and given the ongoing efforts by the previous Commission on Human Rights to adopt a Draft Declaration on the Rights of Indigenous Peoples,[52] on the basis of a text produced by its sub-Commission's Working Group on Indigenous Populations,[53] and the appointment of a Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People,[54] it can reasonably be stated that indigenous peoples—the term 'peoples' being provisionally accepted, by virtue of its acceptance in the Draft Declaration (although not necessarily in other ECOSOC resolutions, *viz.* resolution 2001/57, establishing the Special Rapporteur)— have been subject to an emerging legal status independent of that of both 'minorities' and 'peoples'.

This is most evident when one considers the final outcome of the General Assembly's 22-year deliberation on the topic of indigenous peoples.[55] In it, the General Assembly proclaimed *inter alia* that indigenous peoples have the right to all human rights and fundamental freedoms,[56] that "indigenous peoples *and individuals* are free and equal to all other peoples *and individuals*",[57] that indigenous peoples have the right to self-determination,[58] autonomy or self-government,[59] and, specifically, "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".[60] Significantly, the Declaration proclaims that:

> 1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.
>
> 2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.[61]

Practically speaking, this implies that indigenous peoples are not to be subjected to forced assimilation, and states shall provide redress for any actions which deprives the distinct nature of indigenous peoples,[62] or their cultural, spiritual and religious traditions.[63] Thus, although this may not have been the case *per se* prior to the adoption of the Declaration, it may be observed

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[51] As proclaimed by the General Assembly in Resolution 48/163 (21 December 1993), and launched on 9 December 1994. It should be noted that the title refers to 'people' and not 'peoples'.
[52] *Cf.* an earlier draft text as formulated in UN Doc. E/CN.4/Sub.2/1992/33 at operative paragraph 1, stating: "Indigenous peoples have the right of self-determination, in accordance with international law by virtue of which they may freely determine their political status and institutions and freely pursue their economic, social and cultural development. An integral part of this is the right to autonomy and self-government", with the eventual text, which was sent to the Commission on Human Rights for approval.
[53] Again, note the use in terminology of 'populations' instead of 'people' or 'peoples'.
[54] See Commission on Human Rights resolution 2001/57.
[55] See United Nations Declaration on the Rights of Indigenous Peoples, UN Doc. A/61/L.67 (7 September 2007), adopted by a vote of 143-4-11.
[56] *Id.* at operative para 1.
[57] *Id.* at operative para 2 (emphasis added).
[58] *Id.* at operative para 3, echoing language found in common article 1 of the ICCPR/ICESCR.
[59] *Id.* at operative para 4.
[60] *Id.* at operative para 5.
[61] *Id.* at operative para 7.
[62] *Id.* at operative para 8.
[63] *Id.* at operative paras 11 and 12.

how certain overlaps may be now be observed between 'indigenous peoples' and 'peoples'.[64] Therefore, although there exists in this study the formulation of 'collective groupings' as a sort of definitional catch-all, in which 'peoples' and 'indigenous peoples' might be conceptually grouped, it should be recalled that such terms are formed by separate legal regimes, both collective in scope, but separate in objective, yet having the conceptual potential to overlap with 'minorities', which are inherently singular in definition, yet potentially desirable as a potential remedy obtained in response to specific local circumstances.[65] It may be the case that a 'people' and a 'minority' (indeed, based more on relatively undefined factual circumstances than on juridical pedigree, 'an indigenous people') may conceptually overlap, in terms of definition, based on established international law.[66] The point remains that, broadly speaking, 'peoples' seek access to government, 'minorities' seek parity with a majority and 'indigenous peoples' seek to maintain their traditions, within a state.

Having broadly identified delineations amongst the holders of rights allocated to 'collective groupings', and having reset the term 'minorities' to a framework more receptive to the notion of overlap with self-determination of peoples, the 'right of peoples to self-determination' as a specific unified concept should also be reconsidered as a legal principle operating on a sliding scale of meanings. This is to say that the 'self' and the 'peoples' components are synonymous, since they constitute the specific element of the collective 'group' phenomenon.

What is not at issue here, specifically, is the existence of this element *per se*, but rather the ways in which it can be construed as having a legitimate appellation of this particular status. For example, how can a 'people' be a 'people'? Although the established UN framework must be seen as a broadly representative of the substantive positivist pronouncements on defining a 'people', it will also be of interest to consider simultaneously how the very essence of the concept has changed over time through these same political processes. What should be considered is how the international community forms its responses to the most obvious flaws in the system of international governance, itself largely formed on the basis of consent by sovereign states.

In large swathes of sub-Saharan Africa, the separate juridical pedigree of the variables of 'government' and 'equality' have been proven to be inconsequential, as systems of governmental malfeasance dominate the administrative landscape of certain postcolonial states.

Thus while in the main, there exists a problem of definition, based upon the divergent definitional form of 'people' and 'minority' in public international law, there also exists a simultaneous circumstance whereby, on the one hand, international law is asserting a necessary role in ensuring the right to political participation throughout the population of a state, and on the other hand, is charged with the responsibility of responding to circumstances, whereby 'the

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[64] *Cf.* T.D. Musgrave, Self-Determination and National Minorities 177 (1997) [hereinafter Musgrave]. If indigenous peoples rights are not governed by common Article 1 of the two main human rights covenants and General Assembly Resolutions 1514 and 2625, then, as he concludes, the emerging texts on indigenous peoples "purport to recognize indigenous populations as 'peoples', while refusing to allow them to determine their own political status."

[65] This could be so if for example a small territorially-formed 'people' in a postcolonial state attempted to assert its rights under international law, but only so far as to achieve parity with the majority and not specifically to seek access to government as a particular *collectivité*.

[66] This is so because of the distinction in international law whereby the 'access to government' provisions of self-determination law may factually co-exist with the 'parity with majority' provisions of minority law, but neither legal formulations are *prima facie* likely to co-exist with 'indigenous peoples' rights' as generally observed under international law, given that the rights of indigenous peoples are generally formulated so as to preserve the unique societal roles of autochoneous populations, without disturbing the established, recognised states, conceptually formed to the positivist, 'civilised' standard.

state' *per se* is simply dysfunctional, and structurally underdeveloped from the standpoint of demonstrative capacity.

What remains is the question of administrative malfeasance being implicitly sanctioned by the inefficiencies of the horizontal-enforcement system of international law, and the form under which many postcolonial states came to find legitimate juridical recognition of their claims for and manifestations of sovereignty. As applied to the principal regional territorial entity of this study, the African Continent, primarily south of the Saharan Desert, the gap between theory and practice seems readily apparent, when one considers the potentially discordant forms of international law, which may be applicable in a postcolonial state.

Interpreting the law's applicability towards the modern reality of postcolonial statehood

> There is little doubt today that Africa's survival is seriously threatened by corrupt and inept political elites, unbridled militaries, ethnic rivalries and economic misery […]. The problems of the post-colonial state indicate that the juridical statehood attained with the decolonization of the colonial state has in the past four decades proven inadequate. It is becoming increasingly apparent that sovereignty and statehood are concepts that may have trapped Africa in a detrimental time capsule; they now seem to be straightjackets with time bombs ready to explode.[67]

The paramount variables of territorialism and effectiveness

The international community is often faced with the troubling situation, whereby an internationally-recognised state entity with legal personality lacks the actual capacity in practice to continue as a functioning state. The international law to which this community is bound, however, tends to view situations such as these with considerable indifference, as the conditions of statehood as defined by the Montevideo Convention and subsequent restatements of the law are focused considerably more on the creation rather than the dissolution of states. Nevertheless, the position of positivist international law on the topic is relatively clear: the failure of a state, due to external or internal factors, does not automatically imply its juridical demise. For example, occupation of one state by another does not imply the juridical demise of the former.[68] The United States, for one, never recognised the USSR's annexation of the Baltic States, and the actions taken by the international community, through the United Nations to repel the annexation of Kuwait from Iraq's occupation provide further evidence in this regard. Subsequently, both Cambodia and Somalia are relatively recent examples of states that have seen their existence perpetuated even in the absence of functioning governments.[69]

Thus, international law reflects a sense of deference to the principle of effectiveness on an individual state level and, therefore, the oft-repeated principles of sovereign equality and territorial integrity of states on a collective global level.[70] Effectiveness is independent of legitimacy as

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[67] M. wa Mutua, Conflicting Conceptions of Human Rights: Rethinking the Post-Colonial State, 89 ASIL Proc. 487 (1995).
[68] See e.g. US Restatement (Third) at § 201, comment b.
[69] *Cf.* Henkin, Pugh, Schachter & Smit, Int'l Law: Cases and Materials (3d. ed, 1993), at 247: "A state does not cease to exist when a previously functioning government becomes ineffective or defunct."
[70] *Cf.* Permanent Court of Arbitration, Island of Palmas case (Netherlands *v.* United States), 2 RIAA 829 (sole arbitrator: Huber) (1928), at 845-46: "International law in the 19th century, having regard to the fact that most parts of the globe were under the sovereignty of States members of the community of nations, and the territories without a master had become relatively few, took account of a tendency already existing

such, and therefore is more of an 'insurance policy' guaranteeing sovereignty throughout states in the international community than is it to individuals within that particular state. As Okafor writes, "in the past, traditional international law was little more than a self-serving crystallisation of state practice which was based on the notion that when once an act had been effectively done, it was *ipso facto* legitimate".[71] States came about through effective occupation of territory, and once they did so, they were relatively unrestrained in their choice of actions. In a more contemporary context however—that is to say, through the prism of the UN Charter—territorial integrity is the product of this 'insurance policy', dictating the sovereign equality and non-interference in the internal affairs of all sovereign states.[72] Thus, the Montevideo criteria for determining statehood and the general presumption, in favour of the continuity of the state, do seem to reject the possibility of *terra nullius* in a contemporary context (as the basis for territorial incorporation into European states during colonial times was not generally based on *terra nullius*, in the first instance, according to the legal doctrine),[73] which therefore frowns heavily upon notions of the de-recognition of existing states, in spite of the actualities of the situation on the ground, including the lack of a functioning government.[74] Ergo, the phenomenon of failed states emerges in a form appropriate for juridical analysis.

The question which presents itself at present is one occurring when the state, itself, fails, due to lack of an actual (local) government, to be able to manifest its sovereignty adequately, particularly in a manner which seeks to preserve the core of international human rights law, yet which continues to be propped up by the effectiveness principle. As Gerard Kreijen writes:

> The normative elements of these States stand out. Their whole precarious existence depends on externally acknowledged sovereignty—a formal and negatively asserted independence premised on the right to self-determination—and territory, the latter being neatly appor-

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and especially developed since the middle of the 18th century, and laid down the principle that occupation, to constitute a claim to territorial sovereignty, must be effective, that is, offer certain guarantees to other States and their nationals. It seems therefore incompatible with this rule of positive law that there should be regions which are neither under the effective sovereignty of a State, nor without a master […]." For discussion, see J. Crawford, The Creation of States in International Law 3-4 (1st. ed, 1979).

[71] O.C. Okafor, Re-Defining Legitimate Statehood: International Law and State Fragmentation in Africa 65 (2000), citing T.J. Christian, *Introduction*, in L.C. Green and O. Dickanson (eds.) The Law of Nations and the New World x (1989).

[72] Of course, a truer picture (conveniently forsaken by some states in certain contexts) is that these provisions are considerably mitigated in a contemporary context by the emergence of systems of international human rights law and the laws applicable to armed conflict. *Cf.* L. Henkin, International Law: Politics and Values 12 (1995), emphasis supplied: "Modern states are treated as impermeable and monolithic by international law. Its relations to its citizens was regarded as beyond the reach of other states. For centuries, what transpired between a state and its inhabitants, as once between a prince and subject, was no other state's business. *While this is still a general characteristic of statehood, it is no longer absolute.*" *Cf.* O. Schachter, *The Decline of the Nation-State and its Implications for International Law*, 36 Colum. J. Transnat'l L. 7 (1997): "No state, not even the most powerful, is wholly autonomous, free of constraints and influences from outside its borders."

[73] *Cf.* S. Ratner, *supra* chapter two, at note [104/p.26].

[74] *Cf.* Western Sahara Case (Advisory Opinion), 1975 ICJ Rep. 12, at para 80: "Whatever difference of opinion there may have been among jurists, the state practice of the relevant period indicates that territories inhibited by tribes or peoples having a social and political organization were not regarded as *terra nullius*. It shows that in the case of such territories the acquisition of sovereignty was not generally considered as effected unilaterally through 'occupation' of *terra nullius* by original title but through agreements concluded with local rulers." *But cf.* D. Smith, *Sovereignty over Unoccupied Territories—The Western Sahara Decision*, 9 Case W.Res.J.Int'l L. 135, 140 (1977): "[…] the Court would be hard-pressed to name the party displaying [sovereignty] in Western Sahara […]. The Court's conclusion that Western Sahara was not *terra nullius* in 1884 is not consistent with the fact that there was no country or group of individuals in a position to occupy the territory at that time."

> tioned on the basis of *uti possidetis juris*. The sociological elements are laid on very thinly. Internally, effective government is more a phrase than anything substantial because of the brevity of colonialism and the precipitous process of decolonization that followed, while the normally necessary stable political community shares a similar doubtful status, if only for the distorting effects of *uti possidetis juris*. The sociological roots of these States, their 'is', are dry, which accounts for their lack of positive sovereignty, capacity, or, simply, power. Hence their general inability to enforce what the State as a normative order, the 'ought', usually prescribes. Some of them may never flower. They are formal-legal constructs that resemble cars without engines.[75]

It is asserted that, when such circumstances occur, an analytical deconstruction must begin to occur, so as to consider the roles played by sub-state groups within the failed state. This must be so, for if this sort of analysis is precluded from occurring, for what other purpose does the state retain its potency? That is to say, the discussion should once, briefly, return to the interplay between self-determination and *uti possidetis*, as self-determination is a right of peoples. The difference is that, this second time around, the nature of the topic at hand deals in the first instance with the concept of internal self-determination, as proposed initially by the Friendly Relations Declaration, and elaborated upon, by subsequent developments in the field of global governance and democratic accountability.

Uti possidetis juris and territorial integrity as applied to postcolonial statehood

Thomas Franck, in a thought-provoking 1993 article,[76] coined the phrase 'postmodern tribalism' to refer to "the direct and indirect use of force" of a new political context for "conflicting justice-based claims to land, water, air and resources".[77] It will be of little surprise to see that the claims revolve around the self-determination/*uti possidetis* nexus. He writes:

> Postmodern tribalism seeks to promote both a political and a legal environment conductive to the breakup of existing sovereign states. It promotes the transfer of defined parts of the populations and territories of existing multinational or multicultural states in order to constitute new uninational and unicultural—that is, postmodern tribal—states. It asserts a political, moral, historically-determinist and legal claim to support this agenda. The legal claim it espouses is framed in terms of a well-established existing right, perhaps even a peremptory norm: that of self-determination.[78]

The reasons for this are clear, as concisely proposed by Philip Allott, who states that "endless international and internal conflicts, costing the lives of countless human beings, have centred on the desire of this or that state-society to control this or that area of the earth's surface to the exclusion of this or that state-society".[79] With this in mind, Franck, in drawing reference to the *Frontier Dispute* case,[80] equates territorial integrity with *uti possidetis* and suggests that "two entitlements [self-determination and *uti possidetis*] emerged from quite different times and places, developing separately without apparent conflict between them".[81] Immediately following the second world war, United Nations practice was to synthesise the principles. It tended to defer to *uti possidetis*, in the event of conflict between them, such that self-determination was ex-

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[75] G. Kreijen, State Failure, Sovereignty and Effectiveness 226 (2004).
[76] T.M. Franck, *Postmodern Tribalism and the Right to Secession*, in C. Brölmann *et al.* (eds.), Peoples and Minorities in International Law 3 (1993) [hereinafter Postmodern tribalism].
[77] *Id.*
[78] *Id.* at 4.
[79] P. Allott, New Order for a New World 330 (1990).
[80] Case concerning the *Frontier Dispute* (Burkina Faso *v.* Republic of Mali), Judgement, 1986 ICJ Rep. 544 [hereinafter Frontier Dispute case]. For discussion of the case and its probative recognition of *uti possidetis* as a 'rule of general scope', see discussion *supra* chapter two.
[81] Postmodern tribalism, *supra* note 76, at 6.

pected to occur "within the colonial boundaries, which would remain sacrosanct, unless the people—as a whole—within those boundaries freely elected to change them by integrating with another state".[82] Although none of this stands in apparent contradiction with the historical discussion of self-determination formed from chapter two, the resulting ambiguity from this situation is demonstrated by Franck in more concrete practical terms:

> Fortunately for world peace, but unfortunately for legal clarity, most of the challenges of postmodern tribal secession have arisen in circumstances in which the potential conflict between a state and seceding "peoples" is being managed by a process of conflict resolution without recourse to the language and procedures of international law.[83]

Therefore, while asserting, as is now uncontroversial in law, that secession is neither endorsed nor prohibited *per se* in international law—that secession is a factual situation to which international law responds but does not anticipate— Franck's conclusion is that:

> [t]he probable redefinition of self-determination [in a post-Cold War/post-decolonisation context] does recognize an international legal right, but it is not to secession but to democracy. In the transition from colonial to post-colonial contexts, the right is reinterpreted in the practice of states to take on new vigor as the instrument for regional and global enforcement of minimal standards of governmental legitimacy. This is rooted both in developing human rights law and in the evolution of the international community's thinking about the causes of war.[84]

The perspectives put forth so distinctly by Franck in 1993 came in the midst of a flurry of academic discussion on the topic, particularly in courses given at the Hague Academy of International Law.[85] The most significant criticism of Franck's argument at the time came from Rosalyn Higgins,[86] who considers that a bridge has been built "from self-determination as the process of decolonizing to self-determination as a human right—a right of *peoples*".[87] Rather broadly, she groups the colonial concept of self-determination under the heading of "external self-determination" and Franck's democratic entitlement under the heading of "internal self-determination".[88] Perhaps most significant is her critique of Franck's equation of territorial integrity and *uti possidetis*. Her distinction is as follows:

> *Uti possidetis* is *uti possidetis* and territorial integrity is territorial integrity. *Uti possidetis* is the principle […] whereby states become independent within their colonial boundaries, forfeiting any historical claims they might aspire to regarding territories now held within the old colonial boundaries of others. Territorial integrity, quite simply, is what is required by Article 2(4) of the Charter—that no force be used against the territory of an independent state, whether by bombardment, incursion or occupation. *Uti possidetis* is to do with parallel moments of

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[82] *Id.* at 9.
[83] *Id.* at 15. This perspective, however, presumes that international law plays no specific role in the process of international conflict resolution, an assertion which can not simply be accepted without further introspection. See discussion *infra* chapter four of this study.
[84] *Id.* at 21. *Cf.* T.M. Franck, *The Emerging Right to Democratic Governance*, 86 AJIL 46 (1992).
[85] See e.g. R. Higgins, General Course on Public International Law, 230 Rec. des Cours, at 154 *et seq.* (1991) [hereinafter Higgins], B. Vukas, States, Peoples and Minorities, 231 Rec. des Cours , at 364 *et seq.* (1991) [hereinafter Vukas], T.M. Franck, General Course on Public International Law, 420 Rec. des Cours (1993), I. Brownlie, General Course on Public International Law, 225 Rec. des Cours, at 51 *et seq.* (1995) [hereinafter Brownlie, Hague Academy Course]. See also L.I.S. Rodriguez, L'uti possidetis *et les effectivités*, 263 Rec. des Cours (1997), at 161 *et seq.* for a highly comprehensive Hague Academy course on *uti possidetis*.
[86] R. Higgins, *Postmodern Tribalism and the Right to Secession: Comments by R. Higgins*, in C. Brölmann *et al.* (eds.), Peoples and Minorities in International Law 29 (1993).
[87] *Id.* at 31.
[88] *Id.* at 31-32.

> decolonisation; territorial integrity is a basic Charter principle applicable to all states.[89]

Nevertheless it is recalled that *uti possidetis* is a concept of primarily historical importance and not necessarily one equated with territorial equality, again by drawing reference to the *Island of Palmas* framework. The point on which the discussion at hand would like to focus is that if *uti possidetis* is not necessarily equivalent to that of territorial integrity, then it follows logically that the inverse could be true—namely, that territorial integrity could be something different than *uti possidetis*. This is to say that a post-colonial external self-determination by a people within a sovereign state is not inherently damaging to the much-revered principle of territorial integrity of states. For as the act of external self-determination were to take place—that is to say, as, not inconceivably, a potential act of secession were to take place at the moment of independence from the existing state (e.g. a seceding entity forms a new state, through recognition by other states, following e.g. a declaration of independence and the acknowledgment of the international character of its own borders, as observed at a 'critical date'), the new, smaller seceding governing entity would undertake to uphold the integrity of its territory.

The notion being considered at present is the possibility that such entity may well be better placed to do so, in that it may *prima facie* exhibit a greater propensity to project its power across distance and do so with greater levels of legitimacy than that of their predecessors. This may be particularly the case, as applied to post-colonial African statehood, for every state, even the poorest, has some sort of economic base from which the state can extract resources to perpetuate itself, irrespective of the ethnography formed by the superimposition of the modern territorial state, in European form, following colonialism and decolonisation.

Nevertheless, there remains the reality that although governmental standards are broadly applied through the general forms of collective groupings to make claims for either access to government or parity in a state's administration, when the state itself is demonstrably, fundamentally unable to sustain such claims, the participants in such legal exercises are left to carry on as best they may under the circumstances. This will likely be an undesirable situation, as the legal forms of 'access to government' and 'minority rights' are principally formed by the reality that postcolonial states often have inherited 'civilised' European forms of judicial administration.

Certainly by the 1970s, when colonial possessions became independent on a large scale, and the notion of individual and group protections, within heretofore unrestrained, sovereign states began to matriculate, the rubric of statehood had become irrevocably changed. The problem that remained, however, was one of a lack of definitional clarity and situational duplicity between actions by the General Assembly (the Friendly Relations Declaration) and the ECOSOC (the ICCPR and ICESCR). This sense of definitional incompletion would serve to complicate matters in postcolonial states particularly, as the question of administrative capacity became tangible, in observing how states manifest their own sovereignty.

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[89] *Id.* at 34. Article 2(4) of the UN Charter states: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any manner inconsistent with the purposes of the United Nations". Article 10 of the Covenant of the League of Nations also enshrined the principle of territorial integrity. The interpretative meaning of Article 2(4), as proposed by Schachter, is that disputes between states are to be settled by peaceful means, and that "as long as the act of force [a coercive incursion of armed troops into a foreign State without its consent] involves a non-consensual use of a State's territory or compels a State to take a decision it would not otherwise take, Article 2(4) has been violated". See O. Schachter, International Law in Theory and Practice 113 (1995).

The influence of territorialism on effectiveness-building activities by collective groupings

> Nearly forty years ago, a Professor of Political Science, who was also President of the United States, President Wilson, enunciated a doctrine which was ridiculous, but which was widely accepted as a sensible proposition, the doctrine of self-determination. On the surface it seemed reasonable: let the people decide. It was in fact ridiculous, because the people cannot decide until someone decides who are the people.[90]

It seems clear that the specific intent of the international community, in the United Nations context, was to keep the concept of 'people' separate from that of 'minority'. The 'minority' concept was seen to be a potential cause of state fragmentation and, therefore, as a threat to an institution seeking above all to perpetuate its own existence, the 'state'. It took a manifestation of the political wills of states, within the post-second world war international community, to abandon the concepts of genuinely 'national' self-determination, in favour of a form of self-determination more likely to keep ethnic criteria out of the overall equation. So, decolonisation took place as defined by the *uti possidetis* standard. The question which remains, however, is now that the decolonisation process is, for all practical purposes, complete, and assuming self-determination is an ongoing 'right of peoples', what role, if any, does the ethnic concept—the idea of 'nation' as identified by the first proponents of self-determination as a principle—play in a contemporary definition of that which constitutes the collective, group element to which the right is granted? What role does the national element play within a 'people' actively choosing to seek 'self-determination'?

Going full circle?: The waxing, waning and waxing of the national element

The definitional imprecision which was so apparent in previous attempts to define a 'minority' replicates itself in attempts to define a 'people'. In the case of a minority, this is in large part because the international community is unwilling or unable to assign a specific definition to the term. In spite of this reality, as long as the van der Stoel standard of 'knowing a minority when one sees one' is adhered to, the definitional imprecision is not fundamentally problematic. Having said that, it is simply not possible to draw direct parallels between well-defined, or distinct, experiences of 'minorities' and those of 'peoples'. 'Minority' is a static, self-explanatory concept, as the concept of a minority is substantively grounded to being in opposition to the majority.

Thus the principal reason emerges why direct definitional parallels between the minority and people concepts cannot be drawn. In the first instance, the concept of people has taken on so many different, and often simultaneously contradictory, meanings. Each, by definition, takes on a territorial element, if not for the inherent linkages with statehood. In the second instance, as was discussed earlier in this study,[91] early United Nations practice mandated a substantive change in the nature and scope of the concept of 'people'. As the holder of the right to self-determination tangibly evolved from all the inhabitants of a decolonising territory to self-identifying territorially-based groupings within a state, self-determination became revitalised as a legal concept. The problem, however, remains one of definition, as although the present discussion has become more comfortable in dealing with the language and function of collective groupings, the truth remains that neither 'minority' nor 'peoples' has any universally-accepted, uncontested definition in contemporary international law.

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[90] I. Jennings, The Approach to Self-Government 55 (1956).

[91] At *The 'Ought' becomes an 'is'*: "Whereas self-determination was originally theorised as something akin to national self-determination, with a particular eye on the Central and Eastern European states emerging from empires, in the UN context, self-determination was equated with global decolonisation—a notion which was quite ambivalent towards the various nationalities found within decolonising states."

However, given the relative lack of definition of the 'peoples' concept vis-à-vis that of 'minorities', the conceptual fusion, which permits the consideration of 'collective groupings' as an amalgam of, principally, 'peoples' and 'minorities' leads to its own set of special problems. As was noted in a 1993 report to the UN sub-Commission:

> The controversy over the understanding of 'peoples' as beneficiaries of the right to 'self-determination' had, prior to the 1993 Vienna Declaration and Programme of Action, become heightened. It had been further complicated by the increasingly numerous understandings sought to be given to the content of self-determination. Some of the most vehement parties to the present violence in Bosnia and elsewhere seek to justify it by exaggerated and misconceived interpretation of the right to self-determination. Bosnia-Herzegovina was and should still be seen as a sovereign State whose territorial integrity and political unity should be respected; the acts of aggression in encouragement of group claims to self-determination have demonstrated the dangers inherent in vague and elusive interpretations of the right to self-determination.[92]

Why is this so? In moving beyond the general discussion on the 'peoples' concept presented heretofore, it appears that, in a contemporary setting, certain groups find the 'peoples' concept attractive because of the perception, correct or not, that such a designation will provide the greatest possible benefit to the group. Moreover, given the possibility of autonomy arrangements, devolved powers and other consociational tools being granted to such groups through 'internal self-determination', such a formulation provides to the group a level of benefit similar to the most egalitarian definitions of a 'minority'. From the perspective of the disenfranchised group seeking some form of self-determination, the idea of direct control of one's own political affairs has considerably more appeal than the receipt of some special rights from the majority to protect both the minority within the majority, and, inherently, to perpetuate the minority-majority relationship.

Thus, although the overt 'national' element to self-determination was de-emphasised in favour of a more state-centred focus in early United Nations practice, it is impossible to say that this 'national' element disappeared completely. Although the formulation originating from Hans Kelsen equates 'the people' squarely with 'the state',[93] any singular entity comprising e.g. colonial Belgium and the Belgian Congo and consisting of only one people extracted from the ethnic origins of Alur, Azande, Flemish, German, Kongo, Luba, Lugbara, Mangbetu, Mongo, Ndembu, Pende, Songye and Suku and Wallonian is a paradigmatic example of a legal fiction.[94] Obviously this formulation overlooks any ethnic criteria whatsoever in determining 'peoplehood', for all of the above ethnicities were, legally speaking, amalgamated into the same colonial state, whether in Northwest Europe or in Central Africa.

The reason why such a non-monolithic approach to defining a people must be seen as valid in a contemporary setting is due to the substantive development of the concept in the United Nations debates on decolonisation. Simply put, the eventuality of decolonisation has demonstrated how incorporation of ethnic criteria into the 'peoples' concept is unavoidable. Here, a 'people' has evolved into something defined less by the demarcated territory, which the group inhabits, and more by the particular unifying characteristics of the inhabitants of that territory. Thus the door is opened through the 'saving clause' of the Friendly Relations Declaration, to the possibility of a people constituting something other than 'the state'. Thus the separation is made—in large part via the 'salt-water barrier'—between the territorial 'people' in the European

[92] Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Problems Involving Minorities, Report of the Special Rapporteur, UN Doc. E/CN.4/Sub.2/1993/34 (10 August 1993), para 79.
[93] See H. Kelsen, The Law of the United Nations 52 (1951). Kelsen notes that as Article 1(2) refers only to equal rights amongst states, this determines the meaning of the reference to 'peoples' in the same clause.
[94] See The Diagram Group, Encyclodedia of African Peoples 309 (2000).

colonial state and the territorial 'people' in the African colonised state (again ignoring ethnicity due to the employment of *uti possidetis juris*).[95] Thus the salt-water barrier, inadvertently or specifically, addresses the fundamental reality that there are indeed differences in ethnicities between coloniser and colonised.

Furthermore, it may be observed that the 'particular unifying characteristics' of those inhabiting a piece of territory are, broadly speaking, what constitute ethnicity.[96] In that sense, self-determination has not yet come full circle back to the notion of purely national self-determination, advocated by the dualism of Wilson and Lenin, but it has taken decisive steps in that direction. As colonial administrative boundaries translated into external borders, through the hastily-constructed political process of *uti possidetis*-defined decolonisation, no further consideration to other (ethnic) criteria was granted. As far as the international law of the time was concerned, the colonial entity was simply granted independence from its coloniser.

The reality is that as decolonised entities began performing the functions of statehood with inherited colonial infrastructure, questions of access to government and equality amongst citizens often became of acute importance. Richard Falk's 1988 encapsulation of this reality retains its validity today:

> It is obvious that many governmental actors with the authority to represent States can govern only by reliance on coercion and intimidation. That is, the apparatus of the State has quite often been captured by small élites, even individual tyrants, who rule on behalf of only a fragment of the population within the boundaries of the State. Thus, to assume a correspondence between State and society would be grossly distorting in many cases, even if distinct classes, races, ethnic groupings and regional orientations did not exist.[97]

Thus the stage is set for even further development of the 'ethnic' component of a 'people'. This is so because, in the post-colonial setting, a 'people' must either be limited to the decolonisation context (thereby relegating the concept in the main to the annals of history), or it must be allowed to have some form of ongoing scope. Clearly the latter option is the correct formulation, particularly as it is now theoretically impossible to do so, when one considers the presence of common Article 1 to the human rights covenants,[98] as well as the representative

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[95] *Cf.* A. Eide, *Territorial Integrity of States, Minority Protection and Guarantees for Autonomy Arrangements: Approaches and Roles of the United Nations*, in European Commission for Democracy Through Law of the Council of Europe, Local Self-Government, Territorial Integrity and Protection of Minorities, International Colloquium (Lausanne, 25-27 April 1996) 82: "From the standpoint of international law, the 'permanent population' is identical to the nation. 'Nationality' refers to the country in which a person is a citizen. From an international law perspective, the nationality of a citizen of Belgium is simply Belgian, not Flemish [or] Wallonian […]."

[96] For discussion, see B. Vukas, *States, Peoples and Minorities*, VI HR 267, 322 (1991).

[97] R. Falk, *The Rights of Peoples (In Particular Indigenous Peoples)*, in J. Crawford (ed.) The Rights of Peoples 25 (1988). He continues, *Id.*: "Typically, patterns of rule embody societal hierarchies or constellations of power groupings in a manner that is abusive to those in subordinate positions. *In some respect, the circumstance of indigenous peoples is at the extreme, as these peoples have been marginalized by virtually every modern government, endangering their very survival as distinct cultural, political and social realities.*" (emphasis added) This is of particular interest because in sub-Saharan Africa practically *all* peoples are, if not 'indigenous peoples' in a legal sense *per se,* nevertheless aboriginal to the land, with obvious lineages dating prior to the imposition of European state-centric colonial rule.

[98] James Crawford adds an additional layer of understanding to the concept in that Article 1(2) presents the concept of 'permanent sovereignty over natural resources', and "it locates that principle firmly within the matrix of self-determination […] and it is clear that Article 1(2) is of general application, and is not limited to 'peoples' under colonial rule or foreign occupation". See J. Crawford, *Aboriginal Self-Government in Canada,* Unpublished Research Report for the Canadian Bar Association (January 1988), as reprinted in Musgrave, *supra* note 64, at 150-151.

government provisions of the Friendly Relations Declaration. However, the reality put forth by Patrick Thornberry (in referring to a research report by the Minority Rights Group), demonstrates the existence of a substantial gap between theory and practice that is unsurprising.[99] In short, self-determination of peoples as defined by decolonisation has on the one hand broken the monolith of legally-constructed statehood inherent in the original colonial relationship. On the other hand, it has replaced the original monolith of the metropolitan colonial state with an indigenised replica of itself, in the form of post-colonial juridical statehood in the European model. Whether as a result of specific coercive government policies or of institutional weaknesses, this reality has caused great distress to certain populations within these post-colonial states. Therefore, post-colonial self-determination must pay closer attention to the particular unifying characteristics of groups within these post-colonial juridical states. Given the rich diversity of ethnic groups throughout sub-Saharan African societies (in contrast with the artificial nature of almost all African states themselves), these particular unifying characteristics must be ethnically based. More specifically, the 'ongoing scope' of what constitutes a people must be based primarily on ethnicity. In that way, self-determination—albeit in a much more limited scope than that was granted wholesale to colonial peoples, during the decolonisation period—has regained a measure of its original Wilson-Lenin nationalist meaning, which was subsumed by the 'statist (yet-separated-by-saltwater-barrier)' perspective within the UN context.

'Peoples' in greater focus: The primacy of land or the primacy of humans?

At this point, discussions of a definition of 'peoples' usually return to the 'saving clause' of the Friendly Relations Declaration. Ian Brownlie's aforementioned 'core of reasonable certainty' of what constitutes a 'people' is recalled,[100] as it adds layers of understanding to the traditional criteria of race or religion. It may be useful to refine, further, the definitional distinctions of a 'people' by viewing them through two separate pathways, all the while casting an eye on what role(s) the 'peoples' concept plays, on the principle of territorial integrity and Article 2(4) of the Charter. The first such path is quite representative of the original UN proposals on decolonisation; the second path is more in line with the emergence of a system of international human rights law. Therefore, although it would be fair to say that the former is more rooted in a positivist perspective and the latter rooted in more of a moralistic, or natural law, perspective both have substantial positivist grounding, by virtue of the fact that elements of that morality have been codified in the International Bill of Human Rights.[101] It should be further stated that incorporation of some measure of a natural law perspective in an analysis of this sort should not be automatically be met with trepidation, for the principal underlying element of contemporary

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[99] *Cf.* Thornberry, *Self-determination, Minorities, Human Rights: A Review of the International Instruments,* 38 ICLQ 867 (1989): "When a colony or subject people accedes to independence in the name of self-determination, political unity and integral statehood will rarely be matched by national unity and ethnic homogeneity."

[100] As repeated from Chapter two, *Cf.* I. Brownlie, *Rights of Peoples in International Law,* in J. Crawford (ed.) The Rights of Peoples 5 (1988): "This core consists in the right of a community which has a distinct character to have this character reflected in the institutions of government in which it lives. The concept of distinct character depends on a number of criteria, which may appear in combination. Race (or nationality) is one of the most important of the relevant criteria, but the concept of race can only be expressed scientifically in terms of more specific features, in which matters of culture, language, religion and group psychology predominate. The physical indicia of race and nationality bay evidence the cultural distinctiveness of a group but they certainly do not inevitably condition it. Indeed, if the purely ethnic criteria are applied exclusively many long-existing national identities would be negated on academic grounds—such as, for example, the United States."

[101] For discussion, see J. Allan, *Positively Fabulous: Why It Is Good To Be a Legal Positivist*, 10 Can. J.L. & Juris. 231 (1997), at 239 *et seq.*

positivist international law—that decisions are taken by consent, by the relevant parties—finds its grounding in 'natural' law. Thus it seems clear that the present state of the more 'positivist' law of self-determination tends to have more of a bias in favour of emphasising the role of the land to be 'self-determined', whilst the more 'natural' law of self-determination tends to have more of a bias in favour of the primacy of humans, whose primary concern is 'self-determining' *themselves* in the first instance, with less overt concern for substantive territorial matters. The distinction between these perspectives will be useful to open the second half of this study, as the 'peoples' definition is put through the Friendly Relations Declaration framework, and the concepts of internal and external self-determination are considered in greater depth.

For the moment, reference may be made to two distinct sources in the literature that seem to have first identified this distinction. Both articles, written in the early 1990s, seem particularly focused on the issue of post-colonial external self-determination, as this period witnessed great increases in state fragmentation, concurrent with the general end of the decolonisation process. Lea Brilmayer, in a 1991 article, asserts that it is the historical claim to territory by a specific group which sets the framework for that group's claims to self-determination. She maintains:

> What distinguishes separatist from other minority claims is the fact that the group wishes to establish a new state on a particular piece of land […] A theory of secession necessarily depends upon a theory of legitimate sovereignty over territory. Separatists are typically motivated by a perceived historical injustice, in which land that was rightfully theirs was taken by another group. The land was seized either by the dominant group in the current state, or by a third group which then conveyed the territory to the currently dominant group. In evaluating the persuasiveness of separatists' arguments, it is necessary to investigate these historical claims […] In few cases will the equities point unambiguously in one direction.[102]

An article responding to Brilmayer's assertions came the following year by Catherine Iorns. Although the 'people' in question in Irons' article were indigenous peoples, the juridical separation between 'peoples' claims and 'indigenous peoples' claims should not be overemphasised, as the present discussion is more on the conceptual, rather than technical, level. Iorns discounts the challenges made to the principle of territorial integrity in Brilmayer's argument by framing the 'people' in a more human rights-oriented perspective.

> Where I differ from Brilmayer is in her description that, because we can regard claimants to territory as making competing claims to territorial integrity, we can say that the human rights claims do not really clash with territorial integrity and that, therefore, territorial integrity does not pose a real barrier to the achievement of self-determination. Yet it is the territorial integrity of *present states* that is a fundamental norm of the present world system of states and state sovereignty. The concept of territorial integrity poses a barrier to secession as long as it is conceived of as protecting the present boundaries of states. Brilmayer is quite correct in arguing that this should not be the case, because everyone is really appealing to territorial integrity. However, a simple appeal to the concept of territorial integrity is not the barrier in question; the real barrier is the assumption that protection of the present boundaries of states is so necessary that no derogation will be permitted unless the state concerned agrees to them. [103]

Iorns thus identifies a significant element in the discussion: the attitude of the existing state is of primary importance in the first instance, for if such a state is receptive to claims to self-determination by a collective grouping, that 'people' is positively defined as much by what is granted by the state to that specific collective grouping, as is it negatively defined. For the moment, then, it can be seen how defining a 'people' from a human rights perspective is more re-

[102] L. Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 Yale J. Int'l L. 177 (1991).
[103] C.J. Iorns, *Indigenous Peoples and Self-Determination: Challenging State Sovereignty*, 24 Case W. Res. J. Int'l L. 199 (1992).

ceptive to addressing the specific interests and concerns of particular situations beneath the juridical state monolith, as opposed to a primary concern of maintaining the *status quo* of a people being exclusively defined by a geographic line. Thus, the effect of the application of self-determination vis-à-vis the territorial integrity of an existing state is an inescapable question. To that end, then, as Iorns states, this

> […] will necessarily entail debate on the interests being protected by the principle of territorial integrity and how the various interests involved, including [collective human rights] should be balanced. I suggest that one of the primary factors included in the discussion must be the justification of all territorial entitlements. We must reinstate the human rights component of self-determination, and reinstate the belief that the state exists for the benefit of people, rather than the reverse […]. Any other approach is tantamount to a rejection of world order based on principle and an embrace of might as right.[104]

That said, the human rights element of self-determination (in its historical conception, *i.e.,* decolonisation; and in its contemporary conception, *i.e.,* governance), contrasted with the reality of 'might as right', could be seen as a succinct restatement of the reality of contemporary African states. To that end, the general theoretical discussion now progresses, more specifically, toward the African context, particularly through the provisions of the African Charter on Human and Peoples' Rights.

The African Charter on Human and Peoples' Rights and its influence on the law of collective groupings

Human rights, as defined in the African context, will broadly be seen to be representative of the dynamic interactions between the individual and the collective. What is particularly striking, however, is that the conceptualisation of such interactions, when viewed through the contemporary African reality, leads to stark inconsistencies between the theory and practice of these concepts.

The African Charter on Human and Peoples' Rights was the product of a 1981 Assembly of Heads of States and Governments of the Organisation of African Unity (now African Union (AU)).[105] Since the 1986 entry into force of the Charter, its effectiveness, and that of its associated African Commission on Human and Peoples' Rights, has been limited, particularly due to the substantive ambivalence of African states towards the institution and the structural ineffectiveness and lack of resources of the African Commission itself.[106] However, the African Union has enacted a Protocol to the Charter, which provides for the establishment of a regional Court on Human and Peoples' Rights, with jurisdiction over cases concerning the interpretation of the Charter and human rights instruments ratified by Member-States and the ability to provide advisory opinions on relevant legal matters.[107]

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[104] *Id.* at 200.
[105] For documents of the Organisation of African Unity/African Union, see generally G.J. Naldi, Documents of the Organization of African Unity (1992). The African Charter is also available in 21 ILM 58 (1982) under the title of Banjul Charter on Human and Peoples' Rights [hereinafter African Charter].
[106] However, as Steiner and Alston point out, the Commission has advocated the promotion of human rights education as one of its core functions. See H.J. Steiner and P. Alston, International Human Rights in Context: Law Politics Morals 700 (1996) [hereinafter Steiner and Alston]. See generally E.A. Ankumah, The African Commission on Human and Peoples' Rights: Practice and Procedures (1996) for a discussion of the Commission greater than that permitted by the present study.
[107] See Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, CAB/LEG/665, Adopted June 9, 1998 and entered into force January 1, 2004, at http://www.achpr.org/english/_info/court_en.html. The African Court of Justice is in-

It should be further noted that the African Charter marks a point of departure between the International Bill of Rights or the European and American regional human rights conventions, perhaps due to the fact that "African countries had to contend with both their own notions of human rights as well as those imposed on them by their erstwhile colonisers".[108] Indeed African voices have questioned the legitimacy of the system on this basis.[109] The Charter deviates on occasion from the specific language of the other human rights instruments and is notable for its emphasis on collective rights as being fundamentally supplementary to individual rights. Communal solidarity is seen as more of an active, positive right in Africa than in Europe or the Americas, or in the universal human rights law of the UN.[110] Such an emphasis no doubt stems from the fact that the vast majority of Africans are outwardly-identifiable, in some form of societal grouping. Whether termed as 'ethnic group', 'race', or 'tribe' one wonders if, in some other collective nomenclature, this is the intangible, specific element left wholly disregarded in the Berlin Conference. Alternatively, as Obijiofor Aginam states, "The inclusion of group rights in the African Charter is intended as a mechanism to salvage the social cohesion of African societies which was adversely affected and partially truncated by colonial rule and imperialism".[111] Thus it seems clear that group rights have a natural place in the Charter, although this is not to say that the legal formulation of the Charter and the implementation of these formulations, through the Commission, are unimpeachable.

The African Commission is the only implementing organ for human rights in the African Charter. It has primarily concerned itself with the receipt of individual communications[112] and the biannual reporting requirements of AU member-states on the actions taken in implementing into national legislation the rights established in the African Charter.[113] As reported by Henry Steiner and Philip Alston, the Commission itself has been less than a success, hampered by a relatively weak constitutive document, a general sense of illegitimacy and lack of integrity *per se* (as it is the actual product of African governments, themselves), a relative invisibility to most Africans and a general mistrust on the part of those who have had the occasion to interact with it.[114]

Institutional deficiencies aside, the chief problem with the promotion and protection of human rights in Africa is the abundance of abuses by a multitude of actors and paucity of effective juridical remedies to prevent and protect against such abuses. This problem has a particularly distinctive feature, in that all African individuals can, aside from peaceful collective groupings, be pigeonholed into one of three rather amorphous groups: (a) private citizens, (b)

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tended to take over the function of the Court upon its eventual establishment.

[108] O. Gye-Wado, *The Effectiveness of the Safeguard Machinery for the Enforcement of Human Rights in Africa*, 2 JHRLP 144, 150 (1992).

[109] *Cf.* M. wa Mutua, *The African Human Rights System in a Comparative Perspective*, 3 Rev. of African Commission on Human and Peoples' Rights 11 (1993): "We cannot and should not continue to delude ourselves that we have a human rights system. What we have is a façade, a yoke that African States have put around our necks. We must cast it off and reconstruct a system that we can proudly proclaim as ours."

[110] This is not to say that the rights established in the African Charter differ significantly in terms of application and interpretation. Indeed Articles 4-6 correspond closely with Articles 6-9 of the ICCPR, Article 7 with Articles 14 and 16, Article 8 with Article 18, Articles 10-18 with Articles 21-25 and Article 12 of the ICCPR and Articles 20-24 of the African Charter with Article 1 of the ICCPR.

[111] O. Aginam, *The African Charter of Human and Peoples Rights*, in E.K. Quashigah and O.C. Okafor, Legitimate Governance in Africa: International and Domestic Legal Perspectives 350 (1999) [hereinafter Aginam], citing W. Rodley, How Europe Underdeveloped Africa (1972).

[112] See African Charter, *supra* note 105, at articles 55-59.

[113] See African Charter, *supra* note 105, at article 62.

[114] Steiner and Alston, *supra* note 106, at 703-704, citing comments by U.O. Umozurike, M. wa Mutua and E.J. Sirleaf in Fund for Peace, Proceedings of the Conference on the African Commission on Human and Peoples' Rights, at 10, 25 and 27, respectively (1991).

agents of the state, or (c) rebels. To be certain, this problem is not specifically limited to the African continent nor even postcolonial states specifically, but the levels of economic and social underdevelopment so prevalent in much of sub-Saharan Africa, coupled with the complicated legal systems inherited by African colonies on their independence, and the apparent desire for the African Union to emulate the European Union, in practical form, leads to a set of circumstances ripe for examination.

Private citizens may range from peasants living on subsistence agriculture in the most rural of environments, to educated, reasonably content middle-class urban professionals. Agents of the state could range from the most pedestrian of bureaucratic functionaries to the most dangerous of special-force soldiers. Although these observations are neither particularly extraordinary nor unusual, for any given state *per se*, what is striking about the African context is the episodic grouping of certain individuals as neither private citizens nor agents of the state, but as rebels, or individuals acting in collective opposition to the state in some way, either overtly or clandestinely. But herein lies the amorphous element: clandestine rebels are not 'visible'; they would otherwise be seen as private citizens in their daily lives, or perhaps less likely, agents of the state themselves. To complicate matters further, given the fact that *coups d'état* are hardly unheard of in Africa, it seems reasonable to expect that the armed foot-soldier of an *ancien régime* could quite easily become the disaffected militiaman of a new era. This reality only contributes to the general uncertainty in defining sub-state groups in the African context, for the passions, frustrations and senses of mysticism usually observed in the phenomenon of ethnicity spill over into the already complicated politics of the daily lives of modern African citizens.

Rachel Murray highlights how the OAU/AU has provided a framework for declaring unlawful unconstitutional changes in government, but observes that unconstitutional changes to non-democratic governments are not similarly unlawful. She writes, referring to a 1997 Decision of the Assembly of Heads of State and Government of the OAU,[115] that military *coups d'état* against democratically elected governments, entail intervention by mercenaries to replace democratically elected governments, replacement of democratically elected governments by armed dissident groups and rebel movements and the refusal to relinquish power to the winning party, after elections that are free, fair and regular.[116]

Nevertheless, the point remains that conceptualisations of military changes to government are not merely hypothetical. A good example comes from 1997, three years after the Rwandan genocide, as the country faced tremendous problems in reconciling its population and reintegrating its fractured societies, attempting all the while to operate under something of a veil of normality. With the monitoring presence of the international community having been greatly decreased, some external observers remarked that there had been the start of a new genocide—"*un génocide froid*"[117]—by Hutu extremists, particularly in the south-western part of the country. Insurgents were said to be "operating within a population […] they put on civilian clothes during the day; they go from village to village at night. It's like the Vietnam War," as Patrick Mazimhaka, the then-Rwandese Minister of State, told the *Washington Post*.[118] As massacres continued, e.g. 1,000 ethnic Tutsi and some moderate Hutu refugees were estimated as

[115] Decision on the Unconstitutional Changes of Government in Africa, AHG/Dec.150 (XXXVI), 33rd Ordinary Session, Harare, June 1997. See also Declaration on the Framework for an OAU Response to Unconstitutional Changes in Government, AHG/Decl.5 (XXXVI).
[116] See R. Murray, Human Rights in Africa: From the OAU to the African Union (2004), at 77 *et seq.*
[117] J. Gasana, and N. Nsengimana, *D'un Génocide à l'Autre,* 3 unpublished paper of Project NOUER (*Nouvelle Espérence pour le Rwanda*) on file with author (May 1997).
[118] S. Buckley, *Rwanda's Rising Tide of Violence*, Washington Post Foreign Service, 14 December 1997, p. A25 (available on Lexis).

having been killed in a well-documented December 1997 attack[119], the essence of which a typically African cycle of violence can be observed. The cycle starts when militia groups carry out attacks on civilians. In this example, Hutu extremists perpetuated violent attacks against chiefly—but not exclusively—Tutsi victims. The cycle is perpetuated as national armed forces, in this case, the Tutsi-dominated Rwandese Patriotic Army, immediately retaliates with extra-judicial executions and indiscriminate killings of those suspected of attacks, in this case between 5,000 and 8,000 in a large cave in Gisenyi *préfecture*, between 23 and 28 October 1997.[120] Hence, the cycle of violence further reinforces and perpetuates instability and uncertainty amongst populations.[121]

The concept of 'peoples' as used by the African Charter

The law most applicable to collective groupings in the African Charter is found in Articles 19-24 of the Charter, reproduced herewith:

> *Article 19*. All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.
>
> *Article 20*. (1) All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen. – (2) Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community. – (3) All peoples shall have the right to the assistance of the States Parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.
>
> *Article 21*. (1) All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it. – (2) In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation. – […] – (5) States Parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation, particularly that practised by international monopolies, so as to enable their peoples to fully benefit from the advantages derived from their natural resources.
>
> *Article 22*. (1) All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. – […]
>
> *Article 23*. (1) All peoples shall have the right to national and international peace and security. The principles of solidarity and friendly relations implicitly affirmed by the Charter of the United Nations and reaffirmed by that of the Organization of African Unity shall govern relations between States. – (2) For the purpose of strengthening peace, solidarity and friendly relations, States Parties to the present Charter shall ensure that: (*a*) any individual enjoying the right of asylum under Article 12 of the present Charter shall not engage in subversive activities against his country of origin or any other State Party to the present charter; (*b*) their territories shall not be used as bases for subversive or terrorist activities against the people of any other State Party to the present Charter.

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[119] Agence France-Presse, Rwanda says international community shares blame for massacre, 15 December 1997 (available on Lexis).

[120] See Amnesty International, Rwanda: Civilians trapped in armed conflict, AI Index AFR 47/43/97, 19 December 1997, at 8-19.

[121] Again, while Africa hardly holds a monopoly on this formula—replace Rwanda with Chechnya or Colombia, for example, to obtain similar results—such disease is indeed an African pandemic in no uncertain terms. *Cf.* P. Schwab, Africa: A Continent Self-Destructs 31 (2001): "Enough [countries underwent thoroughgoing hardship] that by 2001 calamity just about became the norm by which much of the continent was appraised."

