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THE RIGHT TO SELF-DETERMINATION IN INTERNATIONAL LAW

Scrutinizing the colonial aspect of the right to self-determination

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1 Introduction

1.1 Introduction to topic

The right to self-determination is one of the most important, yet contentious, principles of international law. It has served as a powerful slogan and a vital justification for the independence of many peoples, most significantly the independence of colonial peoples. In fact, the colonial context is what specifically comes to mind when the right to self-determination is brought up and it is the colonial aspect of the right to self-determination that is uncontested, for the right to self-determination consists of many elements and it has several aspects. The interesting thing about this right is the fact that it is linked to many of the most important and fundamental principles of public international law and that it incarnates the concept of the right of peoples to determine their own destiny without outside interference or subjugation, presupposing all peoples are equal.

This right has equally served as a foundation or a pretext for State intervention and aggression, as the Iraqi attack on Kuwait in 1991 which the Iraqi government justified as an internal affair since it regarded Kuwait as part of Iraq. At the same time it is conversely used as a shield against intervention or even mere critique from other States, for example in situations labeled humanitarian intervention which is a practice that mainly started to be used since the beginning of the 1990s and in the aftermath of the fall of the iron curtain.

First of all, the right to self-determination complements fundamental principles of public international law like State sovereignty, the equality of States and territorial integrity, including the prohibition of force and the principle of non-intervention. With self-determination as a slogan minorities or indigenous groups raise claims of either secession from an already sovereign State entity or independence and freedom from foreign domination. This right does not only exist under public international law but also under international human rights law where it contains, among other things, the equal rights of peoples within a State. Secondly, there is the aspect of economic and political self-

determination which is closely related to the principles of non-intervention and non-interference. This aspect is often seen in the light of colonialism and its remnants today where the term neo-colonialism is often used. Thirdly, the right to self-determination is used as an argument in miscellaneous situations in international law such as questions relating to liberation movements, rebels, aid and assistance or intervention against these groups and movements. In short, there are many situations in the world where the right to self-determination is of great relevance.

1.2 Aim of essay and definition of scope

With the process of decolonization a paradigm shift occurred in international law. Before decolonization the world system consisted of *civilized* nations and peoples that were considered to be *uncivilized* which the former were entitled to colonize or as one author puts it:

“The prewar framework of international law which drew a sharp distinction between Europeans or people of European descent and non-Europeans: only the former were unquestionably entitled to sovereign statehood. The latter were assumed not to be qualified at least *prima facie*. And the burden of proof was on them to justify it in terms of standards defined by Western civilization.”¹

With decolonization a new system was established in international law, a system consisting of equal and sovereign States and the principle of sovereign equality became a foundation on which modern international law was based.

Yet, somewhere in history, after the dust of the battles for decolonization and independence had settled, inequality remained. The voices of Third World advocates, that have not ceased to call out injustices ever since the decolonization process started, are now as loud as ever still demanding reforms in the international order. Where in this equation does the right to self-determination fit? This is a question that has puzzled me for a long time and that I wish to answer.

¹ R.H. Jackson cited in Raic, David, *Statehood and the Law of Self-Determination*, The Hague, 2002, p. 203.

The aim of this essay is to find out which position the right to self-determination holds in international law today and whether its most important aspect, the colonial aspect, is still relevant or whether it has outplayed its role. I have repeatedly asked myself why so many people, mainly in the Third World, raise the same demands and point out the same accusations towards the industrialized world as during the era of colonization. Could it be that while there is a system of sovereign equality in international law today, the actual world order and the attitudes and politics of the rich industrialized nations have not fundamentally changed or is there another answer to the question? The fact that *dependency* still remains in large parts of the world is more or less uncontested. So is the fact that the resources are unjustly or unevenly distributed among nations. Could it be that the dependency of the era of colonization was never really erased denying the former colonies any true chances for development, politically, economically and socially? The questions raised here are highly relevant because the answers affect the position that the right to self-determination holds in international law today.

Although the main objective of this paper is to determine whether this right has the same meaning and status as it had in the context of decolonization where it was first truly laid down and affirmed, other very important issues will be dealt with. The most important of these issues is the duality of the right to self-determination. On the one hand this right is used to affirm the sovereignty of an independent State and protect it from outside intervention (legally and theoretically speaking). On the other hand it is used to justify a people's right to self-determination which can collide with the principle of sovereignty. This is a central and complex problem that must be thoroughly examined and well understood in order to answer any questions posed regarding the right to self-determination.

1.3 Approach, structure and sources

When I set out to study the right to self-determination I naturally had a preconceived idea of the differences of opinion regarding this right. I did not know much about the right but

I had a vague notion that there were different interpretations of the right and that the differences were manifested in the cadre of the United Nations where we are used to seeing conflicting opinions among Member States. As I proceeded with my work it became more and more apparent that there exists a dividing line, two camps even, when it comes to the right to self-determination. This dichotomy seemed inescapable and I myself was taken by surprise as to the degree of division I found both in the doctrine and in the documents of the UN. Although I run the risk of oversimplifying the matter I will nonetheless speak of a Western view on the one hand and a Third World view on the other. I am well aware of the fact that there is no such thing as complete unanimity within either camp. I even have to admit that this is a division of my own making. The West vs. Third World dichotomy I speak of fits well into the known pattern of the North-South debate we have been witnessing on the international scene. This debate can be criticized for being old and tiresome. It can be criticized for being confrontational and counterproductive. But I found myself forced to make such a distinction because of the written material regarding the right to self-determination. The doctrine I managed to get hold of together with the UN texts fall into the pattern of the North-South dichotomy. Instead, the divergence from this seemingly fixed pattern is found in State practice, in popular opinion and in the media. The question is if this division I have created is unfounded. To simplify matters is always problematic, but sometimes necessary and, as I already mentioned, inevitable in this particular case. My position can ultimately be criticized for being selective, convenient and leading because of the question I set out to answer in this essay, namely the question of the colonial aspect of the right to self-determination. I will however leave it to the good judgment of the reader to decide whether my approach and ultimately the angle of this essay are misleading or unfounded.

I will begin by describing the background and development of the right to self-determination after which I will present the most important principles and documents in international law relating to the right and also clarify its content. Then the two different views, the Western and the Third World, will be presented. In connection to this, the colonial aspect of the right will be studied and the consequences of colonialism will be accounted for. I will then look into the political reality that affects State attitude and

practice in regard to self-determination. Under this chapter, the double-nature of the right will be examined.

As for the sources used, I have relied much on the literature on public international law and human rights law where I actively sought to use literature written both by Western jurists and Third World advocates and jurists. I chose to use literature that is almost exclusively written after 1990. I have also examined countless UN documents since the subject of self-determination and the relating issues, especially those concerning its colonial aspect, have been and still are heavily discussed and dealt with in the UN, especially considering the fact that the developing countries constitute a majority in the UN.

2 Background and development of the right to self-determination

The view that people have a right to decide their own matters and thus have a right to self-determination has probably existed since the dawn of mankind, but formally it can be traced back to the French revolution. It then continued to take shape on the international scene as the modern Nation States emerged as a result of a growing awareness of national identity in Europe during the nineteenth century, not only by virtue of the bourgeois nationalism but also by virtue of socialist forces, as in Russia in the beginning of the twentieth century². All this of course, while the colonized peoples were still under the strong grip of the European colonial powers. During World War I the term or the principle of self-determination was used in the propaganda of the allied forces to gain advantage with the different minority groups, for instance within the Ottoman Empire³. It was in the post-World War I context that this principle started to take the shape we know in international law today. The American president Woodrow Wilson was a strong advocator of the principle of self-determination and in 1918 he presented his famous Fourteen Points to the Congress. This work shows his aspirations and visions for world

² Bring, Ove, FN-stadgan och världspolitiken - om folkrättens roll i en föränderlig värld, Stockholm, 2002, p. 187-188.

³ Bring, 2002 p. 187-188. In this particular case, namely in the Ottoman empire, it led to serious conflicts and a counter-reaction by the Ottoman Empire consisting of massacres of minority groups like the Christian Assyrians and Aramaic people that border on today's definition of genocide or at least ethnic cleansing.

peace and security which, for President Wilson, included the right of all peoples to liberty, justice and sovereignty. Wilson also used the term self-determination. In spite of the vagueness of his views on self-determination and despite the fact that his text was criticized, self-determination started to gain in importance as a principle, and later as a right, in international law⁴.

At the end of World War I the League of Nations was created and with that the mandate system which was intended to eventually grant independence to the colonies of the defeated powers, Germany and Turkey⁵. History would later have it that the League of Nations collapsed, the United Nations was created instead after World War II and national liberation and independence claims and struggles would take place in all of the colonies, including those of the States who landed victory in the war. When the UN was formed in 1945 the right to self-determination was already an established term on the international scene and the fact that it was included in the UN Charter was therefore not surprising⁶. Nevertheless, according to some commentators the inclusion of the right to self-determination in the UN Charter was not an obvious move for the UN to make, since the issue of self-determination was still controversial at the early stages of development of the right. Some States were reluctant to its inclusion in the charter even though the Americans and the British had already proclaimed the right to self-determination in the Atlantic Charter⁷. Finally, primarily due to Soviet pressure, self-determination was included in the UN Charter⁸. This right would eventually develop into a more established and accepted right under international law and it would even come to include the notion of a human right with the adoption of the two International Covenants on human rights in 1966. One writer, Hurst Hannum, makes a distinction between the period prior to the

⁴ McCorquodale, Robert, *Self-determination in international law*, Vermont, 2000, p. xiii-xiv and Bring, 2002, p. 188.

⁵ Bring, 2002, p. 187-189.

⁶ *ibid.* p. 187-188.

⁷ The Atlantic Charter, in which President Wilson and Prime Minister Churchill expressed the right to self-determination, was adopted in 1941. In 1942 the charter was made a part of the Declaration by United Nations and was signed by 26 allied nations, <http://www.un.org/av/photo/subjects/hrhis.htm>, 040308

⁸ Raic, *The Hague*, 2002, p. 199-200.

adoption of these texts and the period after, where in his view, this right is seen more as a human right⁹.

The emergence of an actual right to self-determination took place in a colonial context. Conversely, one could argue that the right to self-determination was used to justify decolonization. Thus, during the 60's and 70's it was at its strongest position as far as the right to liberation from colonial powers and issues of development go. It was in the period after the First World War, with the League of Nations and President Wilson's visions that the rights of the colonial peoples really started to gain significance. Later on and as the colonial peoples fought for their independence the right to self-determination became a self-evident right and the newly formed UN recognized and established this right in the Charter of the UN, first and foremost in its article 1(2). It has since been reaffirmed in numerous declarations and other texts by the UN.

To summarize, self-determination evolved from a mere slogan to a principle and later into an actual right in international law even though its scope is far from undisputed. Not only is it ambiguous but it also includes many elements. The only element of the right that is certain and indisputable is the element regarding independence from colonial or foreign domination. Beyond that there are different views on what this right includes. The stages of development of this right can roughly be described as follows: 1) the post-World War I 2) decolonization 3) post-1966 and the two International Conventions where human rights gained in importance and 4) post-Cold War where the so called humanitarian intervention entered the realm of international law. Most authors also speak of self-determination in the context of post-colonialism.

3 The principles in international law relating to self-determination

Before discussing the relevant principles in international law regarding the right to self-determination one important issue must be addressed. Self-determination consists of two conflicting elements which are equally fundamental and in fact imperative in

⁹ McCorquodale, 2000, p. xiv.

international law. The first element is the one relating to sovereign equality, territorial integrity and non-intervention. This entails an obligation in international law to respect the sovereignty of an independent State by refraining from the use of force or from interfering with the internal affairs of that State in other ways. The second element regards the very essence and the *raison d'être* of the right to self-determination in the first place, namely the idea that peoples have a right to govern themselves, where a people is not self-governing. This is an intrinsic dilemma that causes much controversy among experts and States. For instance, it forces upon us the question of whether secession is possible, whether it is a right or whether, on the contrary, it is prohibited. For where only a portion of the population of an internationally recognized State has claims of self-determination it naturally collides with the claims of territorial integrity of the whole population and of that State. The aim of this chapter is to present the most fundamental and important principles concerning self-determination *in general*.

The reason the right to self-determination is so important in international law today can partly be attributed to the fact that this right is an extension or expression of some fundamental principles in international law, namely the principles of sovereign equality, territorial integrity and non-intervention (in all its forms whether it is the prohibition of the direct use of force or other forms of intervention). These principles are simply connected to one another and so the definition and application of one will be of importance to the definition and application of the others. Each of these principles and subsequently the right to self-determination itself give rise to a set of problems and dilemmas and ultimately a need for an interpretation of the principle in question. For instance, a question the importance of which has increased lately is if there is a right to humanitarian intervention in international law, as it collides with the principle of non-intervention.