> *Article 24.* All peoples shall have the right to a general satisfactory environment favourable to their development.

Identifying the existence and appraising the character of post-colonial African collective groupings

Under the overall chapeau of 'Human and peoples' rights', the rights of individuals are generally in articles 2-18, while the rights of peoples are enunciated in articles 19-24. For the purposes at hand, the most salient articles to consider are 19 and 20, as supplemented by selected provisions of the remaining articles.

On a more universal level, the historical development of international human rights law witnessed 'economic, social and cultural' rights being promulgated by the Soviet Union and 'civil and political rights' asserted by the United States. These two 'sets' of rights were recognised as having been artificially split in the 1993 World Conference on Human Rights, which, in its Vienna Declaration and Programme of Action, proclaims all rights to be "universal, indivisible, and interdependent and interrelated [...]".[122] The end result, however, is that over the last 50 years, on paper at least, the standards for individual human rights have been set, yet as has been observed, 'third-generation' collective or group rights have entered into the debate, on a global scale, with much less overall clarity. Although Oscar Schachter wrote in 1995 that "opposing views have been expressed on whether social ends such as 'development' or 'self-determination' should be treated as rights",[123] there is evidence of precisely these social ends, throughout the African Charter. What can be observed in this context is that the Charter deals both with individual and group rights from the outset, beginning with the 'civil and political' aspects of group rights in articles 19 and 20, and the 'economic, social and cultural' aspects of group rights in articles 21-24.[124] It may be assumed that the intent of the African Charter is that the rights of the group are to be read in conjunction with the rights of the individual, primarily as specific provisions are made, first, for the rights of the individual (in articles 1 to 19[125]) and then for the rights of groups.

It will come as no surprise to observe that the question that becomes immediately apparent, in a closer analysis of articles 19 and 20, is definitional in character. If, conceptually, all African peoples are equal, not subjected to external domination and endowed with a specific right to existence and self-preservation, how could contemporary practice suggest anything other than the only accurate definition of 'people' in the African context would be the 'people' occupying the presidential palaces and other seats of state power? For in terms of equality, the concept must be historically viewed through the prism of Article III of the OAU Charter, which provides that Member-States declare adherence to, *inter alia*, the principles of sovereign equality of all member-states, non-interference in the internal affairs of states and respect for the sovereignty and territorial integrity of each state and for the state's inalienable right to independent

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[122] Vienna Declaration and Programme of Action, UN document A/Conf.157/23 at Sec. I, para. 5.
[123] O. Schachter, International Law in Theory and Practice 334 (1995).
[124] *Cf.* Rapporteur's Report, OAU Doc. CM/1149 (XXXVII), Ann. 1, at 4, para. 10, as cited in N.S. Rembe, Africa and Regional Protection of Human Rights 121 (1985): "Noting that in Africa, Man is part and parcel of the group, some delegations concluded that individual rights could be explained and justified only by the rights of the community. Consequently, they wished that the Draft Charter made room for the Peoples' Rights and adopted a more balanced approach to economic, social and cultural rights on the one hand and political and civil rights on the other."
[125] Some overlaps between individual and group rights can be observed, particularly as article 13 refers to the rights of citizens to participate in government, and article 18 refers to the family as being the basis of society, as well as the protection of the rights of women and the aged.

existence.[126]

The Commission, for its part, has been cautious in addressing the topic of collective rights, considering the matter in an impromptu fashion. As observed by a recent study concerning actions by the Nigerian military in the Ogoniland:

> [W]hereas the Commission could have adjudicated on these [cases] by mere reference to the equality provisions in Article 2 of the Charter, it chose to utilise the group rights provisions in Articles 19-23. Strangely enough, it did so without distinguishing the application of the two sets of rights especially as the communication was not necessarily a class action measure and individuals had alleged violations of their rights. Neither does the Commission describe the nature and content of the rights especially as these sets of cases are the only occasions where the Commission has ventured into the application of collective rights or the rights of 'peoples'.[127]

Thus, it would not be facetious to observe at first glance that the most obvious 'people' with the most obvious set of 'rights' are those acting as the agents of the state. As stated in 1983:

> The OAU maintained an indifferent attitude to the suppression of human rights in a number of independent African states by unduly emphasizing the principle of noninterference in the internal affairs of member states at the expense certain of other principles particularly the customary law principle of respect for human rights. President Sekou Toure's prohibitory assertion that the OAU was not "a tribunal which could sit in judgement on any member state's internal affairs" was typical of the inhibition to the members imposed on themselves, not so much to protect their legitimate states' rights as to fend off international concern for gross abuses of human rights in some African states.[128]

The true meaning of self-determination in the African Charter is to be found in Article 20, paragraph 2; namely, that opposition to colonisation or oppression would exemplify what is meant by a people. Here, the scope of the concept is genuinely called into question, for if a 'people' is to be found only in the context of decolonisation, then there are no 'peoples' *per se* left, endowed with a right of self-determination in contemporary Africa, save for Western Sahara. This was the approach taken in 1982 by Richard Gittleman,[129] who clearly saw the 'people' as nothing more than the product of the *uti possidetis*-defined colonial creation.[130] This perspective reflects the view that self-determination of peoples is a one-off exercise, endowing the successor government with control over the principles of sovereign equality and non-interference in the internal affairs of states, with comparatively little concern for the actual standards of governance within those states (*i.e.,* a formalised indifference to notions of internal self-determination). Clearly, this is contrary to the very notion of international human rights law. State practice beyond the African region clearly recognises that self-determination by an entity other than the

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[126] See Charter of the Organisation of African Unity, 2 ILM 766 (1963).

[127] N.B. Pityana, *The challenge of culture for human rights in Africa*, in M. Evans and R. Murray (eds.), The African Charter on Human and Peoples' Rights 233 (2002). It continued, however, by stating that "international law and human rights must be responsive to African circumstances. Africa will make its own law where necessary. Clearly, collective rights, environmental rights and economic and social rights are essential elements of human rights in Africa." *Cf.* Social and Economic Rights Action Centre/Centre for Economic and Social Rights *v.* Nigeria, Communication 155/96, as reprinted in *Id.*

[128] O. Umozurike, *The African Charter on Human and Peoples' Rights*, 77 AJIL 903 (1983).

[129] R. Gittleman, *The African Charter on Human and Peoples' Rights – A Legal Analysis*, 22 Virginia J. Int'l L. 667 (1982).

[130] *Cf. Id.* at 680: Aside from the Namibians, the non-white South Africans and the nomadic populations of the Western Sahara, he states that "all other groups or peoples have either successfully exercised their right to self determination and have thus become a sovereign state as the Republic of Zaire or are a people *not qualified to be included under the rubric of 'people' permitted to exercise the right of self determination.*" (emphasis added)

state itself, "is an ongoing process and is indissociable"[131] from other human rights and fundamental freedoms, a conclusion grounded in the established theoretical analyses of self-determination.[132]

Defining a 'people' through the African Charter framework

Such a perspective is reflected elsewhere in the literature. In a 1988 article,[133] Richard Kiwanuka proposes four interpretative definitions of 'people' in the context of the African Charter:

> (a) all persons within the geographic limits of an entity yet to achieve political independence or majority rule;
>
> (b) all groups of people with certain common characteristics who live within the geographic limits of an entity referred to in (a), or in an entity that has attained political independence or majority rule (*i.e.,* minorities under any political system);
>
> (c) the state and the people as synonymous (however, this is only an external meaning of "people"); and
>
> (d) all persons within a state.[134]

In arriving at his definition (d), Kiwanuka states that when the essential distinction is made between the external conception of a state and its internal components, the limitations of the latter definitions become apparent. Thus, although such a definition is not inherently invalid,[135] it is insufficient as a universal definition, because of the potential for misuse of the concept by unscrupulous governments in terms of violating individual human rights in the name of the group.[136] Kiwanuka takes a step in this direction as well, as he goes on to state that a "'people' in this sense amounts to the aggregate of the different peoples in the sense noted […] referring to minorities".[137]

It becomes increasingly clear that there must be some level of divergence between the state and the people, which steers the discussion toward Kiwanuka's definition (c). Although at first glance, the proposal seems discordant with the present analysis, a closer look reveals that it is through the prism of articles 21 and 22 of the African Charter that the state and the people can

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[131] See United Kingdom statement on behalf of the European Community, UN GAOR, 47th Sess., Third Committee, UN Doc. A/C.3/47/SR.45, 5 Oct 1992, at para. 22, which mirrors the statement of the Representative of the United Kingdom to the Third Committee, 12 Oct. 1984 as cited in 55 BYIL 432 (1984): "Self-determination is not a one-off exercise […] It is a continuous process."

[132] *Cf.* J. Crawford, *The Rights of Peoples: Some Conclusions*, in J. Crawford (ed.) The Rights of Peoples 167 (1988) [hereinafter Crawford, Conclusions]: "[…][t]he right to self-determination, vested in a particular people, is a right against the State which presently administers and controls that people […] 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 […]. The right of self-determination, where it exists, is not vested in any government but is vested in the people concerned."

[133] R.N. Kiwanuka, *The Meaning of "People" in the African Charter on Human and Peoples' Rights*, 82 AJIL 80 (1988) [hereinafter Kiwanuka].

[134] *Id.* at 100-101.

[135] Indeed, governments themselves may rely upon a certain peoples' legitimate right to self-determination, as was the situation in the *South West Africa Cases*. See Crawford, Conclusions, *supra* note 132, at 164.

[136] *Cf.* Kiwanuka, *supra* note 133, at 100: "The lofty ideals of the peoples' rights in the Banjul Charter—such as peace and development—depend, in large measure, on respect for individual rights. Peoples' rights cannot be a substitute for individual rights."

[137] *Id.* at 99.

be viewed synonymously, for the sense of group solidarity in this sense is *economic* in character, and therefore all members of the group would presumably have a common interest to promote economic development.[138] Here, Kiwanuka warns against over-equating the people with all persons within a state. He writes:

> In sum, the apparently progressive introduction of the concept of "peoples" into the Banjul Charter could actually turn out to be counterproductive in some respects, that is, where the rights and interests of the people are not respected by the state. In such situations, peoples rights might initially be treated as state rights and then degenerate into sectarian, class, government, regime and clique rights. In the extreme, they could become certain individuals' rights. This ultimate perversion has already come to pass in many African countries […]. The outrageous exploits of such dictators as Amin, Bokassa and Nguema are legendary. Indeed, politics in Africa, and the developing world generally, sometimes seems like a business venture.[139]

Definition (b) submitted by Kiwanuka refers to the overlap in meaning between minority and people, as discussed earlier in this chapter.[140] With reference to observations from the 1980 Gros Espiell study,[141] he refutes the notion that "contemporary international law does not recognize the right of minorities to self-determination"[142] and echoes Ermacora's earlier assertion that minorities are not precluded from accessing the right to self-determination, particularly when they are, in some way, territorially defined, having a particular culture or religion, having political organisation and economic viability. Ermacora asserts that "it does not depend on governments as to how they are describing an entity as a people; it depends on objective and subjective criteria of a group. It depends also on the self-consciousness of identity".[143] Further, Kiwanuka's most insightful observation in support of minorities and self-determination concerns article 20 of the African Charter, which endows all peoples with the right to existence, thereby addressing the non-hypothetical "problem of genocide"[144] in contemporary Africa.

What is left, then, is definition (a), and it will be noted that there have been numerous changes to the landscape since 1988. Kiwanuka makes reference to the opposition to the apartheid regime in South Africa, independence for Namibia and resolution of the Western Sahara problem in following the previously conceived line of reasoning that these were the only 'peoples' *per se* left endowed with a right of self-determination in contemporary Africa. In his further analysis, the lack of a measure of self-determination for the Eritreans leads him into the equation of self-determination with secession, which demonstrates how his thinking was still rooted in the decolonising process[145] -- a point that is made explicit when he states:

> We can conclude that the first meaning of "people" is all the different communities (peoples), in fact, all persons within the boundaries of a country or geographical entity that has yet to achieve independence or majority rule. Once independence (or majority rule) is achieved, no further independence is permissible. The rights of the different peoples would thereafter be

[138] Kiwanuka cites M. Bedjaoui, *The Right to Development and the Jus Cogens*, 2 Lesotho L.J. 93, 98 (1986): "The individual's pursuit of the right to development vis-à-vis his State can only weaken the State and would occur at the very time when the State needs to be strengthened if it is to neutralize the negative effects of the international factors which counteract its collective development."
[139] Kiwanuka, *supra* note 133, at 97-98.
[140] See, in this chapter, text *supra* accompanying note 41 *et seq.*
[141] See H. Gros Espiell, The Right to Self-Determination: Implementation of United Nations Resolutions, UN Doc. E/CN.4/Sub.2/405/Rev.1 (1980), at para. 56. See also commentary in this study, *supra* chapter two, at text accompanying note 96.
[142] Kiwanuka, *supra* note 133, at 93.
[143] F. Ermacora, *The Protection of Minorities Before the United Nations*, 182 Rec. des Cours 247, 327 (1983 IV).
[144] Kiwanuka, *supra* note 133, at 94.
[145] *Id.* at 89.

> protected as minority rights.[146]

In this characterisation, he seems to be appealing to the conception of self-determination which *would* be seen as a one-off exercise, with the 'ongoing process non-dissociable from other human rights and fundamental freedoms' reconciled through the protection of individual human rights via a municipal minority rights regime. The chief problem with such a conception, however, is that, whilst minority rights guarantees that municipal African legal systems are not to be rejected out of hand as lacking merit, the structural deficiencies demonstrated above in the construction of most contemporary African states, calls into question the practical effectiveness of such a scheme. For example, if a 'people' is, say, facing a potential violation of its right to existence, as protected in article 20, para. 1 of the African Charter, the procedural implementation of mechanisms designed to protect a 'self-determining minority' (necessitated by the limitations of his definitions (a) and (b) and, as further amalgamated in his definition (d)) would have to be performed in a most expedient and even-handed fashion, given that the very existence of the 'people' is under question. Such procedures may well run past the capacities of many states, individually, or the African Commission regionally.[147]

Kiwanuka's own analysis implies that, barring such an effective system, the deference to post-colonial peoples' rights as subjects of domestic minority rights legislation and the limited protection afforded by international law to persons belonging to minorities could be something of a dead letter under the most difficult of circumstances,[148] not least of which circumstances exist whereby a government could make the assertion that there are no minorities on its territory. Therefore, while it seems clear that Kiwanuka's overall analysis aims at characterising the self-determining 'people' as something more than a decolonising act, according to *uti possidetis*-defined lines, the totality of his four definitions seems, in some way, insufficient, or too anxious to avoid successful assertions of self-determination through secession. Perhaps this is due to its formulation prior to Franck's 1992 democratic entitlement thesis, itself no doubt grounded in the post-Cold War acceptance that self-determination has a post-colonial internal character.

The concept of a negatively-formed 'people'

What seems clear though is that there is room to manoeuvre in assessing African collective groupings as 'peoples'. In the first instance, it can be observed that some of these collective groupings may be identified as requiring specific guarantees to uphold, *inter alia*, their right to exist, as in article 20(1) of the African Charter. Such entities would be particularly likely to be negatively defined vis-à-vis the state—that is, to be defined, in some way, against the state,[149] but defined in such a way as to provide direct access to the language and remedies of self-determination of peoples, as opposed to self-determination of minorities. What seems lacking is an institutionalised, 'peoples'-based response mechanism to geographically-defined collective groupings, specifically targeted by the state, as was the Ogoni (also known as Kana or Khana)

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[146] *Id.* at 90.

[147] Thus making the possibility of sanctions something of an empty threat to e.g. potential violators of Article 20(1) of the African Charter. For comprehensive discussion on the practice of the African Commission on Human and Peoples Rights, see F. Viljoen, International Human Rights in Africa (2007).

[148] *Cf. Id.* at 99: Kiwanuka states that peoples (herein synonymous with minorities) have certain "collective rights *against* their state. One of these is the uninterrupted enjoyment of the right to self-determination, which should protect the people against oppression and exploitation". He does not, however, speculate what should protect the people in question, in the event of an interruption in the enjoyment of the right to self-determination.

[149] See discussion *supra* at text accompanying note 104.

people in Nigeria during the 1990s, for example.[150] It can also be observed how another conception of 'peoples' can be viewed as stemming from the African Charter: that a 'people' can be formed as a specific response to the specific actions of a state. Such a conception would recognise an important nuance in the discussion, for it would form a useful linkage in the relationship between a group of citizens, the population at large, and the organs of the state. In the same way in which minority protection regimes tend to find definitional substance by defining a minority in opposition to the majority, it is conceivable that a people could be defined in opposition to the government of a state. Thus, in the same way that equality between the majority and the minority forms the endgame for a minority rights regime, a negatively-formed 'people' could credibly obtain a measure of self-administration within a territorial state if, particularly, it could demonstrate a persistent lack of such access and societal damages as a result of such exclusion.

It seems that such a formulation is not in inherent opposition to the group rights provisions of the African Charter. To proceed beyond this stage, however, it will be necessary to consider what, if any, state practice supports these distinctions. In the African context, although Eritrea (and to a large extent the unrecognised territory of Somaliland) is something of a unique circumstance in that it is a territory which had previously sought to secede, the recognition of Eritrea as an independent state most clearly reflects the assertion that a 'people' can be constructed as a response to the specific actions of a state.[151] Further afield, similar recognition of independent statehood followed the postcolonial secession of Bangladesh from Pakistan, and, in more contemporary terms, there may be similar examples to be extracted from the dissolution of Yugoslavia.

Before the discussion proceeds to the conceptualising of a more contemporary definition of an African 'people' endowed with the right to self-determination, another important analytical element must be addressed. This is the fact that the committee of experts that drafted the Convention took the decision to leave the concept of 'peoples' undefined.[152] Thus, although the drafters of the Charter took pains to include the concept of group rights to reflect the realities of African life and the difficulties in establishing post-colonial state structures that could be responsive to these realities, these difficulties were explicitly reflected in the timidity of the drafting committee. Therefore, to attempt to break somewhat free from that timidity, it would be of interest to recall the principal governance concepts brought forth earlier in this study—particularly the importance and relevance of 'consent' and 'consensus', implying a measure of communal solidarity within the state. As suggested in 1987:

> Third generation rights therefore imply an interdependence of individuals and nations and, by extension, of individuals in all countries. But this interdependence would be essentially negative if it involved only mutual obligations. Its positive aspect is that it also involves mutual interests in so far as every individual shares with every other one the need for a suitable international order. This comprehensive interdependence is what is meant by brotherhood

[150] For discussion, see references in Amnesty International, Nigeria: On the Anniversary of Ken Saro-Wiwa's Execution, Human Rights Organizations Call for Reform, AI index AFR 44/26/96 (6 November 1996), available from <www.amnesty.org>, accessed 4 December 2002. In view of the UN Declaration on the Rights of Indigenous Peoples, it should also be seriously considered that the Ogoni may also be considered an 'indigenous people' *per se* in the Nigerian context. However, this confuses the matter slightly as it may also be reliably asserted that *all* African populations are indigenous to the continent and are faced with the burden of accepting the European state.

[151] *Cf.* K.J. Holsti, The State, War, and the State of War 75 (1996): "The United Nations of course could not create a 'nation' where none existed. It was the war itself which created an Eritrean 'people'."

[152] See Report of the OAU Secretary-General on a Draft African Charter on Human and Peoples' Rights, OAU Doc. CM/1149 (1981), at para. 13.

> or, to use the alternative term now gaining favour, solidarity.[153]

It may be the case that the failure of the African Charter's committee of experts to define 'peoples', specifically, reflects an intellectual hostility towards the concept. For some, a tangible measure of communal solidarity could be seen as threatening to some government. Or, perhaps, due to the fact that such notions of solidarity are themselves derivatives of the global *lex lata* of the international human rights law conceived since the second world war—and therefore a potential threat to some governments—attempts may be made to frame the theoretical concepts of 'consent' and 'consensus' in particularly 'African' terms that are anti-Western in nature. However, care should be taken in allowing such claims to go unchallenged. As Chabal and Daloz write:

> It is difficult to conceive of what a non-Western, particularly 'African' path to modernization is, both because we live in a Western world and because, historically, the West modernized first. Nevertheless, it is useful to remind ourselves that there are today a (growing) number of modern, economically dynamic and scientifically sophisticated countries, such as Japan and the other Asian 'tigers', following their own distinct development path. Indeed, their very progress has been defined in culturalist terms, so that at this stage we might simply define modernization as the ability to function and compete in the contemporary world, according to the economic and technological norms of the West.[154]

It seems that an alternative definition of peoples in the context of the African Charter would draw its inspiration from self-determination's place as the cornerstone of international human rights standards. It would be formed in response to actions by the state, generally, through actions involving systemic and widespread human rights violations involving violations of the right to life. It would be negatively-formulated, in that the people would be constructed in opposition to the state, most likely from a conflict situation. In order for the people to be *obvious* in composition, it seems quite likely that it would need to be territorially-defined. More philosophically speaking, it would need to base its claim for recognition as a 'people'—and therefore its access to the African Charter's 'right to existence'—on the fact that it is exercising self-determination precisely to protect the international human rights standards being denied by the *status quo*. More concretely, such an approach would very strongly imply that the 'people' was committed in the administration of its affairs (whether within the existing state, or perhaps independently) to the implementation of the "universal and holistic […] interrelatedness and indivisibility of all human rights—economic, social, cultural, civil and political",[155] a contemporary prism through which human rights must generally be viewed.[156]

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[153] D. Ott, Public International Law in the Modern World (1987) 244, as cited in Aginam, *supra* note 111, at 351.

[154] P. Chabal and J.-P. Daloz, Africa Works: Disorder as a Political Instrument (African Issues) 50 (1999).

[155] United Nations Development Programme, Integrating Human Rights with Sustainable Human Development. UNDP policy document 16 (January 1998), as cited in S.P. Marks, The Human Rights Framework for Development: Five Approaches, Harvard School of Public Health, FXB Center Working Paper No. 6 (2000), at 2. The five approaches are: 'holistic', 'capabilities', 'right to development', 'responsibilities' and 'human rights education'.

[156] *Cf. Id.*: "We are considering human rights and development after 50 years of distinguishing between civil and political rights on the one hand and economic, social, and cultural rights on the other. It has been argued that the former are 'freedoms from' or '*droits-attribut,*' whereas the latter are 'rights to' or '*droits-créance.*' The former are absolute or of immediate applicability, whereas the latter are relative or for progressive realization. The former are characterized by violations that must be redressed regardless of resources, while the latter are programmatic, calling for cooperation and utilization of resources. These neat distinctions, which developed throughout the Cold War, are disappearing in theory and practice. This is one of the most promising achievements of the post–Cold War period: there is no longer an ideological rationale for favoring one category of rights over another. The holistic approach connects all human

Furthermore, it cannot be overlooked that, at some point in the self-determining process, the people in question will have to undergo a conceptual shift from being in *opposition* to the state to *solidifying* the state, through its demonstrated commitment to universal and holistic human rights. Such challenges are not insurmountable—the very different experiences of Mozambique and South Africa during the early 1990s are two examples of the implementation of such a shift—but a people claiming self-determination in this manner will be expected to perform, and indeed will be unlikely to win recognition as a 'people' without a likelihood of improvement of the situation on the ground. Or, it may be accurate to assume that in the African context individuals are, as was previously classified, either (a) peaceful private citizens or peaceful private groups, (b) agents of the state or (c) rebels. If this would be so, the principal aim of any such 'people' would be to develop an overall administrative climate of judicial equality and procedural expediency, to prevent rebels from resorting to violent, extra-judicial processes to achieve social ends. This would also logically apply to private citizens acting under the colour of state authority, as could be observed in Algeria, for example, as militias were directly armed by the Algerian state in the mid-1990s to respond to terrorist threats.[157]

To extrapolate this formulation into a wider framework, it would be of use to nominate practical examples in whose light elements of the 'peoples' definition under submission could be observed, such as Bangladesh, Eritrea and Yugoslavia. In this way, Bangladesh is the most obvious because it is one of the few cases of contested post-colonial external self-determination to eventually become recognised by the international community. The Eritrean population can be identified as a 'people', primarily due to the fact that they fought a thirty-year war with Ethiopia, although this example is less clear-cut than the secession of East Pakistan leading into the state of Bangladesh. Eritrea, federated with Ethiopia in 1952, was later annexed into the Ethiopian state. This led to war, a negotiated settlement, an Eritrean referendum in favour of independence in 1993 and a 1998 border war, resolved by boundary delimitation by an international commission in 2002.[158] But in Yugoslavia, it could be observed that the social cohesion of the Yugoslav people—always held in check through Tito's social engineering—started to be outweighed by the almost mythical social cohesion of the historical ethnicities and national groups on Yugoslav territory. So began the dissolution of the Yugoslav state, from the secession of Slovenia, to the separation of Serbia and Montenegro, and everything in between.[159]

All these examples are grounded in the substantive reality that a 'people' exercised a form of 'self-determination' in direct opposition to another entity: in Dacca, it was Islamabad; in Asmara it was Addis Ababa; in Yugoslavia it was itself.

It simply reflected the post-socialist reality that as a multi-ethnic entity, the sum of its parts was much less than its whole. In assessing the tensions generally between non-coercive state consolidation and sub-state societal preservation (e.g. the right of an African 'people' to existence), these examples will be seen as reflective of past practice.

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rights, dispensing with many of the traditional distinctions between categories of rights."

[157] See United Nations, Report of the Panel Appointed by the Secretary-General of the United Nations to Gather Information on the Situation in Algeria in order to Provide the International Community with Greater Clarity on that Situation, Introduction (1998), particularly at Part Three (C).

[158] See also discussion in the conclusion of this study.

[159] For discussion, see D. Raič, Statehood and the Law of Self-Determination (2002), at 356-366.

Observations from chapter four

This chapter has attempted to re-frame the legal analysis presented in chapter two in a more practical perspective, focusing on the African decolonisation experience. The fundamental distinctions between a 'state' and a 'nation-state', as outlined in the first chapter of this study, have found practical representation in the contemporary formulations of statehood as having 'juridical' and 'empirical' elements. If, as was discussed, Europe is the 'tap-root of the nation-state', then Africa is the 'tap-root of the juridical state'. The vast majority of sub-Saharan African states have emerged from the colonial experience into negative-sovereignty regimes employing coercion as a principal means of governance.[160] This has led to inherent deficiencies in governance for post-colonial African states vis-à-vis the rest of the world, coupled with a geographic reality that inhibits many African states from exercising true effective control over the whole of their territory.

Indeed, it may appear that the more a state overtly and violently coerces its citizens, the greater the risks of overall state failure (in legal, political and economic senses). This leads not only to systemic human rights violations by the state against individuals, but also to the rise in groups of such individuals who wish to register their opposition against the policies of the state. From here, the collective element of 'collective groupings' is further identified. As similar individuals group themselves collectively, within a particular state (or, in the case of a trans-border grouping, within neighbouring states), these collective groupings can most broadly be seen as 'minorities', 'indigenous peoples' and 'peoples'; however, there is little legal clarity on the actual meaning of these terms, as the concepts have been intentionally left undefined, or the political meaning has changed, or there may be circumstances where a particular situation may not fit squarely into any one of these specific concepts.[161] What is most significant is the general presumption of deference of sub-state issues to state-based legal and political concerns; what has been shown in the African context is a tremendous protection gap for large segments of completely disenfranchised elements of the population as a whole.

The African Charter is in many ways unique to universal human rights law, as it guarantees, *inter alia*, the right of a people to exist. However, the drafters of the Charter intentionally avoided defining what comprises a people. It can be reasonably assumed that self-determination of peoples in the African context acknowledges the existence of collective groupings, if not because African states have never possessed any colonies *per se* from which decolonisation (the original self-determining act to which a 'people' granted) could take place. Given the realities of contemporary African life, what is of particular interest, however, is the extent to which a people can be negatively-formulated; that is, defined in opposition to a state, particularly due to having been targeted for the most serious of human rights violations, *i.e.,* warfare.

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[160] The origin of these terms stem from the major themes introduced by R. Jackson, in Quasi-states: Sovereignty, International Relations and the Third World (1990).

[161] Consider the situation of the Twa ethnic group in Rwanda and Burundi. They are a group of pygmies which are widely considered to be the indigenous people of the land, inhibiting the territory before the arrival of the Hutu from the West and Tutsi from the North. Their indigenous language is different than Kinyarwanda or Kirundi, the national languages of Rwanda and Burundi. Their ethnic and racial characteristics are markedly different than their fellow citizens. They comprise, particularly following the 1994 genocide, less than one percent of the total population of both countries. They could be a minority. They could be an indigenous people. And, particularly in view of the brutality and hatred regularly exhibited against them by practically all other entities, official and informal, state and sub-state in these central African countries, they could be a 'people'—save, perhaps, for their territorial disbursement and dwindling numbers, but mitigated by the particularities of their own collective history. See generally e.g. M. Mbonimpa, Hutu, Tutsi, Twa: Pour une société sans castes au Burundi (1993).

For any hope of being a success, such a formulation by a would-be 'people' must provide a specific climate for the actual 'universal and holistic' implementation of all human rights for all. This re-frames the present overall discussion in a context whereby the tensions generally between non-coercive state consolidation and sub-state societal preservation can be examined in greater depth.

CHAPTER FIVE
Applying the law of modern territorial statehood

One way of conceptualising the postcolonial territorial state is to break the methods of sovereignty employed by the state into vertical and horizontal elements, with the territorial aspect of statehood being held fixed, without prejudice to an eventual modification to the *uti possidetis* standard. The vertical aspect may be seen as representative of the cumulative effect of the state to manifest its independent sovereignty, whilst the horizontal aspect represents the ability for collective groupings to respond effectively to the territorial administration of the postcolonial state. International law broadly advocates systems of administration that uphold political circumstances leading to elections by citizens. However, an 'election-oriented' view of democracy may prove insufficient to fulfil the requirements imposed by the present state of public international law with respect to the precept of 'access to government', particularly in the case of postcolonial states. Although a nascent understanding of what may be manifested by holders of a legitimate claim for 'civil society' may be observed, internal self-determination largely corresponds to the right of a people for access to government. Such a formulation may prove exclusionary in practice. Yet in the postcolonial era, particularly in the new millennium, the legitimacy of such a precept has implications for a right to democracy, particularly as territorial circumstances may genuinely serve to inhibit a peoples' internal 'right to self-determination'. While this may not often be the case, it may be that a territorially defined juridical entity is able to demonstrate certain administrative deficiencies derived from particular deficiencies observed on the ground. Thus, it is conceivable that claims for territorial administration would be recognised by both its populations on the ground, as well as the international community through particular forms of recognition. Along similar lines, it may also be observed through state practice how states may assert forms of administration that may retain a juridical weight serving to inhibit governance on a municipal level. In short, it may be the case that the postcolonial state finds itself regularly drawn into a nexus between situations defined both by administrative (*i.e.,* 'democratic') and territorial circumstances. The case being advocated at present is that territorial definitions should not necessarily comprise the dominant variable in this relationship.

PART A: Territory and 'the new sovereignty'

As observed most recently through the UN's Millennium Declaration process, international human rights law, including the rights and protections afforded to collective groupings, is evolutionary.[1] The effectiveness of the postcolonial state is indeed variable, but the sovereign state remains the fundamental building block of global society, regardless if that state is the product of centuries of national cohesion, or decades of postcolonial independence. What re-

[1] A brief literature review illustrates the point. *Cf.* J.S. Watson, Legal Theory, Efficacy and Validity in the Development of Human Rights Norms in International Law, 1979 U.Ill. L.F. 609: "What human rights advocates are seeking is a supranational legal order of the hierarchical, coercive type prevalent in domestic systems to act as a check on governmental malfeasance. But international law is not such a system and it cannot be turned into one no matter how desirable that may be from a humanistic standpoint." And *cf.* Damrosch *et al*, International Law: Cases and Materials (4th ed., 2001), Preface to the Fourth Edition [hereinafter Int'l Law, Damrosch *et al*]: "In the [eight] years since the previous edition was published, international law has been invigorated with ideas and energy from peoples around the world. Grass-roots movements, transnational networks, and non-governmental organizations have focused attention on issues where international law can make notable contributions to solution of problems affecting all humanity. New standards of conduct have been elaborated in fields as diverse as human rights, trade, the environment, and disarmament; and new institutions are coming into being to realize ambitious goals through law […]. The transformations in the hitherto largely state-centered nature of our discipline have been a major theme of the present revision. Along with emphasizing the centrality of human rights in contemporary international law, we have given enhanced attention to non-state actors and their influence on the theory, content, and implementation of international law." And *cf. Id.* at 587, Ch. 8, Human Rights: "What was once unthinkable had become normal by the end of the 20th century."

mains to be considered are the ways in which this artificially monolithic form manifests sovereignty whilst adhering to the obligations now attached to statehood, in this comparatively modern era.

Louis Henkin's seminal 1989 book proclaimed the existence of an 'age of rights'. Writing from his usual US constitutional perspective, he noted that the age of rights implied the existence of a new reality, whereby "there are few voices now to insist that human rights elsewhere are not the business of the United States".[2] Indeed, as international human rights are universal in scope, this statement may be mirrored with equal veracity. Thus, given that international human rights law is now based on the basic premise that states have duties to uphold human rights in respect of their own citizens, as well as to the international community, what can be simultaneously observed is a palpable sense of unequivocal value in preserving the rights of individuals in domestic governance. This reflects a dramatic transformation in the ability of international law to give specific recognition to entities other than states. The dynamic has shifted towards an expansive conceptualisation of sovereignty, given that individuals have rights in domestic law deriving directly from international law. While the rights outlined in the International Covenant on Civil and Political Rights must be given immediate effect, those in the International Covenant on Economic, Social and Cultural Rights are more aspirational.[3] Yet, a chicken-and-egg question arises. The most severe violation of human rights is violation of the right to life, regardless if a violation of such a right is the result of a state's inability to curb its punitive excesses, or its inability to afford the most fundamental of human needs, such as food and shelter. Perhaps, with the exception of some regions of South and Southwest Asia, sub-Saharan Africa has a disproportionate share of such violations vis-à-vis the rest of the world, and it has been suggested that the nature of the construction of Africa's states plays a role in the establishment of this situation.[4] The ongoing existence of a 'right of peoples to self-determination' leaves room for hope, at the very least, as self-determination developed on the international stage, earned African states' independence and is continually perpetuated in a burgeoning system of rights. However, it is the 'burgeoning' nature of this system that requires closer examination.

Both 'sets' of rights introduce, through treaty accession, a horizontal enforcement of international human rights standards. This should come as little surprise, as international law itself is horizontal,[5] and therefore dependent in large measure upon political actors for its own enforcement. States, when claiming violations of international law, must do so on their own initiative, against one of their juridical peers, using established mechanisms in established forums.

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[2] L. Henkin, The Age of Rights 66 (1989). One feels further compelled to recall the following comments, *Id.*: "No one in the United States suggests that the United States should end human rights violations in other countries by war and conquest; that would be a violation of international law and would bring more human suffering than it would cure."

[3] Beyond the human rights provisions of the African Charter on Human and Peoples' Rights, most African states have agreed to the contemporary international human rights standards, as Botswana, Mauritania, Mozambique and Swaziland are the only African states to have not ratified both human rights covenants. All other African states have done so. Indeed, as at July 2007, out of 192 UN Member-States, there are 156 state-parties to the ICESCR and 160 state-parties to the ICCPR, with the majority of non-state-parties being island states in the Pacific and Caribbean as well as some Asian and Middle-Eastern states and a small number of European micro-states. See the conceptual linkages the regularly updated UN High Commissioner for Human Rights, Status of Ratifications of the Principal International Human Rights Treaties at www.unhchr.ch. In addition, 29 African states are party to the Rome Statute of the International Criminal Court and its complementary jurisdiction to national courts.

[4] See generally J. Herbst, States and Power in Africa (2000) [hereinafter Herbst].

[5] For commentary, see R. Higgins, *Time and the Law: International Perspectives on an Old Problem*, 46 ICLQ 501 (1997), at 501-504.

A significant part of the discussion in this chapter reflects a reality such that, while international human rights law is of horizontal extraction, it vertically instils a universal system of shared expectations about human behaviour, in respect of sovereign states. After discussing verticality and horizontality in legal systems ordinarily, the discussion will then shift from the international plane to the municipal plane, and it will be asserted that a major challenge to effective human rights promotion and protection in postcolonial African states may be observed due to inherent geographical tensions and structural weaknesses. Postcolonial power consolidation, clearly, has been messy, and although it would be foolish to say that such messiness was preordained, a more balanced assertion would suggest that the level of violence frequently targeted against civilians by agents of African states has had a destabilising effect. However, as the precepts of international human rights law have been vertically integrated into the domestic legal systems of states-parties to the International Bill of Rights, the horizontal enforcement of international human rights law is premised upon preventing or responding to situations in other countries, chiefly though the established United Nations framework. This is to say that the general concept of 'international human rights' is largely faced with the peer-based methods of enforcing international law, which are grounded in classical legal positivism. Rather, it should not go overlooked that the subject matter involved with the process of horizontal enforcement of international human rights law is the treatment of individuals within a state. This is not inconsequential; indeed, it exemplifies the extraordinary nature of the new sovereignty regime, at least when contrasted with the classical legal positivism.

Framed within the larger context, one is reminded that the underlying universal human rights principles are being filtered through the various forms of statehood observed heretofore, broadly classed as having 'positive' or 'negative' sovereignty forms, where 'positive sovereignty' is roughly analogous to the ideal of the nation-state, and 'negative sovereignty' is roughly analogous to the reality of the purely juridical state.[6] Here one could reasonably conclude that the positive sovereignty forms tend to be more receptive to the effective implementation of human rights norms into a state's domestic law than do the negative sovereignty forms. Coercive behaviour, by definition, exacerbates tensions between state and society, and such inherent disagreement can cause tremendous discord. Hence the rigidity of the horizontal construct of international human rights law as translated into the domestic laws of states, as international law alone lacks the automatic vertical reach into the inner workings of many states, particularly those taking a more coercive or negative-sovereignty form.

'International law' *per se* does not, except in extraordinary circumstances of state failure, directly manage or administer a territory. This job is quite clearly left to the states, and for that to remedy the violation, the state must undertake its own reforms, whether it is Western European or Central African. Thus on the one hand, it can be held to task in the appropriate intergovernmental forum, with a full spectrum of responses from the feeblest expression of concern about a situation in a territory right up to lawful humanitarian intervention, for human rights protection and promotion is the business of all states.[7] On the other hand, a genocide in Rwanda, to which the world turned a blind eye, occurred quite recently. But this leads to a perverse reality, for if

[6] For discussion, see R. Jackson, Quasi-States: Sovereignty, International Relations and the Third World (1990), particularly at 26-31.

[7] There is of course an innate hesitancy to approach situations with direct countermeasures, as Antonio Cassese notes that the self-determination situations in East Timor, Eritrea, the Baltic States and Yugoslavia were those with "more political and military overtones than any other question concerning human rights and States therefore show a strong propensity to take into account a whole gamut of extra-legal considerations before deciding to intervene in this area". See A. Cassese, Self-Determination of Peoples: A Legal Reappraisal (1995), at 157.

international human rights law cannot be a 'supranational legal order of the hierarchical, coercive type prevalent in domestic systems to act as a check on government malfeasance', as it were, then what does it say about the nature of the states, themselves, when prohibitions against such types of behaviour have been firmly written into their own domestic legal systems for decades?

What is further implied—theoretically, at least—is the development of a commonality of circumstances in the domestic socio-legal systems of the states-parties to the regime of contemporary international human rights law. Even more difficult to express, however, is the commonality of circumstances reflecting the increasing rejection in positivist international law of *suprema potestas*. The seal has been punctured that the standard of treatment afforded to the citizens of any state by that state's own government is without any concern whatsoever to any other state. But rare are the cases whereby the repeated effectuation of massive and systemic human rights violations lead to effective censure and subsequent cessation. The incorporation of international principle into a state's domestic laws is primarily effectuated by the consent of individual states themselves, given that these actions are taken by treaty ratification and the obligations undertaken, through membership in intergovernmental organisations.

The states themselves, sovereign as they are, remain. Indeed, as Pieter Kooijmans stated, drawing upon Georg Hegel, the *suprema potestas* principle is the classical guarantor of the sovereign equality of all states.[8] Yet the sovereign equality of states is not in question. It is, however, reflective of the fact that, in both morality (e.g. the Universal Declaration of Human Rights) and legality (e.g. the two human rights covenants as well as the African Charter), in the international human rights legal system, a state retains its external sovereignty and independence, exclusive of its external accession to internal obligations concerning its own behaviour. This thus serves to mitigate the absolutist nature of its internal power, without significantly undermining its external trappings of sovereignty.[9] What is really at issue is the manner in which these universal and regional standards are implemented in domestic sovereignties. To this end, a logical barometer of the practical relevance of the right of peoples to self-determination is identified, for if all rights are seen to flow from self-determination—as has been asserted in the present text—the success of the system established and reinforced by self-determination in its classical and ongoing forms, will be reflected in the degree to which universal principle is given domestic effect. Indeed, it is here where the nature of African state construction is examined, particularly in the case of civil and political rights, which becomes immediately enforceable at the moment of accession to the ICCPR,[10] whether by a '*state*' or a '*quasi-state*', to use Robert Jackson's phrasing.[11]

The 'state-strength' dilemma of negative sovereignty regimes in postcolonial states

A pattern is beginning to emerge, which demonstrates how aspects of coercion within postcolonial states, including those in Africa, may become structurally ingrained. It can be fur-

[8] See P.J. Kooijmans, The Doctrine of the Legal Equality of States: An Enquiry into the Foundations of International Law 127-128 (1964), citing G.W.F. Hegel, Grundlinien der Philosophie der Rechts (4. Aufl. Herausgegeben von Johannes Hofmeister, 1955) at § 331.
[9] *Cf. Id.* at 129: "For [Hegel], the state is perfection personified, and the welfare of the state the highest aim. The state as such is absolutized, both internally and externally. It is the absolute power on earth; consequently it is sovereign and independent in its relations with other states."
[10] In contrast, the ICESCR reflects aspirational goals, to which a state pledges itself to realise through an ongoing process.
[11] See Jackson, *supra* note 6, at 29. Jackson broadly equates the quasi-state formulation to states exercising primarily so-called 'negative sovereignty'. See also R.H. Jackson, *Negative Sovereignty in Sub-Saharan Africa*, 12 Rev Int'l Stud 247 (1986), particularly at 260 *et seq.*

ther observed, by using the methodology proposed by Kalevi Holsti,[12] that this situation leads to a practical reality whereby the actual living conditions within these post-colonial states remain rooted in a coercive hegemony not dissimilar from that which anti-colonial self-determination sought to repel. Holsti argues that, as time passed and greater numbers of African states decolonised, the most fundamental governance challenge was to improve the structures of the state beyond those inherited from colonialism. Often, the negative, ongoing effects of the widespread use of violence, and the subsequent propensity to adversely affect regional peace and security, have caused resentment, disaffection and isolation amongst populations governed within a state's boundaries. As a result, it may be observed that the more a state coerces its population into respecting its authority, the more repellent are its actual effects. This phenomenon is, again, not uniquely or inherently African; one need only to consider difficult state-society relations in many Asian regions which were also once deeply affected by colonialism to find parallels.[13]

It is the coercive element to the hegemony perpetuated by post-colonial states that is most troublesome, given its correlation with repression and violence. Regardless of the negative effects inflicted upon the populace by state leaders in terms of human rights violations toward various individuals, there is also a fundamentally destabilising element to such actions, when viewed in aggregate. That hegemony exists, in the first instance, is not the inherent problem. Rein Müllerson, in referring to an earlier work by Adam Watson, points out that hegemony itself—on the global plane—is more value-neutral than liberal international lawyers and diplomaticists would tend to think, if only for its long-standing and widespread prevalence in human interactions.[14] Watson's formulation of hegemony reflects this, calling it "the ability of the most powerful states to determine the nature of the society, and especially its practice".[15] Making a leap from the international plane to the domestic, it seems, similarly, that the political apparatus of a sovereign state has a corresponding 'ability to determine the nature of the state society', and, indeed, to determine its practice. Yet, when that practice is observed to contain coercive repression, the linkages to what, in an 'age of rights' may be termed illegitimacy in governmental actions have become overt. Holsi calls this the 'state-strength' dilemma, in that:

> [t]he weak state is caught in a viscous circle. It does not have the resources to create legitimacy by providing security and other services. In its attempt to find strength, it adopts predatory and kleptocratic practices or plays upon and exacerbates social tensions between the myriads of communities that make up the society. Everything it does to be a strong state actually perpetuates its weakness. […] States seek to gain the strength that would give their external sovereignty domestic content. Attempts to increase state strength generate resistance that weakens the state. In attempts to overcome resistance, governments rely on coercive measures against local power centers of various types. […] Their "right to rule" is undermined by their actions, which are frequently discriminatory, short-range, and self-serving.[16]

Under such circumstances, the 'rule of law' may be seen as more akin to protracted armed

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[12] See generally K.J. Holsti, The State, War, and the State of War (1996), particularly at 102 *et seq.* [hereinafter Holsti].

[13] This is reflected by the profound levels of political repression perpetrated by Asian governments of dubious legitimacy against their disenfranchised populations. States emerging from empires and colonial construction, such Iraq and Burma (Myanmar) are two of the most glaring examples, but certainly not the only ones.

[14] *Cf.* R. Müllerson, Ordering Anarchy: International Law in International Society (2000), at 140: "Hegemony can be legitimate as well as illegitimate. In the contemporary world, where concepts of democracy and legitimacy have become powerful ideas shaping and reshaping many societies only hegemony that is seen as legitimate by a substantial number of actors has a chance of being durable."

[15] A. Watson, The Limits of Independence 147 (1997), as cited in Müllerson, *Id.*

[16] Holsti, *supra* note 12, at 117.

conflict than to effective governance. These assertions are substantiated by objective criteria. According to Holsti, Africa led the world, in terms of the numbers of actual armed conflicts on the ground, from the period 1945-1995 (excluding anti-colonial liberation wars), with 44 such conflicts, most of which were classified as 'secession/resistance' (21) or 'ideological/factional' (16), which seems to agree with the notion of coercive hegemony against the peoples of a state by the leader of that state, whereas 'state vs. state/intervention' situations accounted for only seven of the remaining armed conflicts in sub-Saharan Africa. This is further demonstrated by the fact that 37 of the 44 conflicts—fully 84 percent of them—were considered to be internal conflicts, not involving external intervention.[17] Holsti refers to this phenomenon as exemplary of the 'wars of the third kind'.[18] He writes:

> In wars of the "third kind" there are no fronts, no campaigns, no bases, no uniforms, no publicly displayed honors, no *points d'appui*, and no respect for the territorial limits of states. There are no set strategies and tactics. Innovation, surprise, and unpredictability are necessities and virtues. […] In wars of the third kind, just as the civilian/soldier distinction disappears, the role of outsiders becomes fuzzy. The laws of neutrality no longer apply because those who are militarily weak rely on outsiders for arms, logistical support, and sanctuary.[19]

In considering the implications for these circumstances, it should be considered that a basic phenomenon is being considered here: the inter-temporal effectiveness of sovereign independence contrasted with the factual, definitional circumstances readily observed in existence on the ground. In some senses, the discussion replicates that put forth in chapter two whereby the legal principles of self-determination of peoples and *uti possidetis juris* were compared and contrasted. In a postcolonial setting, however, the power dynamic is more relative. To this end, some time will be spent casting the present discussion in 'horizontal' and 'vertical'

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[17] *Viz.* Holsti, *supra* note 12, at 22 (Table 2.1, Armed conflicts by type and region, 1945-1995). This table is the product of data provided in the fifteen-page appendix in his book, compiling "the major instances of armed conflict that have occurred in the international system since 1945 up to, and including, 1995. The list is comprehensive and includes conflicts that would not necessarily be defined as war in the Eurocentric conception (*i.e.,* a contest fought between two distinct national armies who engage each other with the objective of inflicting enough casualties/destruction to compel one party to surrender, with a minimum of 1,000 battle-related deaths)". Holsti's main focus in the African context is on sub-Saharan Africa, as he groups North African countries with the Middle East.

[18] *Cf. Id.* at 28 *et seq.*: "Since 1648, war has been of three essentially different forms. We can call them 'institutionalized war,' 'total war,' and wars of the third kind, sometimes called 'peoples' wars.'" Holsti believes that institutionalised war was conventionally institutionalised inter-state war waged quite separately from civilian life, thereby respecting certain inherent limits in warfare, such as the Thirty Years War. Total war demonstrated greater involvement of the local populace, such as the 1792 Napoleonic *levée en masse.* Further, wars were waged with a view towards annihilation of the enemy, not just a forced surrender as was previously sought out. This had the knock-on effect of codification of basic standards of warfare, through the positivist development of an international law of armed conflict. The resistance developed by collective groupings of individuals against the oppressive powers of coercive hegemony has come to represent this third kind of warfare, exemplified by the revolutionary theories of, *inter alia*, Mao Tse-tung, Vo Nguen Giap and Che Guevara.

[19] *Id.* at 36-37. It is interesting to note that Holsti on the one hand asserts that territorial limits of states do not apply in this type of warfare, while, on the other hand, he points out that African civilians have had some of the greatest numbers of casualties in such wars, despite the evidence that very few armed conflicts in post-colonial Africa are inter-state in nature. *Cf. Id.* at 37 (citations omitted): "One estimate is that between two and three million African civilians died in wars during the 1980s. Gurr estimates that between one-half million and 1.7 million Africans died from government policies of genocide or 'politicide' in the 1980s. The figures for the 1990s, which include vast numbers of civilian casualties in Liberia and Rwanda and the continuation of the war in Sudan, will probably not be significantly lower." Whether such figures can be seen as diminishing in the new century is a conceptual possibility, albeit one beyond the scope of this study.

terms, both on the municipal plane, as a question of effective governance within territorial boundaries, and universally, in the same sense as the manner in which it is now uncontroversial to establish that there is a system of public international law, with standards of behaviour formed from international provenance, since the ICCPR and ICESCR, as part of the International Bill of Rights, are treaty-based voluntary obligations undertaken by states. The obsessive parity sought by the earlier classical legal positivists to incorporate all colonised, or otherwise 'civilised', territorial entities into an overarching legal system grounded in the sovereign equality of states has been replaced with a reality whereby states retain their external sovereignty and membership within the United Nations, but do so with wildly differing capacities to demonstrate genuine 'effective governance' on their territories—that is to say that, although the ICCPR prohibits violations of its terms, and certainly its core precepts, from the moment when a state signs, ratifies or accedes to the international treaty, it may well be the case that some postcolonial states have neither the capacity nor the political will to implement such treaty obligations.

Interpreting the 'horizontal' and 'vertical' aspects of postcolonial statehood

A conceptual breakdown of 'horizontality', 'verticality', 'positive sovereignty' and 'negative sovereignty' is useful to understand the curious roles played by postcolonial states, having been guided by *uti possidetis* but also now broadly subscribing to the UN human rights programme, which holds (postcolonial) self-determination of peoples as sacrosanct. Under such circumstances, the 'horizontal' and 'vertical' concepts take on more precise meanings. The 'vertical' element remains relatively static, as it refers to the direct application of sovereignty by a state. The wavelength of the 'horizontal' element is more dynamic, as it shifts away from the supranational, macro-scale system of interactions and enforcement mechanisms, common to the international community of states, to the municipal, micro-scale machinery employable within a sovereign state, to ensure non-discrimination and full legal protection for all citizens.[20] Positive sovereignty is the ideal, in that it is largely the product of the International Bill of Rights, whereas negative sovereignty may be the reality, in that repressive coercion may be a prevalent governing technique.