The subjects of international law are first and foremost States and modern international law is based on the principle of sovereign equality. This principle constitutes customary international law. Furthermore, the right to self-determination is included in the UN Charter. This incorporation is, according to Ove Bring, not just a mere codification but

also a sign of a development of a new principle in international law, namely the principle of *people's* equal rights and self-determination of *peoples* (as apposed to *States*), as it is expressed in article 1(2) and 55 of the charter. In the latter the principle of international economic and social cooperation is also expressed. This, according to Bring, must be understood as all peoples having an equal right to self-determination and, once self-determination is attained, an obligation is posed on other States not to intervene in the internal affairs of that State¹⁰. This is a common view and as one author commented on Articles 1 and 55: “in each the context was clearly the rights of the peoples of one State to be protected from interference by other States or governments. It is revisionism to ignore the coupling of ‘self-determination’ with ‘equal rights’- and it was the equal rights of *States* that was being provided for, not of *individuals*”¹¹. The view that the right to self-determination only concerns States may have been what the drafters of the UN Charter had in mind and it may still be valid today but it is not the only aspect of self-determination, as many commentators view it. To begin with the Charter did not define important terms such as “people”, most probably intentionally in order to keep the scope vague and open to many interpretations so as to please the many different wills of the Member States. Secondly, another valid interpretation of the term “equal rights”, beside it being “equality of States”, is the World War II perspective and the rejection of ideas of racial superiority and conquest. The latter is a broader definition and covers the inherent equality of peoples¹².

To add to the confusion surrounding the scope of the right and the definition of the term “people” a distinction is made between “people” and “minority”. It is established in international law that the right to self-determination does not apply to minorities¹³. This gives rise to yet another definition problem. It is unclear where the line between people and minority should be drawn. Nonetheless, the right to self-determination is used to

¹⁰ Bring, 2002, p. 40-42

¹¹ R. Higgins, Postmodern Tribalism and the Right to Secession, Comments, in: Brölmann et al. (eds.), cited in Raic, 2002, note 126, p. 201.

¹² Raic, 2002, note 126, p. 201

¹³ “The right to self-determination in the twenty-first century” by Hannum Hurst, Washington and Lee Law Review, vol. 55, no. 3, Summer 1998 at http://www.findarticles.com/p/articles/mi_qa3655/is_199807/ai_n8801110/pg_2

affirm minority rights, at least on a political level, and the claims of certain minorities' right to self-determination are often seen in the literature.

The principle of sovereign equality of States is explicitly articulated in articles 2(1) and 78 of the charter (the latter is hardly of any interest today since it regards the trusteeship system). An exception, however, is made from this principle when it comes to the status of some of the Member States within the Security Council where the five permanent members are clearly privileged with a right to veto Security Council decisions concerning non-procedural matters as affirmed in article 27(3)¹⁴.

Territorial integrity and the principle of *uti possidetis*, which too are an expression of self-determination, must be seen in the light of decolonization. As the colonies were given independence the so called "salt water theory" developed through the UN practice as a practical solution to problems that were anticipated when colonies, that in many cases were not ethnically homogenous, were to be given independence. The principle of *uti possidetis* means that the holder of the right to independence is territorially defined and includes all inhabitants of the whole colony which is separated from the governing metropolitan State by a barrier of salt water. This meant that the fragmentation of a colonial territory was not accepted¹⁵. Furthermore, in certain cases of non-classical colonization where the governing power was not an alien white European oppressor but instead ethnically or culturally close to the dominated people, the right to independence and self-determination did not exist in that particular context as far as international law was concerned. The principle of *uti possidetis* is thus applied at the moment of independence where it "freezes" the colonial borders. The principle of territorial integrity applies to an already sovereign State and in the case of the colonies, only *after* independence¹⁶.

¹⁴ Bring, 2002, p. 42

¹⁵ Exceptions were allowed however. The UN did not insist on territorial integrity in cases where the clear wish of the majority of all inhabitants showed otherwise, as in the case of the separation of the Ruanda-Urundi into the separate States of Rwanda and Burundi. Raic, 2002, p 209.

¹⁶ Raic, 2002, p. 207-209.

The Declaration on the Granting of Independence to Colonial Peoples, the General Assembly Resolution 1514¹⁷, affirms the principle of territorial integrity and Resolution 1541¹⁸ expresses the core meaning of the saltwater theory and the principle of *uti possidetis*. The latter is an old principle that can be traced back to the Roman Empire and Roman law. As it started developing into international law, one of its first areas of application was in Latin America with the withdrawal of Spain in the beginning of the nineteenth century. In modern international law this principle was reaffirmed in the context of the decolonization wave of the 60's. This principle assures the preservation of the colonial borders for the colony given independence¹⁹. It was viewed as a very important means of maintaining order and pre-empting armed conflicts.

Self-determination is obviously connected to one of the most fundamental norms in modern international law and the UN system, namely the prohibition of the use or the threat of force which is laid down in article 2(4) of the UN Charter and is considered a principle of customary international law. This principle has two definitions. The principle and the definition of the term force can be interpreted either restrictively or extensively. The former interpretation aims at limiting the scope of this prohibition giving States a large space to act and intervene in the affairs of other States without it being a breach of international law. This standpoint is usually taken by militarily powerful States. The latter deems illegal virtually all acts threatening the sovereignty of another State and this position is taken by most Member States²⁰. Those who support this position emphasize the inalienability of territorial integrity and political independence of States.

One question that is often raised is whether the term “force” goes beyond armed force and whether for example economic force is included in the definition. This has been

¹⁷ The Resolution 1514 states that: “[a]ny 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”.

¹⁸ In General Assembly Resolution 1541 (XV) on Principles Which Should Guide Members in Determining Whether or Not an Obligation Exists to Transmit Information Called for under Article 73 of the Charter (1960), a non-self-governing territory is defined as a “territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it”.

¹⁹ Raic, 2002, p. 207, Castellino, Joshua, International law and self-determination, The Hague, 2000, p. 109-115.

²⁰ Bring, 2002 p. 69-75.

argued by States in many cases and there is support for this view in countless Resolutions and declarations of the General Assembly (GA). In the Friendly Relations Declaration²¹ for instance it is recalled that States have a duty to refrain from “military, political, economic or any other form of coercion aimed against the territorial integrity or political independence”. It is then reemphasized throughout the text. In this declaration as well as in the two International Covenants on Human Rights it is stressed that all peoples have a right to freely to determine their political, economic, social and cultural development²². So there is certainly a case to be made about the term “force” encompassing other than armed force but this is of course a contentious issue in public international law.

The principle of non-intervention is yet another essential principle in customary international law that is closely linked to self-determination and it is founded upon the principles of sovereign equality and territorial integrity. This principle also encompasses political and economic intervention. In the Nicaragua Case the International Court of Justice stated that coercive methods used to affect the political, economic, social and cultural systems of a State constitute a breach of the customary principle of non-intervention²³. One can also speak of the weaker form of intervention, namely interference, which covers a broad spectrum of acts that may or may not be prohibited in international law.

During the couple of decades following the creation of the UN and the period of decolonization international law, at least in the framework of the UN, evolved in such a way that a strong link was created between the right to self-determination and the right to development. The latter includes the principle of international economic and social cooperation and the right to one’s natural resources and other elements. This aspect of

²¹ The Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations (GA Resolution 2625 (XXV), 1970).

²² It should be kept in mind that the importance of some these texts is not to be underestimated because of the position these texts hold in international law, meaning that the resolutions of the GA are not binding. That does not render them pointless nor insignificant since these texts sometimes are considered to reflect customary international law or clarify it. Nonetheless, these questions tend to always create controversy because of the political reality on the international scene.

²³ Shaw, Malcolm N., *International law*, Cambridge, 1997, p 797-798.

self-determination and the discussions concerning the international economic market and its rules and effects on the Third World can still be found in the frame of the UN. And even though the focus on these issues today, several decades after the decolonization process, is only to be found in the developing countries whereas in the West there is hardly any debate concerning the subject at the governmental level the growing interest in these issues and subsequently the existence of such a debate in Western media indicates its importance for people all over the world regardless of State practice or legal commentary. In any case, the UN, in which virtually every country in the world is represented, never ceases to address the issue since the majority of these countries are developing countries.

This aspect of the right, the aspect concerning developmental issues, is also part of international human rights law. Self-determination in human rights law is seen as a collective right, a peoples' right. In spite of the visions the UN had for the international community, and although the right was mentioned in the UN Charter, it was never included in the Universal Declaration of Human Rights (UDHR) that was adopted in 1948. Instead, in 1966, the International Covenant on Civil and Political rights and the International Covenant on Economic, Social and Cultural Rights, the so called two International Covenants, were finally adopted after more than a decade and a half of the adoption of the Universal Declaration of Human Rights, during which period the struggle to create these two instruments was immense. Their ratification would take yet another decade. The Covenants share an identical first article that states peoples' right to self-determination, their right to the free disposal of their natural wealth and resources and the right to development.

As for the human rights perspective it can be said that even though the right to self-determination might seem like an obvious right it is very much a highly contentious area in human rights law, even more so than in the area of general public international law. This is the case with most group rights, as this right is considered to be, including economic, social and cultural rights.

4 Legal texts and other documents

4.1 The UN charter: articles 1(2) and 55

The mention of self-determination in the Charter is found in articles 1(2) and 55, and although not expressly mentioned it constitutes the foundation for the chapters concerning the non-self-governing territories and the trusteeship system.

In the first article the purposes of the organization are articulated. Article 1(2) specifically, speaks of friendly relations, the principle of peoples' equal rights and self-determination and universal peace. Article 55 is part of the chapter concerning international economic and social cooperation. Even back when the UN was created there was an awareness of the inequalities in terms of wealth and development in the world. And this situation has only deteriorated immensely ever since and today the gap between the rich and the poor countries in the world is wider than ever. This is being emphasized and reemphasized constantly by the UN. In this article the importance of friendly relations and the principle of the equal rights and self-determination of peoples are restated. In addition, this article expresses the UN's task to promote social and economic development, find solutions to international economic, social and health problems as well as to endorse international cultural and educational cooperation and last but not least protect human rights and fundamental freedoms.

Since, as pointed out above, the inclusion of self-determination in the UN Charter was surrounded by much controversy the language used was vague to please all parties. To begin with, the term principle, as apposed to right, of self-determination was used, indicating it was not a strictly legal right at first. Remarkably, in the French version of the UN Charter the term "right", "droit", *is* used. Secondly, its concept, scope and the definition of terms such as "peoples" are not clear. That is to say that there are different opinions among commentators regarding what the drafters of the Charter had in mind when creating the text. While there can be said to exist a consensus on the development of the status of self-determination from a principle into a rule of law, there is no

consensus on its initial importance²⁴. Some authors, like Hannum, are of the opinion that self-determination as a principle was still weak and contentious at the time of the creation of the UN²⁵ and that it developed and grew stronger as time passed and especially with the process of decolonization. Others, such as Ove Bring, while they do share the same views about the development of the principle, and later right, place a bigger emphasis on its importance at the time of the creation of the UN. Bring looks at it from a very different perspective stating that self-determination is part of the foundation of the UN system as it is part of the provisions of the Charter that express the goals and purposes of the UN.

If the scope of this right was unclear at the time of the adoption of the Charter, it would certainly gain in clarity the years that followed due to the work of the UN, especially with the Resolutions of the General Assembly but also through the Security Council and the International Court of Justice (ICJ).

To conclude, there are at least some matters that are clear and agreed upon. The scope and definition of the right are unclear but its development into a rule of law in international public law almost indisputable. Its one field of application that is free from doubts is that of foreign domination and other forms of alien governance and subjugation, which initially referred to colonialism, but has evolved beyond that to include current forms of alien governance.

4.2 The Declaration on Granting Independence to Colonial Countries and Peoples

The development of the right to self-determination must be seen in the light of the political developments in the world after the end of World War II. The East-West dichotomy started to take shape and would later transform into what is also known as a North-South division. The decades following the Second World War would see the

²⁴ Hannum, Hurst, Rethinking self-determination, in McCorquodale, 2000, p. 205.

²⁵ Hannum even laid the emphasis rhetorically on the number of times the term self-determination is used in the Charter stating for instance that the term is mentioned “only twice”.

principle of self-determination move in a direction none of the Member States of the UN had predicted when they adopted the UN Charter²⁶.

In 1955 a historic event took place as the first conference of African-Asian States was held in Bandung. The conference was characterized by a strong feeling of solidarity among the participating States and a common drive in the struggle against colonialism, imperialism and racism and the fight for independence, world peace and social and economic cooperation. The spirit of unity, solidarity and consensus regarding the above mentioned goals is often referred to as the Bandung Spirit. These developments and the fact that the African and Asian States for the first time in history took such a strong stand and demonstrated such determination would reflect on the development of the right to self-determination pushing the emphasis further in the direction of the colonial context²⁷.