It will be asserted that, in postcolonial African statehood, 'vertical state consolidation' represents the cumulative effect of the state to manifest its independent sovereignty, while 'horizontal societal preservation' represents the ability for collective groupings to maintain some sense of postcolonial coherence. General conceptions of horizontal and vertical orders, as means of describing the distribution of authority in a legal system, certainly have their own theoretical antecedents, although one must bear in mind that there are few direct parallels in such forms of analysis. Nevertheless, to set the tone of the discussion, a prime example from 1964 by Richard Falk examined the interplay between domestic courts and the international legal system.[21] Falk unsurprisingly identifies greater horizontal authority in international law than

[20] For if there is such a thing as sovereign equality of states, then, in states subscribing to the international human rights regime, there must be some exigent form of equality amongst citizens within the state, although cultural differences will admittedly find opportunities to denigrate this assertion over time.
[21] See R.A. Falk, The Role of Domestic Courts in the International Legal Order (1964) [hereinafter Falk], particularly at chapter three, pages 21-52. *Cf. Id.* at 22: "The distinction between 'horizontal' and 'vertical' is a metaphor to describe the two basic distributions of power in a legal order. However, it is not a rigid distinction in which the presence of one form of legal order excludes the other. Thus, for example, when one state in the United States is compelled by a federal court to give effect to a judgement of another state by virtue of 'the full faith and credit clause,' there is introduced a vertical element in an essentially horizontal legal order." In view of Falk's comments, given that international law is a system arranged in the main to govern sovereign states, it should be seen as something less than and therefore more horizontal

through municipal legal systems, in that power is distributed amongst sovereign states internationally, while it retains an inherent hierarchical authority, when formulated within one particular state.[22] The idea of an international legal order is one that is inherently horizontal in definition, in reflection of the lack of a dominant vertical polity,[23] and therefore must automatically reflect some of the underdeveloped concepts in postcolonial juridical states, namely a potential incapacity to enforce a uniform system of international law.[24]

Furthermore, it has become difficult to the point of irrationality to deny that the basic core of international human rights standards have become synonymous with a uniform system of international law standards and no deeper allusions are necessary to establish the synonymous relationship between the two. As homage is paid to democratic governance as something which has emerged into the modern law of nations, self-determination will be a legal principle of reinforcing value. International human rights law takes on an elliptical meaning, for it is grounded in self-determination of peoples, but self-determination of peoples is an ongoing process reflecting a system possessed with the right to choose: leaders, systems, beliefs. As opposed to a snapshot taken at a 'critical date', it is an ongoing process, a system of its own accord to respond to situations and to develop jurisprudence. Its ongoing character is why it has become a cornerstone of the modern international legal system, and yet the enforcement of international human rights law, as has been discussed, exhibits all of the flaws and trappings of a horizontal enforcement system.

The legal status of the documentation of human rights abuses and the levels of protection earned by human rights defenders have taken on greater complexity in recent years. The elliptical nature of international human rights law demonstrates how, simultaneously, a morally-inclined legalism is given practical effect, despite having a dubious jurisprudential pedigree. Self-determination is the engine that drives this elliptical dynamic, as it truly does blend the aspriational nature of economic, social and cultural rights with the systemic and procedural nature of civil and political rights. Thus, a more contextual understanding of sovereignty develops, since, for this to occur, the underlying requirement of democratic governance, in the first instance, takes on the form of something akin to autonomy arrangements under the rubric of 'internal self-determination'. It is therefore possible to observe how 'what was once unthinkable had become normal by the end of the 20th century'.

In a recent conference paper, Hans Köchler stated the issue differently, pointing out that the UN Charter is an 'anachronism' because it has not undergone a substantive—and presumably democratising—revision since decolonisation.[25] He asserts:

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than a fully federated system; nevertheless, the same type of underlying structure has an inherent vertical characteristic to it, as sovereign states undertake to vertically-integrate, within their own municipalities, all juridical forms including the international human rights standards: those which have been horizontally promulgated across the community of nations, including—cultural relativist arguments aside—newly-decolonised states.

[22] *Id.* at 21-23.

[23] *Cf. Id.* at 22: "[A horizontal distribution of authority] results in giving a central ordering role to various patterns of self-help and self-restraint. With the possible exceptions of the control of international violence and the avoidance of extreme unfairness to aliens, the maintenance of international order is primarily a horizontal endeavor."

[24] With 'enforcement' meaning an organisational method residing somewhere in the nexus between textbook coercion, *i.e.,* repression, and textbook anarchy, *i.e.,* an absence of polity, this could mean agents of the central government acting on authority from a state capital, or a local agent acting on matters of local jurisdiction, or (more practically) an *ad hoc* mixture of the above.

[25] See H. Köchler, *Self-determination and Democratization of the UN System*, in Y.N. Kly and D. Kly, In

> It is no unfair demand, in terms of democratic values and principles, that *the reality of decolonization* (which brought about the admission of the majority of present member states since World War II) be reflected in the UN Charter itself, if the Organization wants to regain its legitimacy and credibility vis-à-vis the majority of mankind.[26]

So while desirable modernisations, such as the reform of the Security Council, have not taken place, improvements in the efficacy of the international legal order remain channelled through the existing procedures, inefficient as they may be.[27] Although self-determination of peoples is not mentioned in the Universal Declaration of Human Rights *per se*, the Universal Declaration itself, as one of the nascent United Nations' greatest gifts to post-war society, encourages an expansive reading of protective measures both for individuals and *collectivités* vis-à-vis the state. Of course, as the Universal Declaration began its existence largely as a gentleman's agreement regarding the expected direction of post-war legal development, it is only when the Universal Declaration is given specific legal effect, through international and regional covenants, relevant custom, peremptory norms of expected global behaviour and universal jurisdiction for certain crimes that the veracity and evidence of a system of international human rights law becomes evident. Self-determination of peoples, as common article one to the two principal multilateral treaties in international human rights law, is the *Grundnorm* of this system. That the entry into force of the ICCPR and ICESCR was contemporary to the independence of most of the world's colonies was a fortunate circumstance for human rights advocates. It also implies an organic character for self-determination, within contemporary international human rights law. That the implementing legislation of this organic law—the two principal human rights covenants, before unification in the Vienna Declaration and Programme of Action—holds self-determination of peoples as their one and only common element should be seen as reflective of the need for progressive implementation of the elements contained therein. This manifests itself between the administrative bodies of a sovereign state and universal standards of the international legal order.

Although his ideas predated the entry into force of the modern postcolonial human rights legal regime, a return to Falk's earlier commentary on interactions between horizontal and vertical structures illustrates the situation clearly. Falk cites Percy Corbett's assertion that "progress towards clarity and effectiveness of the international legal order will depend less upon the formation and reformulation of general principles, or on codification, than upon the arrangements for the supranational administration of specific common interests".[28] Falk, finding himself out of agreement, responds:

> Professor Corbett regards the only alternative to the development of effective vertical institutions to be the rather fruitless formulation of shared aspirations. Such an argument fails to take serious account of the horizontal possibilities to attain legal order. This position also compels one to identify progress in the stabilization of international relations exclusively with centralizations of authority and power.[29]

In short, it seems apparent that 'verticalisation' and 'horizontalisation' of intellectual concepts can be applied in different forms, dependent upon the circumstance at hand (e.g. modern public international law is largely enforced horizontally—that is, when a state brings a claim,

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Pursuit of the Right to Self-Determination: Collected Papers and Proceedings of the First International Conference on the Right to Self-determination and the United Nations (2001), at 135.

[26] *Id.* at 136 (emphasis in original).

[27] The fact that this is not always the case remains notwithstanding.

[28] Falk, *supra* note 21, at 23, citing P.E. Corbett, Law and Society in the Relations of States 12, 68-69 (1951).

[29] *Id* (footnotes omitted).

complaint, situation, dispute or the like to an intergovernmental body to seek possible remedies). The phenomenon could also be observed vertically, when a state emerging from colonial rule, having inherited artificial external boundaries and an imported formal legal system, and undergoes periods of consolidation and internal contraction as it develops and refines its empirical characteristics.

At this point, a short measure of stock-taking is in order to tailor the ideas presented herein back to an earlier theme in the discussion, which is the deconstructed postcolonial state and the after-effects of *uti possidetis juris* on Africa. As was asserted in chapter two, at the heart of the interplay between self-determination and *uti possidetis* is the question of whether the concepts are legal rules or legal principles, and it will be recalled that a sympathetic reading of self-determination is urged vis-à-vis *uti possidetis*, because *uti possidetis* is a legal rule governing the form of decolonisation whilst self-determination is a legal principle with an organic character, as it sets the underlying foundation for the interdependent basket of rights to be found in the ICESCR and ICCPR.[30] Moving that discussion into the present light, a blueprint for how horizontal frameworks of legal order can be observed in the postcolonial African state. For it is *uti possidetis* which drew the line at the 'critical date' and postcolonial self-determination of peoples, within the sovereignty of the nascent state (or the lack thereof), which dominated the relationship thereafter. Effective self-determination of peoples, as a human right itself, must undertake to protect at a bare minimum the customary international law of human rights,[31] and in states-parties to the ICESCR and ICCPR, the core of the 'international bill of rights'. Furthermore, it must do so—or genuinely endeavour to do so at the very least—without fault, for the basket of international human rights law, with customary human rights law at its core, preserves human lives by linking decorum, presumably to be found in 'statehood', to the rights and responsibilities of individuals subjected to those states' own administrations. The ways in which this is done, however, have been opened up considerably due to the actions of the 'grass-roots movements, transnational networks, and non-governmental organizations' referred to at the outset of this chapter. This opens a new realm of possibilities for the task at hand, in that self-determination of peoples expands the frontiers of sovereignty. It does so by demanding interactivity between state and society, and furthermore, it implies that, in circumstances where the state finds itself substantively less than perfect, society has a full entitlement to pick up the slack, as a product of its own initiative.

That is to say that 'self-determination' is just that, and that is how the 'self' defines itself. Self-determination is an obvious manifestation of natural law in the modern world, as it can be observed that the law as it is actually—and perhaps uniquely as shown by its mainstream acceptance as a legal principle,[32] with influence over the composition of a state's government—juxtaposing the concepts of the 'is' and the 'ought'. Moreover, it does so at a deep structural level, driving the process onward, however repugnant it may be for certain individuals—lawyers and non-lawyers alike—in that morality, for lack of a better word, has become the law, at least in a nascent, conceptual sense.[33] That this is so serves neither to refute the 'ought'/'is' separation, nor to neglect the pluralism of a non-discriminatory legal system. Nevertheless, some may immedi-

[30] See discussion *supra* chapter two of this study.
[31] For these purposes, the provisions of the US Restatement (Third) suffice, as at § 702 states are prohibited from practicing, encouraging or condoning genocide, slavery, disappearances, torture, arbitrary detention, racial discrimination or consistent patterns of gross violations of human rights.
[32] See generally J. Crawford, *The Rights of Peoples: 'Peoples' or 'Governments'*, in J. Crawford (ed.) The Rights of Peoples (1988)
[33] Yet one which should even find basis amongst otherwise 'exclusive' legal positivists. This is self-evident, for what effectively self-determining entity would actually want to harm itself? How could that ever be genuinely construed as 'self-determination' by a territorially-defined *collectivité*?

ately identify a problem, as seemingly unskilled human rights advocates are often thought by mainstream lawyers to over-identify with morality and to argue that unjust laws cannot be seen as laws, in and of themselves.

The validity of this escapes larger concerns, however. For at issue here is a hierarchical juridical question of interactions between sets of rules and groups of principles. Of particular concern is the ability of states to exhibit and manifest the universal properties of sovereignty, territorial integrity, independence, *et al*, which they must do in order to be states, and to do so in a way that does not run afoul of modern obligations. This is where international human rights law takes on a role of its own in linking international and municipal law. Hedley Bull noted that one of the main limitations of international law is that it cannot act independently of itself; that is, it can "mobilise the factors making for compliance with rules and agreements in international society only if these factors are present".[34] These factors *are*, indeed, present: sovereign (vertical, on the international and domestic planes) states have undertaken voluntarily-ascribed treaty obligations (horizontal, most clearly on the international plane). The problem is that it is the nature of the states' own constructions which should come under greater critical examination, if self-determination is to have any practical, tangible meaning. Yet it may well be the case that component societies within the state, and thus the totality of the territorial state itself, can—if empowered to do so—assume some of the roles which otherwise would be played by the government of a state, manifesting its *effectivités* within its territory.[35]

In sum, if the overladen demands on state systems emerging from colonial domination can be deconstructed into both horizontal and vertical forms, and self-determination is seen as a legal principle taking on the amorphous forms just discussed herewith, the question turns to the extent to which civil society groups can legitimately and fairly take on administrative tasks in the absence of a state's own effectiveness.[36]

Many possible answers could be conceived. It could be the case, as occurred in Algeria at the height of six years of insurgency, that civilian militias were armed and positively encouraged to act under the colour of state authority by performing paramilitary activities.[37] It could also be the case that civilian groups provide the essential human services that would be seen as contributing to the *telos* of flourishing in developed, primarily European states. That is to say, rather, that forms broadly reflective of the distinctions between empirical and juridical statehood are contrasted, with the horizontal as the empirical and the vertical as the juridical. Indeed the literature of the time recognised this circumstance—particularly that the juridical has the upper hand—as observed by A.A. Fatouros:

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[34] H. Bull, The Anarchical Society 137 (1st ed., 1977).

[35] But see the discussion on *effectivités*, original title and historical consolidation, *infra* this chapter, Part B.

[36] *Cf.* J.A. Perkins, *The Changing Foundations of International Law: From State Consent to State Responsibility*, 15 B.U. Int'l L.J. 433 (1997), at 504: "Frustrating as the enforcement of international law at times surely is and will continue to be, the essential fact is that the power of international law is not derived from state consent but from its cogency as policy. It is policy that drives states in the development of international law as well as in their adherence to it and in their commitment to its enforcement. The power of law lies in its unique problem solving, conflict resolving, peace building and security enhancing capacities and its resulting role in serving the interests, the convictions and the security of states."

[37] *Cf.* New York Times, Algeria to Arm More Civilians for Fight Against Islamic Militants, 22 January 1998, page A13, available on Lexis. Most interesting is the statement of then-Prime Minister Ouyahia that the government intends to "arm more civilians in self-defense units and will establish more than 100 new police brigades [in 1998] to take over from the army in the fight against Islamic militants [...] with the goal of returning the army to its role of defending the country's borders".

> The rigid wholesale adoption of a legalistic traditional viewpoint on international law seriously restricts the potentialities of the new states. These states admittedly have a very limited choice between alternatives in international political, economic, or legal relations; but they limit themselves further by failing to perceive and identify some of the alternatives which are in fact available. This accounts in part for the fact that the actual impact of the actions and policies of the new states on international legal order is far less radical and far-reaching than their rhetoric at the United Nations may lead one to expect. (Their lack of power, in its more traditional formulation, is, of course, another important reason for this.)[38]

Having set the stage, then, for a more contemporary discussion of horizontal and vertical conceptualisations of power in the postcolonial African state, Falk's defence of the potential for contributions to legal order to be made, from observations on these horizontal and vertical perspectives, can aid in understanding of the underlying phenomena at hand.

The crux of the matter: The variables of 'vertical state consolidation' and 'horizontal societal preservation' explained

In particular, the horizontal form is called horizontal societal preservation and is defined in opposition to the prevalence of coercion in the governance of a postcolonial state. Sub-Saharan Africa is an appropriate model for analysis of this phenomenon, due primarily to the widespread economic underdevelopment and underperformance found there, which further serves to destabilise an already fragile system of human interaction. However, it is the regular manifestation of inter-societal cohesion that preserves some dignity for human existence—*'le système D'* which allows life to carry on regardless of circumstances, as it undoubtedly does each day across the continent.

The vertical societal consolidation form is that which reflects the latest inter-temporal reality of *uti possidetis juris*, namely, that the modern meaning of the concept as something bearing little resemblance to its ancient Roman origins has evolved both into a practical measure, to prevent land grabs by outside powers in nascent postcolonial Latin American, and into a rule of general scope with particular application in Africa and Asia. Some would also say it encapsulates a socio-legal phenomenon, which simultaneously represents 'the heritage of states' in the European tradition, and the lasting implications in terms of territorial delineation in postcolonial sub-Saharan Africa. The vertical state consolidation form is just that: an attempt for a postcolonial state to try to centralise its own authority in order to take fully its place amongst the community of states.

The tensions between vertical state consolidation and horizontal societal preservation now emerge. The vertical aspect reflects the manner in which a state is entrusted with the authority and responsibility for the hegemonic discharge of some rights over its citizens,[39] and separately, the domestic obligation of preservation of certain individual rights. Furthermore, given the shift away from the requirement of the existence of an effective government, as ob-

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[38] A.A. Fatouros, *Participation of the "New" States in the International Legal Order of the Future*, in R.A. Falk and C.E. Black (eds.), The Future of the International Legal Order Vol. I: Trends and Patterns 342 (1969).

[39] An analytical guide is provided by Müllerson, *supra* note 14, at 141: "Taken in abstract, neither hegemony nor independence (*anarchophilia*) in international society are necessarily either good or bad. What really matters is the purpose, direction and methods of the use of hegemonic power or independence. It is not at all rare that newly independent states have started with violation of human rights of their ethnic or religious minorities. Also, struggle for independence is often associated with terrorism. It seems that this should warn us against treating independence as something inherently good or positive and seeing all those who fight for independence as heroes and not as villains."

served from League of Nations practice,[40] towards the acceptance of the legitimacy of a state achieving independence through an act of decolonisation regardless of the capacity to deliver effective governance, it seems that modern international law recognises that *all states* are separately assumed to possess the capacity to do so.

Nevertheless, there simultaneously exists a right of peoples to self-determination. Conceptualising the juridical state as the by-product of both horizontal and vertical tensions reflects the friction—and indeed hostility—between 'state' and '*quasi-state*'. The 'horizontal societal preservation'—if it is to be accepted that "peoples' rights and minority rights are the flip sides of the same coin"[41]—will challenge the outmost limits of legality, at least from a traditional international legal perspective. And yet, there is the 'right of peoples to self-determination'. It could also be observed that 'vertical state consolidation' reflects little more than what some might observe as a 'twilight zone' among international law, history and politics: 'a state is a state is a state', so long as it has successfully been subjected to the juridical processes which confer statehood *per se* upon a particular territory, but it can and should simultaneously be observed that the amalgam of law, history and politics creates facts and factual situations, observable on the ground and debatable in intergovernmental forums such as the Security Council.

Some states clearly have been formed as products of coercion and in terms of practical fact (as measured by the level of widely-reported human rights violations, for example) have obviously not profited from their nascent statehood. Furthermore, it appears to be the case that 'the new sovereignty' also reflects circumstances whereby a disenfranchised segment of a state's population can seek redress through the international legal framework to its right of access to government and its level of parity with the majority of the state.

In short, modern sovereignty accepts, as a matter of fact, that there has been an intersection between the broader social sciences and a heretofore 'pure' globalised system of law. Throughout this study, it has been repeatedly asserted that the 'classical' European state came into being through an inter-societal process rooted in 'consent' and 'consensus', whereas the modern African state primarily came into being through the process of decolonisation and 'coercion', as leaders tried to diffuse their power across the territories of their states. At present, a corollary question can be observed—namely, to what extent the nature of African state construction has influenced the levels of severity of their human rights violations.

This question may be examined most readily by placing the horizontal and vertical concepts at different ends of the spectrum on a prism. On the one hand, there is 'vertical state consolidation', or the right of a state to employ its monopoly on the use of force within its territory, in order to secure its own power throughout its own territorial limits. Such a concept is derived from the early legal formulations of self-determination of peoples, in that 'self-determination' meant decolonisation and the 'people' exercising the right were all the people in an overseas colonial territory. Thus, as states emerged from colonialism, the new leaders tried to forge a specific sense of national cohesion, understandably and quite often in anti-colonialist terms, to instil a sense of unity, and indeed to practically establish effective governmental control over the post-colonial state. The problem is that, as Mobutu Sese-Seko, Jean-Bédel Bokassa, Idi Amin and Robert Mugabe, amongst others, have demonstrated through their actions, in dealing with these difficult questions of identity it is easy to enforce *in extremis* the will to 'create' a sort of empirical post-colonial nation-state.[42] Such 'creations' have often been to the detriment of the indi-

[40] See discussion *supra* chapter two.
[41] See discussion *supra* chapter four.
[42] See e.g. Zimbabwe's torture training camps, BBC News Online, 27 Feb 2004, broadcast as Panorama: Secrets of the Camps, Sunday 29 Feb 2004, BBC One, making concrete allegations of training and indoc-

vidual rights of the citizens of many African states, particularly the right to life, most likely because the European methods of governance do not always make easy translations into local realities.[43] That there is a greater disposition for a collective, as opposed to individual, rights violation cannot be overlooked. Thus it becomes increasingly apparent why the language of self-determination is attractive to the aggrieved within the postcolonial state: the collective element inherent in self-determination contains the potential to provide a measure of needed protection to a group of individuals against the harmful actions of the state. Yet the rights as derived from international human rights law are mainly individual in nature, and violations of such individual rights by the state through the practice of vertical state consolidation can, particularly when they are directed against members of a geographically-contiguous or territorially-defined group, be seen as impinging upon the right of that group to preserve itself—a violation of, *inter alia*, article 20 of the African Charter on Human and Peoples' Rights.

On the other hand, 'horizontal societal preservation' makes the assumption that, whatever the actual ambit of post-colonial self-determination, it is fair to assume there exists, in principle at least, some sort of more modern, post-colonial law of self-determination of peoples,[44] that self-determination means something beyond decolonisation, and that it will therefore necessarily involve operation within one particular state alone. This is significant as in definition, the societies being preserved are collective groupings competing for the benefits of a state, not necessarily ethnic groupings separated by existing state boundaries, such as the Kurds or the Hungarians of Vojvodina. Horizontal societal preservation is an entirely domestic proposition reflecting the reality that members of a community can and do self-identify as a societal grouping in their daily lives, as much as it reflects the reality that the community's members can be specifically targeted by the governmental powers, as the Eritreans were by the Ethiopians before obtaining their independence, or as the Southern Sudanese were by the Northern Sudanese, or indeed as the current inhabitants of Darfur are by militias and other groups operating under the colour of state authority.

Thus horizontal societal preservation assumes that a geographically-contiguous 'people' within a sovereign state has a right to maintain its own cultures and traditions even in the face of vertical state consolidation. Again, the acceptance of the *uti possidetis* standard is tempered by

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trination of Zimbabwean youth in rape, torture and killing programmes at "job training" camps across the country in advance of expected Zimbabwean elections in 2005. However, the government of Zimbabwe has unequivocally denied the allegations, stating that "no sane government would set up institutions of torture and violence and expect to continue gaining the support of its people". See Zimbabwe brands BBC torture film 'unfounded rubbish', Reuters, 5 March 2004, available on Lexis.

[43] *Cf.* P. Chabal and J.-P. Daloz, Africa Works: Disorder as Political Instrument 51 (1999) [hereinafter Chabal and Daloz]: "Whereas in the west, politics is predicated on a well-defined separation between, on the one hand, the political realm and, on the other hand, the more economic, social, religious or cultural issues, this is clearly not the case in Africa. We cannot assume that we know what is or is not 'political'." They go on to discuss the simultaneously inclusive and extensive nature of African political relationships due to the fact that an individual's own communal ties are so deeply entrenched in practically all African societies. *Id.* at 52: "Whatever social changes have taken place in post-colonial Africa have not (so far at least) resulted, as they have in the West, in the gradual but seemingly permanent erosion of the communal in favour of the individual."

[44] *But cf.* A.P. Rubin, *Secession and Self-Determination: A Legal, Moral, and Political Analysis*, 36 Stan. J Int'l L. 253 (2000): "As a matter of positive international law, there seems to be no right to self-determination." He seems to promote the notion that the actual meaning of self-determination is only that of decolonisation and that as decolonisation has run its course, the ambit of self-determination is now closed since peoples' rights have now been reduced to purely municipal interactions between treasonous rebels and existing governmental authority. The inappropriateness of this assertion is addressed *infra* at text accompanying note 185 *et seq*.

the notion that it is most likely true that most self-determination claims, formulated as products of the horizontal societal preservation mould, should be able to be resolved through good-faith internal self-determination arrangements.[45] If the horizontal societal preservation concept is accepted, as a detached reading of the modern law of self-determination would seem to allow, its very existence also represents a logical *démarche* towards a deeper post-colonial intermingling of 'identity questions' with 'self-determination questions' inherently anchored in a mutually-exclusive 'collective' basis: a 'national' basis of sorts, which is quite different than that of the more macro-level notion of the 'nation-state'.[46] Again, whether this is lamentable or laudatory will depend in the main on the examiner's own perspectives and interests.[47] Yet in the face of the most severe and sustained forms of human rights violations targeted against a specific entity, where attempts to create a viable framework for internal self-determination have not been met with success, external self-determination procedures may have to be introduced into the equation. Questions related to group identity—as formulated here in a way much akin to the concept of 'national identity',[48] implying an intermingling between *ethnicity* and *location*—will have to be filtered through the positivist rubric of self-determination of peoples. The overlap has become too great to ignore.

Nevertheless, the extent of international law's ambivalence towards the relevance of these

[45] Or, indeed, if it is not the truth, this is the bias exhibited by public international law generally through the presumption in favour of the continuity of the state, which is something not to be easily overlooked.
[46] *Cf.* A. Smith, National Identity 176 (1991) [hereinafter Smith]: "There is both danger and hope in the division of humanity into nations and the persisting power of national identity throughout the world. The dangers are clear enough: destabilization of a fragile global security system, proliferation and exacerbation of ethnic conflict everywhere, the persecution of 'indigestible' minorities in the drive for greater national homogeneity, justification of terror, ethnocide and genocide on a scale inconceivable in earlier ages […]. [Yet it provides] a source of pride for downtrodden peoples and the recognized mode for joining or rejoining 'democracy' and 'civilization'. It also provides the sole vision and rationale of political solidarity today, one that commands popular assent and elicits popular enthusiasm."
[47] Such a statement is extracted from the French jurist Georges Scelle in that juridical institutions operate simultaneously on their own authorities and on behalf of the international community as a whole. *Cf.* A. Cassese, Remarks on Scelle's Theory of "Role Splitting" *(dédoublement fonctionnel)* in International Law, 1 EJIL 210, 214 (1990): "Progress, in Scelle's view, can be made in the international community only if one moves towards restraining the authority of rulers and succeeds in establishing a set of international social agencies or bodies capable of bringing the international legal order into line with the basic configuration of state systems. For, in Scelle's opinion, the ideal social system is that to be found in 'state societies': Scelle calls the state 'the prototype to which our mind should reduce any political organization' and points out that it is only within the state system that law and order can be realized, on account of the monopoly of force by social organs and the hierarchical structure of the state. This entails that in his view the international lawyer must fight against state sovereignty and lay emphasis on individuals, peoples and nations, as well as all those human *collectivités* other than states which exist on the international scene (international trade unions, churches, international confederations of political parties, non-governmental organizations, etc.): they can play a decisive role in rendering the world community less sovereignty-oriented." (footnotes omitted)
[48] Smith, *supra* note 46 at 21, identifies six attributes of ethnic community, amalgamated into the French term *ethnie*: (a) a collective proper name; (b) a myth of common ancestry; (c) shared historical memories; (d) one or more differentiating elements of common culture; (e) an association with a specific 'homeland' and (f) a sense of solidarity for significant sectors of the population. To support these attributes, his main citation is D.L. Horowitz, Ethnic Groups in Conflict (1985, 2d. ed. 2000), at chapters one and two. Greater definitional clarity is provided by Horowitz (2000), *Id.* at 51: "[…] ethnicity is connected to birth and blood, but not absolutely so. Individual origins count, but exceptions are made. Ethnic identity is relatively difficult for an individual to change, but change sometimes occurs […] ethnic identity is established at birth for most group members, though the extent to which this is so varies. Ethnicity is based on a myth of collective ancestry, which usually carries with it traits believed to be innate. Some notion of ascription, however diluted, and affinity deriving from it are inseparable from the concept of ethnicity."

group identity questions within post-colonial self-determination is of fundamental importance. Whether or not such processes would permit self-determination to the point of post-colonial external self-determination will most likely depend on how the vertical and horizontal tensions play themselves out in any given scenario. It may well be the case that the horizontal and vertical tensions between a state and its subjects can amicably be resolved through specific processes which are not disruptive to the *status quo* of the international legal order. However, this may not be the case under all circumstances. Simply put, the level and nature of human rights violations prevalent within a given state will define the relationship between vertical state consolidation and horizontal societal preservation. Self-determination, state sovereignty and the maintenance of the territorial integrity of independent states all create a nexus around what are probably the most controversial subjects in international law, to be sure. But widespread and readily documented human rights violations, particularly violation of the right to life,[49] may be seen as reflecting the breaking point between state consolidation and societal preservation.

Conceptually, in the face of egregious violations of human rights and fundamental freedoms, the mere presence of the violations on this scale are reflective of a paucity of self-determination, a lack of effective state sovereignty and an artificial sense of territorial integrity. Universal statehood continues to be a dominant legal phenomenon, but in an 'age of rights', natural rights written into a positive legal form have emerged, through a series of concrete measures by, in particular, UN member states. This should be seen as offering strength and support for the state itself, for it has been asserted that if a state truly is in existence, it is proceeding towards a specific end of human activity, a *'telos'* of 'flourishing', to use Lisska's terminology.[50] Few would disagree with the fact that manifest respect for human rights would cause a state to make progress towards this *telos*. Yet, as would be clear to e.g. the civilian victims of the conflicts in Central Africa, if a state is only *juridically* in existence, its capacity to uphold basic rights and to make progress towards its *telos* is drawn into serious question under the most egregious of circumstances. These apparent breaking points between vertical state consolidation and horizontal societal preservation, as delineated by the ambit of a postcolonial 'self-determination of peoples', are neither inevitable nor ubiquitous. But rare is the modern international lawyer who can turn away from such circumstances without acknowledging that such a direct connection exists.

The 'right of peoples to self-determination' as a neutral legal precept

Working from an exclusively historical perspective, self-determination concerned itself primarily with determining if a population is under colonial domination, is subject to a racist regime or if it suffers from alien occupation. While these legal criteria continue to hold true, if one assumes the great rush towards 'decolonisation-as-secession' in self-determination's historical evolution has been completed, the ongoing 'internal' nature of self-determination of peoples remains, making modern self-determination synonymous with self-administration, or

[49] See e.g. Amnesty International Report 2007, introduction to the Africa section, at 15 (also available from thereport.amnesty.org, accessed May 2007), citing armed conflict, under-development, extreme poverty, widespread corruption, inequitable distribution of resources, political repression, marginalization, ethnic and civil violence, and the HIV/AIDS pandemic as the main challenges to the human rights situation in Africa, particularly as a result of armed conflict, lack of effectuation of economic, social and cultural rights, repression of dissent, the death penalty, impunity, violence against women and girls and the relative ineffectiveness of regional institutions for the promotion and protection of human rights. To be certain, sub-Saharan Africa has no monopoly on these types of human rights violations, but the acuteness of their prevalence is significant and noteworthy.
[50] See A.J. Lisska, Aquinas's Theory of Natural Law: An Analytic Reconstruction (1996), at 4-40.

self-government, and gives it an ongoing scope. Since individual rights are the product of 'good' administration, it can then be conceptually accepted that all other rights practically flow from self-determination/ self-administration/ self-government, and that a true right of political participation, as well as a 'peoples' right to existence, could be used to provide a measure of protection to those caught between vertical state consolidation and horizontal societal preservation. The biggest question with this formulation is, thus, the usual difficulty in determining what comprises the 'people', as discussed at length in the previous chapter. However, if one allows for the possibility of a momentary suspension of disbelief about self-determination claims, an inherent bias against peoples' rights in favour of the presumption of the actual existence of the trappings of universal statehood can be observed. It is here where an element of detachment may provide analytical benefit, provided the examiner is cautious enough to make an essential distinction.

The perspectives put forth by Zelim Skurbaty vis-à-vis the inherent biases held by the examiner of any self-determination question reflect this distinction and should not go unnoticed: that self-determination has been misappropriated to reflect political goals completely disconnected from anything even vaguely related to human rights.[51] In practical terms, the manifestations of self-determination are those to which e.g. an international civil servant, a member of a foreign ministry, or a grass-roots human rights activist might hold equally strong levels of opinion, yet would be likely to produce widely differing policies.[52] The modern predisposition of nationalism itself, in its unbalanced, hatred-producing, violently exclusionary form, is a major hurdle for any self-determination claimants to cross. It is epitomised by the concepts of state-defined nationalism rooted in racism, such as the concept of *'Ivoirité'* as formulated by the ex-President of Côte d'Ivoire, Henri Konan Bédié,[53] or the anti-colonialist dogma of the ZANU

[51] See Z. Skurbaty, As if Peoples Mattered (2000), at 196-197. He writes, *Id.* at 196: "Now, the perception of 'national self-determination' as a *disease* is so ubiquitous in legal and political writing that it has evolved into something closely (and deceptively) resembling common knowledge."

[52] In the practitioner's world, it would not seem unreasonable to expect a member of a foreign ministry to view manifestations of 'the right of peoples to self-determination' with suspicion, as there does exist a (misguided) tendency for it to be automatically equated with secession—a notion to which no state would give wholesale advocacy. An international civil servant would likely hold a wide-range of opinions based on that person's own responsibilities of oversight and administration, whereas a local activist may make impassioned and indeed zealous self-determination claims. The totality of these perspectives forms the main part of the practical framework for addressing, and potentially solving, self-determination problems.

[53] Although not explicitly formulated as a specific self-determination claim *per se*, the underlying premise is relevant for the illustrative purposes at hand, in that ethnic and religious differences between populations of a state are inflamed for political purposes. Bédié's *Ivorité* concept dates from the 1995 presidential election and is based on the belief that foreign parentage disqualifies oneself from some forms of political participation, particularly candidature for the presidency (and even Ivorian citizenship), and is widely seen by commentators as the knock-on effect from the 1993 death of the country's first president, Félix Houphouët-Boigny, when Bédié faced a challenge from a political rival, Alassane Ouattara, the prime minister under Houphouët-Boigny. Ouattara, drawing his political support primarily from the Muslim northern part of the country, was deemed (primarily by the then-president Bédié) to have Burkina Faso parentage, and was forced to withdraw from the 1995 presidential race. The new 2000 Ivorian constitution states that any presidential candidate must have been born in Côte d'Ivoire, and the Supreme Court took a decision in October of that year, in an *arrêt* read on Ivorian national radio by the president of the Court, Judge Tia Koné, that Ouattara and thirteen other presidential candidates were disqualified from the election due to their parental provenance. See e.g. Human Rights Watch, Vol. 13, No. 6, The New Racism: The Political Manipulation of Ethnicity in Côte d'Ivoire (August 2001). In 2007, a peace accord between the government and rebel forces led to Guillaume Soro, leader of the New Forces rebels, being named Prime Minister alongside rival President Laurent Gbagbo. *Cf.* New Forces website, http://www.nouvelleci.org/, accessed 27 March 2007.

(PF) party, dominated by Zimbabwe's Robert Mugabe, or, outside the African context, the concepts of ethnically-constructed nationalism, such as the impromptu "no one should dare to beat you" speech given by then-Serbian Communist party official Slobodon Milošević in 1987 to Kosovar Serbs in the town of Polje.[54] Thus it is not wholly irrational to approach self-determination claims with a broad degree of scepticism, particularly when some claims encompass the language and spirit of racist, zero-sum nationalism. In that regard, the underlying hesitancy on the part of some parties, to maintain a sense of intellectual detachment from the subject is exposed; in such cases, *prima facie* biases against such cynical denigration in the name of self-determination are probably not unworthy of maintenance.[55] Two points follow, however: (a) that such biases are acceptable only when they are not cloaks for the avoidance of difficult and unclear substantive questions on the part of socio-juridical actors, and (b) that 'the evils of self-determination' must not outweigh the benefits of self-determination. It is undeniable that the international community heralds decolonisation as one of the greatest actions taken in the history of the United Nations and it is similarly undeniable that common article one of the human rights covenants set the framework for the contemporary existence and development of self-determination as a right of peoples. Therefore, 'nationalism-as-racism' claims benefiting individual political leaders must not be seen as the only formulation of self-determination claims.

Indeed, such claims should not be seen as formulations of self-determination claims at all. To paraphrase Skurbaty, 'self-determination of peoples' in and of itself is nothing more than a value-neutral juridical phenomenon.[56] Thus, valid self-determination claims are likely to invoke a potential meaning quite different from the manifestation of the extreme nationalist phenomena; it therefore seems quite appropriate for all parties potentially involved with the evaluation of a self-determination claim to remain as critically detached as possible and to take intelligent decisions based on the actual circumstances at hand, as best as they can be conceptualised. The examples provided by the actions of Milošević and Tudjman were clear-cut cases of an unfortunate, historically European form of inter-societal exclusion, albeit one which is a complete aberration in the days of European Union and the Council of Europe, and therefore, easily dismissible.[57] Other self-determination claims, however, may be less clear-cut. This is why accurate information as to the actual situation on the ground is of absolute importance in circumstances of 'quasi-states', Africa particularly included, as such outsiders to a particular society, which can begin to provide an accurate assessment of the inter-societal reality, at a particular moment in time. To this end, the work of the United Nations High Commissioner for Human Rights and respected international non-governmental human rights organisations, such as Amnesty International and Human Rights Watch, is now regularly complemented with re-

[54] This sentiment-laden appeal, rooted in myths and legends of the 1389 Battle of Kosovo, later came to define his presidency of Yugoslavia. *Cf.* W. Zimmermann, Origins of a Catastrophe: Yugoslavia and its Destroyers 39-40 (1996): "The aggressive and authoritarian nationalism of Slobodon Milošević in Serbia, and later of Franjo Tudjman in Croatia, was a classic case of this nationalism-as-racism. The two leaders combined the worst features of communism and nationalism. They took the management skills that are a part of standard communist training, plus the instruments of communist power—a large and intrusive party apparatus, control of key elements of the press, an intimidating secret police, and a centralized economic structure—and put them at the service of the demagogic advancement of narrow national interests."
[55] The most illustrative example of this pattern of thought is presented in A. Etzioni, The Evils of Self-Determination, Foreign Policy, Winter 1992-1993, at 21, 22-27.
[56] For discussion and additional examples to be found in the literature, see Skurbaty, *supra* note 51, at 197.
[57] Thus Milošević was brought to The Hague (where he died in custody, in 2006) whilst Tudjman died before the *ad hoc* international criminal tribunal could have ever possibly rendered a substantive judgement against him.

ports and analysis from national non-governmental organisations.[58]

Along a similar line of addressing definitional misconceptions of group rights, it is necessary to definitively cast aside the automatic equation of self-determination with secession. Such measures can be traced to those proposed by Lee Buchheit in 1978 and recalled by Thomas Franck in 1993, when Buchheit wrote that "one must be careful not to confuse the debate over the status of a general right of self-determination with the arguably quite distinguishable question of the place of secessionist self-determination".[59] Thus the discussion begins to question anew the ambit of post-colonial self-determination. Whereas the original scope of colonial self-determination was grounded in a catalysed doctrine of decolonisation, it now seems that legitimate claims to post-colonial self-determination are anathema to dogmatism and are much more receptive to pragmatism. Self-determination claims, following decolonisation, are responses to situations of daily life in post-colonial independent states and while these circumstances can be subject to wild and dramatic fluctuations in terms of outcome, they nevertheless remain incorporated under the uniform, blunt instrument of law. The problem lies in the terminology. Those charged with enforcing 'international law' would be likely to make pronouncements on such measures; nevertheless, the exceptional fluidity of such situations can serve to cause a real challenge for the 'examiner' to whom the self-determination claim is made.[60] Furthermore, during the course of execution of the most credible self-determination claims, the reality of circumstances on the ground can quite easily reveal a perverse, Hobbesian existence for the 'examined'. The earlier concern for how 'international human rights' translates into municipal systems is now obvious, as the propensity for avoiding human rights violations in a postcolonial state will translate readily to the efficacy of self-determination norms, and move the state long in its presumed quest for 'good governance'.

The concept of self-determination itself should not be feared by states. By returning to Skurbaty,[61] his equation of self-determination with sex hardly seems facetious if one considers that both are human actions which, as he says, depending on the circumstances, can be something of the highest order (e.g. love) or the product of the lowest forms of criminal vice (e.g. rape).[62] Both are, in some way, essential human functions, interpersonal interactions taken on either very personal or very public terms. Thus, without prejudice to the inherent value in vigorous, yet fair, evaluatory mechanisms for self-determination claims, the automatic equation of self-determination claims with something 'inherently bad' should be rejected, for such automatic equations have the *potential* to improperly wield the blunt object of law in the face of an otherwise already hopeless set of circumstances. Skurbaty writes:

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[58] See e.g. ECOSOC Resolution 1996/31, Consultative relationship between the United Nations and non-governmental organizations, which, in updating the previous ECOSOC Resolution 1296 (XLIV), established mechanisms for purely national non-governmental organizations, including national human rights organisations, to consult directly with the council, particularly with regard to notification of a meeting's provisional agenda, to attend such meetings and to make written statements and oral presentations during meetings.

[59] L.C. Buchheit, Secession: The Legitimacy of Self-Determination 127 (1978) [hereinafter Buchheit], as cited in T.M. Franck, *Postmodern Tribalism and the Right to Secession*, in C. Brölmann *et al.* (eds.) Peoples and Minorities in International Law 16 (1993).

[60] Ideally this would mean the international community as a whole, but in practice, it cannot be denied that it might also be more likely to mean 'interested parties' within the international community: indeed, each individual party with their own individual interests.

[61] Skurbaty, *supra* note 51, at 197.

[62] This reasoning likely follows that of M. Deutsch and E. Brickman, in *Conflict Resolution*, 15 Pediatrics in Review 16-22 (1994), asserting that conflict is like sex, as a regular occurrence which is an important and pervasive aspect of life.

> [Self-determination] can make or break nations depending on the general political and legal framework within which it is dealt with, and on—without any doubt—the power vectors of the moment. The thrust of my argumentation is that the perception of self-determination as a 'disease' can and should be replaced with the vision of it as a phenomenon struggling its way towards *greater ease*, *actualization of its specific message*, *idea*, *individuality*, *singularity*—all of which I sum up by the term '*individuation*'. From this perspective, self-determination is a special—*disciplinary and time-and-place specific—manifestation* of a broader precept of *individuation*.[63]

Sovereignty's evolution from *suprema potestas* to an 'age of rights': Implications for postcolonial Africa

To recapitulate, it may now be observed that a new *Realpolitik* was born, one having to contend with a system that is international in origin and domestic in scope, with an essence to forming the heart of modern public international law itself. First and foremost, new states were created through decolonisation. In due course, these states bound themselves to international human rights regimes. In acceding to the international human rights regimes, specific principles, guarantees and obligations of international provenance were integrated into municipal legal systems, allowing recourse to protections derived from international instruments in the event of violations. Particularly by the 1980s and certainly 1990s, once the African Charter was given practical effect and most African states had ratified at least the two main human rights covenants with which African states themselves became endowed, if not by way of the same legal tools as their former colonial administrators, then via purportedly reasonable facsimiles—conceptually, at least. And yet the 'state-strength dilemma', the prevalence of coercion as a governance technique and the difficulties in projecting the authority of the state from administrative capital to territorial *Hinterland*, not to mention a perpetual state of underdevelopment in most countries and a feeble and questionable independence of national judiciaries, draws the appropriateness of these facsimiles under closer examination.

The new states will fairly and uniformly have to apply the domestic law of the land, under all circumstances, including international human rights obligations of international origin. Extrapolated to the multilateral plane, within the supranational legal system of human rights law, the uncertain nature of horizontal enforcement systems is shown. States tend to exercise their prerogatives in horizontal-enforcement mechanisms sporadically, often with a high degree of subjectivity and with a keen eye to the overall political situation at the time. Yet of a similar importance, while the mixed effectiveness of horizontal enforcement does reflect the general unwillingness of states to submit themselves to the external scrutiny inherent in the examination of international human rights, it also masks an elementary inability for some states to achieve a genuine congruity between their territories and their constituents. This represents the manifestation of a deeper phenomenon, whereby the evolutionary manner of legal systems and political structures, from colonial inheritance of sovereign *state* rights to the independent preservation of individual rights, is both theoretically and practically germane for further examination. Thus, international principle translates into domestic practice through 'positive sovereignty'.

However, it is still the case that the divergent ways in which colonial administrations developed and were swiftly abandoned may have formulated circumstances of 'negative sovereignty', particularly in postcolonial states that never genuinely experienced territorial integration under colonialism. For example, consider how Britain and France—certainly the two largest African colonialists—tended to take immediate steps for the wholesale incorporation of their

[63] *Id.* at 197-198, emphasis in original.

own legal structures within their colonial possessions,[64] and indeed to develop nominally representative institutions or limited measures of self-rule,[65] whether through district officers (in the case of the French), or indirect rule through traditional authorities (in the case of the British and indeed the Portugese).[66] In contrast, however, the mammoth Democratic Republic of Congo (Congo-Kinshasa),[67] demonstrates that the primary sources of colonial law and administration are extracted from decrees and orders by the former Congo Free State of Belgium's Leopold II and his local officials, yet are also complimented by judicial guidance to apply general principles of Belgian law as well as "local custom insofar as these customs are not contrary to the higher principles of order and civilization".[68] Indeed, the establishment and development of a comprehensive colonial civil code was largely a work-in-progress reflecting Leopold's evolving desires for a legal framework to protect his economic interests.[69] This seems ironic, however, in that, despite a measure of respect for local custom in its domestic legal system, actual Congolese self-government, self-administration or self-improvement was utterly unthinkable to the Belgians right up to the time of departure of the last colonial administrator.[70] Nevertheless, this has now slipped into the realm of practical irrelevance: 'independent states' are precisely that, or at least it is to be assumed. But whereas general practice may evidence the relative inability for, say, 'a Belgian colony' to achieve effective postcolonial self-administration as compared to, say, 'a British colony', this is a phenomenon quite difficult to express in legal terms.[71] It is, in large measure, impossible to do so under the historical doctrines of *suprema potestas*, the sovereign equality and independence of all states and the provisions of the Montevideo Convention.

It is here where added attention should be paid to an important conceptual distinction with particular regard to the requirement of the existence of a government, as identified by a number of established commentators.[72] At issue is the capacity for statehood in the absence of

[64] J.W. Salacuse, An Introduction to Law in French-Speaking Africa, Vol. I, 444 (1969) [hereinafter Salacuse].
[65] *Id.* at 474.
[66] See Chaval and Daloz, *supra* note 43, at 12.
[67] The name 'Congo-Kinshasa' or 'Congo' is used here to distinguish from neighbouring Congo-Brazzaville. The former Congo Free State and Belgian Congo took on the name Democratic Republic of the Congo (*La République Démocratique du Congo*) following its independence in 1960. In 1971, President Mobuto Sese-Seko, in a process of 'Africanisation' of the post-colonial state, changed the name of the state to Zaire. Following his ouster (by Rwandan troops) in 1997, his successor, Laurent-Désiré Kabila reverted the country's name back to the Democratic Republic of Congo.
[68] Report of the Administrator-General of July 16, 1891 to the King, 1 RULEIC at 589 (1876-1891), as cited in Salacuse, *supra* note 64, at 445.
[69] Salacuse, *supra* note 64, at 448.
[70] *Cf. Id.* at 474-475: In Congo, "only two years before independence, there was only a handful of college graduates. In [1958] when Nigeria, for example, had approximately 800 African lawyers, the Congo had none. Nor were there Congolese doctors or engineers. In short, the Congo had large numbers of mechanics and clerks, but few men trained to understand the tasks of government and administration."
[71] M. Koskenniemi reports that 'sovereignty' was equivalent to 'terror' in the Congo, writing without obvious irony in The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960 (2000), at 154-170; however, his telling of the story how the Congo Free State evolved into a Belgian colony does not negate the legal fiction of this paradigmatic 'juridical state', to use Jackson's terminology, because the colony was then decolonised along *uti possidetis* lines, albeit with a woeful relative inability for postcolonial self-governance/self-administration/self-determination, whereas the ex-British colonies (such as those in East Africa), having obtained comparatively greater measures of development, training and support in civil administration under a European legal system, could be just as simply 'juridical' as the Congo, but with a greater potential for effective self-government/self-administration/self-determination: 'all states are equal, but some are more equal than others'.
[72] Int'l Law, Damrosch *et al*, *supra* note 1, at 256-57, citing R. Higgins, Development of International Law Through the Political Organs of the United Nations 21-23 (1963) and J. Crawford, *The Criteria for State-*

an effective government. Recalling the Åland Islands dispute, the Commission of Jurists before the League of Nations concluded that Finland achieved effective government, and therefore statehood, only when the civil war ended in 1918 and foreign troops left the country.[73] However, these commentators also observe that the standard of what is considered an 'effective government' was seen to be considerably less in the ex-Belgian colonies of the Democratic Republic of the Congo, Rwanda and Burundi than that of Finland in 1920, due to the fact that these were colonies being granted independence, as opposed to a new state being created through a revolutionary war of secession. Thus the "state of civil war and virtual anarchy",[74] as was found in Finland in 1917, emerged into a positivist legal state only when Russian and German troops left the country; by contrast, the more contemporary observer notes that in the cases of the Democratic Republic of the Congo, Rwanda and Burundi, independence was granted without a formal government *per se*. From here it is impossible to deny that the aforementioned 'state of war and virtual anarchy' has weighed heavily in each of these states' postcolonial existences. The difference of course is that while it is extremely difficult to argue in positivist legal terms that e.g. the Democratic Republic of Congo is anything but a state, the extra-legal truth of the matter is that in contrast to the earlier example of Russian and German troops in Finland preventing the juridical emergence of the state, the juridical existence of the DRC was sustained, despite the presence of Rwandan and Ugandan troops in the eastern part of the country at the very least through the late 1990s, if only through their exercise of nominal control over a geographic region of the gargantuan territorial state, where the authority of the capital does not find sufficient reach and large territorial swathes are under rebel control.[75]

The paradox thus brought into examination is that at a time of diminished importance in *suprema potestas*, one finds the parallel emergence of a measure of irrelevance for the actual capacity of a state to govern. Yet despite the apparent confusion into which the postcolonial African states were born, it was an emerging 'age of rights'. Therefore, quite obviously, the stark differences in governance standards—measured through the level of human rights violations manifested against civilian populations, in particular—take on a more urgent importance. The question then turns to the ways in which effective structures for postcolonial government could develop from their colonial origins. Indeed, particularly through African states' near-universal accession to the International Bill of Rights, and given the existence of the African Charter through consensual actions taken by states themselves, more recent history has fated all of the now-independent municipal legal systems in African states with the duty to uphold basic substantive human rights obligations. This is no longer controversial; however, particularly with regard to civil and political rights, these activities are undertaken with complete disregard of how their legal and administrative frameworks developed.

This is the ultimate reflection of the legal vacuum that is independent statehood. Yet as Martti Koskeniemmi makes reference to the 'wonderful' artificiality of states,[76] this leads one to observe through the present prism how an overabundance of artificiality can produce an in-

hood in International Law, 48 BYIL 120 (1976).

[73] See discussion *supra* chapter one of this study.

[74] *Id.*

[75] This differs further from the example of Somalia where a similar type of nominal control throughout the country is held in practice primarily by indigenous warlords despite the amorphous trappings of a central government in Mogadishu.

[76] See M. Koskenniemi, *The Wonderful Artificiality of States*, 1994 ASIL Proceedings, at 22, asserting that the concept of legality is an indicator of social power. He writes, *Id.* at 23: "The familiar case law inferring territorial rights from effective occupation or other *effectivités*, for example, emanates from such a conception. Its great pride is that, being unconnected with the spheres of the moral or the ideological, it can produce *verifiable*—and in this sense reliable—conclusions about international law."

verted consequence, whereby quasi-states make quasi-laws, at least in terms of their uniform application (thus reaffirming the 'negative sovereignty' concept and the 'state-strength' dilemma).