The position taken by the socialist countries implied a focus on external self-determination meaning liberation from racist regimes and colonial rule. The position taken by the Third World is basically consistent with the socialist position and boiled down to mainly three questions, namely “(1) the fight against colonialism and racism; (2) the struggle against the domination against any alien oppressor illegally occupying a territory...; (3) the struggle against all manifestations of neocolonialism and in particular the exploitation by alien Powers of the natural resources of developing countries.”²⁸ The Western countries, after initially opposing decolonization and the notion that the principle of self-determination as expressed in Article 1(2) of the UN Charter imposed any specific obligations on States eventually yielded to the demands from the socialist countries and the Third World. After these developments the Western countries started putting the emphasis on the internal aspect of self-determination, meaning the right of a State to freely choose a system of government that fully correlates with the will of the people of that State. The Western countries linked the principle of self-determination to human

²⁶ Cassese, Antonio, *Self-Determination of Peoples – A Legal Reappraisal*, Cambridge University Press, Cambridge, 1995, p. 44

²⁷ *Ibid.* p.44.

²⁸ *Ibid.* p. 45-46

rights which for the West primarily, if not exclusively, meant civil and political rights and so the right to self-determination was regarded as the very essence of democratic freedom and as essential for providing a government with democratic legitimacy²⁹.

By 1960 and prior to the adoption of the Declaration on Granting Independence to Colonial Countries and Peoples (GA Resolution 1514 (XV), 1960), numerous Resolutions expressing the right to self-determination were adopted by the GA and some thirty Non-Self-Governing and Trust Territories had already been given independence. The development of self-determination into a right in customary international law had hence started even though it was not yet affirmed. With the adoption of this Resolution the language used indicated a binding nature to the right, although the Resolution, being a GA Resolution, is not legally binding per se. It is considered that the Resolution reflected existing law³⁰. The term “right” is, for instance, used instead of the term principle, as is done in the UN Charter. This declaration, which was adopted unanimously, was yet another important part of the development of this right into a rule of law in international law. With the UN Resolutions (that indicate *opinio juris*) and State practice, the right to self-determination in the context of giving colonial peoples independence developed into a rule of customary international law during the 1960’s as most colonial territories had achieved independence by the end of the 1970’s³¹.

What this declaration does is to clarify and elaborate on the principles found in article 1(2) of the UN Charter. In paragraph 2 of the declaration it is stated that: “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.”

Another important passage in the declaration that contains principles of customary international law is paragraph 6 where it is affirmed: “Any attempt aimed at the total or

²⁹ Ibid. p. 46-47

³⁰ Raic, 2002, p. 217.

³¹ Bring, 2002, p. 192.

partial 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”³².

The principles expressed in this phrase are aimed at outside intervention by States and not at liberation movements and are in accordance with the principle of non-intervention. The majority of Member States in the UN interpret paragraph 6 as prohibiting secession from already existing States³³. This very important external aspect of the right to self-determination, meaning the right to freedom from State interference, reaffirms the principles of territorial integrity and *uti possidetis* (the preservation of the colonial borders). This element of the right to self-determination is also expressed in the Friendly Relations Declaration (see below).

The last paragraph of the declaration, paragraph 7 reads as follows:

“All States shall observe faithfully and strictly the provisions of the Charter of the United Nation, the Universal Declaration of Human Rights and the present Declaration on the basis of equality, non interference in the internal affairs of all States, and respect for the sovereign rights of all peoples and their territorial integrity.”³⁴

In conclusion, the exact status of the right to self-determination in international law is clear regarding this particular aspect of the right, the external aspect self-determination in the colonial context, and constitutes a rule of customary international law which is reflected in the General Assembly Resolution 1514.

4.3 The two International Covenants

The most important legal texts concerning human rights on the international level are the International Covenant on Political and Civil Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), although the West and the

³² Ibid. p.192.

³³ Ibid. p. 192.

³⁴ Paragraph 7 of the Declaration on Granting Independence to Colonial Countries and Peoples, GA Resolution 1514 (XV), 1960.

developing world each have a distinctly different opinion on which covenant is more important. Nevertheless, both of the two covenants, adopted in 1966, are important from a legal point of view due to the high number of signatures and to the customary nature of some of their contents. Self-determination is a key right in these instruments and in human rights law. What must be remembered here is the context in which these two covenants were adopted. In the year 1966, the voice of Third World countries was loud and the impact of the decolonization wave was probably at its peak.

The first article of the two International Covenants reads as follows:

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

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 people be deprived of its own means of subsistence.

3. The State Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations”³⁵

The question is what the implications of the human rights law aspect of the right to self-determination are. To answer this question we must first assess the status and meaning of this right as a human right. To begin with, it is a collective right and thus cannot be invoked by individuals through the individual petition procedures which the First Optional Protocol to the Covenant on Civil and Political Rights provides for. The question whether self-determination is a legal right only in the colonial context is raised also in the human rights area of international law. The content of the right in this area seem to resonate with that in the domain of public international law. The numerous UN Resolutions, including the Declaration on Granting Independence to Colonial Peoples (Resolution 1514), have naturally been equally important for the interpretation of the right as in the area of public international law. The opinion of the International Law

³⁵ Art. 1 in the ICCPR and the ICESCR.

Commission is that the right to self-determination has a universal application. Most significant is however the practice of the UN Human Rights Committee. This Committee, established under the Covenant on Civil and Political Right, commented on the right to self-determination by interpreting article 1 of the covenant. The Committee has stated that the realization of the right is “an essential condition for the effective guarantee and observance of individual human rights”³⁶. The Committee also makes a distinction between external and internal self-determination. The former encompasses, in the opinion of the Committee, the obligation of a State to take action in its foreign policy in consistence with the realization of self-determination for areas under colonial or racist domination and the latter is directed towards its own people. For internal self-determination the question of democracy, a political structure that enables citizens to participate in the governance of their country, is of great importance and is naturally linked to the provisions of the Covenant on Civil and Political Rights. The exact meaning of external and internal self-determination will be explained below.

Finally, we have to keep in mind the principles of territorial integrity and *uti possidetis* which forbid any attempt at the dismantling of a sovereign State. Since these principles belong in the domain of customary international law, the fragmentation of a sovereign State is prohibited also in the context of human rights law.³⁷

4.4 The Friendly Relations Declaration

The Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations (GA Resolution 2625 (XXV), 1970), as the title reveals, stipulates the principles of international law concerning relations among States. This declaration is highly important in the area of international public law and is one of the most important legal instruments concerning the right to self-determination. Its immense importance can be attributed to many factors. First of all, the contents of this declaration are of a strictly

³⁶ General Comment 12, cited in Shaw, 2000, p. 217.