Tension between national autonomy and international responsibility is paradigmatic for the manners in which many post-colonial African states attempted: (a) to consolidate power across their territories and project administrative power over their citizens from capital to *Hinterland*; (b) to improve upon a ruinous post-colonial aftermath of socio-economic affairs;[77] and (c) to do so while respecting *uti possidetis juris*, with its propulsion of a multiplicity of ethnicities into most arbitrary administrative groupings; and, perhaps most importantly for the ongoing societal development of the postcolonial state, (d) to do so while respecting the obligation to undertake governmental activities in respect of the principles of equality and self-determination.[78] In this way, it becomes increasingly apparent that the aforementioned supra-national legal order of human rights is, at this stage at least, the accumulated product of the domestic legal orders that have voluntarily subscribed to the international human rights regime. It seems at the very least possible that some states will have a greater disposition towards the successful implementation of human rights legislation, presumably leading to a decrease in human rights violations, by having a more sincere commitment, in practice, to domestic implementation (and capacity to do so) and less of a need to refer to external resources such as the United Nations secretariat for advisory services, technical assistance, training and implementation funds.

The 'relatively fixed' and 'relatively fluid' aspects of statehood in a postcolonial context

As shown at the outset of this study, some of the Montevideo Convention criteria for statehood are more fluid in composition than others. Namely, the provisions for a defined territory and a permanent population are more fixed, whereas the requirement for a state to be under the control of its own government and independent on the international plane are reflective of the principle of effectiveness and are therefore more fluid.[79]

A more discerning level of understanding of the interplay between societal groupings has to be approached, and if one hopes to achieve a genuine understanding of the postcolonial state, such discernments may develop an even greater importance when attempting to understand circumstances where a state lacks the ability to enforce its own writ, such as in the eastern Democratic Republic of the Congo.[80] The assertion made is that the state simply lacks effective

[77] For if the anti-colonialist Jean-Paul Sartre is to believed, "the only good thing about colonialism is that, in order to last, it must show itself to be intransigent, and that, by its intransigence, it prepares its ruin." J.-P. Sartre, Colonialism and Neocolonialism 47 (Routledge trans., 2001).
[78] See generally Herbst, *supra* note 4, at chapter one ('The Challenge of State Building').
[79] See discussion *supra* at the closure of chapter one in this study.
[80] This is a relatively controversial assertion, as it runs contrary to statements made by President Joseph Kabila of the DRC and President Paul Kagame of Rwanda, that UN troops are no longer needed in the eastern DRC, and that Rwanda has no troops there. See, respectively, DR Congo peacekeepers 'can leave', BBC News Online, 9 February 2004, and Talking Point Special: Ask Rwanda's President, broadcast on the BBC World Service and archived online, 8 February 2004, 1406 GMT. But see also UN Says Rwanda Troops in Congo Stop Peacekeepers, Reuters, 24 April 2004, available on Lexis. And *cf.* Rwanda President Warns of Troops to Congo, Reuters, 1 May 2004: Although Kigali denied that Rwandese troops entered the DRC in April 2004, Paul Kagame was quoted by Reuters, monitoring Radio Rwanda, as saying that "the United Nations and Congo should 'be informed that we shall not hesitate to send our troops back into Congo if the attacks continue. We shall do it, and do it in broad daylight.'"

control over its own territory.[81] It is the state's own effectiveness encapsulating the 'relatively fluid', as opposed to the 'relatively fixed', provisions of the Montevideo Convention that is drawn into question.[82] One may therefore observe the 'Somalia syndrome', whereby on the one hand, no governmental apparatus even approaching the most rudimentary trappings of control outside of (or indeed inside) the capital city can be observed to exist in a sustainable manner. Yet the fact also remains that the actual existence of the Somali state has never been subjected to serious legal challenge.[83] Indeed, its membership in the United Nations and the African Union has never been contested and other states regularly proclaim its existence as a state. The reason for this is clear: Somalia is a territorially defined entity with a permanent population. It is also an independent state, by virtue of having been 'discovered', 'civilised' and 'decolonised'. The Somali state thus 'exists' without interruption, despite the lack of a government. Although the 'more-fixed' provisions of the Montevideo definition are seen to be in existence, the 'more-fluid' provisions are allowed to slide—indeed, apparently, to the point of irrelevance.

In sum, this is evidence to suggest that sovereign states cannot legally regress into *terrae nullius*, regardless of their actual standards of governance, because *terra nullius* negates territorial integrity, and a cardinal precept in the contemporary international socio-legal system is the dual awareness that, first, humankind has territorially delineated all regions of the planet,[84] and second, that the classical, 'decolonising' form of self-determination has run its course. So the 'Somalias', in a world of Janus-faced sovereign states, retain their 'external' sovereignty whilst completely lacking anything even remotely approaching 'internal' sovereignty (*i.e.,* 'governance', or even simply 'a government'). Thus there exists some deeper definition of the formula between the principles of effectiveness and territorial integrity,[85] in that Somalia demonstrates how effectiveness is defined from territorial integrity itself. Territorial integrity obviously is the dominant variable in the relationship; in much the same way *uti possidetis juris* is the defining

[81] As was stated *supra* chapter one, this seems not to automatically disqualify a state from having 'statehood'. *Cf.* US Restatement, at §201, reporter's note 2: "Some entities have been assumed to be states when they could satisfy only a very loose standard for having an effective government, e.g. the Congo (Zaire) in 1960 […] A state may continue to be regarded as such even though, due to insurrection or other difficulties, its internal affairs become anarchic for an extended period of time."

[82] See discussion *supra* chaper one of this study.

[83] The argument for the withdrawal of Somalia's recognition as a state has been made by G. Kreijen in State Failure, Sovereignty and Effectiveness (2004), at 347 *et seq. Cf. Id.* at 355: "What is interesting about Somalia is not that it shows that States may come into existence with an ineffective government […] but that they may also continue to exist with out any government at all. Somalia is proof of the preserving impact of negative sovereignty on the continued existence of a State. Somalia's denomination as a 'failed State' is therefore something of a misnomer. […] [Somalia] is a 'phantom State': it is no longer palpable, because it exclusively exists in a legal dimension only. Somalia demonstrates that the abandonment of effectiveness has progressed beyond the creative phase of the African States well into the phase of its continued existence." Kreijen concedes, however, *Id.* at 356, that "[i]t will remain very difficult, however, to determine the point at which withdrawal of recognition from a failed State would be justified. […] Perhaps, the only thing that can be said when it comes to judging critical cases is that each of them has to be assessed according to its particular circumstances and that it is neither possible nor wise to formulate standard criteria for the withdrawal of recognition from a failed State. It will be clear […] that the protracted and total absence of government from a State may constitute sufficient reason for other States to pull the plug." However, no such states have undertaken this idea in their dealings with Somalia, either in bilateral or multilateral form.

[84] Imperfectly, to be sure, but the world's border disputes are the exceptions which, through their irregularity, prove the existence of the rule that most of the world's borders—from the imaginary line dividing *Hinterlands* to the most tightly-controlled militarised frontier—are broadly established and traceable to an authoritative source.

[85] As was asserted in chapter one whereby 'territory + population + effectiveness (≈ territorial integrity) = sovereignty (≈ statehood)'.

variable in the first instance vis-à-vis self-determination.

The notion of self-determination as self-defence

From this, it could be asserted that effectiveness matters little in the overall statehood picture. Once a populated territory is deemed capable by other states (and thus, eventually, the international community as a whole) of reciprocating the recognition of statehood it confers upon that territory, and that territory maintains its independence, it could be argued that the standards of public international law have little else to say about actual capacity to govern. The thinking along these lines follows that Somalia is an unfortunate situation, but once the political situation stabilizes, the institutional needs of the state will be filled by the new governing entity—one which will be indigenous and not a product of the discredited system of colonialism. Effectiveness thus remains defined in relation to the self-determining act of decolonisation.

But on the other hand, it appears that effectiveness matters a great deal. Self-determination-as-decolonisation, certainly did increase the numbers of sovereign states. However, in the mid-1960s, soon after self-determination-as-decolonisation took hold as a genuine legal and political phenomenon, it started to grow new wings: self-determination-as-human-rights. When these new institutions began to undertake these new obligations—to provide a right to food as well as a right to political participation, or a right to education as well as a right to freedom of expression—'effectiveness' gained a new lease on life, for certain aspects of self-determination-as-human-rights were naturally filtered through the effectiveness prism: capacity and independence take on new meaning when "all peoples have the right to self-determination" to "freely determine their political status and freely pursue their economic, social and cultural development".[86] The terms take on an even richer meaning when states are considered to be in compliance with the principle of equal rights and self-determination of peoples by virtue of being "possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour".[87] Indeed, when all African peoples "shall have the right to existence" and "oppressed peoples shall have the right to free themselves from the bonds of domination",[88] the focal point reflects the reality that 'self-determination of peoples' must take on multiple meanings. Most likely this will reflect the overlap made by claims of oppressed populations, between the minority rights/peoples' rights sides of the same coin suggested by Thornberry.

In short, effectiveness is defined in relation to a multifaceted socio-legal phenomenon: self-determination as a phenomenon of decolonisation-cum-postcolonial-human-rights as governmental legitimacy and democracy, yet a phenomenon conceived in the context of 'structural injustice' of coercion as a postcolonial governance tool. But human rights promotion and protection is an *effectivité* of the decolonised African state: it must be, for African states have international human rights obligations for which their governments have responsibilities to uphold through the actions of their governmental agents, throughout the land. Practical results fall short of theoretical expectations; yet, with particular regard to economic, social and cultural rights, non-state actors, *i.e.,* civil society, pick up the slack. The end result of this logical thread is that *effectivités* are manifested by those with a potential for providing social benefit in a territorial region, but may not formally be endowed with a state's full powers. The work of local non-governmental organisations, for example, may be of great use in improving the overall effectiveness of a state's governance. It is hard to see how, at this stage of the discussion, societal con-

[86] Common article 1, ICCPR and ICESCR.
[87] Friendly Relations Declaration, UNGA Resolution 2625 (XXV), 1970.
[88] Article 20, African Charter on Human and Peoples' Rights.

tributions from non-governmental organisations should be discounted, particularly given their establishment as *ad hoc* responses to fill local needs.

A curious reality is thus revealed. Emerging states repelled a colonial menace to safeguard the peoples within a state, but those peoples, in a postcolonial context, are also in need of a form of protection against the possibility of predatory measures by a postcolonial state. Once the saltwater barrier was severed in the metropolitan, colonial/colonised state, the colonial power no longer retained the ability to do as it wished in its overseas territory, if it no longer retained that colony. But the more contemporary aspect of the decline of *suprema potestas* is even more significant, as at this point in international law's historical evolution, a state was no longer unrestrained in its choice of actions against its own population. So it seems unsurprising that ethnic groupings, either disfigured or disenfranchised through the *uti possidetis* definitional nature of self-determination, would wish to make claims for protection on the basis of self-determination—'self-determination-as-self-defence', including, perhaps, claims legally unjustified in scope or definition,[89] but not *prima facie* morally objectionable, on the basis of human rights.

The concept of 'self-determination as self-defence' serves to encapsulate the idea that once the process of decolonisation had run its course, and a critical mass formed around the belief that self-determination had an ongoing scope beyond decolonisation through common article one of the human rights covenants, the contemporary outcome of a peoples' right to self-determination would be judged from either a permissive or a restrictive developmental path in articulating the meaning of 'postcolonial' state development. In this sense, the concepts of 'negative' and 'positive' sovereignty and the notions of 'horizontal societal preservation' and 'vertical state consolidation' are also recalled, as a territorial entity making claims, either domestically or internationally, for 'self-determination-as-self-defence' would reflect a circumstance whereby a collective grouping seeks to exercise a form of 'horizontal societal preservation' as a direct response to a specifically coercive act of 'vertical state consolidation'. Such actions would undoubtedly come as the result of 'negative sovereignty', and in drawing on a possible definition of the concept of 'peoples', derived from chapter four.[90] When based upon Article 20 of the African Charter on Human and People Rights, in particular, it could be observed how a people could also be formed in opposition to the specific acts of a state, e.g. in South Sudan or Darfur as contrasted with the Sudanese state as a whole, or perhaps, if formulated through comparatively less dramatic mechanics, in Somaliland as contrasted with Somalia.

Clearly, most significant unresolved question, in the postcolonial world, reflect international law's response to the level and direction of human rights violations, and it is here where the notion of 'self-determination as self-defence', formed from common article 1 to the principal human rights covenants, holds a particular attraction to significantly disenfranchised groups within a state. It is as if a cycle of self-determination has been reborn as *lex ferenda,* only just

[89] *Cf.* H. Hannum, *Rethinking Self-Determination,* 34 Virginia J. Int'l L. 1, 32 (1993) [hereinafter Hannum]: "[The international bill of human rights and the Friendly Relations Declaration] and the *traveaux préparatoires* of the covenants do not establish that the right of self-determination, *defined as a unilateral right to independence*, was intended to apply outside the context of decolonization. As noted above, self-determination has meant at least decolonization since 1945. However, when addressing self-determination claims based on ethnicity or nationalist sentiment, one must recognize the shift from the territoriality based *right* of self-determination developed by the United Nations in the context of decolonization to the ethnic-linguistic-national *principle* of self-determination advocated by Wilson and others in 1919. The difference is not only semantic. It reflects a fundamental limit on the definition that self-determination has acquired during the past four decades." (emphasis supplied)
[90] See *supra* chapter four, discussion of a people bring defined in opposition to the actions of a state.

slightly askew. The original 'act of decolonising self-determination', having attained a territorially-defined legal personality has a general obligation in the *Realpolitik* of contemporary international human rights law, at the very least, to avoid regression into the types of systemic state practices deemed so egregious under colonialism. The juridical state is formed in something of an unsustainable manner, however. So over time, the cumulative effect of targeted human rights violations is amalgamated into a counterbalance to the violations, themselves: because the violations persist, and they are violations *per se,* as such, an ever-expanding countervailing force builds up against the state. The intrinsic weight of the fact that targeted violations against a specific population have occurred over a period of time, and the truly shocking scope of the extent of such violations, leads to a perpetual need for self-government/self-administration/self-determination. In the most extreme circumstances, when the state lacks both the practical capacity and the political will to deliver upon these perpetual needs, the civilian populations are forced into most difficult situations, quite literally from genocide on down. When such circumstances occur—and it is generally accepted as being practically desirable, for a geographically-contiguous people, such as 'Somaliland', has infinitely more relevance than a geographically-intermixed people, such as the Tutsis or the Hutus—then a circumstance of post-postcolonial external self-determination could be envisaged on the basis of the level and nature of human rights violations targeted by a government against a people. In such a circumstance, secession could occur. So be it then, for secession is not expressly forbidden as a matter of course in public international law. But simply because secession is disruptive to the international system, while it is neither legal nor illegal *per se*, it is never politically encouraged. To what extent, then, can postcolonial self-determination put forward effective governance as a way of implementing global standards? Or, rather, to what extent can internal self-determination improve the effectiveness of a postcolonial, juridical, sub-Saharan African state—and at this point, a good compromise question in more concrete terms would be: what governance practices would be likely to ameliorate the dichotomies between the empirical and the juridical? To be certain, the concepts of 'democracy' and 'civil society' have been much discussed in the social sciences at the outset of the new century, but specific policy models and laws enabling or backing such models, may prove elusive.

PART B: Democracy and civil society in the postcolonial state

As discussed in the previous chapter, given factual evidence that circumstances of armed or civil conflict exist within a region of a state and civilians are not provided adequate protections against such hostilities, in the most extreme of such situations, it could also be the case that a 'people' may be observed to have formed in opposition to the most extreme actions of a state, particularly when such actions are repeatedly and consciously targeted against a specific segment of its own citizenry. Through a deconstruction of postcolonial statehood into vertical and horizontal conceptualisations, this chapter has just introduced the concept of 'self-determination as self-defence', asserting broadly that the present state of international human rights law is sufficiently developed, and is able to provide conceptual remedies to populations particularly targeted by the state, when called upon to do so by factual circumstances on the ground. This is because, underlying all self-determination claims, is a basic sense of entitlement of access to government, the principal trust of internal self-determination. It is now evident that the 'new sovereignty', particularly as manifested in postcolonial states, is highly cognisant of the implications of a right of access to government. The disbursement of political participation amongst various populations within a state has developed into a significant aspect of modern territorial statehood.

The 'old' and 'new' forms of sovereignty and the application of state power: Democracy and civil society as a conceptual framework for analysis

To apply Arned Lijphart's now-classical formula to the situation at hand, what is being advocated is the 'consensus model' of democracy over the 'Westminster model'.[91] He writes:

> Especially in *plural societies*—societies that are sharply divided along religious, ideological, linguistic, cultural, ethnic, or racial lines into virtually separate subsocieties with their own political parties, interest groups, and media of communication—the flexibility necessary for majoritarian democracy is likely to be absent. Under these conditions, majority rule is not only undemocratic but also dangerous, because minorities that are continually denied access to power will feel excluded and discriminated against and may lose their allegiance to the regime.[92]

To begin to understand the impact of this assertion, it must be observed that one of the chief alternatives to the 'election-oriented' viewpoint of democracy is that of 'deliberative democracy', a concept that holds collective decision-making at its core.[93] Such a perspective views democracy as a permanently self-perpetuated system of social interactions incorporating meeting, discussion, negotiation and eventual agreement on lawmaking and societal administration. Such a perspective is of interest, as it is considerably more developed than a mere system of majority rule, in that the actual circumstances on the ground are allowed to take on full prominence, both in terms of the extent of political participation by the citizens of a state, and the progressive development of governance structures which are reflective of a society's own needs. In this way, democracy takes on a relatively pure form, given that it is a public process with a purported aim towards human self-sustenance, and is relatively less encumbered with the complexities of an often discordant political process.[94] It would not be without merit to assume

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[91] See A. Lijphart, Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries (1999), particularly at 9-47.

[92] *Id.* at 32-33. Where Lijphart's analysis diverges from the modern African situation is with regard to the coherence of minority rule against the majority. *Cf. Id.* at 33: "In the most deeply divided societies, like Northern Ireland, majority rule spells majority dictatorship and civil strife rather than democracy. What such societies needs is a democratic regime that emphasizes consensus rather than opposition, that includes rather than excludes, and that tries to maximize the size of the ruling majority instead of being satisfied with a mare majority: consensus democracy. […] The consensus model is obviously also appropriate for less divided but still heterogeneous countries, and it is a reasonable and workable alternative to the Westminster model even in fairly homogenous countries." The problem is that, although this is not to cast a complete blanket across all of sub-Saharan Africa, the standard Westminster majority/minority model does not find a direct parallel in the African context given the relative lack of coherence in opposition politics against the oftentimes coercive nature of African governance, as asserted herewith.

[93] See particularly C.S. Nino, The Constitution of Deliberative Democracy (1996), J. Elster (ed.), Deliberative Democracy (1998), J.S. Dryzek, Deliberative Democracy and Beyond: Liberals, Critics, Contestations (2002), and J.S. Fishkin and P. Laslett, Debating Deliberative Democracy (2002) for primary conceptualisations of the idea. For practical manifestations of the concept (admittedly geared more towards established democracies than those in postcolonial circumstances), see B. Ackerman and J.S. Fishkin, Deliberation Day (2004), which advocates the establishment of a two-day holiday with specific financial compensation for participants to take place in the United States two weeks before major elections so that neighbourhood groups can discuss central issues to the electoral campaign. *But cf.* criticisms that the idea is both impractical and unnecessary by Seventh Circuit US Court of Appeals Judge R. Posner in Jan.-Feb. 2004 Legal Affairs, available at http://www.legalaffairs.org/issues/January-February-2004/toc.html.

[94] *Cf.* J. Habermas, The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society (1991) (trans. T. Burger, 1996): "Even before the control over the public sphere by public authority was contested and finally wrested away by the critical reasoning of private persons on public issues, there evolved under its cover a public sphere in apolitical form—the literary precursor of

then, that deliberative democracy is *prima facie* akin to internal self-determination. There are differences between the concepts, to be sure, but as deliberative democracy and internal self-determination both aim toward the improvement of the political process, and thus the improvement of a state's own effectiveness, with particular regard to the promotion and protection of human rights.

However, before undertaking such an analysis, it is useful to take one short step backwards, as it has been made clear how democracy risks finding itself amidst that most troublesome of circumstances, and, with that, its popular commonality with self-determination is revealed: being all things to all people. This is deeply ironic because on the one hand, this is exactly what democracy *should* be, as democracy means a citizen's right to directly or indirectly participate in the political life of the state.[95] However, as was clearly observed in the emerging democracies of Central and (more obviously) Eastern Europe in the 1990s, often citizens' lack of knowledge about the actual functions of democracy was masked by their exuberance for the concept, which reflected a simple majoritarian voting pattern with comparative disregard for either the reflection of societal liberalism,[96] or a practical ability to effectuate the necessary structural reforms. Thus the political participation principles, from which the purported 'democratic entitlement' flows, actually serve to *define* the elected polity, as opposed to being defined *by* it. As James Crawford writes:

> […][e]very person, whether a member of a majority or minority, has basic rights, including rights to participate in public life. Thus the authority of a government, elected by a majority, to conduct for the time being the public affairs of the society is a *consequence* of the exercise of the rights of participation in public life of all citizens, whether they belong to the majority or the minority.[97]

This should not be seen under any circumstance as being controversial; rather, it reflects the underlying core of what comprises the universal democratic process. Bearing this in mind, the role played by territoriality comes to the forefront, due to the limitations of 'universal statehood'. If there were not states, and therefore there were not defined territories, frontiers, capitals and capitols, *Hinterlands* and other euphemisms for the core-periphery model which reflects the distribution of state power amongst most if not all states,[98] peoples' rights would be considerably less controversial, because there would be no so-called 'negatively-defined' peoples. Vertical state consolidation would not be such a critical factor; indeed, not so particularly in Africa, for the lack of fluidity inherent in the transfixion of postcolonial state borders would be allowed to be altered. As should be the case, different situations will be met with different substantive legal challenges, but a certain jurisprudence would be likely to grow with relative ease, as important judicial decisions would be unencumbered with the omnipresent, in addition to substantive defects of the postcolonial state conceived by the *uti possidetis* line. The problem is that the general presumption in international law in favour of the continuity of the state translates into a general deference to the preservation of the existing territorial *status quo*. Given the caustic interplay between state delineations and local populations in some postcolonial Af-

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the public sphere operative in the political domain." For further discussion, see J. Habermas, Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy (Studies in Contemporary German Social Thought) (1998) and J. Habermas, The Inclusion of the Other: Studies in Political Theory (Studies in Contemporary German Social Thought) (2000), particularly at chapter five ("On the Relation between the Nation, the Rule of Law and Democracy").

[95] *Viz.* Article 25 ICCPR

[96] See F. Zakaria, *The Rise of Illiberal Democracy*, 76(6) Foreign Affairs (Nov/Dec 1997), at 22-44.

[97] J. Crawford, Democracy and International Law, 64 BYIL (1993) 114 [hereinafter Crawford, Democracy].

[98] City-states and micro-states being the obvious exceptions.

rican circumstances, only a very few, if any, derivations from the declaratory Cairo Declaration[99] are likely to be reflected in the *politique* of the modern African Union, such as it is.

Significantly, however, when considering the variables of territoriality, democracy and 'civil society', the question of justice remains as a common thread throughout. The interplay between empirical and juridical statehood may well advocate a linkage between the concept of 'fairness', and that of 'juridical practicability', as will now come as little wonder as following in the footsteps of Thomas Franck's 1992 AJIL thesis on democracy,[100] and his 1995 book entitled *Fairness in International Law and Institutions*. To illustrate the point, in the 1995 work, Franck equates 'justice' with 'equity' in the jurisprudence of international legal tribunals, and states that:

> [i]n its international as in its domestic legal context, equity is sometimes derided as a 'countless' norm amounting to little more than a license for the exercise of judicial caprice. This criticism, while addressing a potential problem, ignores the very real 'content' attributed to equity by scholars and international courts, arbitral proceedings and organizations. In fairness discourse, the most restrained justice-based claims may be advanced in the form of equity, which embodies a set of principles designed to analyse the law critically without seeming to depart too radically from the traditional preference for normativity in the exercise of authority, nor to present too bold a challenge to the community's expectations of legitimacy in legal rules and processes.[101]

Yet the trouble is with the potential for 'justice' to mean all things to all people. In an international legal world still dominated by juridical statehood, the inherence of the concept of justice can be both inclusive and exclusionary: this is why the present thesis advocated a severance of the 'nation' and the 'state' at its outset. For in juridical statehood, so-termed exclusionary justice would reflect a state's own enforceable actions, which have the practical effect of systemically damaging a particular population; and on the contrary, inclusive justice would reflect the tangible desire for self-preservation of individual dignity, which is inherent in humanity.[102] However, given that, as will be observed in particular by the Cameroon *v.* Nigeria case before the ICJ,[103] it may be the case that past treaties involving the cession of territorial title from pre-colonial authorities to European colonialists—the legal antecedents to the transference of the *uti possidetis* principle from Latin America to Africa—have served to cause the bereavement of certain disaffected populations.

That said, potential remedies to the variables of territoriality, democracy and 'civil soci-

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[99] *Cf.* Cairo Declaration on Border Disputes among African States, AHG/Res. 16(I) 1964: "The Assembly … Considering that border problems constitute a grave and permanent factor of dissension; Conscious of the existence of extra-African manoeuvres aimed at dividing African states; Considering further that the borders of African states, on the day of their independence, constitute a tangible reality; Recalling the establishment in the course of the Second Ordinary Session of the Council of the Committee of Eleven charged with studying further measures for strengthening African unity; Recognising the imperious necessity of settling, by peaceful means and within a strictly African framework, all disputes between African states; Recalling further that all member states have pledged, under article IV of the Charter of African Unity, to respect scrupulously all principles laid down in paragraph 3 of article III of the Charter of the Organization of African Unity:

1. SOLEMNLY REAFFIRMS the strict respect by all member states of the Organization for the principles laid down in paragraph 3 of article III of the Charter of the Organization of African Unity;

2. SOLEMNLY DECLARES that all member states pledge themselves to respect the borders existing on their achievement of national independence."

[100] See T.M. Franck, The Emerging Right to Democratic Governance, 86 AJIL 46 (1992) [hereinafter Franck, Democratic governance].

[101] T.M. Franck, Fairness in International Law and Institutions 47 (1995) [hereinafter Franck, Fairness].

[102] Whether this is reflected in the doctrine is completely another matter, however.

[103] See discussion *infra* at text accompanying note 279.

ety', may be obtained through what Allen Buchanan calls the 'Democratic Internal Peace Hypothesis'. He encapsulates his ideas as follows:

> Recent liberal theorists of human rights, reviving a thesis advanced by Kant over 200 years ago in his essay "Perpetual Peace," stress another compatibility between peace and justice. According to the Democratic Peace Hypothesis, developed democracies tend not to go to war with another. A more controversial thesis, but one which enjoys considerable empirical support, might be called the Democratic Internal Peace Hypothesis: developed democracies—those which facilitate political participation by all, including minorities, and which effectively constrain majority rule by entrenched human rights—as a general rule are not plagued by large-scale internal violence (government terror or ethnic violence). If either of these theses is correct, even as a broad generalization, and if democracy is a requirement of justice, then again it is mistaken to assume that peace and justice are inherently compatible goals. Nevertheless, it would be obtuse to deny that conflict between the pursuit of justice and the pursuit of peace occur, at least during the transition from out very unjust world to a more just one. […] What examples of conflicts between pursing peace and pursuing justice show is not that justice cannot be a primary goal of a system that takes the value of peace seriously, but only that clashes between these goals can be expected to occur during the transition towards justice. This hardly detracts from the plausibility of the assertion that justice is a chief moral goal of international law. After all, there may be almost no cases in which the pursuit of a moral good consisting of the attainment of more than one goal, or of a moral ideal composed more than one value, is immune to this sort of conflict.[104]

It may be the case that Margaret Moore makes an even better restatement of the criteria necessary for the evaluation of 'justice', in that she envisions a linkage between "the historical treatment, and especially dispossession, of indigenous peoples and their ongoing disadvantaged status".[105] As was observed in the previous discussion between the primacy of humans versus the primacy of territory,[106] the rights of indigenous peoples are legally distinct from those of 'peoples' *per se*, but the underlying inherent phenomena need not be conceptually distinct. Therefore, despite the potentially dubious legal pedigree of historical treatment of local populations, casting a critical eye on these phenomena can serve as a useful mechanism for evaluating internal self-determination claims (and the associated questions of 'justice'). Indeed the phraseology of the process of European colonisation of Africa, coupled with its subsequent decolonisation, as being the 'overlay' of the European (and therefore international legal) state onto the African continent is perfectly evident: whether the circumstance can be translated into a specific legal form is a wholly separate matter.[107]

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[104] A. Buchanan, Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law 79-80 (2004).

[105] M. Moore, *Indigenous Self-Determination,* in S. Macedo and A. Buchanan, Nomos XLV: Secession and Self-Determination 94 (2003) [hereinafter Moore].

[106] See discussion *supra* chapter two.

[107] However, a major point of divergence between her argument (rooted in indigenous peoples' rights) and the postcolonial self-determination of peoples in the African context must be acknowledged. In Africa, while it is true that the totality of almost all African populations are in fact indigenous, indigenous peoples' rights *per se* have taken on a particular legal meaning, due to the fact that specific populations wish to maintain their identity in the face of actions by the state as an overlord. As opposed to indigenous peoples' rights in the Americas, where the colonial administrative presence never fully retreated back to Europe, the peoples' rights in question in Africa reflect the reality that complete transfer of sovereignty to the various indigenous populations within the colonially-delineated state has been seen as perfectly normal, as decolonisation primarily meant the recall of most European administrators. The peer disapproval of Rhodesia and, eventually, apartheid-era South Africa bear out this assertion. Thus the indigenous populations could lay legitimate claim to the government of these newly independent states, which is quite another governance circumstance indeed, from that which deals with the after-effects of colonialism in the new world of the Americas, as there, the colonialists settled in considerably greater numbers than as has been the case in sub-Saharan Africa.

Moore proposes the concept of 'rectificatory justice', which seems to reflect, with relative ease, certain aspects of the phenomenon inherent within the postcolonial African situation. The thrust of her argument is towards the righting of past wrongs, given that the "current poverty and marginalization are the direct result of the past injustice […] suffered at the hands of the white colonialists"[108] and that there is a collective definitional element to indigenous peoples' rights—again, this not being dissimilar to the general African context. It would appear that she exhibits a tendency to recall the nature of the treaties signed between indigenous peoples and European colonialists as the basis for her broad-based, 'rectificatory' perspective.

Indeed this seems to reflect concisely the dichotomy between the *de jure* and *de facto* situations on the ground, which she views as the intersection of grievances with historical colonising treaties and claims of justice. She illustrates the concept for groups as being relatively analogous to claims made by individuals for reparations for injuries suffered, or similar injuries measured for *collectivitiés*.[109] She writes that "(a) the group must be disadvantaged in comparison to other social groups; and (b) there must be an objective history of discrimination and oppression, which can be connected to the present disadvantaged status".[110] This also lends evaluatory credibility to claims for internal self-determination in particular, specifically those circumstances driven by notions of collective self-government and influenced by the administration of particular economic resources, "including land, control over natural resources, and straightforward transfers of money".[111]

Economic considerations aside, 'rectificatory justice' is a concept which can still merit genuine consideration, as the rectifying action aims towards promoting good governance standards for the future, by acknowledging that "groups are in the best position to judge their own interests and so should be given the requisite resources and jurisdictional authority to resolve their own problems and overcome the disadvantages that they face".[112] Beyond this point, Moore's argument, itself, delves into circumstances more relevant to indigenous peoples' rights than the legally-distinct 'self-determination of peoples' under examination at present. Consequently, her line of argumentation will be progressively less germane, as she progresses from the general towards the specific. However, it is not to be overlooked that her 'remedy' to indigenous self-determination is indigenous self-government, and not necessarily "cultural justifications for self-determination".[113] Adding the 'democratic governance' thesis into the equation, predictably, complicates the matter even further. While it would be fictitious to proclaim a blanket, universal and global rule of customary international law (for example) mandating a right to democracy under all circumstances, the critical mass behind the argument would still seem to reflect the 'emergence' of such a right. Indeed, then, this is why, drawing upon Moore's assertion that local groups are the best-placed authorities to respond to their own situations, the discussion should be steered back to the potential role that can be played by civil society, in bridging the governance gap, in the most dysfunctional of situations—that is to say, those being placed under particular examination in the course of this study.

[108] Moore, *supra* note 105, at 95.
[109] *Id.* at 96, citing J. Thompson, *Historical Injustice and Reparation: Justifying Claims of Descendents*, 112 (October 2001) Ethics 114-135.
[110] *Id.* at 96-97.
[111] *Id.* at 98.
[112] *Id.* at 100.
[113] *Id.* at 110.

'Civil society' and international law: Compiling the sum of the 'democratic entitlement'

If civil society is a repository for societal power which is not vested within the state itself, it would be useful to identify briefly the types of societal powers which could be practically observed. Adam Seligman provides an interesting theoretical model, in that he views the roles played in the early United States as modelling the core of a modern formulation of 'civil society'. He does so by listing certain social rights afforded in the United States, which were broadly denied to the working classes in Western Europe and for which social compensation was made in the new world. He identifies in particular, "the rights of unionization; the freedoms of speech, of the press, of assembly; the freedom of movement (within the confines of the nation-state), of association (or combination); and, most importantly, the right to organize political parties and the right of the franchise".[114] Moreover, Seligman goes on to translate these political forms into the logical restatement that 'civil society' and indeed 'citizenship' each take on a form which holds *reason* at is core and "would include the ties of solidarity existing between citizens and not just their political and legal autonomy".[115] Beyond that, it is but a small leap to the equation of *reason* and *equality*,[116] which allows the underlying ideas herewith to be expressed in a form more tangible to the modern international lawyer: the equal treatment of all persons before the law, with the associated expectation that the law is substantively capable of such uniform application.

If one were to cast aside momentarily the significant legal distinctions between the different sets of 'minority rights', 'peoples' rights' and 'indigenous peoples' rights', a liberal interpretation of 'equality' can be observed as underlying. The object of minority rights is for the progressive granting of rights to individuals belonging to the minority so that they will eventually be brought into line with the majority. When a 'people' effectuates an act of self-determination, in particular internal self-determination, this autonomising action serves to provide to members of the 'people' an increased form of political participation, which improves the political relevance of the people in question vis-à-vis other populations within the state, and thus, contributes to the equality of sub-state groups. In addition, indigenous peoples' rights serve a particular function, in that the encroachment of the modern, postcolonial state on the native societies, is inhibited and, were rights to be upheld sufficiently, indeed prohibited; thus, under these circumstances, to preserve the *status quo* is to preserve inter-societal equality.[117] One is therefore reminded anew of the inescapable interplay between the individual and the group, coupled with the parallel reality that the three main definitional forms provided in legality are painfully cumbersome, as a result of their being developed, as it were, under hermetic seal. Furthermore, violations of human rights are, in the main, incorrectly seen as something primarily effectuated against a bereaved individual;[118] group rights *per se*, only come into play when the level of human rights violations is such that it reaches the systemic and widespread level, and would therefore be categorised as 'minority' 'people' or 'indigenous', depending on circumstances. Fortunately, however, there is indeed room for greater nuance in making such assessments. As Carozza writes:

> The inherent dignity of the individual, however, does not mean that he or she exists in isolated, existential loneliness. […] The form of human rights discourse is strongly oriented toward the individual; the guarantees of human rights instruments are framed in terms of the

[114] A.B. Seligman, The Idea of Civil Society 103 (1992) [hereinafter Seligman].
[115] *Id.* at 126.
[116] For discussion, see *Id.* at 127 *et seq.*
[117] See also discussion of the concept of 'ethno-development' in P. Thornberry, International Law and the Rights of Minorities (1991).
[118] For discussion see particularly P.G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AJIL 38 (2003), at 46 *et seq.*

> rights due to each person as an individual human being, not by virtue of his or her status within a group. […] Yet any fair reading of international human rights documents provides a much more complex picture. At the outset, the solidarity of the human family is as much a building block of the structure of human rights as is individual dignity. More specifically, each of the documents of the International Bill of Rights amply recognizes and protects many of the social dimensions of human life, including marriage and family; nationality; religious affiliation, association, and assembly; cultural life; organized labor; and education.[119]

Thus, while no real attempt is being made at asserting a particular judicial status for 'civil society', the existence of the concept cannot be overlooked, at least in the parlance of scholars and practitioners. That may be so; however, the cumulative effects of the underlying constitutive elements cannot be merely cast aside as a matter of expediency. This leads directly into the notion of civil society promulgated by Philip Allott, who contributes to the contextual understanding of 'civil society' and 'democracy' in a way that is useful for the assessment exercise at hand and in a manner that is logically consistent with the notion of citizens' equity in the eyes of domestic legal systems. He writes:

> The semantic shift from *government* to *governance* and from *society* to *civil society* may seem to be slight, but its theoretical and practical implications are profound. *Governance* is government seen as the social function of a governing class whereas, in the liberal democratic tradition, *government* is seen as society's self-government. *Civil society* implies that there is a realm of collective non-governmental societal social action which is parallel to, but not an integral part of, the function of 'governance' whereas, in the liberal democratic tradition, it is *society* in its entirety which integrates all social systems in the process of public-realm decision-making. To disintegrate the integrity of *society* and to separate the people from their *government* is a theoretical counter-revolution against liberal democracy, a nostalgia for the bad old days of more and less enlightened absolutism.[120]

In sum, it is asserted that deliberative democracy, on the one hand, is better placed to reflect societal norms than is majoritarian democracy, because, particularly in divided societies, the consultative process provides a closer connection to the principles of equality, justice and reason. These principles, in turn, make further contributions to transforming a society toward a more egalitarian construction, and therefore, it is further assumed, a more functional society would follow. On the other hand, however, deliberative democracy can also be seen as something of an *ignis fatuus*. The problem is that deliberative democracy obviously draws upon the deliberative process for its systemic legitimacy, and peaceful, rational deliberation, while certainly possible to observe in local African societies, does not always easily translate to the postcolonial African state. Or as Jorge Valadez writes, the possibility cannot be overlooked of

> [derailing] the whole project of basing democratic decision making in multicultural societies on public deliberation, namely, the absence of unitary political communities, the existence of moral and cognitive incommensurable differences within the polity, and the dilemma of group inequalities.[121]

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[119] *Id.* at 46-47, citing the family as the "natural and fundamental group unit of society" in UDHR Art. 16, ICESCR Art. 10 and ICCPR Art. 23; the right to nationality in UDHR Art. 15 and ICCPR Art. 24; the right to marry in UDHR Art. 16 and ICCPR Art. 23; freedom of religion "in community with others" in UDHR Art. 18 and ICCPR Art. 18; freedom of information in UDHR Art. 19 and ICCPR Art. 19; freedom of assembly in UDHR Art. 20 and ICCPR Art. 21; participation in the cultural life of the community in ICESCR Art. 15 and ICCPR Art. 27; the right to form and join trade unions in UDHR Art. 23, ICESCR Art. 8 and ICCPR Art. 22; the right to education in USHR Art. 26 and ICESCR Art. 13; and, indeed, common article one to the ICCPR and ICESCR on self-determination of peoples.

[120] P. Allott, The Health of Nations: Society and Law beyond the State 162 (2002) [hereinafter Allott].

[121] J.M. Valadez, Deliberative Democracy, Political Legitimacy and Self-Determination in Multicultural Societies 30 (2001). He continues, *Id.* at 31: "Indeed, it is no exaggeration to say that deliberative democracy faces its greatest challenges in multicultural societies. It is in these societies that we can most clearly

A swift rebuttal to this point can be made, however, in that while there indeed may be an absence of unitary political communities, the creation of such structures is better effectuated in the building of a genuine body politic through a collaborative process, as opposed to an electoral process whereby the first party across the goalpost dictates, perhaps quite literally, public policy.

Deliberative democracy, with its emphasis on consensus-building, is in many ways a different concept than that which is most commonly observed as comprising internal self-determination, as the latter concept will tend to heavily rely upon devolutionary political measures and regional autonomy for a 'people'.[122] The end result, however, is that such compartmentalisation of a state's unitary political apparatus does allow all parties within the state to have a more equitable chance at political participation.

'Democracy' and 'civil society' in postcolonial African states

The topic of democracy has become a fixture on the agenda of the African Union, particularly following the Lomé Declaration of the Organization of African Unity,[123] the Declaration on the Principles Governing Democratic Elections in Africa,[124] Constitutive Act of African Union (AU),[125] into which the former Organization of African Unity was merged. In particular, a Conference on Elections, Democracy and Governance was convened in Pretoria in 2003.[126] Although its outcome was nonbinding, the Conference adopted certain principles towards the promotion of good governance and the strengthening of democratisation, calling for, *inter alia*, constitutional and legal frameworks able to entrench democratic values, basic international and regional human rights standards, the establishment of anti-corruption bodies, independent judiciaries and election management bodies and liaisons with civil society, including a right to monitor elections.[127]

The AU built upon these principles with work towards a Draft Charter on Democracy, Elections and Governance,[128] with AU ministers assisted by a group of Independent Experts,[129]

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identify the limits of deliberative democracy as well as its most fundamental problems."

[122] See discussion in H. Hannum, *Rethinking Self-Determination,* 34 Virginia J. Int'l L. 1 (1993).

[123] See Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government, OAU Doc. AHG/Decl.5 (XXXVI), adopted by the 36th ordinary session of the Assembly of Heads of State and Government, Lomé, Togo, 10-12 July 2000, noting that "the strengthening of democratic institutions will considerably reduce the risks of unconstitutional change on our Continent" and that democratically elected governments should be afforded particular protections against *coups d'état*, mercenary intervention, armed dissident groups and rebel movements. Furthermore, the refusal of a government to relinquish power after free, fair and regular elections is to be seen as 'unconsitutional'. See also Grand Bay (Mauritius) Declaration and Programme of Action, OAU Doc. CONF/HRA/DECL (I), which reaffirmed the OAU's commitment to implementing international human rights law throughout its member states, and the African Charter for Participation in Development (Arusha, 1990).

[124] See OAU Doc. AHG/Decl.1(XXXVIII) (2002) [hereinafter Democratic Elections Principles].

[125] See OAU Doc. CAB/LEG/23.15 (2001), particularly at article 4, whereby member states are commit to the following democratic principles: (a) respect for democratic principles, human rights, the rule of law and good governance; (b) promotion of gender equality; (c) promotion of social justice to ensure balanced economic development; (d) respect for the sanctity of human life, condemnation and rejection of impunity and political assassinations, acts of terrorism and subversive activities; and (e) condemnation and rejection of unconstitutional changes of governments.

[126] See http://www.africa-union.org/News_Events/Calendar_of_%20Events/Election%20Democratie/Pretoria%20conference%20Statement%20April%201003.pdf (accessed August 2007)

[127] *Id.*

[128] See Meeting of Government Experts held in Addis Ababa, 15-17 May 2004.

[129] See AU Press Release 12/2006 (Addis Ababa, 31 March 2006).

which will become binding on AU member states, following its adoption. Significant in the Draft Declaration is that the AU intends to resolve that "the peoples of Africa have a right to democracy and it is the obligation of its Governments and the peoples themselves to actively promote and defend it".[130] In addition, the Draft Declaration states that:

> [t]he effective exercise of representative democracy is the basis for the rule of law and of the constitutional regimes of the Member States of the African Union. Representative democracy is strengthened and deepened by permanent, ethical, and responsible participation of the citizenry within a legal framework of constitutional order.[131]

In addition, certain linkages are made between democracy and human rights, in particular the right to political participation, in that:

> [a]ny person or group of persons who consider that their human rights, with regard to the participation in the democratic process, and particularly in the electoral process have been violated may present claims or petitions to appropriate agencies for the promotion of human rights and consolidation of democracy in the continent. […] The principles of democracy and popular participation, equal opportunity and equitable access and transparent redistribution of resources for all people must underlie all development objectives and strategies.[132]

Such an apparent fondness for democracy on the part of the African Union must be viewed in the light of what one commentator terms "the decay of the state" at the hands of "one-party states and regimes that tolerated no opposition" and therefore revealed political systems which "had failed to deliver the goods".[133] In this sense, by undertaking such a transformative exercise, the African Union has demonstrated considerable commitment towards implementing standards of democratic rule, in the postcolonial state. Whether there exists the actual capacity to implement such initiatives is another question, however. In any event, the initiatives undertaken by the African Union have served to link the concepts of democracy and human rights in ways heretofore unforeseen. Rachel Murray encapsulates the sum of expectations in the African Union with regard to democratic participation, and its conceptual evolution from the 'Westminster model' to the 'consensus model'. She characterises this evolution as follows:

> There is a general agreement that democratic elections should be 'free and fair' and give expression to 'the will of the people'. This has been affirmed by the OAU organs, and reiterated in its recent Declaration on the Principles Governing Democratic Elections in Africa and in the CSSDCA [Conference on Security, Stability Development and Cooperation in Africa] process. The OAU has said that there should be free choice as to who governs a state in full recognition of voting rights. On several occasions the OAU has stated that elections should reflect the wishes of the people of the state. Therefore, […] where there is 'some consistency between the will of the voters and the result of the election, elections could be said to be 'authentic', where 'the exercise of political rights is an essential element of representative democracy, which also presupposes the observance of other human rights'.[134]

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[130] See Draft AU Charter on Elections, DOC. EX.CL/258 (IX), available on: http://www.africa-union.org/News_Events/Calendar_of_%20Events/Election%20Democratie/Draft%20AU%20Declaration%20on %20election.pdf, accessed August 2007 [hereinafter Draft AU Charter], at §1.1. For an overview of its drafting history, see http://www.africa-union.org/root/au/conferences/past/2006/april/pa/apr7/meeting.htm, accessed August 2007.

[131] Draft AU Charter, *supra* note 130, at §1.3

[132] *Id.* at §2.2 and §3.6

[133] B. Freund, The Making of Contemporary Africa: The Development of African Society since 1800 260 (2d. ed., 1998). He continues, *Id.* at 266: "Certainly it is likely that those with state connections, past or present, are still apt to be the best placed […]. In Zaire, where the 'second economy' is so powerful and obvious, the state often seems to observers like a parasite that lives off a burgeoning, highly commercialised and unregulated world."

[134] R. Murray, Human Rights in Africa: From the OAU to the African Union 83-84 (2004). (footnotes

In determining standards for how elections are to be held, on the basis of African Charter-based and UN covenant-based international human rights law, Murray makes the following observations: (a) multi-party elections appear to be a necessity; (b) the fairness of the elections must be measured by the international community and the state's own population; (c) this fairness is dependent upon the level of voter participation; (d) elections should be peaceful; (e) institutions should be impartial; (f) basic human rights standards should be vigilantly upheld at times of elections; (g) fraud should be prevented; (h) elections should benefit from adequate security and funding; and (i) elections should be transparent.[135] But particularly as can be observed in the language of the Draft Declaration, it can be demonstrated how the AU's efforts with regard to the promotion of democracy has sought to incorporate both concern for elections and concern for governance standards. As Murray concludes, leaving the problem of enforcement notwithstanding :

> [t]he concept of self-determination was initially expanded to prompt the OAU to focus on elections and the manner in which governments came to power as an element of what constituted a democratic state. Over more recent years it has been willing to examine wider issues including the way in which countries are run. In some respects the OAU/AU, as elsewhere, has interpreted this to encompass a variety of human rights issues. […] With recent changes in respect of the AU and its Constitutive Act, […], the potential to maintain the link between democracy and human rights is large.[136]

'Positively' and 'negatively' defined peoples and questions of civic participation

With the importance of periodic elections becoming so apparent, potential overlaps between the right to political participation and the effectuation of internal self-determination in postcolonial states may be observed. The question of political participation in postcolonial states serves to recall Skurbaty's concept of individuation, referenced earlier in this chapter.[137] The concept stands to reason in that it allows a collective grouping (*collectivité*) to develop based upon the characteristics that matter most to the group. It furthermore reflects an aspect of the principle of effectiveness (measured by *effectivités*) whereby a governmental entity wields a considerable measure of legitimately-identifiable power over a territorial unit. Individuation is a building block of governance. It manifests power invested into political leaders, in such a way as to reflect consent (at the very least), or consensus (ideally) amongst a population. Alternatively, individuation delimits the extent to which a collective grouping can legitimise territorial power activities. Thus an evaluation of the contemporary ambit of self-determination would seem, *prima facie*, not to benefit from an automatic excess of definitional conservatism, as legitimate claims for self-determination can be made on the basis of factual circumstances and not just on extremist, irrational and indeed nihilistic criteria. Raw nationalism is, in actual fact, something which is very hard to come by in this day and age: to self-identify on the basis of the genuine popular will of a grouping (whether a true 'people' *per se* or otherwise) is to heed the simple fact that, within any modern territorially-defined 'nation', it is extremely likely to find embedded significant numbers of ethnic, linguistic or cultural minorities. The point remaining is that ethnicity is universal, and inherent in a universal phenomenon is the possibility for differences in interpretation, with some interpretations ripe for a thematic re-evaluation. As Chabal and Daloz write:

> Ethnicity is commonly considered in Africanist circles as a problem: either because it is seen

omitted)
[135] *Id.* at 85 *et seq.*, referring to the Democratic Election Principles.
[136] *Id.* at 112-113.
[137] See text *supra* this chapter accompanying note 63.

> as an inconvenient leftover from a previous 'traditional' age and a hindrance to modernization or else because it is viewed as a divisive political weapon used by unscrupulous political operators. Both these views, however, are themselves throwbacks to mechanistic interpretations of African realities, casting ethnicity as a simplistically 'tribalist' form of identity or mere tool. We need to conceptualize ethnicity as a dynamic, multi-faceted and interactive cluster of changeable self-validated attributes of individual-cum-collective identities. There is no 'single' ethnicity out there cast in stone for ever. There are ways of defining oneself and others in accordance with a set of beliefs, values and subjective perceptions which are both eminently malleable and susceptible to change over time.[138]

These 'eminently malleable' perceptions reflect the awareness that, particularly in Africa, 'culture', 'ethnicity', 'people' 'nation', 'state', and indeed 'minority', are all terms used in widely interchangeable circumstances with varying effects. Or, as Eric Hobsbawm writes more generally, "[t]he idea of 'the nation', once extracted, like the mollusc, from the apparently hard shell of the 'nation-state', emerges in distinctly wobbly shape".[139] Thus in evaluating self-determination claims, one would be likely to derive the most benefit by listening to the claims put forth by the parties, based upon what they could be *expected* to say and based on the specific circumstances at hand. From there, the underlying principles need to be carefully worked through, mindful, all the while, that self-determination effectively means some configuration of self-government. Yet, above all, it is suggested that the nature of the construction of 'people' will play a significant role in determining what configuration of self-government will be deemed an adequate 'horizontal' response to 'vertical' state consolidation pressures. A more proactive, 'positively defined' people—'a people that knows what it is in relation to what it is'[140]—will require less of a 'horizontal' reflex to 'vertical' state consolidation than will a more reactive, 'negatively defined' people, or 'a people that knows what it is in relation to what it is not'.[141] It is in those circumstances, where the societal preservation of a collective grouping—a 'people', perhaps—is in greatest doubt, that greater doses of 'horizontal societal preservation' will be required through the configuration of self-government. This, effectively, means two things. First, a comparatively greater degree of 'horizontal societal preservation' will require a comparatively greater degree of self-determination. Second, post-colonial 'self-determination of peoples' has the potential to be something more dynamic than 'national self-determination', in that, as was observed in the previous chapter discussing the basis of a peoples' right to existence in Article 20 of the African Charter, a 'people' can be constructed as a societal stopgap response to excessive state hegemony.

To explain this premise, consider the following. Across the states of sub-Saharan Africa, in particular, an individual has the desire to act in community with others, in a manner which differs from that usually seen in European societies. The roots of community lie in its collective consciousness, with whom a shared history exists for its members. However, there is no 'one size fits all' rule for determining, defining and delineating these communities. Under the premise being examined, on one extreme, this 'shared history' could well mean upholding particular ethnic, racial, cultural, social, religious and linguistic traditions, which go back hundreds, if not thousands of years.

This reflects the notion of a 'positively-defined' people. Such communities, which form a

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[138] P. Chabal and J.-P. Daloz, Africa Works: the Political Instrumentalization of Disorder 56 (1999).
[139] E.J. Hobsbawm, Nations and Nationalism Since 1780 190 (2d. ed., 1990). He bases this statement on a 1972 public opinion survey in the Federal Republic of Germany which observes the fluid definitions provided by respondents for the terms 'nation', 'people' and 'state', in view of the coexistence of two German states and one 'people', as such.
[140] Think of the Faeroe Islanders or the Fresians, as well as those in Somaliland and the South Sudanese.
[141] Think of the Eritreans, or as a result of acts of genocide, inhabitants of Darfur.

cohesive majority in a well-defined administrative area, are in principle at least quite likely to be able to exercise the right to self-determination on the basis of self-government, within the existing state framework.[142] With their own self-governing rights comes their own administrative responsibilities; indeed, the legitimacy of such communities, in an 'age of rights', will also be reflected in the degree to which the rights of all minorities, within this administrative area, are guaranteed and protected. But it seems *prima facie* likely that most self-determination claims of 'positively-defined' peoples are good candidates for internal self-determination measures. A pathway seems to exist under the rubric of internal self-determination, whereby such an administrative entity can make certain specific claims following a natural progression, in levels of self-government. These forms can include, *inter alia*, cultural autonomy, internal political autonomy, formal geographic autonomy (e.g. a 'federated region'), a federation and a confederation. Such forms reflect the mainstay of ways in which self-determination means self-administration by a group willing and able to represent the interests of this community as a whole. The range of political possibilities provided to effectuate self-determination reflects the notion of horizontal societal preservation and as such, reflects a 'right of peoples to self-determination' defined in more proactive terms, with a gradient of practical responses.

However, in the present day it must also be recognised that, at the other extreme, a 'shared history' could also mean that a unique community is formed in direct response to specific actions related to their relationship to their own state. This point is significant, as it serves to illustrate how so-called 'negatively-defined' peoples might be identified in factual situations. A number of illustrative examples could be considered.

For example, Sudan is a state comprised, in the main, of two mutually-exclusive peoples:[143] the power-wielding, comparatively unified Islamic Arabic populations of the North and the marginalized and largely discordant Christian/animist Black populations of the South and in Darfur. Warfare has been waged against the South Sudanese since 1984. And yet, the Southern Sudanese 'people' is, in actual composition, little more than the product of myriad different ethnicities, galvanized and battered, over four decades of an wickedly violent, multilevel, internecine, municipal conflict, both amongst the other fragmented populations of the South and the dramatically more unified population of the North which acts primarily from the state capital and seat of power, Khartoum.[144] More recent developments since 2003 in West Sudan have followed a similar pattern of domination in the Darfur region (approximately the size of France, with between four and five million people), whereby uniform-wearing militiamen known as *Janjaweed*, acting under the command of the central government, have displaced, with impunity, up to one million black Muslim agrarians.[145] This has been confirmed by a report of the UN

[142] This assertion, however, remains dependent on good-faith bargaining between the state authorities in the capital and the local authorities on the ground—something which is not always guaranteed.
[143] For if there is to ever exist such a thing as a 'people', the manner in which such fundamentally different populations have been grouped together in Sudan must pay acknowledgement to the inclusion of the two mutually-exclusive Sudanese 'peoples' formed on geographic, administrative, racial, social, cultural, ethnic and religious—not to mention linguistic—lines. By analogy, if the Flemish and Wallonians are generally accepted as being 'peoples', how could the North and South Sudanese be considered anything other than 'peoples' as well?
[144] For a practical representation of this fragmentation, see the Declaration of Principles by the Parties to the Sudanese Conflict, 20 May 1994, between the 'Government of the Republic of the Sudan' and the 'Sudan Peoples' Liberation Movement/Sudan Peoples' Liberation Army' and the 'Sudan Peoples' Liberation Movement/Sudan Peoples' Liberation Army – United' (SPLM/SPLA and SPLM/SPLA – United), now nominally unified under the rubric of the 'Sudan People's Liberation Movement/Army (SPLM/A)' (documents on file with author).
[145] See e.g. New York Times, In Sudan, Militiamen on Horses Uproot a Million, 4 May 2004, available on NEXIS; see also Human Rights Watch, Darfur in Flames: Atrocities in Western Sudan, Vol. 16, No. 5 (A),

High Commissioner for Human Rights to the Security Council. The report, facilitated by the Secretary-General,[146] documents a systematic or widespread pattern of violations on the part of the Sudanese government, including indiscriminate attacks on civilians, rape and other serious forms of sexual violence, destruction of property and pillage, forced displacement, disappearances, persecution and discrimination.[147]

Similarly, in the Ethiopian/Eritrean situation, given that Eritrea's place within Ethiopia had remained so deeply contested, once the conflict had reached the levels of the 1998 border war, there could be no doubt that Eritrea's population constituted a specific 'people', for they could be one of two things and they certainly were not Ethiopian.

Further afield from the Horn of Africa, one could also go so far as to observe that the circumstances experienced by civilians of all ethnic groups in the eastern Democratic Republic of Congo, *could* be those which would establish a 'people' *per se*. However, having neither had access to any measures of self-rule under colonial domination, nor, having been under any sought-after form of control by any post-colonial administration, they unsurprisingly lack anything close to the formal, administrative cohesion needed to be considered a 'true' people, due no doubt to having been subjected to conditions akin to genocide, in a geographic region where such events are not hypothetical. Furthermore, it is not generally accepted that the population of the eastern DRC reflects one specific ethnic grouping.[148] It therefore follows that people live where foreign armies dominate and savage militias and act with impunity, and where the power projected from the capital does not reach out kindly, or even at all.

Does this reveal a latent *'people'* not dissimilar from the Southern Sudanese 'people', something akin to the Sudanese hodgepodge of ethnicities and liberation movements and armies both united and disunited, or are these Congolese civilians merely unorganised-yet-victimised individuals lacking a formal administrative hierarchy, and therefore caught in one of the numerous 'internal conflicts' of the modern age? Although the answer to such a question cannot adequately be foretold, the underlying point nevertheless remains. These are the places where the daily life has seen little advancement since the days of and the standards set by the Belgian thesis.[149] As it is impossible to deny that civilian members of the various ethnicities in the eastern DRC are, in malformed understatement, 'disenfranchised' and that the only 'part of national life' being undertaken at present takes on genocidal overtones, the relative uniqueness of this phe-

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April 2004, and Human Rights Watch, Sudan: Government and Militias Conspire in Darfur Killings, press release, 23 April 2004.

[146] This facilitation was on the basis of the Security Council's usual examination of the situation in Sudan, including its supervision of the ongoing peace process, and was not specifically under Article 99 of the UN Charter as such, but rather, was linked to a high-level humanitarian mission led by the World Food Programme's Director and the Secretary-General's Special Envoy for Humanitarian Affairs for the Sudan.

[147] See United Nations, Report of the High Commissioner for Human Rights: Situation of human rights in the Darfur region of the Sudan, UN Doc. E/CN.4/2004/3, 7 May 2004, particularly at paragraphs 46-107. Unfortunately the Council's non-response to the report was a disappointment.

[148] The Alur, Azande, Luba, Lugbara and Mangbetu ethnic groups inhabit the eastern DRC. See The Diagram Group, Encyclopedia of African Peoples 309 (2000).

[149] See discussion *supra* chapter two at text accompanying note 34, particularly recalling the statement by the Belgian delegate to the General Assembly in GAOR 9th Sess. 4th Ctte. 419th Mtg. Para. 20 (1954) that non-self-governing territories other than trust territories under the Trusteeship Council were those which were "administering within their own borders territories which were not governed by the ordinary law; territories with well-defined limits, inhabited by homogeneous peoples differing from the rest of the population in race, language and culture. Those populations were disenfranchised; they took no part in national life; they did not enjoy self-government in any sense of the word […]."

nomenon can be simultaneously observed: it does not occur in the southern, or central, or western parts of the country.[150] Residents of the eastern Democratic Republic of Congo are by no means 'full members of the state' (as it is). The state, as such, has not held actual authority over their territory for quite some years now. As such, whether 'a bunch of unfortunate people' or a *'people' per se,* regardless of what they actually 'are' in definition, they remain negatively-defined: they 'know what they are in relation to what they are *not*'.

In view of the reality that a 'shared history' does not always reflect ideal human circumstances, on the one hand, positively-defined 'peoples' would show a tendency to take so-called 'horizontal' actions aimed at promoting good governance and internal self-determination. By having already received a measure of self-government through decolonisation (to be sure) and an additional measure of self-government, through interactions with the state powers in the capital (perhaps), a positively-defined people will aim toward working within the existing state to achieve more broad-based political participation, increased protection, and prevention from discrimination and constructive steps taken toward the implementation of the right to development, which, as Paul Ochoeje identifies, all make effective contributions to good governance.[151] As the state matures, the thinking goes that the less threatened it is by peoples' rights, there are corresponding improvements in overall governance standards. It also seems likely that a 'positively-defined' people would be likely to have more of an essential awareness of inter-social connectedness within the group than would a 'negatively-defined' people. A 'positively-defined' people would therefore be more likely to reflect the classical formulation of a unique ethnicity, something not far removed from a "homogeneous people differing from the rest of the population in race, language and culture", to use the language of the Belgian thesis.

'Negatively-defined' peoples as self-determination's guarantee of last resort

By contrast, negatively-defined 'peoples' would tend to take so-called 'horizontal', *i.e.,* preservational, actions by, primarily, geographically-contiguous 'peoples' *per se*, aimed at upholding the right of all peoples to be free from foreign domination. Forming a numeric majority in a reasonably well-delineated area, there are more Black Africans than Arabic Africans in South Sudan; there are more Eritreans in Eritrea than Ethiopians, and there were (most likely) more targeted civilians than arms-bearers in the eastern DRC during the aftermath of the Rwandan genocide. All of the above share a common need for self-government to preserve these respective societies, their welfare and indeed, their right to life.[152] These are the animate 'peoples' for whom the inanimate 'nation-state' has no particular meaning. Indeed these are the circumstances where the violence, civil strife and widespread and systemic violations of human rights and fundamental freedoms inherent in secessionist circumstances (as in the Bangladeshi example), are already so pervasive and entrenched, that things are unlikely ever to improve. A nega-

[150] It is difficult to dispute that the cycle of violence, seen in the late 1990s and early 2000s in the DRC, runs much wider, with a greater intensity, in the eastern part of the state than anything that can be observed in the rest of its territory.

[151] See P. Ocheje, *A "Rights" Approach to Governance in Africa,* in E.K. Quashigah and O.C. Okafor (eds.), Legitimate Governance in Africa 193-194 (1999). He comments, *Id.:* "The estrangement of the mass of Africans from their state rests to a significant degree on the lack of commonality between the interests of the governing elites and those of the governed. To bridge the gap, African countries need to take rights seriously. Efforts to strike a basis for increased relevance of the state among the populace is not likely to yield desired results until civil society is able to enjoy greater and more liberal space in governance, basic human needs are seriously addressed, equality is guaranteed, and development is pursued in a more humane manner."

[152] Although it is admitted that the final example is considerably less geographically-congruous than the others.

tively-defined 'people' will thus tend to have a lower propensity for success in working within the existing state to achieve self-government than will a comparatively more peaceful, comparatively more mono-ethnic, state.[153] However, there are circumstances wherein unavoidable geographic realities will compel a negatively-defined 'people' to overcome this limitation.[154]

A note on the concept of 'positively' and 'negatively' defined 'peoples'

It should be noted that the appellation of 'positive' or 'negative' when conceptualising the 'people' concept is built upon the aforementioned notions of 'positive' and 'negative' sovereignty. It is used merely to facilitate discussion of the topic and not to confuse matters further. It may be seen that a 'positively-defined' people would show a propensity for making claims rooted in internal self-determination (*i.e.*, supportive of the territorial *status quo*) and 'negatively-defined' peoples would be likely to display a greater propensity for making claims rooted in external self-determination. This is not, however, to say that the final outcomes are predetermined, but it is to say that awareness of the definitional predispositions of self-determination claims, can be helpful in the evaluation of such claims: the self-determination threshold will be higher, in the 'negative' formulation, and therefore internal self-determination measures may, in some circumstances, prove insufficient.

This is to suggest that there is no contradiction between the statements that "without a right to secession, there is no people's right of self-determination", and "if the right of self-determination included automatically the possibility of secession, there could not be any right of self-determination".[155] Dietrich Murswiek, in balancing territorial integrity and self-determination, concludes that, while a stable system of sovereign states is still greatly favoured by states (being, themselves, the basic actors in global society), at the point of greatest tensions between vertical state consolidation and horizontal societal preservation,

> [t]he conservation of the *status quo* has no absolute legal value. International stability and peacekeeping may normally be bound to the territorial *status quo*, but this is not a question of necessity. Particularly the non-fulfilment of legitimate self-determination claims often is a source of conflicts. There are situations in which durable maintenance of peace can only be reached by territorial alterations, e.g. by secession of a part of a territory.[156]

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[153] Again, such circumstances will have to be fairly judged based upon what the claimants could be expected to say, whereby the examiner will have to identify and process the underlying principles while aiming for an effective configuration of self-government.

[154] Such is the case when ideology becomes deeply entrenched in a conflict situation, as was the case with UNITA in Angola for example (where support for the government or for UNITA ran from village to village and house to house rather than across great geographic swathes inhabited by "homogeneous peoples differing from the rest of the population in race, language and culture"). Nevertheless, the Angolan conflict, by virtue of its protraction (continually from Angola's 1975 independence until Jonas Saivimbi's death in February 2002), and goals (access to government and the resources of the Angolan state), must be seen as taking on at least some of the trappings of self-determination.

[155] D. Murswiek, *The Issue of a Right of Secession – Reconsidered*, in C. Tomuschat (ed.) Modern Law of Self-Determination 21 (1993).

[156] *Id.* at 36. He continues, *Id.* at 37: "The subject of the offensive right of self-determination is every people that first can clearly be distinguished from other peoples by objective ethnic criteria, particularly by culture, language, birth or history. Secondly, a people must settle in on a coherent territory, on which it forms at least a clear majority. Mere minorities are not subjects of the right of self-determination. […] But it is important to recognize that the terms 'minority' and 'people' do not totally exclude each other; rather they partly overlap: one group that is a minority in relation to the whole population of a State can, on the one hand be a national minority in the meaning of the law relating to minorities. But on the other hand, it can be a people in the meaning of the right to self-determination at the same time. This is the case

In the end, the summation of the negative and positive definitions of a 'people' demonstrates the need for 'horizontal societal preservation' in a postcolonial state. While not a 'new right' *per se,* horizontal societal preservation is grounded in a so-called process of 'individualisation' in relation to the postcolonial 'right of peoples to self-determination'. It is an attempt to address the limitations of the blunt instrument of the Montevideo Convention's definition of statehood. It is an attempt to add an element of contextual distinction to the ethnic ambivalence of *uti possidetis juris*. It is an attempt to expose the conceptual underpinnings behind self-determination so that a genuine sort of self-governance is able to follow as a matter of course.[157] Moreover, it is an attempt to reflect the assertion that if the self-determination/self-administration/ self-government door is open to ethnic or national groupings, with a growing awareness of the fluidity of such concepts, it is conceptually irrational to dismiss out of hand a 'people' formulated from the most extreme circumstances, whereby self-determination means not self-government, but collective self-preservation and individual survival.

The right to political participation in the postcolonial state: Channelling human rights law through vertical and horizontal forms:

To consider more deeply the role international human rights law plays in improving the effectiveness of the postcolonial state, we must return to the now oft-repeated assertion: the European-designed state is a foreign body imposed upon postcolonial, e.g. African, societies. Some might argue this no longer matters: that postcolonial states earned their independence through a successful manifestation of the 'right of peoples to self-determination', that a truly organic law of self-determination was trumped by *uti possidetis* and that the European-designed state is now juridically manifested in the independent postcolonial state. In large measure, they would be correct. For, indeed, every state has a capital city with the basic trappings of statehood: formal executive offices, with luxurious residences, a capitol, a judiciary with a formal legal system, a central bank, a national military and local civilian police, an administrative and regulatory bureaucracy, principal ports of entry and exit, periodic territorial markings to delineate international boundaries, *et al*.

This leads, once more, to the oft-repeated response: the independent postcolonial state fails at achieving the same results as the European state, because of the depth of the comparative disconnectedness between the state and its constituents. In many ways, this reflects the dichotomy between the 'official' and 'unofficial' planes of societal interactions in postcolonial states, such as those in contemporary Africa. As Donald Rothchild and Letitia Lawson write:

> Over time, as African economies deteriorated and state institutions lost considerable legiti-

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if the group is the only population or if it forms a clear majority on a territory that is suitable for State-building and where the group has traditionally settled."

[157] For discussion, see generally *The Nation As Mind Politic* (Chapter Four) in Allott, *supra* note 120. In particular, his method for explaining the process of self-identification (and therefore the intellectual antecedent to the self-determination process), *Id.* at 113, deserves mention. He asserts that self-identification is a three-layered process involving "projection of the individual's self-process onto the collectivity; introjection of the collectivity's self-process onto the individual and the forming of a subjective totality identified as the collectivity (the nation)". He continues, *Id.* at 114: "The subjective totality (the nation) is neither a thing which is created and which then takes on a life of its own nor is it merely an illusion shared by an indefinite number of individuals. The subjective totality is and remains an integral part of the psychic process of the individual but it always surpasses the process of any given individual […]. The nation is thus just one of those countless remarkable phenomena of the human reality, the reality made by the human mind, which depend on us to think them into existence and to maintain them in existence by our thinking but which at the same time think us into existence, and sustain us in existence."

> macy and sense of purpose, the routines of state-society relations were disrupted. Economic deterioration increased state softness (*i.e.,* the inability of the state to regulate society and to implement public policies in an effective manner) and societal demands on the state. Though perceived as the key distributor of resources, the state lacked the capacity to satisfy public demands. Overstaffed, overbureaucratized, overcentralized, and itself a major consumer of scarce revenues, the state found itself unable to implement its own developmental programs, particularly in the hinterlands […]. As the state failed to meet public expectations, then, its legitimacy eroded, and the public began to perceive it as an alien institution "suspended, as it were, above society."[158]

Thus, *inter alia*, political movements, non-governmental organisations, trade unions, religious groups, women's organisations, public health facilities, neighbourhood groups, environmental committees, professional associations, recreation clubs and welfare organizations all play significant roles, which go unrecognised in 'official' terms. Indeed, the proliferation of mobile telephones and the development of internet access, while comparatively less widespread in sub-Saharan Africa, has contributed to the establishment of informal 'networks' of like-minded groups, and has contributed to an increasingly free and critical press.[159] The point is that these are all elements in existence in 'developed' societies, yet these are elements that, in postcolonial states, are spotlights on their own comparative inadequacies. The problem is that in practical terms, these are the types of organisations which could well bring a given society one step closer to the '*telos* of flourishing', but because they are not actual agents of the state, they have the potential to be problematic.[160] Thus in the absence of these building blocks of governmental effectiveness, political actions that would normally be initiated and supported by a local governmental authority are undertaken by those not specifically mandated to exercise the appropriate functions.

One may wonder why, in circumstances whereby the 'state-strength dilemma' has been so apparent, agents of the state should actually hold a 'monopoly' on the 'power' that is presumed to exist. The line between 'state' and 'society' blurs further—a matter that is important because it can draw the appellation of 'state authority' into question: in situations whereby state agents operate in the *Hinterlands*, the sense of connectedness to the bureaucratic function of the state, and the administrative and regulatory pull of the capital is not often felt. Local societies often function independently of macro-level political delineations. The after-effects of colonial possession, and, thus, the relevance of the original legal title, are profound.[161] Nevertheless, it has been demonstrated that the actual societal situation, upon which this legal title is built, is variable.

An illustration of this is, by analogy, akin to the biological process of dissecting the walls of individual cells. Cells are broken down into organic and inorganic types. In the days of state-

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[158] D. Rothchild and L. Lawson, *Interactions Between State and Civil Society,* in J.W. Harbeson *et al* (eds.) Civil Society and the State in Africa 257-58 (1994) [hereinafter Rothchild and Lawson], citing G. Hyden, *Problems and Prospects of State Coherence*, in D. Rothchild and V.A. Olorunsola (eds.) State Versus Ethnic Claims 69 (1983).

[159] The establishment and maintenance of the site allafrica.com is exemplary of this type of development.

[160] Many enterprises which would be under private control in the European context, even before its recent spate of large-sector privatisations, are indeed agents of the state in sub-Saharan Africa. *Cf.* J.C.N. Paul, *Participatory Approaches to Human Rights in Sub-Saharan Africa*, in A.A. an-Na'im and F.M. Deng (eds.) Human Rights in Africa: Cross-Cultural Perspectives (1990): "The colonial state built the foundations—legal, economic and political—of the postcolonial state […]. The state became the major employer of salaried workers; the incomes and perks of its higher officials were extraordinarily large, relative to the local economy, and the status ascribed to these offices was great."

[161] See e.g II R.S.A.1324, Honduras-Guatemala Border case, as cited in M. Kohen, Possession Contestée et Souveraineté Territoriale 473 (1997) [hereinafter Kohen].

hood where effectiveness had primacy over territorial integrity, the 'cells' of statehood were more akin to inorganic types. They had cell walls, as such, which could be seen as the presence of juridical effectiveness inherent in 'civilising' statehood.[162] But when colonialism had to be abandoned, the cell walls were made to undertake some form of reaction which—to continue analogously—transformed them from inorganic to organic. The symbolic dissolution of the cell wall, by comparison, reflects the equity between states (and types of cells), as well as the underlying differences between the various sub-types of the synonymous object. That is to say, further, that, if the structures (the principle of effectiveness as a rigid cell wall) have been corroded to the point of irrelevance (the process of decolonisation creating a hybrid-organic cell), to what extent do 'agents' of 'the state' actually need to work for 'the state' *per se*?

More specifically, the positivist aspect of statehood holds dear a 'civilising' effect, yet those who have a legal, postcolonial title to carry on the 'civilising' mission may not always be, comparatively speaking, the best placed to do so. For if the colonial menace was overthrown, and indeed, if something like modern democratic governance has been fated to replace colonial 'civilisation', who really is to say whether e.g. a hierarchical state military provides a greater social benefit on the ground than e.g. a consortium of local women's associations; or, for that matter, a local taxation authority versus an informal network of local goods providers? This is where postcolonial self-determination becomes deeply convoluted, as if self-determination were to mean the right to choose, then local societies would act in such a way as to benefit themselves the most. That such societies are not always homogenous, that minority rights regimes can be ineffective, that peoples' rights are problematic, then factual situations could easily lead to legal conundrums. Still, if the 'ethical positivism' framing natural law as a philosophical underpinning of rights can be accepted, some of the rigidity in assigning the 'governance' function exclusively to direct agents of the state can be mitigated. In other words, it could be argued—and, indeed, it should be argued—that whoever can do the job should do the job.

The notion of political accountability then takes on a more complex meaning, as Patrick Chabal writes. If decolonising self-determination created political accountability as a new principle,[163] and political accountability could not be inherently be supported by the bureaucracy,[164] then the roles played by 'civil society' should be reconsidered. Drawing on Jean-François Bayart, he seems to frame 'civil society' with a pragmatic response to the weaknesses of the postcolonial African states:

> […] in the African context, civil society, in so far as it can be formally defined, consists not just of what is obviously not part of the state but also of all who may have become powerless or disenfranchised: not just villagers, farmers, nomads, members of different age groups, village councillors, or slum dwellers, but also professionals, politicians, priests and mullahs, intellectuals, military officers and all others who are, or feel they are, without due access to the state. Civil society is thus a vast ensemble of constantly changing groups and individuals

[162] The fact that colonialist states came nowhere near the level of widespread governmental effectiveness directly correlating to the absolute rigidity to be found in inorganic cells is irrelevant, as the endgame of the civilizing mission was societal replication. *Cf.* J.F.C. Ferry, Speech Before the French Chamber of Deputies, March 28, 1884, in Discours et Opinions de Jules Ferry, ed. Paul Robiquet (1897), 210: "Gentlemen, we must speak more loudly and more honestly! We must say openly that indeed the higher races have a right over the lower races [...] I repeat, that the superior races have a right because they have a duty. They have the duty to civilize the inferior races [...] In the history of earlier centuries these duties, gentlemen, have often been misunderstood; and certainly when the Spanish soldiers and explorers introduced slavery into Central America, they did not fulfill their duty as men of a higher race [...] But, in our time, I maintain that European nations acquit themselves with generosity, with grandeur, and with sincerity of this superior civilizing duty."
[163] P. Chabal, Power in Africa: An Essay in Political Interpretation 65 (1994) [hereinafter Chabal].
[164] See *Id.* at 67.

> whose only common ground is their exclusion from the state, their consciousness of their externality and their political opposition to the state.[165]

Civil society, generally speaking, is a repository for societal power that is not vested within the state itself. It is not a particularly new idea, identifiable by an inward-looking view of society that came about by the end of the seventeenth century, fuelled by the Scottish enlightenment and the writings of Cicero, Grotius, Puffendorf and Barberyrac.[166] A definitional framework for a more contemporary era is provided by Nancy Thede, in her paper to the UN seminar on the interdependence between democracy and human rights. She writes:

> Civil society as a theoretical concept refers to a relational sphere of ideology and power where individuals associate for ends determined collectively and autonomously. It is "outside" the state because no coercion from the latter is involved. […] The approach commonly used to civil society in operational terms raises several issues. First, there is a strong tendency to reduce the scope of the notion to concrete actors, and in particular to nongovernmental organizations (NGOs) only. In many cases, the reference is to those NGOs dedicated to involvement in the policy process only. Second, civil society is often considered as being in opposition to the state, an alternative or even antithetical to it. In reality, however, the state is the necessary guarantor of the autonomous space in which civil society operates. Third, civil society is often treated in a strictly instrumental manner, as an actor that can channel programming determined by other agencies, but not as an autonomous agent on its own terms.[167]

The problem is that often in a postcolonial state, such as in the African context, when the rulers of very weak states become practically indistinguishable from warlords,[168] "a 'civil society' of independent entrepreneurs may consist of the very same people a ruler regards as menacing rivals or local people identify as warlords".[169] While this may indeed be possible, this appears to be more due to the knotty delineation between state and society under those circumstances, rather than due to an inherently dysfunction-causing syndrome. The point is encapsulated by Steven Ndegwa:

> As one observer of civil society in Africa [Louis Helling, in a personal communication to Ndegwa] noted, being in civil society is the alternative to employment in the civil service. This statement expresses both the possibility and likely contradiction that civil society may hold for democratic development in Africa. In the 1960s, scholars and development practitioners believe that the African state was the only institution capable of developing newly independent countries. […] But today, the civil service and the state in general have become liabilities to African development and democracy. The current situation presents a reversal of sorts. Development aid is increasingly channelled through nonstate actors, and progressive elites for social, economic, and political change are situated in civil society. Will civil society act any differently from the civil service (the state) to deliver on the promise of democracy?[170]

Indeed that is the question at hand, and it must be acknowledged from the outset that the answer may be in the affirmative, due to the distinctly blurred nature between the public and private realms. The 'complex social milieu' through which this process is borne is well-

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[165] *Id.* at 83, citing J.-F. Bayart, *Civil Society in Africa,* in P. Chabal (ed.) Political Domination in Africa (1986), at 112: "Though it is arguable that the concept of civil society is not applicable outside European history I shall define it provisionally as 'society in its relation with the state […] in so far as it is in confrontation with the state' or, more precisely, as the process by which society seeks to 'breach' and counteract the simultaneous 'totalisation' unleashed by the state."

[166] See Seligman, *supra* note 114, at 21 *et seq.*

[167] N. Thede, *Civil Society and Democracy*, paras. 4-5, Seminar on the Interdependence Between Democracy and Human Rights, UN OHCHR, 25-26 November 2002, available from www.unhchr.ch.

[168] See W. Reno, Warlord Politics and African States (1998), at 3 *et seq.*

[169] *Id.* at 33.

[170] S.N. Ndegwa, The Two Faces of Civil Society: NGOs and Politics in Africa 5 (1996).

encapsulated by Donald Rothchild and Letitia Lawson:

> In many countries, vertically organized interest groups continue to be more influential than horizontally organized ones. Horizontally organized interest groups such as labor unions, bar associations, women's organizations, and farmers associations are making increasing demands on the state, adding to its legitimacy even while challenging the government; however, vertically organized communal groups continue to weaken the authority of the state, and the public realm more generally, through clientlistic politics and other privatizing strategies. Thus, as we attempt to understand the operation of civil societies in Africa, we must be alert to the sometimes reinforcing but often contradictory demands of communal groups (which may exert centrifugal forces on both state and civil society) and emerging class and economic interest groups (which more often exert centrifugal forces), as well as the continued salience of societal disengagement.[171]

What is recognised is that the institutions which reflect the best forms of societal self-preservation are those which may not necessarily be associated with the state *per se*, and that individual rights protections, including the minority rights regime, may also prove problematic in implementation. This is problematic because elements in the human condition that allow for self-organisation and self-protection, such as those going back to ancient Sumerian societies, predate the imperial 'civilising' mission by thousands of years. Now, the postcolonial state must look inward at itself to recapture the essence that has long since gone missing.[172] As Rothchild and Lawson conclude:

> Civil society is made up of publicly active groups that implicitly recognize the legitimacy and authority of the state (although not necessarily the government or the existing regime). These groups, in interaction with the state (both cooperation and conflictual), attempt to define and control the political, economic, and social norms that will govern society at large. Elites who represent sectional interests against the state often operate outside the confines of civil society, insofar as they fail to accept the boundaries of the society and the legitimacy of the state.[173]

The problem of disenfranchisement in the postcolonial state has become apparent to the extent that some African scholars want to 'redefine' legitimate (African) statehood.[174] *Prima facie*, it would appear that, given the increasing relevance of 'civil society' to the administration of postcolonial states, and the resulting implications for public international law generally, a liberal reading of what constitutes an *effectivité* would contribute to the manifestation of internal self-determination in the postcolonial state.

The contributions of internal self-determination to the concept of a 'national life'

> The non-universal, relativist view of human rights is in fact a very state-centred view and loses sight of the fact that human rights are *human* rights and not dependent on the fact that states, or groupings of states, may behave differently from each other so far as their politics, economic policy, and culture are concerned. I believe, profoundly, in the universality of the

[171] Rothchild and Lawson, *supra* note 158, at 256.
[172] *Cf.* J.D. van der Vyver, *Religious Freedom in African Constitutions*, in A.A. An-Na'im (ed.), Proselytization and Communal Self-Determination in Africa 139 (1999): "There is more to human rights protection than simply constitutional guarantees. Besides effective enforcement mechanisms, including a courageous judiciary willing to stand up to the powers that be, human rights protection is also to a large extent dependent upon a certain consciousness—a public morality founded on respect for human rights and fundamental freedoms—that manifests itself in a belief on the part of the government and the subjects of state authority that implementation of the values embodied in the doctrine of human rights makes for better living conditions within the body politic."
[173] Rothchild and Lawson, *supra* note 158, at 256.
[174] See generally O.C. Okafor, Re-Defining Legitimate Statehood: International Law and State Fragmentation in Africa 65 (2000).

> human spirit. Individuals everywhere want the same essential things: to have sufficient food and shelter; to be able to speak freely; to practise their own religion or to abstain from religious belief; to feel that their person is not threatened by the state; to know they will not be tortured, or detained without charge, and that, if charged, they will have a fair trial. I believe there is nothing in these aspirations that is dependent upon culture, or religion, or stage of development.[175]

A concise segment of Hurst Hannum's work elucidates discussion of the 'self-determination as self-defence' idea, by melding the viewpoints of three articulate scholars to begin fleshing out post-colonial responses to tyranny. The discussion suggests that threatened groups have a right to societal existence,[176] and indeed some measure of equality vis-à-vis other groups within the state;[177] perhaps most significantly, too, the effectuation of this right is not expressly delineated by the make-up of existing state boundaries.[178] Such a viewpoint is likely to succeed in reflecting the essence of the contemporary ambit of self-determination. What is significant to highlight, however, is the increased role that internal self-determination mechanisms can play to guarantee these ends. Hannum's 1993 article equates 'self-determination-as-self-defence' with the automatic sense of 'self-determination-as-secession', or indeed revolution, but not explicitly drawing reference to the reasoned persuasiveness of either democratic processes or devolutionary powers as a catalyst for manifesting postcolonial internal self-determination. He writes:

> If a minority's physical existence is threatened, or if there is intense discrimination against a particular segment of society, some reaction against oppression is undoubtedly justified; even the Universal Declaration of Human Rights refers to "rebellion against tyranny and oppression" as a "last resort." However, secession may not be the most appropriate remedy. Overthrowing the oppressive government and restoring human rights would be as philosophically and politically sound as secession.[179]

Although questions of secession are problematic by default, it can be further imagined that an effective "reaction against oppression" could be achieved without necessarily invoking secessionist claims. For if self-determination means access to government, a genuinely devolved governance system, with equal opportunities to receive the benefits of the state and adequate minority protection guarantees, would be an operative counterbalance to the *status quo*: a 'reaction against oppression'. It therefore seems logical to assume that, in an inter-societal conflict, once the wisdom of the abandonment of the military option becomes apparent, and steps to that end are taken (through a the implementation of a negotiated peace, the emergence of the phenomenon of 'war fatigue' or perhaps in direct response to secessionist claims as such), the notion that further inter-societal developments will involve a concrete 'reaction against oppression' is doubtless.

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[175] R. Higgins, Problems and Process: International Law and How We Use it 97 (1994) [hereinafter Higgins].
[176] *Cf.* B. Neuberger, National Self-Determination in Postcolonial Africa 71 (1986), as quoted in Hannum, *supra* note 89 at 44: "There can be compelling reasons for secession such as if the physical survival or the cultural autonomy of a nation is threatened, or if a population would feel economically excluded and permanently deprived."
[177] *Cf.* O. Kamanu, *Secession and the Right to Self-Determination: An OAU Dilemma*, 12 J. Mod. Afr. Stud. 335, 362 (1974), as cited in Hannum, *Id.*: "The ultimate justification of all social institutions, including the state, is the welfare of the individual, not just some metaphysical institution called 'the majority'."
[178] *Cf.* L. Buchheit, *supra* note 59, at 222, as cited in Hannum, *Id.* at 45: "Remedial secession envisions a scheme by which, corresponding to the various degrees of oppression inflicted upon a particular group by its governing State, international law recognizes a continuum of remedies ranging from protection of individual rights, to minority rights and ending with secession as the *ultimate remedy*." (emphasis supplied)
[179] Hannum, *Id.*

The continual perpetuation of self-determination

This demonstrates once more that the ambit of self-determination is certainly not conceptually closed or, as was suggested by Kiwanuka,[180] a one-off exercise, for there is no inherent preclusion for further acts of self-determination after decolonisation.[181] As Crawford writes, governments themselves are highly unlikely to address violations of peoples' rights,[182] but individual human rights are sometimes functionally insufficient,[183] and "if you regard self-determination as essentially a summary of other rights […] then a key right to self-determination is the right to participate democratically in the political system to which you belong […]. On this view, self-determination is a continuing right, the collective expression of the individual rights of the members of each political society".[184] And yet one must tread lightly in this regard, as refutations of the distinctions between colonial self-determination and postcolonial self-determination still can be observed. Rubin's previous comments identifying 'self-determination' with 'secession' and 'self-government' as mere 'morality' exemplify this assertion.[185] It would seem that he fails to consider a legal middle ground between *status quo* and secession, for if "the general multilateral treaty terms referring to national self-determination as a right represent agreement as to moral or political principle, not legal entitlement,"[186] then this must be seen as a compulsory rejection of the democratic entitlement theory and a legal repudiation of anything but decolonising secession through self-determination. Such a viewpoint seems stiflingly rigid, in that it implies only that decolonisation has become a *fait accompli* with no further relevance in terms of law or policy. Indeed, the correlation of postcolonial self-determination with democracy has demonstrated how the modern law of self-determination is something more than a one-off exercise.

It has become impossible to deny that a juridical status for a middle ground between these points should not be seen as mere conjecture. This middle ground is the specific measure of a state's effectiveness towards the promotion and protection of the basic core of international and regional human rights standards, the level of access to the decision-making structures made available to citizens of a state and the level of practical independence of judges and lawyers. If this is not yet recongisable as specific right *per se*, it must nonetheless be accepted as demonstrative of recent trends in the development of the postcolonial law on self-determination. Thomas Franck asserts that such a step is fundamental in order for this ongoing, postcolonial 'right of peoples' to avoid what he terms a "descent into incoherence".[187] That is to say, it has become difficult to ignore Franck's repeated assertions; as he illuminates:

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[180] See R.N. Kiwanuka, *The Meaning of "People" in the African Charter on Human and Peoples' Rights*, 82 AJIL 80 (1988), and discussion *supra* chapter four at text accompanying note 133.
[181] Other acts of self-determination could occur, such as a devolutionary arrangement as part of an internal self-determination package, or, perhaps, a continuation of that process into external self-determination through either consensual or contested means.
[182] J. Crawford, *The Right of Self-Determination in International Law,* in P. Alston (ed.) Peoples' Rights 22 (2001) [hereinafter Crawford].
[183] *Id.* at 24.
[184] *Id.* at 25. He continues, *Id.* at 38, stating that the *lex lata* of self-determination is that it applies to all peoples, for that "it would be strange if self-determination was defined only by its [contemporary] denial."
[185] See Rubin, *supra* note 44, at 253: "Since there is no holder of such a right and no standing in any state to speak for the national or other minority or majority of another, and all states deny such a right to their own secessionist movements, it is doubted that this category, although much discussed and asserted loudly, exists."
[186] *Id.* at 269.
[187] T.M. Franck, *Legitimacy in the International System,* 82 AJIL 713, 746 (1988).

> The current trend of efforts to redefine self-determination by ameliorating the underlying problems does recognize an international legal right, not to secession, but rather to cultural autonomy and democracy. In the transition from colonial to post-colonial contexts this right, as interpreted in the practice of states, has begun to be applied vigorously to measure the legitimacy of a secessionist regime. […] Probably, the *uti possidetis* claim of a totalitarian state, or one which has persecuted its minority and denied petitions for regional autonomy, is weaker than a similar claim advanced by a democratic society which consistently accords equal rights to its minorities.[188]

However, indeed, the circumstances currently under discussion are not those related to a 'secessionist regime', as such (as these circumstances are those which are, in the first instance, to be pursued in order to *avoid* the implications to *uti possidetis*), but rather, the extent to which steps can be taken to develop and strengthen autonomous structures, without a wholesale disruption to the *status quo*. To that end, what really seems to be at issue is that, in order to advance through to the more comprehensive, adversarial stages of self-determination (e.g. asserting a greater level of 'horizontal societal preservation', in response to actions undertaken in the name of 'vertical state consolidation'), a 'people' would have to overcome certain burdens of proof, in order to credibly advance along a further irreversible act of state-creation in an already-decolonised state. Such is the formulation advanced by Paul Brietzke, in an articulate and meticulously referenced 1995 article.[189] In it, amongst his numerous conclusions, is the observation that a self-determining entity will have to bear considerable burdens in demonstrating its worthiness towards the self-determination process, as well as toward demonstrating its democratic credentials. He adds:

> The nation's burden of proof would increase to the extent that it demands one of the more extreme self-determination remedies. Self-determination provokes so much conflict because states have long equated the right with the most extreme remedy: secession. Thus […], international law should expand the repertoire or menu of less extreme self-determination remedies so that international evaluators can achieve a better fit between a remedy and a particular denial of self-determination that is proved.[190]

This perspective fits squarely within the framework put forth by Frederic Kirgis,[191] deserving further consideration in light of more recent discussions concerning postcolonial statehood in particular. Drawing upon the 1970 Friendly Relations Declaration and the 1994 Vienna Declaration and Programme of Action, Kirgis refines his earlier attempts to measure "custom on a sliding scale"[192] through the interactions between levels of democracy on the ground and the tolerance of the international community for changes to the *status quo*. The essence of his argument is as such:

> If a government is at the high end of the scale of democracy, the only self-determination claims that will be given international credence are those with minimal destabilizing effect. If a government is extremely unrepresentative, much more destabilizing self-determination claims may well be recognized. In this schema, a claim of right to secede from a representative democracy is not likely to be considered a legitimate exercise of the right of self-determination,

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[188] See Franck, Fairness, *supra* note 101, at 168.
[189] P.H. Brietzke, *Self-Determination, or Jurisprudential Confusion: Exacerbating Political Conflict* 14 Wisc. Int'l L.J. 69 (1995) [hereinafter Brietzke]. His comments, *Id.* at 128, are evocative of the general tone of his article: "The relevant legal and political issues would be more fairly joined if scholars recast the jurisprudence of self-determination into something like a dialectical pragmatism."
[190] *Id.* at 129. He continues, *Id.*: "Although self-determination has grown stronger and more concrete as a process, it needs an institutional home in order to develop an adequate civil law-style doctrinal *jurisprudence*, to resolve disputes more effectively and to strengthen sanctions on misbehavior."
[191] F.L. Kirgis, *Editorial Comment: The Degrees of Self-Determination in the United Nations Era*, 88 AJIL 304 (1994) [hereinafter Kirgis].
[192] See F.L. Kirgis, *Custom on a Sliding Scale*, 81 AJIL 146 (1987).

> but a claim of right by indigenous groups within the democracy to use their own languages and engage in their own noncoercive cultural practices is likely to be recognized—not always under the rubric of self-determination, but recognized nonetheless. Conversely, a claim of a right to secede from a repressive dictatorship *may* be regarded as legitimate.[193]

Simply put, if the tensions between 'vertical state consolidation' and 'horizontal societal preservation' are low, the balance of legitimacy in self-determination claims tips towards the preservation of the *status quo*, whereas, if the tensions escalate beyond a certain point—not just violations of cultural and linguistic rights, but large-scale civil and political rights violations, including violations of the right to life—the balance of legitimacy for those self-determination claims tips towards the allowance of a modification to the *status quo*. This is so because such a claim would very likely be automatically 'less destabilising'; indeed, as these are the socio-political circumstances, genuinely mired in the mud of the Hobbesian floor, if undertaking such a drastic measure to establish self-rule were capable of pushing all people on the territory in question further towards the Kantian ceiling through significant decreases in violations of the right to life,[194] the only thing becoming destabilised would be the borders of the states in question (and 'quasi-states', at that). Many of these characteristics may be observed in sub-Saharan Africa, as observed by Bayart, Ellis and Hibou:

> There is a strong possibility that sub-Saharan Africa is returning to the 'heart of darkness'. This, we must repeat, is not synonymous with 'tradition' or 'primitiveness', but is related to the manner in which Africa is inserted in the international system through the economies of extraction or predation in which many of the leading operators are foreigners, whose local African partners have to a considerable degree based their careers on the use of armed force. The relevance of Joseph Conrad's novel is clear for anyone who has an interest in situations like those of the Democratic Republic of Congo, Liberia, Sierra Leone, the Central African Republic, Sudan or Equatorial Guinea.[195]

Consequently, further evidence is given to the confluence of democratic governance with contemporary public international law. But before examining this juridically questionable premise in greater detail, some initial delineation should be made, on ways in which the international community should address such self-determination claims. By now, the relative unwillingness of the international community to examine the topic critically comes no longer as a surprise. One way to proceed through these circumstances is to employ the two-part test first devised by Lee Buchheit in the late 1970s, by categorising the 'objective' and 'subjective' conditions related to the situation on the ground.[196] He suggests that objective criteria, such as race, ethnicity, language, history, culture and geography, are matched against the extent to which a territorial group self-identifies as a 'people' and expresses a sufficient commonality of interests as likely to continue to do so in the future.

Provided such objective and subjective conditions can be identified, one would then want to find a means of assessment for the vertical and horizontal tensions that are aiming for reconciliation. Patrick Thornberry, although referring to minority groups and not 'peoples' *per se*, provides six criteria that can be put to good use, in identifying repressive circumstances which would make an aggrieved population want to improve its level of self-rule.[197] He identi-

[193] Kirgis, *supra* note 191, at 308.
[194] The best way to measure this would be using Bangladesh and Eritrea as examples. Both should be seen as relative successes in this regard, despite the intense armed conflicts that respectively catalysed and followed their secessions.
[195] J.-F. Bayart, S. Ellis and B. Hibou, The Criminalization of the State in Africa 114 (1999). Note that this work does not use 'criminalization of the state' to mean the invocation of state responsibility as such.
[196] Buchheit, *supra* note 59, at 10.
[197] See P. Thornberry, International Law and the Rights of Minorities (1991), at 1 *et seq*.

fies: (a) assimilation (creation of a homogenous society for the purpose of strengthening the state); (b) integration (merging elements of various cultures whilst guaranteeing equal rights); (c) fusion (encouraging the cultural amalgamation of groups over time); (d) pluralism (encouraging the intermingling of separate cultural groups over time); (e) segregation (a dominant/dominated power arrangement epitomised by the *apartheid*-era South Africa or the pre-Hernandez *v.* Texas[198] and Brown *v.* Board of Education[199]-era United States); and (f) ethnodevelopment (an inverted *Leitkultur* of sorts, exemplified by the actions taken by indigenous peoples' rights advocates, aimed at the self-empowerment and preservation of the distinctness in a society's own culture in the face of a more dominant political reality). Particularly in the most damaging of such circumstances, such as (forced) assimilation and segregation in the list above, the extent to which coercive state behaviour is seen to exist becomes apparent. In addition, as has been advocated, coercion has indeed become a dominant governance theme throughout postcolonial Africa. Based upon the discussions presented heretofore, it can be further implied that this coercive activity does little to alleviate a hegemonic core-periphery model within a state, and therefore works to perpetuate the maintenance of inter-societal tensions; it is, after all, coercion. Therefore, the extent to which these situations can be remedied are the extents to which self-determination of peoples can improve the effectiveness of the governance over a particular territorial entity. The 'democratic governance' thesis thus deserves deeper analysis.

A recapitulation of modern territorial statehood: Sovereignty in view of the concepts of democracy, internal self-determination and minority rights

> Self-determination has never simply meant independence. It has meant the free choice of peoples. During the era of colonialism, that choice was focused on the possibility of independence or other post-colonial status. That is the aspect of colonialism that reflects the entitlement referred to in Article 1 of the International Covenant on Civil and Political Rights that all peoples may 'freely determine their political status'. But the entitlement goes beyond that (and this is the part that is conveniently forgotten by those who limit self-determination to a historical moment of decolonization)—the entitlement is also to 'freely pursue their economic, social and cultural development'. And how can that be done if self-determination does not also provide for free choice not only as to *status* but also as to *government*? […] And the right remains an ongoing one. It is not only at the moment of independence from colonial rule that peoples are entitled freely to pursue their economic, social and cultural development. It is a constant entitlement. And that in turn means that they are entitled to choose their government.[200]

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> The principle of democracy is now universally recognized. The right of all people to take part in the government of their country through free and regular elections, enshrined in Article 21 of the Universal Declaration of Human Rights, is not peculiar to any culture. People of all cultures value their freedom of choice, and feel the need to have a say in decisions affecting their lives. Increasingly, they understand that democracy, properly implemented, provides the best guarantee of a climate of free discussion, in which people can learn from each other's ideas, and reach agreement on solutions to their common problems. One of the greatest challenges to humankind in the new century will be the struggle to make the practice of democracy equally universal. In that struggle, nations in which democracy is already well established will need to be vigilant in preserving that achievement, and to work together to help those where democracy is still new or emerging.[201]

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[198] See 347 U.S. 475 (1954).
[199] See 347 U.S. 483 (1954).
[200] Higgins, *supra* note 175, at 119-120.
[201] Address delivered by UN Secretary General Kofi Annan at the International Conference: "Towards a

'Democracy' *per se* is a sentiment expressed with increasing, and presumably welcome frequency, from its legal antecedents in the Friendly Relations Declaration to the interwoven rights of self-determination and political participation and other United Nations actions in the field of human rights.[202] If, as the Vienna Declaration and Programme of Action proclaims, all human rights are universal, indivisible, interdependent and interrelated, and self-determination of peoples is not a one-off exercise, then it is a claim to self-rule—a legitimate claim to democracy—that an aggrieved people would seek to obtain in the first instance, in order to achieve a measure of horizontal societal preservation. To be certain, while the classical international law makes few critical demands that a state is to be democratic in order to earn legitimate recognition as a state *per se*,[203] under the most contentious of circumstances, whereby claims are being made within a state that the state itself is not living up to the requirements put forth in the Friendly Relations Declaration with regard to governmental representation "without distinction to race, creed or colour", democracy is, in fact, of great relevance in pushing a state closer toward the fulfilment of these requirements. Democracies are the product of systems of laws, so they must therefore reflect the wills and needs of lawmakers chosen by those with a voting entitlement within a state. This highlights the problem to be found so often in sub-Saharan Africa, in that the systems of laws tends to reflect the wills and needs of the original colonialists which replicated, to varying degrees, the European socio-political institutions in their colonial administrations. This reflects a deeper reality that the 'wills and needs of the lawmakers' are, in reality, largely still the 'wills and needs of the colonialists', or, at the very least, are constructed from that mould.[204]

The scholarship of Philip Allott is instrumental in advancing this view, in that he dissects the social function of law into "the presence of the social past", "an organising of the social present" and a "conditioning of the social future", and, from that, he suggests the implications of how law affects society.[205] His argument is that law develops a society's 'self-constituting' aspects in law, ideas and actions, creating a specific social form and a universalising, particularising system, as a means to determine the 'middle ground'—a common interest for a society—as well as a theoretical basis for explaining a society "whose structures and systems make possible the mutual conditioning of the public mind and the private mind, and the mutual conditioning of the legal and the non-legal".[206] Democracy, then, by ensuring the right to choose, also contributes to the 'positive' definition and formulation of a people, in that, as members of the state would form a true society, able to articulate common interests grounded in a universal framework, to register their complaints and promote common interests. The phenomenon of horizontal societal preservation is integrated into the vertical state consolidation through the democratic process. To this end, the state and its different societies aim at working in tandem to develop the social

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Community of Democracies", UN Press Release SG/SM/7467 (27 June 2000).

[202] See particularly Commission on Human Rights resolution 2001/36 on Strengthening of popular participation, equity, social justice and non-discrimination as essential foundations of democracy (23 April 2000) considers the interplay between democratic development, poverty and sustainable human development. In addition, CHR resolution 2000/47 on Promoting and consolidating democracy (25 April 2000), aims at improving the processes of democracy and the functioning of democratic institutions and mechanisms within the framework of administrative and regulatory law. States are called on to promote and consolidate democracy by taking actions to strengthen human rights and fundamental freedoms; the rule of law; electoral processes; civil society; good governance; sustainable development; and social cohesion and solidarity, including strengthening state-society relations through devolution.

[203] But see discussion of the Badinter Commission, *supra* chapter two.

[204] For greater definition, see generally M. Koskenniemi, *'Intolerant Democracies': A Reaction*, 37 Harvard Int'l. L.J. 231 (1996).

[205] Allott, *supra* note 120, at 90.

[206] *Id.* at 290-91.

form. The promotion of the cultural interests of one particular group—indeed, ideally, all such groups—proceeds in such a way as to not be inherently threatening to others within the state.