³⁷ Shaw, 2000, p. 215-218, 234.

legal nature. Secondly, it was adopted unanimously (with no vote), expressing the States' consensus on the issues in the declaration and can therefore be said to express the *opinio juris* of States. These two facts, its legal nature and the *opinio juris*, make it one of few UN Resolutions to have a distinct legal status³⁸, keeping in mind that, just as in the case of the Declaration on Colonial Peoples (Resolution 1514), it is not legally binding as such. It does however hold the nature of customary international law. Ove Bring states that in order for a GA Resolution to constitute customary international law two criteria must be fulfilled: firstly the Resolution must be adopted by consensus or "without a vote" and secondly the text must clearly affirm legal principles of a general scope and applicability³⁹. With the adoption of this declaration the legal principles set forth in the Charter of the UN were, to an extent, elaborated either affirming or interpreting and clarifying them in a legally authoritative manner. One example of these principles is the principle of non-intervention the scope of which is given a better definition in the declaration. Another is the prohibition of the use of force that is stipulated in article 2(4) of the Charter⁴⁰.

The elements of the declaration that are of a clarifying nature in relation to the principles of the Charter are also legally binding, as the Charter itself is. Both the Declaration on the Independence of Colonial peoples and the Friendly Relations Declaration are clear examples of GA Resolutions that, while not legally binding, help develop customary law, given their consensual nature and the authoritative manner in which they interpret and elucidate principles of international law⁴¹.

There are, however, segments in the declaration that are vaguely expressed, due to the necessity to compromise on the international scene, and these aspects give rise to different interpretations. This does not diminish the binding nature of the whole declaration, given its consensual nature, but what is binding of the more ambiguous statements of it is the "accurate" interpretation, as Ove Bring puts it. This means there is

³⁸ Ibid., p. 37-39.

³⁹ Ibid., p. 27.

⁴⁰ Ibid. p. 37-39.

⁴¹ Brownlie, Ian, Public, international law, New York, 2003, p. 663.

a need for some further elucidation through State practice or statements to fill out the blanks⁴².

The significance of the declaration not only lies in the fact that it helps both affirming and interpreting certain legal principles in international law. The declaration is also a perfect reflection of the two areas of tension concerning the right to self-determination.

Firstly, the declaration, especially if one studies the drafting work leading up to its adoption, illustrates the incompatibility of the two sides of the right to self-determination. On the one hand a State's sovereignty, territorial integrity, political independence, unity etc. are not only presented as principles of basic importance in international law but almost as sacred and inviolable principles. On the other hand the declaration deals thoroughly with the right to self-determination from the reverse perspective, that is *peoples'* right to govern themselves, which in certain cases directly collides with the territorial unity of an independent State.

The second area of contention concerns the different positions taken by the West and the Third World. The differences are not many and may not be noticed in the declaration at first glance. They become more apparent if one studies the work and discussions that took place before all States agreed on a final draft of the declaration and subsequently adopted it unanimously.

During the drafting of the declaration the political situation in the world was still such that there was a dividing line between the western countries on the one hand and the socialist countries and Third World countries on the other. This dichotomy affected the drafting of the Friendly Relations Declaration and its contents. However, it must be noted that the gap between the West and the Third World had shrunk considerably regarding most of the issues dealt with in the declaration due to the growing consensus vis-à-vis decolonization. I will briefly present the issues on which there was consensus and those

⁴² Bring, 2002, p. 37-39 and Shaw, 2000, p. 781.

regarding which differences could not be resolved and which had to be translated into the declaration as ambiguous passages.

I will begin by describing the clear and undisputed parts of the declaration and its legal consequences. If the 1960 Declaration on Colonial Peoples (GA Resolution 1514), as an elucidation and elaboration of the UN Charter, helped transform the principle of the right to self-determination into a legal right in international law, the 1970 Friendly Relations Declaration contributed to affirming this right and extending it to other areas⁴³. This means the right to self-determination no longer exclusively applies to non-self-governing peoples under colonial rule but to every people subjected to foreign or racist domination, subjugation or exploitation. Further, the external aspect of the right which implies sovereignty, territorial integrity, freedom from outside interference or intervention etc., is also an area where there is total agreement and which is dealt with thoroughly and repeatedly in the declaration with one very important yet vaguely expressed exception to which I will return. This expansion of the external aspect of self-determination can be regarded as a victory from the point of view of the Third World. Conversely, the Western view that the internal aspect of the right, where the question of democracy is a very important one, should be given greater importance and universal application did not win much ground but had to step back and take a position of secondary importance in the declaration⁴⁴.

This brings us to the area of contention and the parts of the declaration where the ambiguity of the language gives rise to different interpretations. The section of the declaration that raises most questions is found under the heading “The principle of equal rights and self-determination of peoples” and reads as follows:

“Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which 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-

⁴³ Cassese, 1995, p. 70.

⁴⁴ Ibid. p. 109-111

determination of peoples as described above and thus possessed of government representing the whole people belonging to the territory without distinction to race, creed or colour.”⁴⁵

This paragraph can be interpreted in the light of the view of the Third World. It could thus be regarded as further affirming the pivotal importance of the principle of territorial integrity. On the other hand, the second part of the paragraph starting with “...conducting themselves...” can be seen as a saving clause⁴⁶ and the exception to the principle of territorial integrity that I mentioned above. An interpretation in accordance with the Western view could mean that there is an opening for an exception to the principle of territorial integrity. The second half of the paragraph can thus be interpreted as guaranteeing, legally speaking, a State’s territorial integrity and political unity *only* if that State acts in accordance with the principle of equal rights and self-determination of peoples as put forth in the declaration. Of course, the difficulty lies in deciding exactly which obligations the principle of self-determination places on States. If one gives the words “...as described above...” a primary role the answer would most likely be that States have to first and foremost comply with the external aspect of the right. Naturally, things are not as simple for there is another interesting element in this paragraph. The paragraph ends with “...and thus possessed of a government representing the whole people...” which refers to the *internal* aspect of the right. This means that at least indirect importance is given to internal self-determination. According to one author some commentators have “overlooked or played down” this clause though it is of great importance⁴⁷.

To sum up, this paragraph can firstly be regarded as questioning the idea that the principle of territorial integrity is nearly absolute, an opinion expressed if not by Third World advocates at least by the regimes of Third World countries. Secondly, it can be looked at as drawing attention to the internal aspect of the right to self-determination. But ultimately it does not seem to solve the dilemma and the inherently conflicting parts of

⁴⁵ The Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations (GA Resolution 2625 (XXV), 1970).

⁴⁶ Cassese, 1995, p. 111.

⁴⁷ *Ibid.* p. 111

the right to self-determination. Quite the opposite, it seems to accentuate this dilemma because it helps keeping the window of different interpretations wide open.

4.5 Other UN Resolutions

The right to self-determination and rules of international law related to it are addressed in countless Resolutions, both in those of the Security Council and those of the General Assembly. The Friendly Relations Declaration and the Declaration on the Independence of Colonial Peoples might be two of the most important Resolutions and of a distinct legal nature, but these are not the only significant Resolutions adopted in the UN. To begin with there are numerous Resolutions regarding specific situations and specific conflicts. There are also declarations concerning the right, or aspects of it, in general and which are not linked to a certain people or specific circumstances. In this context the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty (GA Resolution 2131(XX), 1965) is of interest. It has been followed by many GA Resolutions that recalled and reaffirmed its importance. Other GA Resolutions, that do not necessarily have the same strong legal status as the Friendly Relations Declaration and Resolution 1514, or any legal status at all, include numerous Resolutions on non-interference in the internal affairs of States like the Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States (Resolution 36/103, 1981). There are also countless Resolutions prohibiting unilateral economic measures as a means of political and economic coercion against developing countries.

I examined the voting on one of the latest of the Resolutions on economic measures as a means of coercion, GA Resolution 52/181 on Unilateral Economic Measures as a Means of Political and Economic Coercion against Developing Countries of December 1997 and what I found was not surprising at all. All the States that voted in favor of this Resolution are developing countries, countries in Asia, Africa and Latin America. The United States voted against it. All States that abstained from voting were mostly European countries. This is highly symptomatic for the division of the world into two camps regarding issues

of interference in the internal affairs of States, political and economic self-determination and the disposal of one's natural resources. I will discuss these issues more deeply further on in the paper.

Yet another important GA Resolution that is linked to self-determination and the issues mentioned above is the Declaration on the Right to Development, the GA Resolution 41/128 of December 1986. The importance of this declaration is most noteworthy in the area of human rights law and in the framework of the UN system. While this collective right that to a large extent belongs to the area of economic, social and cultural rights clearly has been and still is the subject of high importance on the UN agenda one cannot yet speak in terms of a legal right in international law⁴⁸. The right to development is based on the idea of self-determination, including economic self-determination, and the free disposal of one's natural resources. Furthermore, it is connected to the UN Charter, especially art 55, to Friendly Relations Declaration and other texts and principles, containing the notion of international cooperation. These issues have been developed and are evoked, almost exclusively, by Third World advocates and countries.

4.6 Legal status

Until recently the majority of Western jurists did not recognize this right as having legal content due to its vague scope and the fact that it represents a "concept of policy and morality"⁴⁹, as Ian Brownlie puts it. But the developments in international law have led to a change and Western jurists do accept this right as a legal principle today. Brownlie, for instance, states that the generality of the right and its political nature do not deny it legal content⁵⁰.

The change of attitude towards the legal status of self-determination is in large due to the work of the UN that has resulted in the elaboration of the right and the affirmation of its legal status. The huge amount of documents dealing with the right testifies to its

⁴⁸ Shaw, 2000, p. 224.

⁴⁹ In Shaw, 2000, p. 518.

⁵⁰ Shaw, 2000, p. 518.

importance as a concept. Its legal status exists as customary international law, as treaty law or as a general principle of law, although some controversy surrounds the latter aspect⁵¹. As I have already mentioned, the Colonial Declaration as well as the Friendly Relations Declaration constitute binding interpretations of the UN Charter due to their authoritativeness and their being evidence of *opinio juris*. The two International Covenants are not only binding treaties but also constitute authoritative interpretations of many provisions found in the Charter of the UN. Additionally and beside these instruments dealing with the right in general, there are other UN Resolutions treating specific situations relating to self-determination⁵².

As for the status of the right to self-determination in relation to the fundamental principles of international law, there is a similar pattern, namely that they hold legal status by virtue of customary international law. For instance, the practice of the UN and of States indicates that the principles of territorial integrity and *uti possidetis* are a reflection of customary international law⁵³.

Furthermore, the ICJ has affirmed in the East Timor Case that the right to self-determination has an “*erga omnes* character”⁵⁴. The Court went on stating that the right of peoples to self-determination is “one of the essential principles of contemporary international law”⁵⁵. Many authors will even go further to state that it constitutes a norm of *jus cogens*. The firm manner in which the numerous GA Resolutions are formulated, the State practice, where States have repeatedly expressed the obligation to respect the right, the rulings of the ICJ and the strong standpoint taken in the doctrine supporting the idea of *jus cogens* are all factors, according to Raic, supporting the notion that this right constitutes *jus cogens*. In addition to that, the International Law Commission takes the

⁵¹ Ibid. p. 178.

⁵² *ibid*, p.178-179.

⁵³ Raic, 2000, p. 207.

⁵⁴ East Timor (Portugal v. Australia), Judgment 30 June 1995
ICJ Reports 1995, p. 90.

⁵⁵ *Ibid*, paragraph 29 and Shaw, 2000, p.180 and Raic, 2000, p. 218-219.

stand, in light of, inter alia, the East Timor Case, that the obligation to respect the right is *jus cogens*.⁵⁶

To conclude, the legal status of the right to self-determination can be summarized as follows. Its mention in the UN Charter was of monumental importance. Although it was laid down as a vague principle, the fact that it was included in the charter made future developments, mainly by way of customary international law, possible. The 1960 UN Declaration on Granting Independence to Colonial Countries and Peoples helped affirm the principle as a right and gave it its colonial shape, meaning it affirmed peoples' right to freedom from colonial rule. Six years later, the two International Covenants were adopted. These Covenants play a double role, that of treaty law and of yet another tool in the elaboration of customary international law, as they are used to interpret the UN Charter. Their identical first article means that the right to self-determination does not end with independence since the external aspect of the right is affirmed. For instance, the importance of respecting the political independence and territorial integrity of States and thus the prohibition of outside interference is stressed⁵⁷. Subsequently, and with the adoption of the 1970 Friendly Relations Declaration the scope of the right was extended to other areas. For example, the right came to include not only colonial situations but all forms of foreign, alien or racist domination or exploitation. Regarding the Friendly Relations Declaration and the 1960 UN Resolution on Granting Independence to Colonial Peoples, it must be stressed that they are not to be studied in isolation but within the context of their adoption. Statements made and stands taken by States before, during and after this period in history together with State practice, rulings by international courts and more constituted *usus* and *opinion juris* that in conjunction are necessary in crystallizing customary international law⁵⁸.