Such is the ideal balance between vertical state consolidation and horizontal societal preservation in post-colonial states. Obviously, however, such idyllic formulations of inter-societal harmony will be practically difficult to achieve in many African states; nevertheless, it is precisely these formulations that represent the true potential of internal self-determination. Were the 'democratic governance' theorists to be correct, international human rights law would witness further structural reinforcements. Domestic legal systems would guarantee citizens a genuine say in how they would be governed and therefore—in much the same way self-determination of peoples is the genesis of all other basic human rights—governments would have a direct incentive to uphold those basic human rights, and a sub-state 'people' could use its status as such to its advantage in negotiating concessions from the central government.

Furthermore, there would be a dual-faceted international aspect to the right to democratic governance. First, because the core of human rights, from which the right to democratic governance was extracted, was international in origin, there would be something of an internationally-defined global standardisation process, whereby domestic jurisdictions would have relatively similar competences to respond to claims of violations of democratic governance issues from domestic groups. Moreover, if the domestic remedies became exhausted without a satisfactory resolution for the aggrieved party, there would be recourse to the treaty-monitoring bodies of the various UN covenants, as well as the horizontal enforcement system in the international forums of the UN Human Rights Council and the General Assembly.[207] It therefore becomes increasingly apparent that what is under consideration, at present, is the role internal self-determination plays vis-à-vis the promotion of other human rights, and to what degree it is able to do so in view of a particular circumstantial reality (*i.e.,* to what degree internal self-determination is able to respond to the needs of the entire populace and therefore increase the effectiveness of the state).[208] To this end, it is here where we return to Franck and his general assertion that it is only when a measure of coherence is inserted into the governance system of a particular state can actual compliance with the rules of that system logically be expected to follow.[209] This has strong implications for the aforementioned concept of 'individuation', because it is the actual guarantor of good-faith in effectuating democracy, and therefore in effectuating internal self-determination.

Thus the equation of internal self-determination with democracy gains further strength, particularly when projected through the core of Franck's related message—namely, that 'democracy matters' in assessing the legitimacy of states. The standard of democratic governance existing in a particular county would be a legitimate counterbalance to the exercise of purely coercive power by governments. Indeed, Franck asserted, democracy matters to such an extent that there are now legitimate legal expectations derived from the essence of international human rights law, which, when taken in aggregate, would dramatically reinforce the basic civil right to political participation. Obviously then, there is a tangible knock-on effect in terms of internal self-determination. This reinforcement would come primarily through four indicators for de-

[207] However, the hesitancy of the Human Rights Committee to accept group claims, discussed *supra* chapter four, must be recalled.
[208] For discussion, see K. Doehring, *Effectiveness*, in R. Bernhardt (ed.), 7 Encyclopdia of Public International Law 70, at section 3 ("Effectiveness as a Pre-condition of the Creation of Rights").
[209] For discussion, see T.M. Franck, *The Power of Legitimacy Among Nations* (1990), at 91 *et seq.* See also generally Franck, Fairness, *supra* note 101, Franck, Democratic governance, *supra* note 100, Crawford, Democracy, *supra* note 97, at 113 and J. Crawford, The Creation of States in International Law 148-155 (2d. ed., 2006).

termining the legitimacy of rules: (a) pedigree, or the rule's root in historical processes; (b) determinacy, or the rule's ability to communicate content; (c) coherence, or the rule's consistency with other rules; and (d) adherence, or the rule's vertical connectedness to higher normative principles.[210] However, in Franck's formulation, perhaps the element of greatest significance is the necessity for regular elections for a state to be deemed 'legitimate', a requirement which Franck notes is being met with increasing incidences of democratic elections—or nominally democratic at least—in all parts of the world.[211] It can be furthermore inferred that such a requirement would demonstrate an evolution in international law further away from the effectiveness principle towards a more qualified judgement of the actual *effectivités*, in that to have genuine effective control over a territory, the government of a state would, at the very least, have to offer the opportunity for citizens in otherwise disaffected regions to have the right to vote on national affairs, as well as in local administration.[212] Such a formulation involves direct responsiveness between the administration of a territory and its administrators—certainly something quite different from overt coercion, and certainly the government which employs the former over the latter will be seen as 'more legitimate' in international law.

But let it be explicitly clear: democracy matters, profoundly, both as a matter of law—*opinio juris sive necessitates*—and as a matter of policy. In Fareed Zakaria's words:

> We live in a democratic age. Over the last century the world has been shaped by one trend above all others—the rise of democracy. In 1900 not a single country had what we would today consider a democracy: a government created by elections in which every adult citizen could vote. Today 119 do, comprising 62 percent of all countries in the world. What was once a peculiar practice of a handful of states around the North Atlantic has become the standard form for humankind. Monarchies are antique, fascism and communism utterly discredited. Even Islamic theocracy appeals to only a fanatical few. For the vast majority of the world, democracy is the sole surviving source of political legitimacy. Dictators such as Egypt's Hosni Mubarak and Zimbabwe's Robert Mugabe go to great effort and expense to organize national elections—which, of course, they win handily. When the enemies of democracy mouth its rhetoric and ape its rituals, you know it has won the war.[213]

A more specific entry-point into democracy's role in contemporary international (human rights) law comes from the Seminar on the Interdependence Between Democracy and Human Rights, held in November 2002, at the United Nations Office at Geneva.[214] While Shadrack Gutto, in a conference paper, observed that "in the modern social sciences as well as in legal understanding, self-determination means political and economic, social and cultural self-determination in all the spheres and at all the levels of social organisation and governance",[215]

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[210] See Franck, democratic governance, *supra* note 100, at 52 *et seq;* see also discussion of Franck's democratic governance argument *supra* chapter two of this thesis.
[211] *Id.* at 64, referring to ICCPR Article 25, whereby all citizens have the right "(a) to take part in the conduct of public affairs, directly or through freely chosen representatives; and (b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors", as viewed through e.g. GA Resolution 45/150 (21 Feb. 1991), at para 2: "…that periodic and genuine elections are a necessary and indispensable element of sustained efforts to protect the rights and interests of the governed…"
[212] Although some, such as Elihu Lauterpacht, recognise the direct, ongoing and permanent linkages between the acquisition of territorial title by a state and its ongoing sovereignty over that territory. See E. Lauterpacht, *Sovereignty: Myth or Reality?*, 73 Int'l Affairs 149 (1997), at 149 *et seq*.
[213] F. Zakaria, The Future of Freedom: Illiberal Democracy at Home and Abroad 13 (2003).
[214] Commission on Human Rights' resolution 2001/41 (adopted 23 April 2001 in a 44-0-9 vote) on Continuing dialogue on measures to promote and consolidate democracy mandated the Office of the High Commissioner for Human Rights to organize an expert seminar to examine the interdependence between democracy and human rights, and to report on its conclusions to the Commission's 59th session.
[215] S. Gutto, *Current concepts, core principles, dimensions, processes and institutions of democracy and the*

what is perhaps more revealing is the emphasis given in the mandating resolution itself, which

> [r]eaffirms that democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing;[216] and also reaffirms that free and fair elections are an essential feature of democracy and must be part of a broader process that strengthens democratic principles, values, institutions, mechanisms and practices, which underpin formal democratic structures and the rule of law.[217]

What is immediately shown is that elections are a recurring natural feature of democracy, and are thought of as essential benchmarks for demonstrating its existence. As will become apparent in the course of the present discussion, although the electoral process is an important one, it will be something of a challenge to remain focused on the idea of democracy in a larger scope, one which takes due account of the criteria promulgated by e.g. Franck and Thornberry in the course of the present discussion. That the electoral process was seen, in the chairperson's conclusions of the UN seminar on democracy and human rights, as a particular procedure in the context of a series of larger societal phenomena, is even more revealing.[218]

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inter-relationship between democracy and modern human rights, para. 7, Seminar on the Interdependence Between Democracy and Human Rights, UN OHCHR, 25-26 November 2002, available from www.unhchr.ch.

[216] CHR Resolution 2001/41, at para. 2.

[217] *Id.* at para. 3.

[218] These conclusions are reproduced in full:

- Democracy and human rights are interdependent and inseparable. Human rights standards must be seen to underpin any meaningful conception of democracy, and democracy offers the best hope for the promotion and protection of all human rights.
- The High Commissioner for Human Rights opened the seminar with a call for a concept of democracy that is holistic, encompassing the procedural and the substantive, formal institutions and informal processes, majorities and minorities, female and male, government and civil society, the political and the economic, the national and international.
- There is no single model of democracy or of democratic institutions. Indeed, the ideal of democracy is rooted in past and emerging philosophies and traditions from all parts of the world, including particular philosophical writings, ancient texts, spiritual traditions, and traditional mechanisms originating in east and west, north and south. Thus, we must not seek to export or promote any particular national or regional model of democracy or of democratic institutions. To the contrary, a key strength of this approach is its recognition that each society and every context has its own indigenous and relevant democratic institutional traditions. While no single institution can claim democratic perfection, the combination of domestic democratic structures with universal democratic norms is a formidable tool in strengthening both the roots and the reach of democracy, and in advancing a universal understanding of democracy.
- The basis of democracy is its principles, norms, standards and values, many of which are enumerated in international human rights instruments. Democracy thus goes beyond formal processes and institutions, and should be measured by the degree to which these principles, norms, standards and values are given effect and the extent to which they advance the realization of human rights.
- The language of democracy has sometimes been misused. There is a value in helping the international community to be consistent in its use, by emphasizing its internationally agreed normative human rights content and by further clarifying its constituent principles and elements.
- Giving effect to democratic principles and to the standards contained in the human rights instruments necessitates the building of strong institutions of democratic governance, based on the rule of law, and including an accountable executive, an elected legislature, and an independent judiciary. Democratic institutions ensure popular control of power. Free and fair elections are essential, as are appropriate and effective institutions for popular participation and consultation between elections. Ombudsman offices, national human rights commissions, well-constituted electoral commissions, national oversight mechanisms, public audit offices, and other such bodies can all contribute to enhancing democratic governance in a society.
- Popular participation and control, collective deliberation, and political equality are essential to de-

The practical effect of democracy remains a most complicated business, with regard to the need for regular elections and sustainable structural conditions alike, for the politics of identity are complex enough in the European context alone,[219] but in circumstances whereby dis-

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mocracy, and these must be realized through a framework of accessible, representative and accountable institutions subject to periodic change or renewal. Democracy is a mechanism of self-determination, and must be based on the freely expressed will of the people, through genuine elections, with free information, opinion, expression, association and assembly.

- In a democracy, the rights, interests and 'voice' of minorities, indigenous peoples, women, disempowered majorities such as some populations of post-colonial societies, and vulnerable, disadvantaged and unpopular groups must be safeguarded.
- Democracy is never 'achieved' and the process of democratization is never complete. Popular vigilance is required. All countries, and the international community itself, are engaged in ongoing processes of democratization, and these processes should be strengthened and supported.
- The appeal of democracy includes its association with the advancement of the quality of life for all human beings. There is an inextricable link between democracy, all human rights and socio-economic progress and development. There is no 'either-or' dichotomy between socio-economic progress and democracy. To the contrary, democracy, development and human rights are interdependent and mutually reinforcing, and should thus be pursued together. Meaningful and informed political participation is in fact dependent upon fulfillment of economic and social rights such as the right to food and the right to education. The right to development is itself a crucial area of public affairs in every country, and requires free, active and meaningful participation.
- In the current context of globalization, whereby decisions affecting people's lives are often taken outside the national context, the application of the principles of democracy to the international and regional levels has taken on added importance. What should be pursued is a continuum of democratic governance, extending from the village, to the State, to our regional and international institutions and back.
- The effective application of the rule of law and the fair administration of justice are vital to the good functioning of democracy. Democracy thus demands attention to ensuring judicial independence, applying human rights law in judicial decisions, combating corruption in judicial systems, strengthening judicial administration, assuring adequate resources for the justice sector, and enhancing judicial training and education.
- The essential role of democratically elected legislatures requires particular emphasis. Properly constituted legislative bodies represent a vital institutional link between the people, their democracy and their human rights.
- The media should play an important role in democracies, contributing to the dissemination of human rights information, facilitating informed public participation, promoting tolerance, and contributing to governmental accountability. To do so, however, they must promote tolerance and social responsibility and be careful in their use of terminology and fair and responsible in their reporting. At the same time, concentration of media power can undermine democracy.
- A freely functioning, well-organized, vibrant and responsible civil society is essential to democratic governance. This presumes an active role for NGOs, women's groups, social movements, trade unions, minority organizations, professional societies and community groups, watchdog associations and others. Such groups have historically made important contributions to the formulation and advocacy of democratic rights. Civil society must itself adhere to the principles of human rights and democracy.
- Democracy, in form and substance, is threatened by concentrations and abuse of power, poverty, corruption, foreign occupation and aggression, inequality, discrimination, repression of minorities, exclusion of women, terrorism, abusive counter-terrorism measures, inadequate education, ineffective and unaccountable civil service, and, in general, all abuse of human rights. Building, protecting and consolidating democracy means, necessarily, countering these threats.
- Well-functioning democracies require adequate resources and technical expertise, both of which are appropriate subjects of international cooperation and assistance, where requested by countries seeking to strengthen democratic processes and institutions.

[219] That European states have become able to successfully accommodate stark differences in religious practice, language, culture, custom and tradition despite inconstancies in the full and exclusive definition of their own borders is, of course, a relatively recent development.

jointed ethnicities, collective identities and ungrounded power structures dominate the political landscape, a genuine rationale to one person is often a genuine absurdity to another. Furthermore, all is not always genuine, particularly when one considers how various ideologies exacerbate the stresses of ethnicity, myth, nationalism, emotion and misrepresentation, which can be so easily used by leaders to cause new discord,[220] or to perpetuate the discord left behind by colonials.[221] In addition, if one particular bit of territory within a state does not have access to effective government, if it has not enjoyed access to effective government, and, (as long as the *status quo* is maintained) if it is unlikely *ever* to have access to effective government, by virtue of a self-determination claim acceding to the level of a legal principle, an exception to the *uti possidetis* rule may be seen as valid, and an alteration to the *status quo* may well be within legal reach. However, if the internal character of self-determination can be preserved, this is clearly the most desirable outcome, as international law generally upholds the territorial holdings of a state "at least if it has controlled those holdings long enough for the rest of the world to get used to it".[222] Such an attitude is reflective of the desire of the state-based international system to perpetuate itself. Certainly, by the end of the 20th century, it seems fair to say that the world has, indeed, gotten used to the arbitrary nature of African borders. Simultaneously, international society was also beginning to observe that states which uphold liberal democratic practices have a tendency to avoid warfare with other liberal democratic states, as shown in a classic study by Michael Doyle.[223]

Although the line between interstate and intrastate relations is blurred, these thought processes do not occur in a vacuum, and less than a decade after Doyle's ground-breaking assertions, Thomas Franck was making his proclamation of democratic governance as an 'emerging right' as well as discussing its alter ego, the concept of 'postmodern tribalism' in regions lacking practices of good governance.[224] Yet it became increasingly observed in the international affairs literature that "the weak are more likely to accept the principles forwarded by the strong, in the first instance, if such principles are convincingly framed as universal rather than particularistic".[225] So, liberal democracy reached the universal stage, on the basis of some intrinsic worth. It is the root of a desirable system of future international order, to paraphrase Anne-Marie Slaugh-

[220] For discussion, see M. Barrett, The Politics of Truth, from Marx to Foucault (1991), at 166-67.
[221] *Cf.* A. Pagden, Peoples and Empires: Europeans and the Rest of the World from Antiquity to the Present 166 (2001): "Africa, as its postcolonial history has demonstrated all too brutally, is a land violated not just by the activities of European freebooters but by a false conception of ethnicity. Unlike India or much of Asia, or even ancient Mexico or Peru, sub-Saharan Africa before the arrival of the Europeans had very few very large-scale societies. One of the tragic consequences of indirect rule […] was the assumption that Africans were divided into what, in honour of some supposed affinity with early European societies, were called tribes. Most of these were either too large or too small to capture the complex ethnic divisions of most parts of the continent. The Bangala of Zaire, the Baluyia of Kenya, the Bagisu of Uganda, and the Yorba and Ibo of Nigeria were all colonial inventions."
[222] J. Reiman, *Can Nations Have Moral Rights to Territory?*, in J.R. Jacobson (ed.), The Territorial Rights of Nations and Peoples: Essays from The Basic Issues Forum 168 (1989).
[223] M. Doyle, *Kant, Liberal Legacies and Foreign Affairs*, 12 Philosophy and Public Affairs 213 (1983). But see E.D. Mansfield and J. Snyder, *Democratization and War*, 74(3) Foreign Affairs 79 (May/June 1995), observing that transitions to democracy lead to volatility between authoritarian elites and mass politics, and that statistical evidence demonstrates how this transitional period causes a greater propensity for greater aggression and warmongering.
[224] See generally Franck, democratic governance, *supra* note 100.
[225] M.N. Barnett, *Bringing in the New World Order: Liberalism, Legitimacy, and the United Nations*, 49 World Politics 526, 546 (1997), reviewing B. Boutros-Ghali, Agenda for Peace (2d. ed, 1995); Commission on Global Governance, Our Global Neighborhood (1995); G. Evans, Cooperating for Peace (1993) and the Ford Foundation Report of the Independent Working Group on the Future of the United Nations, The United Nations in Its Second Half-Century (1995).

ter, in an article published concurrently with Franck's democratic governance thesis.[226] This is in many ways a new development, as it has assumed the 'natural' governance position previously associated by Robert Dahl with "monarchy and aristocracy, by despotism and oligarchy".[227] Dahl equates modern democracy with 'polyarchy',[228] and identifies certain institutions necessary for government 'of, by and for' the people. These criteria are reproduced in full:

> (a) control over governmental decisions about policy is constitutionally vested in elected officials; (b) elected officials are chosen and peacefully removed in relatively frequent, fair and free elections in which coercion is quite limited; (c) practically all adults have the right to vote in these elections; (d) most adults also have the right to run for the public offices for which candidates run in these elections; (e) citizens have an effectively enforced right to freedom of expression, particularly political expression, including criticism of the officials, the conduct of the government, the prevailing political, economic, and social system, and the dominant ideology; (f) they also have access to alternative sources of information that are not monopolized by the government or any single group; (g) finally they have an effectively enforced right to form and join autonomous association, including political associations, such as political parties and interest groups, that attempt to influence the government by competing in elections and by other peaceful means.[229]

While Dahl goes on to state that polyarchy is less likely to be achieved in circumstances whereby "the political triumph of one poses a fundamental threat to another",[230] when recalling the general African focus of this study, particularly in equating democracy with a form of internal self-determination whereby the 'self' is defined by the 'self', and not through territorial delineation,[231] the dichotomy between peoples' rights and minority rights is recalled, as there is an element of inescapable territoriality therein; this time, however, the territoriality is formulated within the independent postcolonial state. That is to say that the recurring importance of elections, as the most generally-accepted international benchmark for detecting an act of internal self-determination, has been identified and is worthy of closer examination, but to do so is to interlink the concepts of 'people' and 'minority' once more, for there will always be such overlaps in practice, and overriding policy objectives will not allow the process to overrun minority rights protections for individuals. This further implies that, as the principal objective of such protections is progressive individual equality with the majority population, certain non-discrimination provisions will have to be considered above and beyond the baseline levels of an individual's right to political participation within the state, as potentially coupled with minority rights protections (and the inevitable point of *reductio ad absurdum*, where the question of infi-

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[226] A.-M. Slaughter, *Towards an Age of Liberal Nations*, 33 Harvard Int'l L.J. 393, 400-404 (1992).
[227] R.A. Dahl, Democracy and Its Critics 232 (1989) [hereinafter Dahl].
[228] See generally *Id.* at 232-264. Dahl identifies seven institutions to be observed in a polyarchy, including: democracy, elected officials, free and fair elections, inclusive suffrage, right to run for office, freedom of expression, alternative information and associational assembly. See *Id.* at 221; see also R.A. Dahl, Polyarchy: Participation and Opposition (1971).
[229] Dahl, *supra* note 227, at 233. But *cf.* Brietzke, *supra* note 189, at 98: "The value and meaning of a collective right like self-determination is encompassed by its status as an 'externality,' a public or collective good. Like other collective goods, self-determination can only be produced jointly, through a 'political' cooperation, and no member of a nation can exclude another member from enjoying the benefits. Therefore, neutral observers must scrutinize the fairness of a nation's conditions for membership. […] This collective national identity justifies the imposition of duties on members, in ways that the interests of no single member, and no individualistic theory of human nature, can justify. This justification results from the whole being greater than the sum of its parts in collective activities, owing to the synergy of interdependence."
[230] Dahl, *supra* note 227, at 260.
[231] For discussion, see G.H. Fox, *Self-Determination in the Post-Cold War Era: A New Internal Focus?,* 16 Mich. J. Int'l L. 733 (1995), at 737-752 (reviewing Y. Beigbeder, International Monitoring of Plebiscites, Referenda and National Elections: Self-Determination and Transition to Democracy (1994)).

nite minorities within minorities is brought into play) and, particularly in the case of a 'negatively-defined' people, collective actions vis-à-vis the state itself. That is to say that if self-determination has an external status as a 'public good', its benefits must be equitably distributed to all parties, including territorially-based, collective 'peoples', and yet this must be done without infringing the basic rights of individuals, which are part of minority groupings within such territories. Furthermore, recalling Dahl's earlier criteria for polyarchy, a recurring theme is identified, in line with earlier discussions, in that elections, as the right to choose becomes the original, but not the only, manifestation of democracy. Reading to Dahl's earlier criteria, the right to choose ideally has implications for: (a) accountability for public officials; (b) frameworks for stability in periods of administrative change; (c) inter-societal equity as the conceptual basis for such changes; (d) a sense of openness towards governance; (e) legal protections to permit and indeed encourage societal organisation to influence the outcome of elections; (f) an individual's intellectual objectivity in effectuating one's right to choose; and (g) access to civil society, in the broader sense.

Roles for civil society in a democratic state: Strengthening, not threatening, the *status quo*?

The problem is that, particularly in Africa, the end results are so wildly mixed. Polyarchy is rare in juridical statehood—and the benevolent polyarchy conceived of by Dahl is even more so—and yet great institutional faith seems to be instilled in the idea of elections without considering fully the implications of such circumstances. This is what it means to say that self-determination of peoples and *uti possidetis juris* do not fully contemplate the implications of their relationship over time. This may well be one reason why the breaking points between the legal principle of self-determination and the legal rule of general scope of *uti possidetis juris* are to be found particularly in Africa. What is not under examination is conflict between *uti possidetis* and self-determination *per se*,[232] for, at this stage of the discussion, the ongoing *rationae temporis* of *uti possidetis* is greatly in doubt,[233] as it is not completely synonymous with the principle of territorial integrity in the first instance, and indeed has been replaced by that principle, by virtue of the fact of the African states' independence for decades now. Rather, the onus is on self-determination of peoples to fulfil its destiny between the nexus of Articles 20 and 13 of the African Charter: that is, to fuse, through practical manifestation, peoples' rights and the right to political participation. This is seen most clearly in the work of the African Commission on Human and Peoples' Rights through its *Katangese Peoples' Congress* v. *Zaire* decision,[234] whereby the African Commission, in the context of an attempted secession of Katanga from Zaire, determined that, to effectuate this form of self-determination, the province would be required to "exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire", in the absence of widespread and massive human rights violations or evidence to the effect that Katangese citizens are being denied the right to political participation guaranteed in Article 13(1). The fact that the African Commission declared "that the case holds

[232] See also Frontier Dispute Case (Burkina Faso *v.* Republic of Mali), 1986 ICJ Rep. 554, 567, whereby the Court held in *dicta* that the two principles would not automatically be in conflict with each other as *uti possidetis* was seen as worthwhile as a stability-preserving measure.
[233] Thus, the origins are revealed of a common fallacy amongst certain international lawyers and Africanists alike that *uti possidetis juris*, equated with the AU (OAU) Cairo Declaration, means that frontiers are eternally inviolable. Boundaries, it should be recalled, can be changed by mutual consent or by acts of secession sufficiently credible to achieve adequate recognition by other states, first on a regional level, and then on a more widespread level.
[234] For discussion, see African Commission on Human and Peoples' Rights, Communication 75/92, *Katangese Peoples' Congress* v. *Zaire*, Eighth Activity Report 1994-1995, Annex VI, at 388, particularly at para. 6.

no evidence of violations of any rights under the African Charter [and that the] quest for independence for Katanga therefore has no merit under the African Charter on Human and Peoples' Rights",[235] this decision was reinforced by the UN Security Council, which rejected Katanga's attempted secession, and served to declare such actions contrary to Zairian municipal law and to demand a cessation of secessionist activities in the territory.[236]

The stability that was originally to have been garnered from the employment of *uti possidetis* at the critical date of decolonisation is now better placed to be effectuated through the practical manifestation of this fusion. The fact remains that self-determination means two things: it is first a general legal principle setting the tone for the protection of a comprehensive package of rights;[237] secondly, it is the cornerstone of the international legal entitlement to democracy, via internal self-determination. But herein yet another dilemma is revealed: democracy, as the right to choose, is election-centric, and yet mere elections as such do very little inherently to promote and protect the civil and political rights identified through the African Charter. It is fatuous to equate the occurrence of periodic, free and fair elections with the basket of protections afforded by, in particular, articles 2-13 of the African Charter. What is more chiefly at issue is the human dignity of citizens of postcolonial African states.[238] The concepts, not inherently dissimilar themselves, preserve the essence of what is least indisputably the customary international law of self-determination—that of decolonisation—and project it into the modern age under the rubric of democracy.[239] It does so in three forms: administrative, electoral and statutory. The administrative form is a peoples' right to autonomy in government, as negotiated with the central power. The electoral form is a citizens' right to ensure that government is responsive to their needs. The statutory form captures the comparatively lesser-defined philosophical energy that is generated by the legal weight of international and regional human rights law, as effectuated by the postcolonial state itself, in its municipal judiciaries and through horizontal enforcement of international human rights law. Thus, internal self-determination as an election-oriented process certainly does contribute to human dignity; however, the problem which remains lies rooted in the extreme limitations on state capacity. This is a problematic circumstance caused by the uncertain centre of gravity among the three distinct components.

However, this is how internal self-determination serves to strengthen the postcolonial state, for it is a type of individuation that strengthens both the vertical and horizontal aspects of the state—perhaps to the chagrin of some members of that state's government. But civil society is

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[235] *Id.*

[236] See Security Council resolution S/Res/169 (24 Nov. 1961).

[237] Reflecting the core provisions of the African Charter on Human and Peoples' Rights on civil and political rights, particularly non-discrimination and equality, the right to life, dignity and fair treatment, as well as personal security, due process in judicial processes and intellectual and associative freedoms.

[238] The idea of human dignity a judicial construct has figured in the literature since Oscar Schachter's classical writings on the topic. See O. Schachter, *Human Dignity as a Normative Concept*, 77 AJIL 848 (1983). Skurbaty, who works from the same construct, makes a germane restatement of the concept, particularly as he uses human dignity as a pathway towards development of his 'individuation' concept. *Cf.* Skurbaty, *supra* note 51, at 426: "(a) *human dignity* is the major goal value as well as the source of (international) human rights); (b) it is *inter alia* a *normative concept*; (c) its content as well as implications are unclear, 'left to intuitive understanding'; (d) the existing definitions are tautological, static and do not capture the dynamic nature of the concept, its—one can say—*modus operandi*; (e) given the paramount importance of the concept for the international law of human rights it would be highly desirable to offer a new definition and understanding of *human dignity*; (f) the new concept should ideally be able to bridge the domains of *majority-minority problématique, Human Dignity, Human Rights and Self-Determination*; and (g) the concept should become a fusion-word, a kind of linkage, a medium, a metaphor connection informing the new legal reasoning."

[239] For discussion see e.g. S. Huntington, *Democracy's Third Wave*, 2(2) Journal of Democracy 12 (1991).

a practical form of democracy in action, and it is, in some ways, not difficult to see how it can be perceived as inherently threatening to a government—as something akin to the manifestation of an *effectivité* which is being done by, in the main, organisations that are, by definition, 'non-governmental'. The question is more than the manifestation of governmental activity and the titular control over territory: it is a fact that, in the vast majority of rural Africa, there is often very little else left, other than the civil service and civil society, as centres of power, finance, intellect and the like. To that end, in referring to the *amicus curiae* report of Georges Abi-Saab to the Canadian Supreme Court on the question of secession of Quebec, Crawford writes that the *a priori* application of self-determination to a situation is followed by its effectiveness, which "can only be determined once the process has substantially run its course".[240] In this sense, it is not difficult to imagine how that process may have run its course, and it is now up to the internal components of the state to contribute to the challenges of postcolonial governance. While this is apparently wise, as a matter of policy,[241] it is a circumstance very difficult to express or indeed enforce as a matter of law, however, lest it go forgotten that self-determination is a right of peoples and not a right of civil society, which, itself, is an even more amorphous and less-accepted concept than are 'peoples'. Furthermore, to be practicable, a 'people' will be given more of an essential territorial definition and delineation than will 'civil society'.[242] But, it would be simultaneously foolhardy to ignore that civil society undoubtedly contributes to a more robust national life by compensating for the shortcomings of the state, and in so doing makes significant impacts on the relatively more easily accepted concept of effectiveness, and the increasingly-understood concept of democracy. Thus, from a policy perspective, international law should be seen as incorporating an expansive view for the recognition of non-state actors, which may perform state-like functions. This is drawn from the possibility whereby individual states would legislate certain protections for societal groups, in their own domestic legislation, as could be most readily evident for international and grassroots development organisations, for example. It would also be assumed that the loosening of laws restricting the right of freedom of association would be a *sine qua non* under the same formula.[243]

The fact of the matter is that self-determination of peoples is measured in simultaneous quantities of political development and legality, which need not necessarily be either equal or congruous. So, while "it is indispensable to conceptualise politics in Africa more in terms of the ever-fluctuating power relations between constantly changing state and civil society than in terms of the logistics and topography of formal power,"[244] it is more important to stay true to the reality that "self-determination, having for years been denied as a legal right by vested interests in the West, Eastern Europe and the Third World alike, now faces a new danger: that of being all

[240] Crawford, *supra* note 182, at 52.
[241] And indeed is certainly is a matter of policy, as e.g. United States policy has been to advocate the promotion of democratisation in African countries. For discussion see J.W. Harbeson, *Externally Assisted Democratization: Theoretical Issues and Practical Realities*, in J.W. Harbeson and D. Rothchild (eds.) Africa in World Politics: The African State System in Flux (2000), at 244-257.
[242] *Cf.* Y. Dinstein, *Collective Human Rights of Peoples and Minorities*, 25 ICLQ 102, 109 (1976), identifying an essential characteristic for a 'people' is to be "located in a well-defined territorial area in which it forms a majority".
[243] For example, in March 1991, the Government of Angola approved the Law of Association, and a few days later, it ratified a law on political parties confirming a multiparty system based on nation unity and pluralism of ideas. This led to rapid growth of organisation-building: political parties (as many as sixty), NGOs (from neighbourhood groups, to environmental committees, professional associations, women's organizations, sports clubs, and welfare organizations). While many of these were short-lived, some continue to have an impact, especially development-oriented NGOs, which have access to economic resources through foreign aid.
[244] Chabal, *supra* note 163, at 93.

things to all men".[245] So, there is necessary regression into the relatively firmer ground of the 'democratic entitlement' product of what Susan Marks, in a major critique of Franck's democratic governance thesis, terms the 'liberal revolution'.[246] Marks's observation that the democratic norm thesis is little more than an 'election-oriented' view is useful in identifying that the form of self-determination, whereby citizens ensure government is responsive to their needs, is the most easily-identifiable aspect of postcolonial internal self-determination. The problem is in assessing the electoral phenomenon as a part of internal self-determination. Furthermore, Franck's own conception of democracy holds paramount to determine the legitimacy of governance by way of "evidence of *consent to the process by which the populace is consulted* by its Government".[247] But it will be of even greater interest to consider the electoral, administrative and statutory forms of self-determination, while simultaneously considering the roles that could be played by civil society in effectuating such tasks. To do so would provide about as clear of a picture of internal self-determination measures in postcolonial African states as could be imagined, and will be of even greater use in evaluating the practical situations of postcolonial self-determination.

The challenge of linking democracy, rights and society in the postcolonial state

Despite the apparent virtues of a consensus-oriented *politique*, the Westminister model of democracy remains prevalent. If the democracy, as an 'election-oriented' reality, is as it appears, then it is a reflection of the fact that elections are the most tangible and easily-identifiable manifestation of a 'democratic norm', which itself is hardly the most deeply-rooted and universally-accepted concept in modern public international law.[248] It could just as well be seen that 'democracy' is a logical step in the wholesale incorporation of the concept of justice into lawmaking, as advocated by US Supreme Court Justice Benjamin Cordozo.[249] Also, a willingness to operate more on the conceptual, rather than technical, level is likely to be of benefit.[250] These techniques will be useful, for the essence of Marks's argument is to encourage an environment wherein the critique of ideology facilitates the analysis of the "asymmetrical power relations",[251] which may occur given that the decision-making process is effectuated by 'the people' only through politicians.[252] Marks considers the least-effective of democratic states to be undertaking "low-intensity democracy",[253] a concept she views as having an "electoral fixation",[254] and one

[245] Higgins, *supra* note 175, at 128.
[246] See S. Marks, The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology (2000), particularly at chapter two: International Law and the 'Liberal Revolution' [hereinafter Marks].
[247] T.M. Franck, General Course on Public International Law, 420 Rec. des Cours 102 (1993).
[248] *Cf.* Marks, *supra* note 246, at 41: "For Franck, the norm's validity is clear; if he qualifies it as 'emerging', this is because of doubts about the adequacy of existing supervisory procedures. In his analysis, the democratic entitlement will lack full 'coherence' until enforcement measures are put in place which are both consistent in their application and compatible with other international rules (such as the principle of non-intervention)."
[249] See B.N. Cordozo, The Growth of the Law (1924), at 87 *et seq*.
[250] For discussion, see the report by C. Chinkin, in *Theme Panel IV: The End of Sovereignty? (Roundtable)*, 88 ASIL Proceedings 71 (1994).
[251] Marks, *supra* note 246, at 146.
[252] *Cf. Id.* at 50: "The role of the people is not to 'decide issues' but 'to produce a government'", citing J. Schumpeter, Capitalism, Socialism and Democracy, 282, 269 (6th ed., 1987).
[253] *Id.* at 53. Her other synonyms for the idea include 'cosmetic democracy' and 'façade democracy', not unlike the phenomenon of 'Governmental Non-Governmental Organisations', or GONGOs. *Viz.* World Federalist Movement, Background Paper on GONGOs, QUANGOs and Wild NGOs (2001), on file with author.
[254] *Id.* at 60, citing W.I. Robinson, Promoting Polyarchy: Globalization, US Intervention and Hegemony 345 (1996).

with which Franck's democratic norm thesis can be associated through the wholesale extrapolation of the liberal democratic to all circumstances. She writes:

> The purported norm of democratic governance identifies democracy with the holding of multiparty elections, the protection of civil rights and the establishment of the rule of law. It has international law endorse calls to institute formal or 'political' democracy in post-communist and developing countries, but needs to countervail moves to secure the development of social and pluralist democracy. At the same time, it adopts an affirmative approach to 'actually existing democracy', which tends to eclipse awareness of the enduring—and in some ways increasing—deficits of liberal states.[255]

For Marks, the underlying problem revolves around "the pervasiveness of political exclusion of various sorts", whereby democracy amounts to little more than broken promises and rote actions. Superficial institutional reform, in the initial phase, can actually do more harm than good by maintaining the internal *status quo* under the guise of actual constitutional, administrative and regulatory reform. This leads her to conclude that the democratic norm thesis can lead to "a dangerous inducement to complacency" in low-intensity democracy states:

> Against the promise of self-rule and political equality stands a reality of oligarchy and technocracy, invisible power and bureaucratic-business domination, individual political alienation and differentiated social opportunity. By encouraging the belief that liberal societies represent the near-pinnacle of democratic achievement, the democratic norm thesis promotes an uncritical, affirmative approach to democratic life which shifts attention away from liberal democracy's manifold broken promises.[256]

After drawing reference to ideas promulgated by David Held on the notion of an alternative 'cosmopolitan democracy' largely rooted in the concept of autonomy,[257] Marks concludes that, without deeper structural reform, the 'democratic entitlement' could well end up as a hindrance to genuine social development, due to the fragmentation caused by the ineffectiveness of the underlying structures. Rather than reinforcing the interdependence and interrelatedness of all human rights, Marks asserts that a blanket right to democracy, in its application, can have the unintended consequence of further societal fragmentation. For that, she asserts that the democratic entitlement should be seen as a 'new legal principle' rather than a 'right to a right'. The core of her argument is that "the concept of democratic inclusion should function as a *principle*, to guide the elaboration, application, and invocation of international law".[258] Marks refers to the principles of sovereign equality and non-interference in domestic affairs as reference points "moulding the agenda of international law-making, shaping the interpretation of international legal norms, and influencing the procedures for asserting international legal rights and enforcing international legal duties" to modify law slightly, by expanding the frontiers of legality to meet social needs.[259] She writes:

> I propose the principle of democratic inclusion as a new principle, which might serve to reshape such established legal norms as the principle of sovereign equality of states and the principle of non-interference in domestic affairs, and also to orient future international legal developments in a particular direction. I envision the principle as weaving into the fabric of international law a kind of bias in favour of popular self-rule and equal citizenship, that is to say, a bias in favour of inclusory political communities.[260]

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[255] *Id.* at 74-75.
[256] *Id.* at 73-74, citing N. Bobbio, The Future of Democracy: A Defence of the Rules of the Game 27 (1987).
[257] *Id.* at 106, citing D. Held, Democracy and the New Global Order: From the Modern State to Cosmopolitan Governance (1995), particularly at chapters seven and eight.
[258] *Id.* at 111.
[259] *Id.*
[260] *Id.*

Territorialism as an inhibitor to the principle of democratic inclusion?

At the outset of this chapter, the variable of territorialism was left, *ceteris paribus,* analytically fixed. This was done both in the interest of analytical clarity, to conceptualise the postcolonial state, and to recognise the existence of legal instruments, such as the *uti possidetis juris* rule and the OAU Cairo Declaration. However, international law shows more ambivalence towards the question of territorial modification, and would show considerably more neutrality towards the question of secession than e.g. the restrictive perspectives espoused by U Thant in 1960.[261]

In actual fact, international law acts without prejudice toward an eventual modification of the *uti possidetis* standard, particularly whereby geographically-defined regions attempting to effectuate an internal right of peoples to self-determination are unlikely ever to obtain such objectives without a substantial change in factual circumstances throughout the relevant administrative structures and populations concerned. In the present analysis, the removal of territorialism as a dominant variable for critical examination was effectuated for analytical purposes. It must be recalled, however, that recognition, to the extent that it may be determined, may be driven as much from political as legal motivations, although, in any event, the declaratory effect of such political actions is also indicative of juridical weight.[262] It is another question altogether whether states, in practice, decide to use strict legal criteria under all circumstances to recognise new territorial entities as 'peoples', 'minorities' or any other legal form, including a new state, for that matter.

Nevertheless, what may be observed is a concept in the same vein as the assertion that the original self-determination *Grundnorm* of decolonisation has been replaced with a *Grundnorm* of human dignity through internal self-determination, as well as broader frameworks of minority rights protections, democracy and civil society which form part of the law of modern territorial statehood. This phenomenon may also be observed when considering implications for territorial sovereignty emanating from international environmental law as well. Nico Schrijver, for example, draws reference to certain aspects of the Corfu Channel case, in the context of Albania's failure to warn others of the existence of a minefield in its territorial waters, whereby the ICJ observed that every state has an "obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States".[263] Additionally, Schrijver goes on to identify the following principles of international environmental law with application to state sovereignty: (a) permanent sovereignty over natural resources; (b) due care for the environment and precautionary action; (c) inter- and intragenerational equality; (d) good neighbourliness; (e) equitable utilization and apportionment of environmental resources; (f) prior information, consultation

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[261] See discussion *supra* chapter two of this study.

[262] *Cf.* D. Raič, Statehood and the Law of Self-Determination (2002), at 426-7 [hereinafter Raič]: "[C]ombining the law of self-determination and recognition practice in the field of unilateral secession leads to the conclusion that if an entity is recognized as a State, while it has been established as a result of unilateral secession, and its creation is sought to be justified on the basis of the right of external self-determination, the recognition of statehood implies the recognition of the applicability of a right of unilateral secession of the people in question. Recognition has thus assumed a dual role: it is not only the State which is recognized, but also the right of external self-determination of the people concerned." Raič refers particularly to K. Knop, *The 'Righting' of Recognition: Recognition of States in Eastern Europe and the Soviet Union*, State Sovereignty: The Challenge of a Changing World (Proceedings of the 1992 Canadian Conference on International Law), at 38.

[263] See N.J. Schrijver, Sovereignty over Natural Resources: Balancing Rights and Duties (1997) [hereinafter Schrijver], at 237, citing the Corfu Channel case (UK *v.* Albania), 1949 ICJ Rep. 22. Schrijver also refers, *Id.* at 238, to the Lac Lanoux case (Spain *v.* France), 24 ILR 120 (1957), which followed similar reasoning, concluding that "territorial sovereignty plays the part of presumption. It must bend before all international obligations, whatever their source, but only for such obligations."

and early warning; (g) state responsibility and liability; (h) termination of unlawful activities and the making of reparation; (i) preservation of *res communis* and the common heritage of mankind; (j) duty to co-operate in solving transboundary environmental problems; (k) common but differentiated obligations (e.g. collaboration between the developed and developing world); and (l) peaceful settlement of environmental disputes.[264]

In sum, 'inclusory political communities' are mainstreamed into international legal parlance, and if equality is the cornerstone of these communities, all forms of social exclusion, discrimination and racism must be seen as impermissible.[265] The reinforcing series of societal improvements lead to circumstances whereby the right to life is held to a greater importance, and presumably societies make a Kantian step towards the *telos* of flourishing. The problem, of course, is that the problem of peace is equally universal and frustrating, and the least socially, politically and economically developed societies are undoubtedly the hardest hit. But what is really at issue is the search for a better way to control the power of the state in a manner acceptable for all the state's citizens.

Whether the *uti possidetis* standard will be modified in any given practical circumstance will be determined by a largely immeasurable mixture of factual situations on the ground, evidence documenting those situations, the level of horizontal enforcement by other states in regional and UN bodies concerned with human rights, international peace and security and the practicality of implementing decisions taken in this regard. The more significant point for the present legal analysis is on the more theoretical level, however, and stems directly from the removal of the *ceteris paribus* assumption, which was used to hold *uti possidetis* as a constant variable in the postcolonial state equation. Such a removal of this assumption is broadly what has been advocated in the present analysis, particularly through the conceptions of a 'negatively-formed' people, which is both relatively geographically-contiguous and formed more as an *ex post facto* result of predatory actions by a state, than on strict grounds of a singular ethnicity formed by race or religion. Particularly in situations where internal self-determination could be satisfied though a form of autonomy within a state,[266] the question of modifying the territorial *status quo* will not normally arise. As a matter of course, however, should such forms of internal self-determination never actually come to fruition in practice, and indeed the state's own obligation to protect its citizens comes clearly into question,[267] the postcolonial relevance of *uti possidetis* will also be increasingly called into question.

The underlying legal element remaining is that which constructed the colonial state in the first instance. In Africa, of course, this is to say that before discussions about territorial integrity of states and the manifestation of sovereign acts can be genuinely considered, questions of how and why state boundaries have been demarcated and delineated constantly loom in the back-

[264] See Schrijver, *Id.* at 240-249.
[265] See particularly The incompatibility between democracy and racism, Commission on Human Rights resolution 2001/43, and the Report of the High Commissioner for Human Rights in document E/CN.4/2002/69.
[266] See Raič, *supra* note 262, at 264, and discussion *supra* chapter two of this study.
[267] The responsibility to protect, discussed *supra* chapter three of this study, is gaining currency as an accepted 'modern' human right in UN practice. This is most clearly observed in the Report of the High-Level Mission on the situation of human rights in Darfur pursuant to Human Rights Council decision S-4/101, Human Rights Council document A/HRC/4/80, 7 March 2007, particularly at section III (The Darfur Peace Agreement, the Ensuing Violence and the Responsibility To Protect), section IV (Sudan's Action Regarding the Responsibility to Protect), and Section V (The International Community's Responsibility to Protect). In the Sudanese context, see also Security Council Resolution 1706 (2006), 31 August 2006, reaffirming the responsibility to protect as per the 2005 World Summit outcome document, A/RES/60/1 (24 October 2005).

ground. That e.g. the after-effects of the Berlin Conference of 1884-85 continue to be a significant definitional variable in every African state of the 21st century clearly demonstrates how much influence the concept of original title has on the overall conceptualisation of statehood, and indeed how the territorial aspects are relatively more fixed in definition than are the administrative aspects of statehood.[268] In sum, in order to genuinely understand the function of the postcolonial state, aspects of its territorial construction must be given due consideration. Particularly as *uti possidetis juris* in its original employment was meant to prevent competing claims for territorial occupation in colonial and decolonising geographic regions,[269] it will be useful to briefly consider some additional jurisprudence of the ICJ, particularly with regard to territorial disputes between states, to observe general trends on how the Court responds to the phenomenon of territorialism as a component of sovereignty.

PART C: Capita selecta from recent state practice concerning territorialism

In chapter two of this study, considerable time was spent discussing jurisprudence stemming primarily from the ICJ concerning the interplay between the 'right of peoples to self-determination' and the legal rule of *uti possidetis juris*.[270] In this section, attention will briefly be given to the interplay among a number of ICJ cases, with particular relevance to the territorial aspect of statehood. Essentially, the legal weight of the original title to territory obtained through colonisation will be contrasted with that of the juridical manifestation of sovereignty—*effectivités*, in postcolonial states.

The underlying legal argument at present concerns the relative legal weight attributed to the formation of the postcolonial state in pre-colonial, colonial and postcolonial stages, which all have particular correlations with the evolution of the principle of self-determination. In recalling the previous discussion, self-determination was first a political precept, then a right to decolonisation in the early UN context, and is now primarily a guarantor of access to government in the postcolonial context.[271] But as has been discussed, a juridically valid act of external self-determination may also follow an act of decolonisation to serve as a last-chance definitional guarantor of the practical applicability of internal self-determination in a postcolonial state.[272] The concept may be viewed in two contrasting perspectives. The first circumstance, *i.e.,* 'original title', may be observed when a territory is colonised and 'civilised', as most often occurred when colonial powers sought to cede territory to colonised administrations. This is the 'civilising' act, which brought so-called 'uncivilised' lands into the European global legal system, and given the strong juridical weight allocated to positivist perspectives in law, these original treaties of cession continue to hold genuine legal significance. This is particularly so in postcolonial states, whereby the *uti possidetis juris* is of obvious relevance, and may be most readily observed in Africa, as the intergovernmental Berlin Conference was convened, with the specific purpose of defining the geographical limits of territorial administration by colonial entities.[273] Thus colonising states also declared their intent to actually manifest colonial *effectivités* in territories separated by the 'saltwater barrier'. Once these colonies actually became formed, and subsequently, once they were granted independence, the primary and secondary stages of self-determination had been effectuated. What is significant for the present analysis, however, is the

[268] See discussion *supra* chapter one of this study.
[269] See discussion *supra* chapter one of this study, at text accompanying note 75.
[270] See particularly *supra* chapter two of this study, at text following note 125.
[271] See discussion *supra* chapter two of this study.
[272] See discussion *supra* chapter three of this study.
[273] See discussion *supra* chapter one of this study.

reality that the establishment of a title to territory, as it was an instrument of juridical positivism concerning the sovereign state, is both a nascent creation and an enabling function. In this sense, it is nascent because the agreement between coloniser and colonised was one between the unequal, between 'sovereign' and 'the other'. In addition to gaining territory, the colonising entity also established its juridical status equivalent upon an otherwise 'uncivilised' territory as a matter of definition. Simultaneously, the phenomenon was also enabling, in that it served to structurally validate the universal nature of territorial statehood in early international law and therefore served the purpose of juridical globalisation as sought by classical legal positivism.

In the third, postcolonial stage of self-determination's evolution, if only for the existence of the *uti possidetis* rule, it is obvious that decolonisation was not meant by international law to be a free-for-all. This is borne out by practice, whereby most African states for example continue to retain essentially the same external frontiers as those of colonial times. However, it may also be observed, in particular circumstances, where the monolith of 'original title' proves insufficient to reflect the complexity of the actual situation on the ground in the postcolonial state, and that benefit would be derived from a more 'modern' evaluation of the aspects of sovereignty, e.g. fundamental human rights standards, the responsibility to protect, the advocacy of multi-dimensional democracy and the importance of protecting and involving civil society, it may be useful to critically assess the *uti possidetis* standard and determine if an additional measure of juridical consideration should be applied, in addition to the 'original title' standard of allocating sovereignty to a territory. Such a phenomenon could be most readily observed in states once colonised, 'civilised', decolonised and now subject to the various *effectivités* which may be manifested on a territory, with correspondingly variable standards of governance. Although it seems *prima facie* that the original title to territory is of primary importance, the historical consolidation doctrine and the roles played by postcolonial *effectivités* deserve closer examination, particularly given the arbitrary territorial constructions of many postcolonial states. It may even be the case that territorialism should reflect less of a stranglehold on the state than it does in certain circumstances. In particular, it may be the case that excessive reliance on original title may, in some circumstances, practically corrupt vertical state consolidation and substantively inhibit the potential for horizontal societal preservation, because the demands of maintaining the territorial space are such that governance standards of postcolonial states are practically impossible to uphold and maintain.

Thematic observations involving original title, *effectivités* and historical consolidation

Three principal cases will be referred to in determining the relationship between original title and historical consolidation. Most recently, the ICJ Nicaragua *v.* Honduras case is useful in acknowledging the interplay between *uti possidetis* and the effectiveness of the postcolonial state.[274] This case demonstrates how the historical consolidation model is not to be rejected out of hand, as *uti possidetis* was shown to require the observance of colonial *effectivités* in order to be juridically valid. This was not seen to be so in this case,[275] which led the Court to consider a limited possibility of including postcolonial *effectivités* as potential determinants of sovereignty over a disputed territory.

[274] Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua *v.* Honduras) [hereinafter Nicaragua/Honduras], available from http://www.icj-cij.org/docket/files/120/14075.pdf, accessed 8 October 2007.
[275] See discussion *supra* chapter two of this study.

The Court's reasoning in Nicaragua/Honduras follows Eritrea's contested secession from Ethiopia, in which the historical consolidation doctrine was readily employed. In the Delimitation Decision by the Boundary Commission of 13 April 2002,[276] subsequently acknowledged by both Eritrea and Ethiopia as final and binding, in accordance with the Comprehensive Peace Agreement signed in Algiers on 12 December 2000, the neutral Boundary Commission, composed of five members, was mandated to delimit and demarcate the territorial boundary between the secessionist Eritrea and the larger Ethiopia.[277] Although the Commission's decision served, in practice, to validate certain instances of historical consolidation, in discharging its responsibilities to delineate and demarcate the international frontier between two previously integrated postcolonial states,[278] this decision stood in contrast with the outcome of the territorial dispute between Cameroon and Nigeria before the ICJ, which occurred just six months later.[279] In it, the Court avoided an approach supportive of the historical consolidation doctrine and indeed clearly favoured the concept of original title over that of territorial occupation and effective control,[280] particularly by broadly reaffirming that agreements entered into, between colonising and colonised entities, were of primary legal significance in determining title to territory, from which sovereignty is derived.[281] In sum, of the three cases presently being surveyed, it appears that the Ethiopia/Eritrea arbitration was most responsive towards favouring the notion of historical consolidation, whereas the ICJ can broadly be seen as ignoring this notion in the Cameroon/Nigeria case. However, the International Court's willingness in the Nicaragua/Honduras

[276] See also Eritrea - Ethiopia Boundary Commission: Decision Regarding Delimitation of the Border between The State of Eritrea and The Federal Democratic Republic of Ethiopia, in annex to Letter from the Secretary-General to the President of the Security Council, UN Doc. S/2002/423, 15 April 2002 [hereinafter Boundary Commission Decision]. See also Security Council Resolution 1430 (2002), particularly at preambular paragraph three.

[277] See UN Doc. S/2000/1183, 40 ILM 260 (2001). The Eritrea-Ethiopia Boundary Commission was established pursuant to an agreement dated 12 December 2000, alternately entitled "Agreement between the Government of the State of Eritrea and the Government of the Federal Democratic Republic of Ethiopia" and "Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea". *Cf. Id.* at Article 4: "1. Consistent with the provisions of the Framework Agreement and the Agreement on Cessation of Hostilities, the parties reaffirm the principle of respect for the borders existing at independence as stated in resolution AHG/Res. 16(1) adopted by the OAU Summit in Cairo in 1964, and, in this regard, that they shall be determined on the basis of pertinent colonial treaties and applicable international law. 2. The parties agree that a neutral Boundary Commission composed of five members shall be established with a mandate to delimit and demarcate the colonial treaty border based on pertinent colonial treaties (1900, 1902 and 1908) and applicable international law. The Commission shall not have the power to make decisions *ex aequo et bono*. […] 13. Upon reaching a final decision regarding delimitation of the borders, the Commission shall transmit its decision to the parties and Secretaries General of the OAU and the United Nations for publication, and the Commission shall arrange for expeditious demarcation. 14. The parties agree to cooperate with the Commission, its experts and other staff in all respects during the process of delimitation and demarcation, including the facilitation of access to territory they control. […] 15. The parties agree that the delimitation and demarcation determinations of the Commission shall be final and binding. Each party shall respect the border so determined, as well as the territorial integrity and sovereignty of the other party. 16. Recognizing that the results of the delimitation and demarcation process are not yet known, the parties request the United Nations to facilitate resolution of problems which may arise due to the transfer of territorial control, including the consequences for individuals residing in previously disputed territory."

[278] See Eritrea-Ethiopia Boundary Commission: Decision Regarding Delimitation of the Border between The State of Eritrea and The Federal Democratic Republic of Ethiopia, in annex to Letter from the Secretary-General to the President of the Security Council, UN Doc. S/2002/423, 15 April 2002 [hereinafter Boundary Commission Decision]

[279] See Land and Maritime Boundary between Cameroon and Nigeria (Cameroon *v.* Nigeria), Equatorial Guinea intervening (Merits), Judgement, 2002 ICJ Rep. 303 [hereinafter Cameroon-Nigeria case]

[280] See *Id.* at para. 65 *et seq.*

[281] See *Id.* at para. 205 *et seq.*

case to consider postcolonial *effectivités*, as being reflective of acts of sovereignty to a group of offshore islands not necessarily subjected to the colonial *uti possideis*, showed greater definitional flexibility than was observed in Cameroon/Nigeria. The Nicaragua/Honduras decision may represent an intellectual *démarche* by the Court away from such a strong reliance upon original title when determining title to territory in addressing territorial disputes between (postcolonial) states.

'Historical consolidation' in the Ethiopia/Eritrea arbitration and in the Cameroon/Nigeria case

Looking closer at these three examples of recent case law, the inclusion of Eritrea in this study is intrinsically linked to the border dispute between it and Ethiopia, from which it claimed independence following the victory of its military forces in 1991 at the end of a long secessionist war. Following a referendum in 1993, Eritrea achieved independent statehood. However, such independence was by no means pacific, and a vicious war erupted in 1998, followed by a concerted military drive by Ethiopia into Eritrea in 2000, which abated only through an OAU-sponsored peace treaty in December of that year.

Aside from a short, Italian occupation and annexation between 1935 and 1941, Ethiopia is something of the Thailand of Africa, in that it has never been colonised or subjected to foreign domination. But Eritrea, occupying the northernmost geographic position of the combined entity, was subjected to control by Italians and was established as an Italian possession in the 1889 Treaty of Uccialli.[282] Italian colonisation of Eritrea lasted from 1890 until 1941, when control passed to the British, which from January 1942 administered both Ethiopia and Eritrea from Addis Ababa until 1952. What is problematic is the *ad hoc* boundary delimitation and demarcation in 1900, 1902 and 1908 between the Colony of Eritrea, then governed by Italy, and the Empire of Ethiopia.[283] Because the Allied Powers could not resolve the final status of Eritrea in the time allocated to do so after the second world war, in the words of Alexis Heraclides, "Eritrea is one of a very few incremental secessions which were originally integral 'non-self-governing territories', hence a 'self-determination unit'," and, as such, "Eritrea's fate was decided at the United Nations in 1950 after prolonged debate".[284] In General Assembly Resolution 390A(V), the Assembly recommended that "Eritrea shall constitute an autonomous unit federated with Ethiopia under the sovereignty of the Ethiopian Crown", and this was effectuated from 11 September 1952. At such time, Ethiopia's absolute ruler Emperor Halie Selassie I "set out to achieve what he could not obtain through the UN—the unqualified and total annexation of Eritrea to Ethiopia".[285] He began on 11 September 1952, by declaring null and void the aforementioned border treaties of 1900, 1902 and 1908, followed by voiding the Eritrean Constitution and dissolving the Eritrean parliament, thereby ending the federation between the two entities on 14 November 1952. Eritrea was therefore to become a province of Ethiopia.[286]

Despite this incorporation, diverse distinguishing characteristics may be observed in dif-

[282] For discussion, see R. Albrecht-Carrie, Italian Colonial Policy, 1914-1918, 18 Journal of Modern History 123-147 (June 1946).
[283] See Boundary Commission Decision, *supra* note 276, at para. 2.7, p. 11.
[284] A. Heraclides, The Self-Determination of Minorities in International Politics 178 (1991) [hereinafter Heraclides]. *But cf.* Holsti, *supra* note 12, at 74: "In this manner, the United Nations, somewhat reminiscent of the Berlin Congress of 1884-5, decided the fate of a large territory."
[285] Heraclides, *supra* note 284, at 178-179.
[286] Boundary Commission Decision, *supra* note 276, at para. 2.10, p. 12. *But cf.* Heraclides, *supra* note 284, at 179: "The incorporation process was finalized by the 1960s. On 14 November 1962 the Eritrean Assembly, by then reduced to a mere rubber-stamp of imperial decisions, announced the end of the Federation. Eritrea had become one province of Ethiopia, the fourteenth."

ferentiating the Eritrean *collectivité* from that of the Ethiopians. This may be observed, despite the fact that the Eritrean population is diverse, divergent and at times divisive, with nine ethnic groups, divided amongst Christians and Muslims, but with 'negligible' internal social tensions based solely on ethnicity or religion.[287] But nevertheless, Kalevi Holsti finds the grouping of such populations in the larger federation with Ethiopia to be a formative experience. He writes:

> [The UN GA] took a colonially defined territory with a collection of peoples of different religions, economic practices, social structures, and languages and decided to tack them on to a preexisting empire of immense comparative proportions, a state whose main groups shared nothing in common with the Eritreans, but which through this decision gained a maritime coastline. […] The idea that a vast territory should simply become part of an empire with which it had no affinity except geographic proximity was quite in keeping with the administrative reorganizations of European and Russian colonies in Africa, Muslim Russia, and the Middle East during the nineteenth and early twentieth centuries. The result was a thirty-year war in which the Eritreans—not without a civil war among themselves—undid the state-making effort of the United Nations by formally separating themselves from Ethiopia. The United Nations of course could not create a "nation" where none existed. It was the war itself which created an Eritrean "people."[288]

In determining the boundaries between Ethiopia and Eritrea, the Boundary Commission spent considerable time evaluating the circumstances of the three treaties from 1900 (dealing with the central sector), 1902 (dealing with the western sector) and 1908 (dealing with the eastern sector).[289] Broadly speaking, although the Commission did not use the term 'historical consolidation' *per se* in either its observations or its *Dispositif*, it can be observed how evidence of the manifestation of territorial administration was, indeed, recognised by the Commission in determining demarcation points in the disputed boundary. As a result, the demarcation of the boundary occasionally modified the sovereignty of a particular locality, and factors were considered, by the Commission, that were not necessarily established by the three treaties of original title.[290]

The Commission's reasoning for undertaking such an approach can be observed, in Chapter Three of the decision, whereby the Commission established its task and determined the applicable law. Here, the Commission noted that the provenance of a map that is not part of a treaty might be of juridical value, in determining how and where to allocate sovereignty in a disputed frontier zone. In particular, although the substantive quality of the map and the extent of

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[287] For a comprehensive discussion of the component parts of the Ethiopian and Eritrean peoples, a discussion of the conflict dynamic between the two and a *résumé* of conflict resolution responses taken by the international community, see European Platform for Conflict Prevention and Transformation, Ethiopia/Eritrea: A devastating war between former friends, available from http://www.euconflict.org, accessed 18 October 2006.

[288] Holsi, *supra* note 12, at 74-75.

[289] See Boundary Commission Decision, *supra* note 276, at 31, 57 and 85. See also E. Hertslet, The Map of Africa by Treaty, Vol. 3 (3d ed., 1967).

[290] In forming its *Dispositif*, beginning from the position of the pertinent colonial treaties, the Commission sought evidence of sovereignty on the basis of (a) conduct relevant to the exercise of sovereign authority (*effectivités*); (b) diplomatic and other similar exchanges and records and (c) maps. While deviations from the provisions of the three treaties by the Commission were limited in scope, it may be observed that the relative lack of definition in the three treaties created an environment encouraging of the possibility to seek evidence of sovereignty from *effectivités* and to allocate a juridical weight from such manifestations. *Cf. Id.* at §4.78: "The Commission has already decided that the boundary line resulting from the 1900 Treaty must be adjusted so as to ensure that Tserona, the Acran region and Fort Cadorna are placed in Eritrean territory (see paras. 4.70- 4.72, above). The manner of that adjustment is set out in Chapter VIII, paragraph 8.1, sub- paragraph B, below. The Commission now accordingly decides that the boundary resulting from the 1900 Treaty must be further adjusted, in the manner also set out in Chapter VIII, paragraph 8.1, sub-paragraph B, so as to place Zalambessa in Ethiopian territory."

its distribution will need to be considered, the actual uses of such maps, in practice, are significant and not without legal consequences.[291] More significantly for the purposes of the current analysis, however, the Commission established that sovereign actions might have more tangible practical legal effects, as noted:

> As to activity on the ground, the actions of a State pursued *à titre de souverain* can play a role, either as assertive of that State's position or, expressly or impliedly, contradictory of the conduct of the opposing State. Such actions may comprise legislative, administrative or judicial assertions of authority over the disputed area. There is no set standard of duration and intensity of such activity. Its effect depends on the nature of the terrain and the extent of its population, the period during which it has been carried on and the extent of any contradictory conduct (including protests) of the opposing State. It is also important to bear in mind that conduct does not by itself produce an absolute and indefeasible title, but only a title relative to that of the competing State. The conduct of one Party must be measured against that of the other. Eventually, but not necessarily so, the legal result may be to vary a boundary established by a treaty.[292]

Furthermore, in determining the applicable law to be applied in determining the boundary between the two states, the Commission noted that customary international law may also play a role in determining the role of original title in boundary delimitation situations, as it determined:

> Turning to the requirement in Article 4, paragraphs 1 and 2, of the December Agreement that the decision of the Commission shall also be based "on applicable international law," the Commission is much assisted by the consideration by the International Court of Justice of a comparable requirement in the Kasikili/Sedudu case. In that case, the parties by agreement prescribed that the decision should be made "on the basis of the […] Treaty […] and the relevant principles of international law." The Court decided that the words "and the relevant principles of international law" were not limited in their effect to the international law applicable to the interpretation of treaties; they also required the Court to take into consideration any rules of customary international law that might have a bearing on the case, for example, prescription and acquiescence, even if such rules might involve a departure from the position prescribed by the relevant treaty provisions. Thus the Court accepted the possibility that an attribution of territory following from its interpretation of the relevant boundary treaty could be varied by operation of the customary international law rules relating to prescription. As it turned out, the Court found in that case that there was insufficient prescriptive conduct to affect its interpretation of the treaty. But what matters for present purposes is that the Court read the applicable law clause before it as including recourse to such rules of customary international law.[293]

The approach taken by the ICJ in favouring original title

As discussed in chapter two of this study, the Court took a restrictive approach on the relationship of the manifestation of *effectivités* and the provisions of original treaties of title, and sided widely with Cameroon in determining sovereignty over disputed territories. By invoking

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[291] *Cf.* Boundary Commission Decision, *supra* note 276, at §3.21: "A map that is known to have been used in negotiations may have a special importance. […] But a map produced by an official government agency of a party, on a scale sufficient to enable its portrayal of the disputed boundary area to be identifiable, which is generally available for purchase or examination, whether in the country of origin or elsewhere, and acted upon, or not reacted to, by the adversely affected party, can be expected to have significant legal consequences. Thus a State is not affected by maps produced by even the official agencies of a third State unless the map was one so clearly bearing upon its interests that, to the extent that it might be erroneous, it might reasonably have been expected that the State affected would have brought the error to the attention of the State which made the map and would have sought its rectification."

[292] *Id.* at §3.29, citing Case concerning Kasikili/Sedudu Island (Botswana/Namibia), 1999 ICJ Rep. 1100, at para. 87.

[293] *Id.* at §3.14

claims of historical consolidation, by virtue of its longstanding and peaceful occupation of disputed territories in the Lake Chad disputed area, Nigeria claimed sovereignty over these areas.[294] The Court was patently unimpressed with this reasoning, as it identified a limited scope of conceptualisation, in the concept of 'historical consolidation' from the Fisheries (United Kingdom *v.* Norway) case.[295] It then proceeded to question the notion of historical consolidation generally.[296] However, the Court did recall its previous jurisprudence, establishing the legal validity of *effectivités* generally,[297] but ultimately found that Nigeria's claims of *effectivités* in the Lake Chad area "did not correspond to the law".[298]

Furthermore, in the Bakassi Peninsula disputed area, the Court relied heavily upon the Anglo-German Agreement of March 1913, which ultimately was seen as having allowed Britain to pass title to Germany,[299] thereby legitimising present-day Cameroon's claim to this disputed territory. The Court took such a decision, despite the protestations of Nigeria that the 1884 Treaty between Britain and the Kings and Chiefs of Old Calabar was of importance, as it was only a protector or administrator and not a sovereign,[300] and, therefore, it was not in a position to cede territory in the 1913 treaty.[301] The Court recalled its pronouncement in the Western Sahara advisory opinion that "agreements concluded with local rulers […] were regarded as derivative roots of title",[302] and as such the Court disregarded Nigerian acts of sovereignty on the peninsula, into which Cameroon acquiesced.[303]

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[294] *Cf.* Cameroon/Nigeria case, *supra* note 276, at para 62, where Nigeria claimed sovereignty over certain named villages established on the shores of the receding Lake Chad. In doing so, Nigeria claimed "(1) long occupation by Nigeria and by Nigerian nationals constituting an historical consolidation of title; (2) effective administration by Nigeria, acting as sovereign and an absence of protest; and (3) manifestations of sovereignty by Nigeria together with the acquiescence by Cameroon in Nigerian sovereignty over Darak and the associated Lake Chad villages".

[295] See 1951 ICJ Rep. 130. In the case, Norway had historically delimited certain maritime territories without opposition from any state, which in the view of the Court represented "a well-defined and uniform system . . . which would reap the benefit of general toleration, the basis of an historical consolidation which would make it enforceable as against all States". See *Id.* at 137. However, the Court observed that historical consolidation has never been the basis of title, either alone or in case law.

[296] *Cf.* Cameroon/Nigeria case, *supra* note 276, at para 65: "The Court notes that the theory of historical consolidation is highly controversial and cannot replace the established modes of acquisition of title under international law, which take into account many other important variables of fact and law. It further observes that nothing in the Fisheries Judgment suggests that the 'historical consolidation' referred to, in connection with the external boundaries of the territorial sea, allows land occupation to prevail over an established treaty title. Moreover, the facts and circumstances put forward by Nigeria with respect to the Lake Chad villages concern a period of some 20 years, which is in any event far too short, even according to the theory relied on by it.

[297] *Cf. Id.* at para 68, citing the Frontier Dispute (Burkina Faso *v.* Mali) case, 1986 ICJ Rep. 587, at para 63: "Where the act does not correspond to the law, where the territory which is the subject of the dispute is effectively administered by a State other than the one possessing the legal title, preference should be given to the holder of the title. In the event that the *effectivité* does not co-exist with any legal title, it must invariably be taken into consideration."

[298] *Id.* at para 70.

[299] See *Id.* at para 205.

[300] See *Id.* at para 207.

[301] See *Id.* at para 201.

[302] *Id.*

[303] *Cf.* P.H.F. Bekker, International Decisions, Land and Maritime Boundary between Cameroon and Nigeria (Cameroon *v.* Nigeria: Equatorial Guinea intervening), 97 AJIL 391 (2003): "As regards Nigeria's administrative activities, which it claimed were acts *à titre de souverain* that Cameroon failed to protest, the Court dismissed the precedents invoked by Nigeria as irrelevant, given that in none of them were the acts referred to acts *contra legem*. The question of whether *effectivités* suggest that title lies with one country

Clearly, the Court's reasoning was designed to reflect a restrictive approach towards considering the role of *effectivités* and the notion of historical consolidation in addressing territorial disputes. However, in the operative part of the judgement, the judges produced a number of negative votes on substantive matters and demarcation points in the disputed territorial frontier zones, particularly from Judge Koroma and Judge *ad hoc* Ajibola. To this end, the dissenting opinion of Judge Koroma is of particular interest, as his reasoning is substantively closer to that employed by the Boundary Commission in the Ethiopia/Eritrea situation. In it, Judge Koroma claims that the court was wrong to accept the 1913 Anglo-German agreement, and the *uti possidetis* that was to stem from it, because, in citing Oppenheim, he was of the opinion that a protected state is its own legal person.[304] He also recalls from past ICJ jurisprudence that the concept of 'title' is relatively flexible and definitionally fluid.[305] Koroma notes that in the peninsula, Britain introduced new native courts as complements to local native council, and various public works, elections, administrative activities and military actions,[306] and as such, particularly given Cameroon's acquiescence to such activities, caution should be taken in excluding the notion of historical consolidation from a valid juridical framework. Koroma criticises an over reliance on the restrictions suggested by the *Fisheries* case, which he views as inappropriate,[307] and articulates his framework for incorporating historical consolidation in the law of statehood. He writes:

> In my view, the categories of legal title to territory cannot be regarded as finite. The jurisprudence of the Court has never spoken of "modes of acquisition", which is a creation of doctrine. Just as the Court has recognized prescriptive rights to territory, so there is a basis for historical consolidation as a means of establishing a territorial claim. Nor can the concept of historical consolidation as a mode of territorial title be regarded as "over-generalized" and alien to jurisprudence. Both municipal and international law including the Court's jurisprudence, recognize a situation of continuous and peaceful display of authority—proven usage—combined with a complex of interests in and relations to a territory, which, when generally known and accepted, expressly or tacitly, could constitute title based on historical consolidation. The "important variables" of the so-called established modes of acquisition, which the Court did not define, are not absent in historical consolidation. If anything, they are even more prevalent—the complex of interests and relations being continuous and extending over many years plus acquiescence. Historical consolidation also caters for a situation where there has been a clear loss of absence of title through abandonment or inactivity on the one side,

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rather than another must be distinguished from the question of whether such *effectivités* can serve to displace an established treaty title. The Court confirmed the rule that preference will be given to title when there is a conflict between title and *effectivités*."

[304] *Cf.* Dissenting Opinion of Judge Koroma, Cameroon/Nigeria case, *supra* note 276, at para 17, [hereinafter Koroma], citing Sir R. Jennings and Sir A. Watts (eds.), 9 Oppenheim's International Law, Vol. I, at 269: "[I]t is characteristic of a protectorate that the protected state always has, and retains, for some purposes, a position of its own as an international person and a subject of international law."

[305] *Cf. Id.* at para 30, quoting the Frontier Dispute (Burkina Faso/Mali) at para 18: "It is hardly necessary to recall that [the term 'legal title' denoting documentary evidence alone] is *not the only accepted meaning of the word 'title'*. Indeed, the Parties have used this word in different senses. In fact the concept of title may also, and more generally, *comprehend both any evidence which may establish the existence of a right, and the actual source of that right*." (emphasis added by Koroma). And *cf. Id.*, quoting the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening) at para 45: "The term 'title' has in fact been used at times in these proceedings in such a way as to leave unclear which of several possible meanings may therefore perhaps be usefully stated. As the Chamber in the *Frontier Dispute* case observed, the word 'title' is *generally not limited to documentary evidence* alone, but comprehends 'both any evidence which may *establish the existence of a right, and the actual source of that right*'."

[306] *Cf. Id.* at para 23: "A considerable amount and volume of evidence was presented to substantiate the claim of historical consolidation including education, public health, the granting of oil exploration permits and production agreements, the collection of taxes, the collection of custom duties, the use of Nigerian passports by residents of the Bakassi Peninsula, the regulation of emigration in Bakassi, and that the territory itself had been the subject of an internal Nigerian State rivalry."

[307] *Id.* at para 25.

> and an effective exercise of jurisdiction and control, continuously maintained, on the other (see Fitzmaurice, "General Principles of International Law", *Receuil des Cours*, 1957, II, p. 148).[308]

In sum, the Court's decision, particularly that concerning the Bakassi Peninsula, proved controversial on the ground, and the handover of the Bakassi Peninsula from Nigeria to Cameroon, as ordered by the Court, was at first resisted by the Nigerian state and local residents on the ground. However, in 2006, Nigerian troops eventually withdrew from the peninsula and sovereignty became transferred to Cameroon.[309] This process was substantively completed in 2008.[310] Nevertheless, given the general unpopularity of the decision for individuals on the ground, particularly in assessing the impact of the Court's decision on the peninsula, the disregard for anything other than original title by the Court is lamentable. This viewpoint is particularly strengthened the lack of consultation with the affected population, revealing a corresponding disregard for the right of peoples to self-determination. When viewed through a prism of sovereignty which is fully cognisant of the basket of rights and responsibilities integrated into the modern state, it is difficult to see how the Court's approach, in this case, was preferable to that employed in the Ethiopia/Eritrea Boundary Commission, or, indeed, the line of argumentation established in Judge Koroma's dissenting opinion. This may be seen as being particularly so when, as e.g. could be observed on the Bakassi Peninsula, clear postcolonial *effectivités* could be observed by a state not clearly holding title.

A middle ground in Nicaragua/Honduras: Taking postcolonial effectivités *into consideration*

However, soon after the Cameroon/Nigeria decision, the Court revisited the question of historical consolidation in a postcolonial circumstance, in the 2007 Case Concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua *v.* Honduras).[311] The question of postcolonial *effectivités* was of great importance, due to the fact that the Court was unable to observe acts of colonial administration on the four disputed islands of Bobel Cay, Savanna Cay, Port Royal Cay and South Cay in the Caribbean Sea. Honduras claimed that the disputed maritime boundary between the two states was formed on the basis of *uti possidetis juris*,[312] and although the Court clearly found that *uti possidetis* was applicable to the territorial delimitation between Nicaragua and Honduras, as they were both Spanish colonial provinces,[313]the Court could not apply *uti possidetis* to the disputed islands, despite the theoretical applicability of *uti possidetis* to maritime possessions.[314] In particular, the Court observed:

> [t]hat the mere invocation of the principle of *uti possidetis juris* does not of itself provide a clear answer as to sovereignty over the disputed islands. If the islands are not *terra nullius*, as both Parties acknowledge and as is generally recognized, it must be assumed that they had been under the rule of the Spanish Crown. However, it does not necessarily follow that the successor to the disputed islands could only be Honduras, being the only State formally to

[308] *Id.* at para 26.
[309] See e.g. BBC News, Nigeria hands Bakassi to Cameroon, http://news.bbc.co.uk/1/hi/world/africa/4789647.stm, accessed August 2007.
[310] See e.g. BBC News, Nigeria cedes Bakassi to Cameroon, http://news.bbc.co.uk/1/hi/world/africa/7559895.stm, accessed August 2008.
[311] See Nicaragua/Honduras, *supra* note 274. See also P. Bekker and A. Stanic, ASIL Insights: The ICJ Awards Sovereignty over Four Caribbean Sea Islands to Honduras, available from www.asil.org, accessed 17 October 2007.
[312] See *Id.* at para 147 *et seq.*
[313] See *Id.* at para 154.
[314] *Id.* at para 156.

> have claimed such status. The Court recalls that *uti possidetis juris* presupposes the existence of a delimitation of territory between the colonial provinces concerned having been effected by the central colonial authorities. Thus in order to apply the principle of *uti possidetis juris* to the islands in dispute it must be shown that the Spanish Crown had allocated them to one or the other of its colonial provinces.[315]

As stated previously, given the Court did not find particular evidence of either Nicaragua or Honduras manifesting sovereignty on the disputed islands, it concluded that "the principle of *uti possidetis* affords inadequate assistance in determining sovereignty over these islands because nothing clearly indicates whether the islands were attributed to the colonial provinces of Nicaragua or of Honduras prior to or upon independence".[316]

Given the lack of evidence of colonial activity, so as to activate unquestionably the colonial *uti possidetis*, in order to assign sovereignty over the four disputed islands, the Court was forced to seek evidence of postcolonial *effectivités*. Although a direct parallel with the Cameroon/Nigeria case cannot be made as the factual circumstances differed between the two, primarily as a result of the considerable geographic definition and evidence of colonial *effectivités* provided in the Anglo-German Agreement of 1913,[317] the Court's attitude strongly favouring original title, in determining sovereignty under disputed circumstances was in some ways mitigated by the necessity for the Court to achieve a decision to the case. It could be observed that the Court employed postcolonial *effectivités* as a matter of last choice. Indeed, this follows the hierarchy put forth in what Brian Taylor Sumner terms the ICJ's 'hierarchical decision rule', whereby the Court, when addressing territorial disputes, "applies a tripartite, hierarchical rule that looks first to treaty law, then to *uti possidetis*, and finally to effective control".[318]

In particular, the legal argument put forth by Honduras revolved around its acts of legislative and administrative control effectuated in the disputed islands,[319] whereas Nicaragua claimed "original title over the islands based on adjacency".[320] This 'principle of adjacency' proposed by Nicaragua was readily disposed of by the Court on both conceptual and substantive grounds,[321] which led the Court to examine specific postcolonial *effectivités* on the islands, as there was insufficient evidence to determine ownership of the islands at the moment of Honduras's independence in 1821. Honduras, in the Court's view, would need to satisfy the test of an "intention and will to act as sovereign, and some actual exercise or display of such authority" established in the Legal Status of Eastern Greenland Judgement of the Permanent Court of International Justice,[322] as well as "the extent to which sovereignty is also claimed by some other

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[315] *Id.* at para 157.
[316] *Id.* at para 167. It continued, *Id.*: "Equally, the Court has been presented with no evidence as to colonial *effectivités* in respect of these islands."
[317] The Court was also able to specify a starting point for the maritime boundary between Nicaragua and Honduras on the basis of the endpoint of the land boundary and instructed the parties to the dispute to negotiate remaining uncertainties in the demarcation of the maritime boundary. See *Id.* at para 277 *et seq*, and the decision's operative clause, *Id.* at para 321.
[318] B.T. Sumner, *Territorial Disputes at the International Court of Justice*, 53 Duke L.J. 1779 (2004) 1803-04 [hereinafter Sumner].
[319] The Court, *Id.* at para 170, received considerable evidence from Honduras purporting to demonstrate considerable *effectivités* manifested by itself on the disputed islands, "including acts of legislative and administrative control, the application of Honduran civil and criminal law to the disputed islands, the regulation of immigration, fishing activities carried out from the islands, naval patrols, the oil concession practice of Honduras and public works".
[320] *Id.* at para 171.
[321] See *Id.* at para 164, para 171.
[322] See *Id.* at para 172 and see also discussion *supra* chapter one of this study.

Power".[323] However, the Court recalled, from the Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia) case, that these tests could demonstrate relatively inconsequential sovereign acts, either in terms of frequency or force, given the specific intent for such acts to be sovereign *per se*.[324] On the basis of submissions, the Court agreed with Nicaragua's assertion that Honduras's claim for legislative and administrative control of the islands was insufficient,[325] but found evidence that e.g. in granting the US government overfly rights for some of the islands, Honduras had exercised sovereignty in the realm of the application and enforcement of criminal and civil law,[326] had issued work permits to foreigners, had regulated immigration to the islands (if only since 1999, however),[327] had demonstrated certain public works to which legal significance could be accorded,[328] and had "modestly" issued permits for the regulation of fishing and housing on the islands.[329] However, evidence of sovereignty on the basis of naval patrols by either party to the dispute was considered but not conclusively determined by the Court.[330]

Ultimately, the Court accepted these *effectivités* by Honduras as evidence of sovereignty, and noted that "those Honduran activities qualifying as *effectivités* which can be assumed to have come to the knowledge of Nicaragua did not elicit any protest on the part of the latter",[331] which led to the Court's unanimous finding that Honduras has sovereignty over the four disputed islands.

Implications for the territorial integrity of a postcolonial state

In the absence of absolute clarity as to the original title to disputed territory, the Court's willingness in Nicaragua/Honduras to recognise postcolonial *effectivités* as factors contributing to the determination of sovereignty is significant, particularly given the limited scope of such *effectivités* to be observed, in such remote locations.[332] However, this does not imply that Court had, in some way, reversed its previous decision from Cameroon/Nigeria, particularly if the tripartite 'hierarchical decision rule' proposed by Sumner is, as should be observed, viewed as acceptable. However, as Sumner acknowledges, the categorisation of these three separate rules is not watertight. He writes, as also could be observed on the Bakassi peninsula, that the positioning of territorial title at the pinnacle of these rules serves to negate the roles played by self-determination and affords unwarranted juridical weight to *uti possidetis juris*:

> When the court lacks guidance from treaties, *uti possidetis*, or effective control, it is most likely to proceed in enquiry *infra legaem* and halve the difference between the litigants' posi-

[323] *Id.* at para 173, quoting Legal Status of Eastern Greenland Case (Denmark *v.* Norway), 53 PCIJ Rep. Ser. A/B (1933), at 45-46.
[324] *Cf. Id.* at para 174, quoting Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia *v.* Malaysia) [hereinafter Indonesia/Malaysia], 2002 ICJ Rep. 625, para 134: "[The Court] can only consider those acts as constituting a relevant display of authority which leave no doubt as to their specific reference to the islands in dispute as such. Regulations or administrative acts of a general nature can therefore be taken as *effectivités* […] only if it is clear from their terms or their effects that they pertained to [the territories in question]."
[325] *Id.* at paras 177-181.
[326] See *Id.* at para 185.
[327] See *Id.* at para 189.
[328] See *Id.* at paras. 206-207.
[329] See *Id.* at para 196.
[330] See *Id.* at para 201.
[331] *Id.* at para 208.
[332] This observation mirrors the Court's reasoning in Indonesia/Malaysia, *supra* note 324, at para 143 *et seq.* whereby *effectivités* were observed as being manifested by Malaysia's establishment of a bird sanctuary and regulation of turtle eggs in these disputed island territories.

> tions. The court—somewhat ironically—prefers prescribing an equitable solution over entertaining justifications based on geography, economics, culture, history, elitism or ideology. […] It is noteworthy that in [the Minquiers and Ecrehos Case (France *v.* United Kingdom)], the parties did not present evidence as to what nationality the inhabitants of the Minquiers and Ecrehos groups considered themselves. In no way was self-determination a factor in the court's decision.[333]

Of course, it must also be recognised that the jurisprudence examined in this part of the chapter is not of a direct corollary to the questions of 'vertical state consolidation' and 'historical societal preservation' within a state. On the other hand, the Boundary Commission's work in Ethiopia and Eritrea, itself, was the direct result of the part of a territory, albeit controversially, seceding from a larger state. In that sense, the relationship between the phenomenon of territorial disputes between states and territorial disputes between states and collective groupings is conceptually tangible, albeit without direct juridical transferability from state-to-state relations to state-to-sub-state relations. Furthermore, the potential recognition of an act of secession by a 'negatively-defined' people, employing a campaign for independence, motivated by the notions of 'horizontal societal preservation' and the possibility of postcolonial external self-determination as a 'right of last resort' is theoretically conceivable, but not in a way whereby the ICJ would adjudicate the secession of a portion of a state. Rather, as observed in e.g. Bangladesh and Eritrea, and indeed as may be witnessed by the non-recognition of Somaliland, recognition of new states is a decision taken by states, whereby regional and interregional political considerations play a hugely significant and substantial role. Thus, when viewed inter-temporally, since the globalisation of the European state established the planet's primary legal and political form, a relatively limited number of successful secessions within the international community may be observed. All the while, the number of UN member-states has slowly increased, however. It is difficult to refute the conceptual validity of the theoretical juridical conceptualisation of a successful act of secession, whereby either through boundary delimitation and demarcation, or through other forms of territorial dispute settlement, questions of territorial definition will be evaluated on the basis of certain criteria, such as the 'hierarchical decision rule' observed from the ICJ's practice.

Thus, as has been suggested throughout the course of this study, because the *uti possidetis juris* is the product of original title treaties, and the Court, as the primary judicial organ of the United Nations, will readily seek to evaluate territorial disputes on the basis of legal instruments, it is rather unsurprising that 'other' potential reflectors of sovereignty over a certain territory are broadly disregarded by the Court. The problem, however, is that when a 'modern' conceptualisation of sovereignty is employed—one which is fully cognisant of self-determination of peoples, the responsibility to protect, minority rights, indigenous peoples' rights, the right to democracy and the potentially extra-legal *effectivités* employed by civil society organisations in contributing to the territorial integrity of a state, the steadfast insistence by the Court to maintain the primacy of original title in adjudicating territorial disputes is puzzling. As has been observed, particularly through the Court's willingness to entertain postcolonial *effectivités* as indicators of sovereignty in the Indonesia/Malaysia and Nicaragua/Honduras cases, original title is not the only method of determining possession in territorial disputes. Tangible activities manifested by states or collective groupings intended to act *à titre de souverain*, whilst not universally valid and, therefore, appropriate for critical analysis, are nevertheless evidence of intent and practice in modern territorial statehood.

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[333] Sumner, *supra* note 318, at 1806-07 (footnotes omitted). However, the Minquiers and Ecrehos Case (France *v.* United Kingdom) dates from 1953, when self-determination as a legal concept was still in the early stages of its development in the UN framework. See 1953 ICJ Rep. 47.

Therefore, as some of these elements may prove controversial as they come to be evaluated, the International Court of Justice, and public international law generally, would serve the cause of self-determination of peoples by affording it a place in the legal framework worthy of its position as common article one to the two main global human rights covenants. For example, as discussed herein, despite a general sense on the Bakassi Peninsula that inhabitants had a Nigerian identity, the Court's decision shifted the disputed peninsula to Cameroon on the basis of original title. No referendum was held on the territory and no significant consultation was made with local residents in formulating this decision. Self-determination in this circumstance could be seen as having been marginalised in favour of *uti possidetis*, to which one might observe that the objective of international and regional peace and security may have been infringed, should the decision to transfer sovereignty to Cameroon have produced armed conflict, internecine violence, or widespread human rights violations. If this serves to heighten the juridical acceptance of the notion of 'historical consolidation', whilst mitigating the strength of the *uti possidetis* rule in its relationship with self-determination of peoples, in some circumstances it may well be the case that the dual causes of international peace and security, and the territorial integrity of the postcolonial state, would be served.

Observations from chapter five

Although the concept of 'sovereignty' *per se* has evolved greatly from its positivist theoretical origins of *suprema potestas* and the practice of 'civilising the uncivilised', the territorial sovereign state remains the baseline form of analysis in international affairs. In a system of international law whereby state power is not unlimited, it is sometimes difficult to observe where 'traditional' characteristics of statehood and sovereignty evolve into the more modern aspects. In geographic areas least likely to find natural correlations between 'the nation' and 'the state', such as postcolonial states, it is obvious how tensions exist within the state's natural inclination to solidify its power (*i.e.,* 'vertical state consolidation'). Simultaneously, when sovereignty is viewed in full light of its 'modern' aspects, self-associating groups may protect themselves against predatory actions by the states (*i.e.,* 'horizontal societal preservation'). When viewed in conjunction with theories of democracy that view democracy as an ongoing process, as opposed to a series of elections, the effectiveness and territorial integrity of the state are solidified.

The relationship between a peoples' right to self-determination and *uti possidetis juris* has been extensively discussed in this study, and, indeed, by considering recent examples of state practice, the tensions therein remain evident. The question outstanding, when considering territorial disputes between states (including newly independent states and, to a certain extent, 'would-be' states), corresponds to the relative juridical weight of original title versus subsequent, and particularly postcolonial, acts of sovereignty. It is relatively uncontroversial to observe how original title is an important and significant part of these deliberations. Indeed, the fact that e.g. in sub-Saharan Africa, state boundaries remain largely unchanged since the period of decolonisation reflects the basic legitimacy of using original title to evaluate territorial disputes. This should be relatively unsurprising, as 'statehood' was chiefly a positivist conceptualisation and such cessions and annexations of territory were historically common and valid. However, this formulation serves to overlook, particularly, the rise and sustained validity of self-determination of peoples, as may be observed by situations whereby claims for autonomy or indeed independence may be held subservient to *uti possidetis*, or circumstances whereby definitive actions related to their territorial status are taken without regard to the expressed will of local populations per referendum, the non-recognition of territorial entities making claims for sovereignty or other manifestations of popular opinion.

CONCLUSION

The 'modern' aspects of statehood derived from international human rights law have further complicated the already paradoxical nature of territorial administration. That this is so is broadly to be welcomed, however, as it reflects the extent to which international society has evolved away from the *étatism* of *suprema potestas*. Nevertheless, it is not difficult to observe the complications in viewing populations as subjects of law through the prism of states, peoples, minorities, indigenous peoples, other groupings, and indeed, individuals. The overarching question remaining is this: to what extent does the state define the population, or the population define the state?

This is the essential idea put forth in the widely-cited separate opinion of Judge Dillard in the Western Sahara Case.[1] The point remains that access to government is the baseline unit of analysis for self-determination of peoples. What can be assumed, in a more contemporary sense, is that although the *uti possidetis juris* principle transferred the colonial shape and form to the postcolonial state, *uti possidetis juris* is chiefly of historical value, whereas self-determination is continually perpetuated through Article 1 of the ICCPR and ICESCR.

Thus if, *inter alia*, self-determination of peoples has an ongoing scope beyond decolonisation, if a 'people' can be more than the sum of a state's populations within its frontiers, if a 'people' can be defined in opposition to the actions of a state, if a peoples' right to self-determination is the flip side of minority rights guarantees and if 'peoples' rights' as a topic of juridical examination continues to evolve in definitional form, in the face of genuine and formidable claims to a state and the international community from a portion of a territorial state, territorial modifications may occur, even in postcolonial states. The cumulative end result may involve the acknowledgement that an effective administrative structure, lacking the status of government *per se*, is better poised to assume the official administrative function over that territory than that which would be expected, should the governmental (and perhaps territorial) *status quo* be maintained.

Although Dillard does not frame his discussion in the context of such concepts specifically, he does tangentially consider the theoretical question of potential recourse to the administration of the state by its inhabitants—and the potential for the (remedial) modification of a state's boundaries—by observing the following:

> To what extent, if any, does the right of self-determination limit the possible policy choices open to the General Assembly [in its supervisory power over future decolonisation processes in Western Sahara]? The Court has treated this delicate question with great circumspection in paragraphs 71 and 72 of the Opinion. In the former it states that the right of self-determination "*leaves the General Assembly a measure of discretion with respect to the forms and procedures by which that right is to be realized*" (emphasis added). In the latter it calls attention to "various possibilities" which exist for the future action of the General Assembly as "for instance with regard to consultations between the interested States, and the procedures and guarantees required for ensuring a free and genuine expression of the will of the people". It seemed hardly necessary to make more explicit the cardinal restraint which the legal right of self-determination imposes. That restraint may be captured in a single sentence. It is for the people to determine the destiny of the territory and not the territory the destiny of the people. Viewed in this perspective it becomes almost self-evident that the existence of ancient "legal ties" of the kind described in the Opinion, while they may influence some of the projected procedures for decolonization, can have only a tangential effect in the ultimate

[1] Western Sahara (Advisory Opinion), separate opinion of Judge Dillard, 1975 ICJ Rep. 116

> choices available to the people.[2]

In the course of this analysis, it has been argued that the effectiveness of a state's territorial administration can be improved by associating the concept of self-determination with that of self-defence. This is because a predatory environment can develop when a postcolonial state tries to consolidate itself vertically, through, *inter alia*, (coercive) assimilation. In such circumstances, a counterbalance must be made horizontally within the state, so that peoples, minorities, indigenous peoples and other vulnerable groups[3] are able to associate and interact as they so choose. Such a formulation is not excessively critical of the concept of assimilation *per se*, for it is certain that collective groupings assimilate amongst themselves in their interactions. It is, however, to very strongly imply that coercively assimilative activities—in practice, those which may be independently observed as upholding 'territorialism' over 'effectiveness'—are punitive towards a peoples' right to self-determination, and the international community should respond appropriately.

The importance of intelligent decision-making from genuinely factual circumstances

This is most evident when a state's responsibility to protect populations—itself quite a new, and therefore nebulous, international legal obligation—is factually called into question, or, in other circumstances of acute threat, viz. Darfur. On a more conceptual level, this may translate into the acknowledgement of a reality whereby international law should not disregard the will of the people, as observed in some aspects of the Cameroon *v.* Nigeria case, particularly with regard to the Bakassi Peninsula. Similar circumstances should be more critically reassessed in future cases before the International Court, as 'verticality' in modern territorial statehood may, in a state's administration, represent assimilation to the point of abandonment of the principle of consent in the conduct of a population's democratic administration. Conversely, the 'horizontalism' in modern territorial statehood, although it may form a practical counterbalance to state activity, ultimately is largely subservient to the juridical weight of the state, particularly when viewed in the context of the ability of such juridical entities, such as 'peoples' and 'minorities', to effectuate tangible administrative change onto the structure of a state.

In Judge Dillard's separate opinion, he observes that:

> The concept of *terra nullius* has meaning with reference and only with reference to the well-established principle of international law that title to territory may be acquired through "effective occupation". A condition to the legitimacy of this method of acquiring original title is that the territory be *sans maître*, *i.e.*, *terra nullius*. Furthermore the problem becomes legally important only when the legitimacy of the occupation either as originally manifested or as geographically extended is challenged by a third State as was true in many cases of which the *Legal Status of Eastern Greenland (P.C.Z.J., Series A/B, No. 53),* the *Island of Palmas* (UNRZAA, Vol. II, p. 829), and the *Clipperton Island* (ibid., p. 115) cases furnish familiar examples.[4]

The problem with 'effective occupation', in a postcolonial sense, is its subjectivity. Effectiveness is a dominant variable in the matrix of statehood as defined by the Montevideo Convetion. In a world whereby colonial actions were explicitly sanctioned, *suprema potestas*, whether deliberate or coincidental, unequivocally validated all activities of a state. In a world whereby *suprema potestas* and colonialism are both repudiated, the activities of a state, particularly a postcolonial state facing difficulties in projecting power effectively throughout its territory, may become questionable from a legal perspective, following on from, *inter alia*, the access

[2] *Id.* at 122.
[3] *I.e.,* the pragmatic amalgam term 'collective groupings' employed earlier in the context of this study.
[4] *Id.* at 123.

to government, respect for good (e.g. democratic) governance and 'responsibility to protect populations' provisions of modern international law. It may very well be that the government of a state finds difficulty projecting its power across distances, in which case the capital city may possess an overconcentration of governmental power vis-à-vis the rest of the territorial state.[5] Thus the territorial *Hinterlands* of such states may, or may not, be effectively governed from the capital. Nevertheless, in a modern sense, undoubtedly, the 'effectiveness' of a state is not only measured by its credentials to legitimate claim over territory; it is also measured by the ability of that territory to administer itself, in conformity with the precepts of modern public international law. In this manner, as has been observed when contrasting ICJ jurisprudence in Cameroon *v.* Nigeria and Nicaragua *v.* Honduras, questions may arise between the doctrine of 'original title' and that of 'historical consolidation'. It has been argued in this study that incorporating the latter analytical framework into juridical decision-making may demonstrate comparatively greater levels of respect for self-determination of peoples, and therefore should be encouraged.

This serves, in sum, to contribute towards the continued reinforcement of international human rights law into the practice of public international law and a wholly dispassionate juridical acknowledgement of the *non-étatisme* in modern public international law. For this to be practically so, it should be acknowledged that original treaties of cession, like *uti possidetis juris*, serve a necessary purpose as aspects of the wider law of statehood. However, as it is now three decades since the entry into force of the two principal human rights covenants, the ICCPR and ICESCR, self-determination of peoples must not be seen either as an inconvenience or potential oversight in terms of juridical decision-making with territorial application. The analytical starting point for jurisprudential analysis should reflect gravitation away from colonial activity being the supreme basis for the formulation of the state towards an ongoing, practical assessment of whether a state possesses the capacity to govern itself effectively, while being mindful of basic civil and political, and economic, social and cultural rights, and whether such individual rights are universally distributed and upheld across the territory. To be certain, administrative and juridical decisions will be continually taken on the basis of factual circumstances that will vary from case to case.

The challenge of applying factual circumstances to a legal fiction

Beyond a certain point, it should also be acknowledged that modern territorial statehood is defined primarily by a number of specific legal fictions that have been allocated great definitional and managerial powers, by virtue of circumstances. A state, a people, a minority, an indigenous people, an independent group, and an individual are all obviously-accepted, juridcally-grounded explanations for the human condition. It is precisely here how the broad concept of 'human rights', once either unimaginable, or a subject to be widely ignored or castigated, has now evolved to such a point so as to establish itself squarely in the discourse of modern human society as well as in the lexicon of international law.

Yet 'human rights', as a topic of legal examination, finds its credibility in the main through the prism of a state that has voluntarily accepted e.g. the ICCPR and ICESCR. The voluntarist nature of this aspect of public international law is, as is the state, a theoretical construction, but with highly significant and practical consequences, particularly in circumstances whereby the ineffectiveness of such theory can be readily observed. It seems now considerably less controversial to assert that the continual reinforcement of human rights provisions into the territorial

[5] See generally J. Herbst, States and Power in Africa (2000), at chapter five ('National Design and the Broadcasting of Power').

administration of a state is something to be welcomed, in contrast to three decades ago, when human rights emerged as an enforceable, treaty-based subject of law.

In sum, it can be observed how the state, when viewed comprehensively in terms of composition and critically in terms of postcolonial substance, may be little more than an 'imaginary domain' itself—hence the advocacy in this study for the avoidance of the term 'nation-state' when considering statehood as legal phenomenon. Costas Douzinas emphasises the conceptual point more fully, as such:

> The symbolic castration and the mirror stage that follows it create a projected sense of bodily integrity, and imaginary completeness which replaces the feeling of fragmentation and lack of limb co-ordination. […] Becoming a legal subject denies in a similar fashion, as we saw, the bodily wholeness of the person and replaces it with partial recognitions and incomplete entitlements. Rights by their nature cannot treat the whole person; this is the reason why no right to rights exists. Such a right would be the right of a person to be himself or herself, a unique human being in common with others, a right that would defeat the whole purpose of having rights. In law, a person is never a complete being but a combination of various partial and often conflicting rights, the contingent holder of legal entitlements that punctuate life. The sum total of rights constructs the legal subject as a rather imbalanced vehicle for the differential investments of the law. If we were to imagine the portrait of the legal subject, it would have a passing resemblance with its human sitter but it would also be strangely alien, as if painted in the style of Cubism: a huge ear, a miniscule mouth, one protruding and aggressive eye, an elephantine nose placed where the mouth should be. It would be the projection of a three-dimensional imago onto a flat and flattening canvas.[6]

As such, as the multi-dimensional reality of postcolonial statehood continues to be projected onto the standard form of the state as a juridical construction, while international legal practice continues to reinforce the role of the individual in international law. In critically evaluating circumstances between states or collective groupings within a state which lay claim to the administration of a portion of a territory, it may be helpful to suggest that the relatively fixed provisions of statehood—defined territory and permanent population—could be mitigated by the relatively fluid provisions of statehood—governmental control and independence—if doing so would produce a demonstrably more effective state.

As a juridical construct, creating and sustaining a state possessed with the capacity to support and uphold its various populations in social cohesion is the principal objective of modern territorial statehood.

[6] C. Douzinas, The End of Human Rights: Critical Legal Thought at the Turn of the Century (2000).

LIST OF WORKS CITED

Abi-Saab, G. "The Effectivity Required of an Entity that Declares its Independence in Order for it to be Considered a State in International Law", in A.F. Bayefsky, *Self-Determination in International Law: Quebec and Lessons Learned*. The Hague: Kluwer Law International, 2000.

Ackerman, B. and Fishkin, J.S. *Deliberation Day*. New Haven: Yale University Press, 2005.

Aginam, O. "The African Charter of Human and People's Rights", in E.K. Quashigah and O.C. Okafor, *Legitimate Governance in Africa: International and Domestic Legal Perspectives*. The Hague: Kluwer Law International, 2000.

Albrecht-Carrie, R. "Italian Colonial Policy, 1914-1918".18 *Journal of Modern History* 123-147 (June 1946).

Alexandrowicz, C.H. *The Afro-Asian world and the law of nations: (historical aspects)* 123 Rec. des Cours (1968-*I) 117-214.*

Alexandrowicz, C.H. The European-African Confrontation. Sijthoff: Rijswijk, 1973.

Allan, J. Positively Fabulous: Why It Is Good To Be a Legal Positivist. 10 Can. J.L. & Juris. 231 (1997).

Allott, P. The Health of Nations: Society and Law beyond the State. Cambridge: Cambridge University Press, 2002.

Alston, P. "Downsizing the State in Human Rights Discourse", in N. Dorsen and P. Gifford (eds.), Democracy and the Rule of Law. Washington: CQ Press, 2001.

Allott, P. Eunomia: New Order for a New World. Oxford: Oxford University Press, 1990.

Amnesty International. *Nigeria: On the Anniversary of Ken Saro-Wiwa's Execution, Human Rights Organizations Call for Reform*. AI index AFR 44/26/96 (6 November 1996).

Amnesty International. *Rwanda: Civilians trapped in armed conflict.* AI Index AFR 47/43/97, 19 December 1997.

Anderson, M. *Frontiers: Territory and State Formation in the Modern World*. Cambridge: Polity Press, 1996.

Andrews, J.A. *The Concept of Statehood and the Acquisition of Territory in the 19th Century*. 94 LQR 408, 419 (1978).

Andryesk, O. *Report on the Definition of Minorities*. Utrecht: 8 *SIM* Special.

Anghie, A. Imperialism, *Sovereignty and the Making of International Law*. Cambridge: Cambridge Univresity Press, 2004.

Anghie, A. *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law*. 40 Harvard Int'l L.J. 1-80 (1999).

Ankumah, E.A. *The African Commission on Human and Peoples' Rights: Practice and Procedures*. The Hague: Kluwer Law International, 1996.

Annan, K. Statement at the International Conference: "Towards a Community of Democracies". UN Press Release SG/SM/7467 (27 June 2000).

Arbour, L. *The responsibility to protect as a duty of care in international law and practice*, 34 Rev. Int'l Studies 445 (2008).

Asch, R.G. *The Thirty Years War: The Holy Roman Empire and Europe*. New York: St. Martin's Press,, 1997.

Austin, J. *The Province of Jurisprudence Determined*. Cambridge: Cambridge University Press, 1995.

Bagehot, W. *Physics and Politics*. London: Kegan Paul, 1887.

Barnett, M.N. *Bringing in the New World Order: Liberalism, Legitimacy, and the United Nations*. 49 *World Politics* (1997).

Barrett, M. *The Politics of Truth, from Marx to Foucault*. Stanford: Stanford University Press, 1991.

Barsh, R. "Indigenous Peoples and the Rights to Self-Determination in International Law", in B. Hocking (ed.), *International Law and Aboriginal Human Rights*. Holmes Beach: Gaunt, 1988.

Bayart, J.-F. "Civil Society in Africa", in P. Chabal (ed.) *Political Domination in Africa*. Cambridge: Cambridge University Press, 1986.

Bayart, J.-F., Ellis S. and Hibou, B. *The Criminalization of the State in Africa*. Bloomington: Indiana University Press, 1999.

Bayefsky, A.F. *Self-Determination in International Law: Quebec and Lessons Learned*. The Hague: Kluwer Law International, 2000.

Bedjaoui, M. "The Right to Development and the Jus Cogens", 2 Lesotho L.J. 93, 98 (1986).

Beigbeder, Y. *International Monitoring of Plebiscites, Referenda and National Elections: Self-Determination and Transition to Democracy*. The Hague: Kluwer Law International, 1994.

Bekker, P.H.F. "International Decisions, Land and Maritime Boundary between Cameroon and Nigeria (Cameroon *v*. Nigeria: Equatorial Guinea intervening)", 97 AJIL 391 (2003).

Belgian Government Information Service (New York). *The Sacred Mission of Civilisation: The Belgian Thesis* (1953).

Bobbio, N. *The Future of Democracy: A Defence of the Rules of the Game*. Minneapolis: University of Minnesota Press, 1987.

Boutkevitch, V. *Freedom of Movement*. Working paper for the Sub-Commission on Prevention of Discrimination and Protection of Minorities. UN Doc. E/CN.4/Sub.2/1997/22, 22 July 1997.

Boutros-Ghali, B. *An Agenda for Peace*. UN Doc. S/24111, at para. 17 (1992, 2d. ed, 1995).

Brierly, J.L. *The Law of Nations*. 6th ed.. London: Waldock, 1963.

Brietzke, P.H. "Self-Determination, or Jurisprudential Confusion: Exacerbating Political Conflict". 14 Wisc. Int'l L.J. 69 (1995).

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

Brown, P.M. "Editorial Comment: Self-Determination in Central Europe". 14 AJIL 235-239 (1920).

Brownlie, I. *African Boundaries – A Legal and Diplomatic Encyclopaedia* 11 (1979).

Brownlie, I. *Basic Documents on Human Rights*, 3rd ed. Oxford: Oxford University Press, 1993.

Brownlie, I. *General Course on Public International Law*, 225 *Recueil. des Cours* (1995).

Brownlie, I. *International Law and the Use of Force by States*. Oxford: Clarendon Press, 1963.

Brownlie, I. *Principles of Public International Law*, 1st ed. Oxford: Clarendon Press, 1966. .

Brownlie, I. *Principles of Public International Law*, 4th ed. Oxford: Oxford University Press, 1990.

Brownlie, I. *Rights of Peoples in International Law*, in J. Crawford, ed., *The Rights of Peoples*. Oxford: Clarendon Press, 1988.

Buchanan, A. *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law*. Oxford: Oxford University Press, 2004.

Buchheit, L.C. *Secession: The Legitimacy of Self-Determination*. London: Yale University Press, 1978.

Buckland, W.W. *A Text-Book of Roman Law from Augustus to Justinian*, 3rd ed. Cambridge: Cambridge University Press, 1963.

Bull, H. *The Anarchical Society*. New York: Columbia University Press, 1977,

Buzan, B. *People, States and Fear: An Agenda for International Security Studies in the Post-Cold War Era*. New York: Lynn Rienner, 1991

Calleo, D.P. *Reflections on the Idea of the Nation-State*, in C.A. Kupchan, ed., *Nationalism and Nationalities in the New Europe*. Ithaca: Cornell University Press, 1995.

Carozza, P.G. *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AJIL 38 (2003).

Cassese, A. *International Law in a Divided World*. Oxford: Clarendon Press,1986.

Cassese, A. "Remarks on Scelle's Theory of 'Role Splitting' in International Law", 1 EJIL 210 (1990)

Cassese, A. *Self-Determination of Peoples: A Legal Reappraisal*. Cambridge: Cambridge University Press,1995.

CBC News. "House passes motion recognizing Québécois as nation" 27 November 2006. Available at http://www.cbc.ca/canada/story/2006/11/27/nation-vote.html (last accessed 16 August 2008).

Chabal, P. and Daloz, J.-P. *Africa Works: Disorder as a Political Instrument* (1999).

Chabal, P. and Daloz, J.-P. *Africa Works: the Political Instrumentalization of Disorder* (1999).

Chabal, P. *Power in Africa: An Essay in Political Interpretation* (1994).

Chen, T.C. *The International Law of Recognition* (1951).

Chinkin, C., in *Theme Panel IV: The End of Sovereignty? (Roundtable)*, 88 ASIL Proceedings 71 (1994).

Christian, T.J. "Introduction", in L.C. Green and O. Dickanson (eds.), *The Law of Nations and the New World* (1989).

Commission on Global Governance. *Our Global Neighborhood* (1995).

Concise Oxford English Dictionary, 10th ed. (1999).

Corbett, P.E. *Law and Society in the Relations of States* 12 (1951).

Cordozo, B.N. *The Growth of the Law* (1924).

Craven, M.C.R. *The European Community Arbitration Commission on Yugoslavia*, 1995 BYIL 333

Crawford, J. *Aboriginal Self-Government in Canada,* Unpublished Research Report for the Canadian Bar Association (January 1988), as reprinted in Musgrave, Self-Determination and National Minorities, (1997).

Crawford, J. *Responsibility to the International Community as a Whole*, 4th Snyder Lecture, delivered 5 April 2000, available from www.lcil.law.cam.ac.uk (last accessed 21 August 2008).

Crawford, J. *The Creation of States in International Law*, 2nd ed. 2006.

Crawford, J. The Creation of States in International Law ,1st ed., 1979.

Crawford, J. *The Criteria for Statehood in International Law*, 48 BYIL 93 (1976-77).

Crawford, J. "The Right of Self-Determination in International Law: Its Development and Future", in P. Alston (ed.), *Peoples' Rights: The State of the Art* . Oxford: Oxford University Press, 2001.

Crawford, J. "The Rights of Peoples: 'Peoples' or 'Governments'", in J. Crawford (ed.) *The Rights of Peoples*. Oxford: Clarendon Press, 1988.

Crawford, J. "The Rights of Peoples: Some Conclusions", in J. Crawford (ed.) *The Rights of Peoples*. Oxford: Clarendon Press, 1988.

Crawford, J., Peel J. and Olleson, S. *The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: Completion of the Second Reading*, 12 EJIL 963 (2001).

Dahl, R.A. *Democracy and Its Critics* (1989).

Dahl, R.A. *Polyarchy: Participation and Opposition* (1971).

Damrosch, L. F. *et al*, ed. *International Law: Cases and Materials*. 4th ed. New York: American Casebook Series, 2001.

Davidson, B. *Modern Africa: A Social and Political History*. 2nd ed. London: Longman, 1989.

Deschênes, J. "Proposal concerning a Definition of the term 'Minority'". UN Doc. E/CN.4/Sub.2/1985/31.

Deutsch, M. and Brickman, E. *Conflict Resolution*. 15 *Pediatrics in Review* 16-22 (1994).

Dinstein, Y. "Collective Human Rights of Peoples and Minorities". 25 ICLQ 102 (1976).

Documenty Vneshnei politiki SSSR. Vol. I. Moscow, Gospolitizdat (1957).

Doehring, K. "Effectiveness", in R. Bernhardt (ed.), 7 *Encyclopedia of Public International Law* 70.

Donati, C. *Stato e Territorio* (1924).

Doyle, M. *Kant,* "Liberal Legacies and Foreign Affairs". 12 Philosophy and Public Affairs 213 (1983).

Dryzek, J.S. *Deliberative Democracy and Beyond: Liberals, Critics, Contestations* (2002).

Dugard, J. and Raič, D. "The role of recognition in the law and practice of secession", in M. Kohen (ed.) *Secession: International Law Perspectives* (2006).

Dugard, J. *Recognition and the United Nations* (1987).

Duke Adolphus Frederick of Mecklenburg, *Into the Heart of Africa*. London: Cassell, 1910.

Duursma, J.C. *Self-Determination, Statehood and International Relations of Micro-States* (1996).

Eide, A. *Minoritetsvernet, stebarn i det internasjonale menneskerettighetsvern?* (1983).

Eide, A. "Minority Protection and World Order: Towards a Framework for Law and Policy", in A. Phillips and A. Rosas (eds.) *Universal Minority Rights* (1995).

Eide, A. *New Approaches to Minority Protection* (1995).

Eide, A. "Territorial Integrity of States, Minority Protection and Guarantees for Autonomy Arrangements: Approaches and Roles of the United Nations", in *European Commission for Democracy Through Law of the Council of Europe, Local Self-Government, Territorial Integrity and Protection of Minorities*, International Colloquium (Lausanne, 25-27 April 1996).

Elster, J. (ed.) *Deliberative Democracy* (1998).

Engers, J.F. *From Sacred Trust to Self-Determination*, 24 Neth. Int'l L. Rev. 88 (1977).

Ermacora, F. *The Protection of Minorities Before the United Nations*, 182 *Recueil des Cours* 247 (1983).

Espiell, H.G. *The Right of Self-Determination: Implementation of United Nations Resolutions*, UN Doc. E/CN.4/Sub.2/405/Rev.1 (1980).

Etzioni, A. "The Evils of Self-Determination". Foreign Policy (Winter 1992-1993).

Evans, G. *Cooperating for Peace* (1993).

F.L. Kirgis, "Editorial Comment: The Degrees of Self-Determination in the United Nations Era". 88 AJIL 304 (1994).

Falk, R. "The Rights of Peoples (In Particular Indigenous Peoples)", in J. Crawford (ed.) *The Rights of Peoples* (1988).

Falk, R.A. *The Role of Domestic Courts in the International Legal Order* (1964).

Fatouros, A.A. "Participation of the 'New' States in the International Legal Order of the Future", in R.A. Falk and C.E. Black (eds.), *The Future of the International Legal Order Vol. I: Trends and Patterns* (1969).

Fawcett, J.E.S. *The British Commonwealth in International Law* (1963).

Fawcett, J.E.S. *The Law of Nations*. New York: Basic Books, 1968.

Ferry, J.F.C. Speech Before the French Chamber of Deputies, March 28, 1884, in Paul Robiquet (ed.), *Discours et Opinions de Jules Ferry*, (1897).

Finnish Presidency of the Council of the European Union, *OSCE: EU Statement on the so-called 'referendum' and so-called 'presidential elections' in South Ossetia on 12 November 2006*, 9 November 2006.

Fiore, P. *Le droit international codifié et sa sanction juridique* (1890).

Fishkin, J.S. and Laslett, P. *Debating Deliberative Democracy* (2002).

Fitzmaurice, G. "General Principles of International Law". 92 *Recueil des Cours* 5 (1957).

Ford Foundation Report of the Independent Working Group on the Future of the United Nations, The United Nations in Its Second Half-Century (1995).

Fox, G.H. "Self-Determination in the Post-Cold War Era: A New Internal Focus?", 16 Mich. J. Int'l L. 733 (1995).

Franck, T.M. *Fairness in International Law and Institutions* (1995).

Franck, T.M. *General Course on Public International Law*, 420 Recueil des Cours (1993).

Franck, T.M. "Legitimacy in the International System". 82 AJIL 713 (1988).

Franck, T.M. "Postmodern Tribalism and the Right to Secession", in C. Brölmann *et al.* (eds.), *Peoples and Minorities in International Law* (1993).

Franck, T.M. "The Emerging Right to Democratic Governance". 86 AJIL 46 (1992).

Franck, T.M. *The Power of Legitimacy Among Nations* (1990).

Freund, B. *The Making of Contemporary Africa: The Development of African Society since 1800*. 2nd. ed. Boulder: Lynne Rienner,1998.

Friedmann, W. *The Changing Structure of International Law*. London: Stevens and Sons, 1964.

Gasana, J. and Nsengimana, N. *D'un Génocide à l'Autre*. Unpublished paper of Project NOUER (*Nouvelle Espérence pour le Rwanda*) on file with author (May 1997).

Gilbert, G. "The Legal Protection Accorded to Minority Groups in Europe". 1992 Neth. YB Int'l L. 71.

Gittleman, R. "The African Charter on Human and Peoples' Rights – A Legal Analysis". 22 Virginia J. Int'l L. 667 (1982).

Grant, T.D. "Defining Statehood: The Montevideo Convention and its Discontents". 37 Colum. J. Transnat'l L. (1999).

Gros Espiell, H. "Special Rapporteur of the United Nations Subcommission on the Prevention of Discrimination and Protection of Minorities", in *The Right of Self-Determination: Implementation of United Nations Resolutions*. UN Sales Publication E.79.XIV.5 (1980).

Gross, L. "The Peace of Westphalia, 1648-1948". 42 AJIL 20 (1948).

Guerrero, J.G. *La VII^{e} Conférence Panaméricaine : Montevideo, 3-27 décembre 1933*. XLI Rev. Gén. de Droit Int'l Public 401 (1934).

Gye-Wado, O. "The Effectiveness of the Safeguard Machinery for the Enforcement of Human Rights in Africa". 2 JHRLP 144 (1992).

Habermas, J. *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. Studies in Contemporary German Social Thought (1998).

Habermas, J. *The Inclusion of the Other: Studies in Political Theory*. Studies in Contemporary German Social Thought (2000).

Habermas, J. *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (1991).

Hannum, H. *Autonomy, Sovereignty and Self-Determination: The Accommodation of Conflicting Rights*. Philadelphia: University of Pennsylvania Press, 1990.

Hannum, H. "Rethinking Self-Determination". 34 Virginia J. Int'l L. 1 (1993).

Harbeson, J.W. "Externally Assisted Democratization: Theoretical Issues and Practical Realities", in J.W. Harbeson and D. Rothchild (eds.) *Africa in World Politics: The African State System in Flux* (2000).

Hart, H.L.A. *The Concept of Law* (1961).

Healy, D. *James G. Blaine and Latin America* (2001).

Hegel, G.W.F. "Grundlinien der Philosophie der Rechts". 4. Aufl. Herausgegeben von Johannes Hofmeister, 1955.

Held, D. *Democracy and the New Global Order: From the Modern State to Cosmopolitan Governance* (1995)

Henkin, L. *International Law: Politics and Values* (1995).

Henkin, L. *International Law: Politics, Values and Functions*. 216 *Recueil des Cours* 22 (1989).

Henkin, L. The Age of Rights (1990).

Henkin, Pugh, Schachter & Smit. *Int'l Law: Cases and Materials*. 3rd. ed (1993).

Henrard, K. *Devising an Adequate System of Minority Protection: Individual Human Rights, Minority Rights and the Right to Self-Determination* (2000).

Heraclides, A. *The Self-Determination of Minorities in International Politics* (1991).

Herbst, J. *States and Power in Africa: Comparative Lessons in Authority and Control* (2000).

Hertselet, E. *The Map of Africa by Treaty 996-998*. 3rd. ed. London: 1909.

Hertslet, E. *The Map of Africa by Treaty*, Vol. 3. 3rd ed. London: 1967.

Higgins, R. *Development of International Law Through the Political Organs of the United Nations* (1963).

Higgins, R. "General Course on Public International Law", 230 *Recueil des Cours* (1991).

Higgins, R. *International Law and the Avoidance, Containment and Resolution of Disputes* (1991).

Higgins, R. "Postmodern Tribalism and the Right to Secession: Comments", in C.M. Brölmann *et al* (eds.), *Peoples and Minorities in International Law* (1993).

Higgins, R. *Problems and Process: International Law and How We Use it*. Oxford: Oxford University Press, 1994.

Higgins, R. The Development of International Law Through the Political Organs of the United Nations 13 (1963)

Higgins, R. "Time and the Law: International Perspectives on an Old Problem". 46 ICLQ 501 (1997).

Higgins, R. V. General Course on Public International Law, *International Law and the Avoidance, Containment and Resolution of Disputes*, 230 *Recueil des Cours* (1991).

Hill, D.J. *A History of Diplomacy in the International Development of Europe*, Vol. II. New York: Longmans Green, 1925.

Hill, H. *Claims to Territory in International Law and Relations* (1945).

Hobsbawm, E.J. *Nations and Nationalism Since 1780: Programme, Myth, Reality*. 2nd ed. Cambridge: Cambridge University Press, 1990.

Hochschild, A. *King Leopold's Ghost: A Story of Greed, Terror, and Heroism in Colonial Africa*. Boston: Houghton Mifflin, 1998.

Holsti, K.J. *The State, War and the State of War*. Cambridge: Cambridge Studies in International Relations, 1996.

Horowitz, D.L. Ethnic Groups in Conflict. 2nd ed. (2000)

Huntington, S. "Democracy's Third Wave". 2(2) Journal of Democracy 12 (1991).

Hyde, C.C. *International Law, Chiefly as Interpreted by the United States*. 2nd. ed. (1947).

Hyden, G. *Problems and Prospects of State Coherence*, in D. Rothchild and V.A. Olorunsola (eds.) State Versus Ethnic Claims 69 (1983).

Indian and Foreign Review. 1 Jul. 1971.

Initiative and Referendum Institute, *Final Report of the Initiative and Referendum Institute's Election Monitoring Team*, 27 July 2002, available on www.iandrinstitute.org/international/FinalSomalilandReport7-24-01combined.pdf (last accessed August 2004).

Iorns, C.J. "Indigenous Peoples and Self-Determination: Challenging State Sovereignty". 24 Case W. Res. J. Int'l L. 199 (1992).

Jackson, R.H. *Quasi-States: Sovereignty, International Relations and the Third World*. Cambridge: Cambridge University Press, 1990.

Jackson, R.H. *Negative Sovereignty in Sub-Saharan Africa*, 12 Rev Int'l Stud 247 (1986).

Jellinek, G. *Allgemeine Staatslehre*. 3rd ed. (1914).

Jennings, I. *The Approach to Self-Government* (1956).

Kamanu, O. *Secession and the Right to Self-Determination: An OAU Dilemma*, 12 J. Mod. Afr. Stud. 335 (1974).

Keller, A., Lissitzyn, O. and Mann, F. "Creation of Rights of Sovereignty Through Symbolic Acts 1400-1800". New York: Columbia University Press, 1938.

Kelsen, H. *Das Problem der Souveränität* (1920).

Kelsen, H. *Law and Peace*. Cambridge: Harvard University Press, 1942.

Kelsen, H. *The Law of the United Nations* (1951).

Kelsen, H. *Principles of International Law* (1952).

Kelsen, H. "Recognition in International Law: Theoretical Observations", 35 AJIL 605 (1941).

Kennedy, D. *A New Stream of International Law Scholarship*, 7 Wisc. Int.L.J. 39

Kirgis, F.L. "Custom on a Sliding Scale". 81 AJIL 146 (1987).

Kirgis, F.L. "Editorial Comment: The Degrees of Self-Determination in the United Nations Era". 88 AJIL 304 (1994).

Kiss, A.C. "Permissible Limitations on Rights", in L. Henkin (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights*. New York: Columbia University Press, 1981.

Kiwanuka, R.N. "The Meaning of 'People' in the African Charter on Human and Peoples' Rights". 82 AJIL 80 (1988)

Knop, K. "The 'Righting' of Recognition: Recognition of States in Eastern Europe and the Soviet Union, Canadian Conference on International Law", in *State Sovereignty: The Challenge of a Changing World*. 1992.

Knox, T. *Hegel's Philosophy of Right*. Oxford: Clarendon Press, 1942.

Köchler, H. "Self-determination and Democratization of the UN System", in Y.N. Kly and D. Kly, In *Pursuit of the Right to Self-Determination: Collected Papers and Proceedings of the First International Conference on the Right to Self-determination and the United Nations* (2001).

Kohen, M. "Introduction", in M. Kohen (ed.) *Secession: International Law Perspectives* (2006).

Kohen, M. *Possession Contestée et Souveraineté Territoriale* (1997).

Kohen, M.G. "L'uti possidetis révisité : L'arrêt du 11 septembre 1992 dans l'affaire El Salvador/Honduras". 4 *Revue Générale de Droit Internationale Public* (1993).

Kohen, M.G. *Possession contestée et souveraineté territoriale* (1997).

Kooijmans, P.J. *The Doctrine of the Legal Equality of States: An Enquiry into the Foundations of International Law* (1964).

Koskenniemi, M. " 'Intolerant Democracies': A Reaction". 37 Harvard Int'l. L.J. 231 (1996).

Koskenniemi, M. *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* Cambridge: Cambridge University Press, 2002.

Koskenniemi, M. "The Wonderful Artificiality of States". ASIL Proceedings, 1994.

Krasner, S.D. "Compromising Westphalia", 20(3) Int'l Security 115 (Winter 1995-1996).

Kreijen, G. "Somalia and Withdrawal of Recognition", in Kreijen (ed.), *State, Sovereignty and International Governance* (2002).

Kreijen, G. *State Failure, Sovereignty and Effectiveness* (2004).

Kurban, D. *et al*, *Zorunlu Göç ile Yüzleşmek: Türkiye'de Yerinden Edilme Sonrası Vatandaşlığın İnşası* (Confronting Forced Migration: The Construction of Citizenship in the Aftermath of Internal Displacement in Turkey) (2006).

Lansing, R. "Self-Determination: A Discussion of the Phrase". The Saturday Evening Post, May 1921.

Lansing, R. *The Peace Negotiations: A Personal Narrative* (1921).

Lauterpacht, E. "Sovereignty: Myth or Reality?", 73 Int'l Affairs 149 (1997).

Lauterpacht, H. *Recognition in International Law* (1947).

Lawrence, T.J. *The Principles of International Law* (1895).

Lenin, V.I. *Selected Works* (1969).

Lijphart, A. *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (1999).

Lindley, M.F. *The Acquisition and Government of Backward Territory in International Law*. New York: Longroans and Co, 1926.

Lisska, A.J. *Aquinas's Theory of Natural Law: An Analytic Reconstruction* (1996),

Lorimer, J. *The Institutes of the Law of Nations* (1883).

Lugard, F.J.D. *The Dual Mandate in British Tropical Africa* (1922).

Mann, M. *States, War and Capitalism: Studies in Political Sociology*. Oxford and New York: Basil Blackwell, 1988.

Mansfield E.D. and Snyder, J. "Democratization and War". 74(3) Foreign Affairs 79 (May/June 1995).

Marks, S. *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (2000).

Marks, S.P. "Emerging Human Rights: A New Generation for the 1980s?". 33 Rutgers L.R. 435 (1981).

Mbonimpa, M. and Hutu, Tutsi. *Twa: Pour une société sans castes au Burundi* (1993).

McGoldrick, D. "Canadian Indians, Cultural Rights and the Human Rights Committee". 40 ICLQ 658 (1991).

McNair, A.D. *The Law of Treaties*. Oxford: Clarendon Press, 1961.

Menon, P.K. "Some Aspects of the Law of Recognition". 66 Revue de droit international et de droit comparé 161 (1989).

Moore, J.B. *Costa Rica-Panama Arbitration: Memorandum on Uti Possidetis*. Rosslyn: The Commonwealth Company Printers, 1913.

Moore, M. *Indigenous Self-Determination,* in S. Macedo and A. Buchanan, *Nomos XLV: Secession and Self-Determination* (2003).

Müllerson, R. *International Law, Rights and Politics: Developments in Eastern Europe and the CIS*. London: Routledge, 1994.

Müllerson, R. *Ordering Anarchy: International Law in International Society* (2000).

Murray, R. *Human Rights in Africa: From the OAU to the African Union* (2004).

Murswiek, D. "The Issue of a Right of Secession – Reconsidered", in C. Tomuschat (ed.) Modern Law of Self-Determination. London: Nijhoff, 1993.

Musgrave, T.D. Self-Determination and National Minorities (1997).

Naldi, G.J. Documents of the Organization of African Unity (1992).

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

Naqvi, A. "West Pakistan's Struggle for Power". 4 South Asian Rev. 213 (April 1971).

Ndegwa, S.N. *The Two Faces of Civil Society: NGOs and Politics in Africa* (1996).

Neuberger, B. *National Self-Determination in Postcolonial Africa* (1986).

Nino, C.S. *The Constitution of Deliberative Democracy* (1996).

O. Chimedu Okafor. *Re-Defining Legitimate Statehood*. The Hague: Nijhoff, 2000.

O'Brien W.V. and Goebel, U.H. "United States Recognition Policy Toward the New Nations", in W.V. O'Brien (ed.), *The New Nations in International Law and Diplomacy* (1965).

Ocheje, P. "A 'Rights' Approach to Governance in Africa", in E.K. Quashigah and O.C. Okafor (eds.), *Legitimate Governance in Africa*. The Hague: Nijhoff, 1999.

Okafor, O.C. *Re-Defining Legitimate Statehood: International Law and State Fragmentation in Africa* (2000).

Okeke, C.N. *Controversial Subjects of Contemporary International Law: An Examination of the New Entities of International Law and their Treaty-Making Capacity* (1972).

Oppenheim, L. *International Law: A Treatise*. 2nd ed. Cambridge: Cambridge University Press, 1912.

Orentlicher, D.F. "Separation Anxiety: International Responses to Ethno-Separatist Claims". 23 Yale J. Int'l L. 1 (1998).

Ott, D. *Public International Law in the Modern World* (1987).

Packer, J. *On the Definition of Minorities* in J. Packer and K. Myntti (eds.) *The Protection of Ethnic and Linguistic Minorities in Europe* (1993).

Pagden, A. *Peoples and Empires: Europeans and the Rest of the World from Antiquity to the Present* (2001).

Paul, J.C.N. "Participatory Approaches to Human Rights in Sub-Saharan Africa", in A.A. an-Na'im and F.M. Deng (eds.) *Human Rights in Africa: Cross-Cultural Perspectives* (1990).

Pellet, A. "The Opinions of the Badinter Arbitration Commission: A Second Breath for the Self-Determination of Peoples". 3 EJIL 178 (1995).

Perkins, J.A. "The Changing Foundations of International Law: From State Consent to State Responsibility". 15 B.U. Int'l L.J. 433 (1997).

Phillips, A. and Rosas, A. (eds.) *The UN Minority Rights Declaration* (1993).

Pipes, R. *The Formation of the Soviet Union: Communism and Nationalism 1917-1923* Cambridge: Harvard University Press, 1964.

Pityana, N.B. *The Challenge of Culture for Human Rights in Africa*, in M. Evans and R. Murray (eds.), *The African Charter on Human and Peoples' Rights* (2002).

Pomerance, M. "The Badinter Commission: The Use and Misuse of the International Court of Justice's Jurisprudence". 20 Mich. J. Int'l L. 31 (1998).

Radan, P. *The Break-up of Yugoslavia and International Law* (2002).

Raič, D. *Statehood and the Law of Self-Determination* (2002).

Ratner, S.R. "Drawing a Better Line: Uti Possidetis and the Borders of New States". 90 AJIL 590 (1996).

Reiman, J. "Can Nations Have Moral Rights to Territory?", in J.R. Jacobson (ed.), *The Territorial Rights of Nations and Peoples: Essays from The Basic Issues Forum* (1989).

Rembe, N.S. *Africa and Regional Protection of Human Rights* (1985).

Reno, W. *Warlord Politics and African States* (1998).

Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, 25 January 2005, not issued as a UN document, available from http://www.un.org/News/dh/sudan/com_inq_darfur.pdf (last accessed 21 August 2008).

Reyntjens, F. *L'Afrique des Grands Lacs en Crise*. Paris: Karthala, 1994.

Rigo-Sureda, A. *The Evolution of the Right to Self-Determination: A Study of United Nations Practice* (1973).

Roberts, J. M. *History of the World*, 2nd ed. Oxford: Oxford University Press, 1993.

Robinson, J. "From Protection of Minorities to Promotion of Human Rights". 1948 Jewish Yb.Int'l.L. 115.

Robinson, W.I. *Promoting Polyarchy: Globalization, US Intervention and Hegemony* (1996).

Rodley, W. *How Europe Underdeveloped Africa* (1972).

Rodriguez, L.I.S. "L'uti possidetis et les effectivités". 263 Rec. des Cours (1997).

Rolling, B.V.A. *International Law in an Expanded World*. London, 1960.

Rosenstock, R. *The Declaration of Principles of International Law Concerning Friendly Relations: A Survey* (1971).

Roth, B. *Governmental Illegitimacy in International Law* (1999).

Rothchild D. and Lawson, L. "Interactions Between State and Civil Society", in J.W. Harbeson *et al* (eds.) *Civil Society and the State in Africa*. Boulder: Lynne Riener, 1994.

Rubin, A.P. "Secession and Self-Determination: A Legal, Moral, and Political Analysis". 36 Stan. J Int'l L. 253 (2000).

Ruggie, J.G. *Constructing the World Polity: Essays on International Institutionalization*. New York: Routledge, 1998.

Russell, R.B. *A History of the United Nations Charter* (1958).

Sachs, J.D. *The End of Poverty* (2005).

Salacuse, J.W. *An Introduction to Law in French-Speaking Africa*, Vol. I (1969).

Salmond, J. *Jurisprudence*. 7th ed. (1924).

Sartre, J.-P. *Colonialism and Neocolonialism*. London: Routledge, 2001).

Schachter, O. *Human Dignity as a Normative Concept*. 77 AJIL 848 (1983).

Schachter, O. *International Law in Theory and Practice* (1995).

Schachter, O. "The Decline of the Nation-State and its Implications for International Law". 36 Colum. J. Transnat'l L. 7 (1997).

Scheinin, M. "The Right to Self-Determination under the Covenant on Civil and Political Rights", in P. Aikio and M. Scheinin (eds.), *Rights of Indigenous Peoples* (2000).

Schoiswohl, M. *Status and (Human Rights) Obligations of Non-Recognized De Facto Regimes in International Law: The Case of 'Somaliland'* (2004).

Schrijver, N.J. "The Changing Nature of State Sovereignty". 70 BYIL 1999 65 (2000).

Schumpeter, J. *Capitalism, Socialism and Democracy*. 6th ed. (1987).

Schwab, P. *Africa: A Continent Self-Destructs* (2001).

Schwarzenberger, G. *A Manual of International Law*. 4th ed. London, 1960.

Scott, J.B. "The Seventh International Conference of American States". 28 AJIL 219, 226 (1934).

Seligman, A.B. *The Idea of Civil Society* (1992).

Sharma, S.P. *Territorial Acquisition, Disputes and International Law*. The Hague: Nijhoff, 1997.

Shaw, M.N. "The Western Sahara Case". 49 BYIL 119 (1978).

Shaw, M.N. *Title to Territory in Africa: International Legal Issues*. Oxford: Clarendon Press, 1986.

Shaw, M.N. *Africa Boundaries: A Legal and Diplomatic Encyclopaedia* (1979).

Shaw, M.N. *International Law*. 5th ed. (2003)

Shaw, M.N. "Peoples, Territorialism and Boundaries". 3 EJIL 478 (1997).

Shaw, M.N. *The Definition of Minorities in International Law* 20 IYHR 13 (1991).

Shaw, M.N. "The Heritage of States: The Principle of *Uti Possidetis Juris* Today". 67 BYIL 75 (1996).

Shaw, M.N. *Title to Territory in Africa: International Legal Issues* (1986).

Simsarian, J. "The Acquisition of Legal Title to Terra Nullius". 53(1) Political Science Quarterly 111 (1938).

Skurbaty, Z. *As if Peoples Mattered*: *A Critical Appraisal of 'Peoples' and 'Minorities' from the International Human Rights Perspective and Beyond*. LL.D. thesis submitted to the Raoul Wallenberg Institute, University of Lund, 2000.

Slaughter, A.-M. "Towards an Age of Liberal Nations". 33 Harvard Int'l L.J. 393 (1992).

Smith, A. *National Identity* (1991).

Smith, D. "Sovereignty over Unoccupied Territories—The Western Sahara Decision". 9 Case W.Res.J.Int'l L. 135 (1977).

Smith, D. *The State of War and Peace Atlas* (1997).

Soper, P. "Some Natural Confusions About Natural Law". 90 Mich. L.Rev. 2423 (1998).

Stalin, J. "Marxism and the National Question", in J. Stalin, *Marxism and the National and Colonial Question*. London: Lawrence and Wishart, 1942.

Steiner, H.J. and Alston, P. *International Human Rights in Context: Law Politics Morals* (1996).

Sumner, B.T. "Territorial Disputes at the International Court of Justice". 53 Duke L.J. 1779 (2004).

Talmon, S. *Recognition of Governments in International Law: With Particular Reference to Governments in Exile* (1998).

Temperley, H.M.V. *A History of the Peace Conference of Paris*, vol. IV (1969).

The Diagram Group, *Encyclopedia of African Peoples* (2000).

Thede, N. *Civil Society and Democracy*, paras. 4-5, Seminar on the Interdependence Between Democracy and Human Rights, UN OHCHR, 25-26 November 2002, available from www.unhchr.ch (last accessed 21 August 2008).

Thompson, J. *Historical Injustice and Reparation: Justifying Claims of Descendents* (October 2001).

Thornberry, P. *International Law and the Rights of Minorities* (1991).

Thornberry, P. "Self-Determination, Minorities, Human Rights: A Review of Interna-

tional Instruments". 38 ICLQ 867 (1989).

Thucydides *et al*, *History of the Peloponnesian War*, Book One. London: Penguin, 1986.

Tomuschat, C. *Secession and self-determination*, in M. Kohen (ed.) Secession: International Law Perspectives (2006).

Tomuschnat, C. *Human Rights: Between Idealism and Realism*. Oxford: Oxford University Press, 2003.

Turp, D. "Québec's Right to Secessionist Self-determination: The Colliding Paths of Canada's Clarity Act and Québec's Fundamental Rights Act", in J. Dahlitz (ed.) *Secession and International Law: Conflict Avoidance – Regional Appraisals*. Cambridge: Cambridge University Press, 2003.

Umozurike, O. "The African Charter on Human and Peoples' Rights". 77 AJIL 903 (1983).

United Nations Development Programme, *Integrating Human Rights with Sustainable Human Development*. UNDP policy document 16 (January 1998), as cited in S.P. Marks, *The Human Rights Framework for Development: Five Approaches*, Harvard School of Public Health, FXB Center Working Paper No. 6 (2000).

Valadez, J.M. *Deliberative Democracy, Political Legitimacy and Self-Determination in Multicultural Societies* (2001).

van Creveld, M. *The Rise and Decline of the State*. Cambridge: Cambridge University Press, 1999.

van der Stoel, M. *Keynote Address to the Human Dimensions Seminar, Case Studies on National Minorities Issues, Warsaw, 24-28 May 1993*, as reprinted in 1 CSCE ODHR Bulletin 22 (1993).

van der Vyver, J.D. "Religious Freedom in African Constitutions", in A.A. An-Na'im (ed.), *Proselytization and Communal Self-Determination in Africa*. Maryknoll: Orbis, 1999.

Vasak, K. and Alston P. (eds.) *The International Dimensions of Human Rights*. 2 vols. (1982).

Vasak, K. *Human Rights: A Thirty-Year Struggle: the Sustained Efforts to give Force of law to the Universal Declaration of Human Rights*, UNESCO Courier 30:11 (November 1977).

Verzijl, J.H.W. *International Law in Historical Perspective* (1970).

Viljoen, F. *International Human Rights Law in Africa* (2007).

von Pufendorf, S. VII *De Jure Naturae et Gerntium Libri Octo* (1934).

Vukas, B. "States, Peoples and Minorities". 231 *Recueil des Cours* (1991).

wa Mutua, M. "The African Human Rights System in a Comparative Perspective". 3 Rev. of African Commission on Human and Peoples' Rights 11 (1993).

wa Mutua, M. "Conflicting Conceptions of Human Rights: Rethinking the Post-Colonial State". 89 ASIL Proc. 487 (1995).

Wade, H.W.R. "The Basis of Legal Sovereignty", 172 Camb. L.J. 196 (1955).

Watson, A. *The Evolution of International Society*. London: Routledge, 1992.

Watson, A. *The Limits of Independence* (1997).

Watson, J.S. "Legal Theory, Efficacy and Validity in the Development of Human Rights

Norms in International Law". 1979 U.Ill. L.F. 609.

Watts, A. *International Law and the Antarctic Treaty System* (1992).

Weller, M. "The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia". 86 AJIL 569 (1992).

Westlake, J. *Chapters on the Principles of International Law* (1894).

Whiteman, M.M. *Digest of International Law*.

Wilson, R.R. "International Law In Treaties of the United States". 31 AJIL 271, 284 (1937).

Wilson, W. *War and Peace, Presidential Messages, Addresses and Public Papers* (1917-1924) Vol. I, eds. R.S. Baker and W.E. Dodd, at 182 (New York and London: Harper and Brothers Publishers, 1927).

Young, C. *The African Colonial State in Comparative Perspective* (1994).

Zakaria, F. *The Future of Freedom: Illiberal Democracy at Home and Abroad* (2003).

Zakaria, F. "The Rise of Illiberal Democracy". 76(6) Foreign Affairs (Nov/Dec 1997).

Zimmermann, W. *Origins of a Catastrophe: Yugoslavia and its Destroyers* (1996)

TABLE OF LEGAL CITATIONS

1951 ICJ Rep. 130.

1954 Convention relating to the Status of Stateless Persons (ECOSOC Resolution 526A (XVII), 26 April 1954).

1959 Antarctic Treaty, 402 UNTS 71 (entered into force on 23 June 1961).

1971 ICJ Rep. 16.

2 United Nations Monthly Chronicle 36 (1970).

26 UN Ybk. 215-220 (1972).

3 UN SCOR, 383 Mtg., 2 Dec. 1948, No. 128.

31 ILM 1486 (1992).

347 U.S. 475 (1954).

347 U.S. 483 (1954).

820 HC Debs., WA, col. 26, 28 June 1971.

A.B. v. M.B., as cited in 17 ILR 110-111 (1950)

Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference, Statutes of Canada 2000, c.26.

Action for Declaratory Judgment and Permanent Injunction, and Motion for Interlocutory Measures, Bertrand v. Bégin, 10 August 1995, Quebec 200-05-002177-995 (Sup. Ct.).

Advisory Opinion on Reparations for Injuries Suffered in the Service of the United Nations, 1949 ICJ Rep. 3

African Charter on Human and Peoples' Rights.

African Charter for Participation in Development (Arusha, 1990).

African Commission on Human and Peoples' Rights, Communication 75/92, Katangese Peoples' Congress v. Zaire, Eighth Activity Report 1994-1995, Annex VI.

An Act respecting the exercise of the fundamental rights and prerogatives of the Québec people and the Québec State, R.S.Q., c. E-20.2.

Arbitral Award of the King of Spain (Nicaragua v. Honduras), 1960 ICJ Rep. 205.

Banjul Charter on Human and Peoples' Rights, 21 ILM 58 (1982).

Barcelona Traction, Light and Power Company Limited Judgment, 1970 ICJ Rep. 3.

Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN GA Resolution 60/147 (16 December 2005).

Bennell v. State of Western Australia (2006) FCA 1243.

Bertrand v. Bégin, [1996] RJQ 2393.

Bertrand v. Québec (A.G.), [1995] 127 DLR (4th) 408.

Cairo Declaration on Border Disputes among African States, AHG/Res. 16(I) 1964.

Case Concerning Acquisition of Polish Nationality, 1923 PCIJ, Ser. B, No. 7.

Case concerning East Timor (Portugal v. Australia), 1995 ICJ Rep. 102.

Case concerning Kasikili/Sedudu Island (Botswana/Namibia), 1999 ICJ Rep. 1100.

Case Concerning the Northern Cameroons (Cameroon v. United Kingdom), 1960 ICJ Rep. 53.

Case Concerning the Right of Passage Over Indian Territory (Portugal v. India), 1960 ICJ Rep. 6.

Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya v. Chad), 1994 ICJ Rep. 6.

CDDH (93) 22, Strasbourg, 8 September 1993, feddh 93.22.

Charter of the Organisation of African Unity, 2 ILM 766 (1963).

Conference on Security and Cooperation in Europe (CSCE), Helsinki Final Act (1975).

Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia, 31 ILM 1488 (1992).

Covenant of the League of Nations.

Customs Regime between Germany and Austria Case, Permanent Court of International Justice, PCIJ Ser. A/B (1931), No. 41.

Decision on the Unconstitutional Changes of Government in Africa, AHG/Dec.150 (XXXVI), 33rd Ordinary Session, Harare, June 1997.

Declaration of Polish Delegate Beck to the League Assembly, League of Nations OJ, Spec.Supp. 122 at 42 (1934).

Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government, OAU Doc. AHG/Decl.5 (XXXVI)

Declaration on the Right of Peoples to Peace, UN GA Res. 39/11, 12 November 1984.

Declaration on the Right to Development, UN GA Res. 41/128, 4 December 1986.

Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, UN GA Res. 47/135, 18 December 1992.

Declaration on Yugoslavia, 31 ILM 1486 (1992).

Deutsche Continental Gas-Geshellschaft v. Polish State (1929), 5 Annual Digest of Public International Law Cases (ILR) 5, 14-15 (1929-30).

Draft AU Charter on Elections, DOC. EX.CL/258 (IX)

Draft Resolution of the Third Committee in UN Doc. A/C.3/L.294.

Draft Resolution of the Third Committee in UN Doc. A/C.3/L.299 (25 November 1952)

Draft Resolution of the Third Committee in UN Doc. A/C.3/L.304 (28 November 1952), and as amended by India in UN Doc. A/C.3/L.297/Rev.1.

ECOSOC Resolution 1296 (XLIV).

ECOSOC Resolution 1996/31, Consultative relationship between the United Nations and non-governmental organizations.

Ethnic, Religious and Linguistic Minorities, UN Doc. E/CN.4/Sub.2/384 95 (1979).

Eritrea - Ethiopia Boundary Commission: Decision Regarding Delimitation of the Border between The State of Eritrea and The Federal Democratic Republic of Ethiopia, in annex to Letter from the Secretary-General to the President of the Security Council, UN Doc. S/2002/423, 15 April 2002.

Friendly Relations Declaration, UNGA Resolution 2625 (XXV), 1970.

Frontier Dispute (Benin/Niger), Judgment, 2005 ICJ Rep. 120.

Frontier Dispute (Burkina Faso v. Republic of Mali), 1986 ICJ Rep. 554.

Frontier of Walfisch (Walvis) Bay between Germany and Great Britain, XI Recueil des Sentences Arbitrales 306 (1911).

GA Res. 2625 (annex), UN Doc. A/5217 (1970).

GA Resolution 45/150 (21 Feb. 1991).

Gámez-Bonilla Treaty of 7 October 1894, affirmed by Award of the King of Spain of 1906.

GAOR 9th Sess. 4th Ctte. 419th Mtg. Para. 20 (1954).

General Act and Declaration of Brussels of 2 July 1890, 17 Aust. Treaty Series (1920).

General Assembly resolution 3203 (XXIX), on 17 September 1974.

General Assembly Resolution 48/121, confirming the VDPA as originally published in UN document A/CONF.157/24 (Parts I and II).

General Assembly resolution 543(VI) of 5 February 1952.

General Comment No. 12(21) of the Human Rights Committee, Regarding Article 1, GAOR, 39th Sess., Supp. 40, UN Doc. A/39/40 (1984) 142.

General Comment No. 23(50) of the Human Rights Committee, Regarding Article 27, GAOR, 49th Sess., Supp. 40, UN Doc. A/49/40 (1994), Vol. I 107.

Grand Bay (Mauritius) Declaration and Programme of Action, OAU Doc. CONF/HRA/DECL (I).

H.Con.Res. 467 (21 July 2004), resolving that Congress "declares that the atrocities unfolding in Darfur, Sudan are genocide".

Human Rights Council decision S-4/101, Human Rights Council document A/HRC/4/80, 7 March 2007.

I R.S.A. 228 (1922).

International Covenant on Economic, Social and Cultural Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, in accordance with Article 27.

International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49.

International Law Commission, Draft Articles on the Responsibility of States for Internationally

Island of Palmas Case (1928), 2 UN Reports of International Arbitral Awards 829, United States v. Holland (Judge Huber arbitrator), at 842.

Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Equatorial Guinea intervening (Merits), Judgement, 2002 ICJ Rep. 303.

Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras: Nicaragua intervening) case, 1992 ICJ Rep. 386.

Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgement of 11 September 1992, 1992 ICJ Rep. 35.

League of Nations, Commission of Jurists on Aaland Islands Dispute, League of Nations OJ, Spec.Supp. 4, at 8-9 (1920).

League of Nations, Report presented to the Council of the League by the Commission of Rapporteurs, Council Doc. B7/21/68/106, at 28 (16 April 1921).

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), advisory opinion, 1971 ICJ Rep. 16,

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ Rep. 136.

Legal Status of Eastern Greenland Case (Denmark v. Norway), 53 PCIJ Rep. Ser. A/B (1933).

Mabo & Others v. State of Queensland (No 2), 175 CLR (1992).

Minority Schools in Albania, Ser. A/B. No 64 Advisory Opinion 17 (1935).

Minquiers and Ecrehos Case (France v. United Kingdom),1953 ICJ Rep. 47.

Montevideo Convention on the Rights and Duties of States (1933) 49 Stat. 3097, T.S. No. 881, 165 L.N.T.S.

Native Title Act 1993 (Cth), s 24AA, s 24MD

North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. the Netherlands), 1969 ICJ Rep. 3.

Norwegian Fisheries Case, 1951 ICJ Rep. 116.

OAU Doc. AHG/Decl.1(XXXVIII) (2002).

Official Journal of the League of Nations 701-702 (September 1921).

Official Records of the Economic and Social Council, 62d session, supplement No. 4, UN Document E/1978/32 (1978).

Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (UN Doc. A/56/10).

Opinion No. 4 on International Recognition of the Socialist Republic of Bosnia and Herzegovina by the European Community and its Member-States, 11 January 1992, 31 ILM 1501 (1992).

Permanent Court of Arbitration, Island of Palmas case (Netherlands v. United States), 2 RIAA 829 (1928).

Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Problems Involving Minorities, Report of the Special Rapporteur, UN Doc. E/CN.4/Sub.2/1993/34 (10 August 1993).

Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, CAB/LEG/665, Adopted June 9, 1998 and entered into force January 1, 2004, at http://www.achpr.org/english/_info/court_en.html (last accessed 21 August 2008).

Question of the Monastery of Saint-Naorum (Albanian Frontier) (Advisory Opinion), PCIJ Ser. B No. 9, 10.

Reference re Secession of Quebec, [1998] 2 S.C.R. 217.

Report of the High Commissioner for Human Rights in document E/CN.4/2002/69.

Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of The Aaland Islands Question, Official Journal of the League of Nations, Special Supplement No. 3, at 5 (October 1920).

Report of the International Law Commission on the work of its 48th Session, 6 May-26 July 1996, UN Doc. A/51/10, at para. 162 & Annex II.

Report of the OAU Secretary-General on a Draft African Charter on Human and Peoples' Rights, OAU Doc. CM/1149 (1981), at para. 13.

Report of the Special Envoy of the Secretary-General on Kosovo's future status, UN Doc. S/2007/168, 26 March 2007.

Report of the Working Group on the Rights of Persons Belonging to National, Religious and Linguistic Minorities, UN Doc. E/CN.4/1991/53 (1991).

Restatement of the Law (3d) of Foreign Relations Law of the United States (1987).

Revised Statutes of Canada c.I-6 (1970).

Rio Declaration on Environment and Development, 14 June 1992, in 31 ILM 876 (1992).

Rome Statute of the International Criminal Court.

Security Council Resolution 1430 (2002).

Security Council Resolution 1674 (2006), 28 April 2006.

Security Council Resolution 1706 (2006).

Security Council resolution 751 (1992).

Security Council resolution 814 (1993).

Security Council resolution S/Res/169 (24 Nov. 1961).

Social and Economic Rights Action Centre/Centre for Economic and Social Rights v. Nigeria, Communication 155/96.

Sovereignty over Certain Frontier Land (Belgium v. Netherlands), 1959 ICJ Rep. 209.

Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia), 2002 ICJ Rep. 625.

Statement of the Representative of the United Kingdom to the Third Committee, 12 Oct. 1984 as cited in 55 BYIL 432 (1984).

Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), available from http://www.icj-cij.org/docket/files/120/14075.pdf (last accessed 8 October 2007).

The General Act of the Berlin Conference of 26 February 1885

Treaty between the Principal Allied and Associated Powers and Poland, signed at Versailles (29 June 1919).

Treaty of Lausanne (Frontier between Turkey and Iraq) (the Mosul Boundary Case), PCIJ Ser. B No. 12, 21.

Treaty of Nanking, Treaty of Peace, Friendship and Commerce Between Her Majesty the Queen of Great Britain and Ireland and the Emperor of China, 29 August 1842, G.B.-I.R.-P.R.C., 93 Consol. T.S. 467.

U.S. Restatement (Third).

UN Commission on Human Rights resolution 2000/47 on Promoting and consolidating democracy.

UN Commission on Human Rights resolution 2001/36 on Strengthening of popular participation, equity, social justice and non-discrimination as essential foundations of democracy.

UN Commission on Human Rights resolution 2001/41.

UN Commission on Human Rights resolution 2001/43.

UN Commission on Human Rights resolution 2001/57.

UN Doc. A/3077, para. 39 (1955).

UN Doc. A/45/40, Vol. II, App. A (1990).

UN Doc. A/AC.125/L.80.

UN Doc. A/RES/60/1 (24 October 2005).

UN Doc. CCPR/C/DR[XII]R6/24 (31 July 1983).

UN Doc. CCPR/C/DR/R6/197 (Communication No. 197/1985), 27 July 1988.

UN Doc. E/CN.4/SR.253.

UN Doc. E/CN.4/Sub.2/1992/33.

UN Doc. S/2000/1183, 40 ILM 260 (2001).

UN Doc. S/RES/303 (6 December 1971).

UN Doc. S/RES/307 (21 December 1971).

UN General Assembly Resolution 48/163 (21 December 1993).

UN General Assembly Resolutions 45/150 (1991) and 46/137 (1991).

UNCIO, doc. 343, I/1/16, Vol. 6 296 (1945).

UNCIO, doc. WD381, CO/156, Vol. 18 657-658.

UNCIO, Vol. VI, Committee I/1, Sixth mtg., at 296 (1945).

UNGA Resolutions 1514(XV), 1541(XV) and 2625(XXV).

United Kingdom statement on behalf of the European Community, UN GAOR, 47th Sess., Third Committee, UN Doc. A/C.3/47/SR.45, 5 Oct 1992.

United Nations Charter.

United Nations Declaration on the Rights of Indigenous Peoples, UN Doc. A/61/L.67 (7 September 2007)

United Nations Millennium Declaration, UN Doc. A/RES/55/2 (18 September 2000).

United Nations, Report of the High Commissioner for Human Rights: Situation of human rights in the Darfur region of the Sudan, UN Doc. E/CN.4/2004/3, 7 May 2004.

United Nations, Report of the Panel Appointed by the Secretary-General of the United Nations to Gather Information on the Situation in Algeria in order to Provide the International Community with Greater Clarity on that Situation (1998).

Universal Declaration of Human Rights.

US Supreme Court case The Antelope 23 U.S. (10 Wheat.) 66 (1825).

Vienna Convention on the Succession of States in Respect of Treaties (1978).

Vienna Declaration and Programme of Action, UN document A/Conf.157/23 (1993).

Western Sahara Case (Advisory Opinion), 1975 ICJ Rep. 12.

Wrongful Acts, at Articles 40 and 41, in Report of the International Law Commission, 53d Session, GAOR 50th Session, Supplement No. 10, UN Doc. A/56/10.

Zakon o poryadke resheniya voprosov, svyazannikh s vykhodom soyuznoy respubliki iz SSSR, (Law on the resolution of issues of the secession of the Union Republics from the USSR). Records of Congress of People's Deputies of the USSR Supreme Council, No. 15, Moscow, 1990 (in Russian).