⁵⁶ Raic, 2000, p. 217-219.

⁵⁷ Cassese, 1995, p. 55

⁵⁸ *Ibid.* p. 70

5 The content of the right to self-determination

After reviewing the most important principles and texts in international law relating to the right to self-determination I will now present the different features of the right. It is appropriate at this point to re-emphasize that self-determination is often used in conjunction with other general principles of international law. It complements the principles of sovereignty and equality of States, the principles of territorial integrity, non-use of force and non-intervention⁵⁹.

5.1 External and internal self-determination

An important characteristic of the right to self-determination in the colonial context is its external manifestation, meaning the aspiration to form an independent State vis-à-vis other States and the international community. The external aspect of self-determination requires action from and imposes obligations on States to support and facilitate a people's aspirations to reach independence. Conversely, self-determination outside the context of decolonization has an internal nature that consists of a people's right to freely pursue their economic, social and cultural development, ideally through democratic governance. Some authors like Ove Bring attach another element to the internal aspect of self-determination, namely the right to freedom from outside interference and intervention in accordance with the principles of the UN and international law. Bring states that most often what is meant by internal self-determination is the element of non-interference, a negative obligation imposed on States (as apposed to the *positive* obligation imposed regarding external self-determination)⁶⁰. Other authors, namely those who focus on democratic governance as a means of realizing peoples' right to self-determination and protecting human rights, attribute the principles of non-intervention and non-interference to the external aspect of the right⁶¹. What the exact content of the internal and external aspects of the right to self-determination is however of little importance since we, first of

⁵⁹ Brownlie, 2003, p. 555.

⁶⁰ Bring, 2002, p. 202-203.

⁶¹ See note 18 in Bring, 2002, p. 202.

all, are not dealing with two different rights but with the same right⁶², and secondly there are no differences of opinion regarding the material content of these two aspects of the right. When discussing a people's right to self-determination and development within an independent State the legal foundation that is used, for example in the form of UN Resolutions such as the Friendly Relations Declaration, also serves as the legal foundation for the principles of non-intervention and non-interference. However, the fact that the right to self-determination is cleverly used in the rhetoric must not be forgotten. I stated above that there are no differences of opinion regarding the material content of the right, but this is not entirely correct. What I meant by that statement is that everyone agrees upon the elements and aspects that constitute the right but these elements are sometimes interpreted in different lights according to the interests they are meant to serve. I will come back to these issues in the next chapter. Suffice it to say that one way to shift the meaning of the right in the "right" direction, whichever that maybe depending on who is arguing, is through the question of whether the addressees of the right are *peoples* or *States*. Needless to say there is evidence supporting both views.

Finally, there is a consensus regarding the fact that the right to self-determination applies beyond the colonial context. This is supported not only by the Friendly Relations Declaration but also by UN bodies like the Human Rights Committee (in its General Comment on Article 1 of the ICCPR) and State practice and statements⁶³. But again, it is the scope of the right in the post-colonial era that can manifest itself differently depending on who is arguing.

5.2 Non-intervention and the right to self-determination

This principle has developed into a rule of customary international law and a fundamental principle of UN law over the course of time, its most apparent form being the prohibition of threat or use of force. The link to "the principle of equal rights and self-determination of peoples" in Article 1(2) and to sovereign equality of States in article 2(1) of the UN

⁶² Raic, 2000, p. 227.

⁶³ Ibid, p. 230-233.

Charter is pivotal. State interpretation and practice of the Charter both within as well as outside the UN system has led to the development of the principle of non-intervention which goes far beyond the restrictive interpretation of the non-use of force. The right to self-determination and Article 1(2) in particular now apply to other areas beside that of colonial oppression meaning that even free and independent peoples and States have a right to freedom from outside intervention. Moreover, in practice this entails an obligation not to interfere, directly or indirectly, in the internal affairs of a State with the purpose of influencing or manipulating the political life and the political decision mechanisms of that State. The essence of the principle was agreed upon by the USA and Latin-American States and reaffirmed in the Charter of the Organization of American States (the OAS) in 1948⁶⁴. This in turn influenced the work of the UN and in 1970 the Friendly Relations Declaration was adopted. This declaration dedicates a great deal to intervention and interference in all its forms, economic, political or other, directly or indirectly manifested. This declaration also influenced the European States and similar provisions concerning non-intervention were adopted in the Helsinki Act in 1975⁶⁵. The latter is only politically binding but contains many fundamental principles that are legally binding in international law⁶⁶. In sum, all of these legal and political instruments together with State practice and rulings by the ICJ such as in the Nicaragua Case⁶⁷ amount to the fact that the principle of non-intervention is an essential and strong principle in international law which is naturally to be interpreted so also in the context of the right to self-determination, given the strong link between the two.

⁶⁴ Article 3 in the Charter of the OAS. In Article 3 e) for instance it is affirmed that:

“Every State has the right to choose, without external interference, its political, economic, and social system and to organize itself in the way best suited to it, and has the duty to abstain from intervening in the affairs of another State. Subject to the foregoing, the American States shall cooperate fully among themselves, independently of the nature of their political, economic, and social systems;”

⁶⁵ The Helsinki final Act of 1975 following the Conference on security and cooperation in Europe. See Articles I-II, IV and VI where the principles of sovereign equality, non-intervention, territorial integrity etc. are affirmed and Article VIII in which the right to self-determination is affirmed.

⁶⁶ Bring, 2002, p. 107-108.

⁶⁷ Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment 27 June 1986, the ICJ Reports 1986, p. 14.

5.3 Political and economic self-determination

The issues of political and economic self-determination and the issue of intervention have been addressed in the work of the UN countless times and there is an enormous number of Resolutions and other texts concerning the matter. The Friendly Relations Declaration is probably the most important text here, addressing all kinds of prohibited actions of not only intervention, including armed intervention, but also many different acts of interference. A long and detailed preamble gives a preview of what the declaration is about, namely the importance of “international peace and security and the development of friendly relations and cooperation between nations”⁶⁸, which are fundamental principles of the UN, and the means to achieve these goals. The territorial integrity and sovereign equality of States, the right to self-determination, the principle of non-intervention and the subjection of people to alien subjugation, domination and exploitation are some of the matters discussed. The declaration continues with the proclamation of principles under each of which a meticulous elaboration and reaffirmation of these principles is made. This does not mean that the declaration clarifies all principles approached in it but it has certainly brought much clarification to many fundamental principles in international law.

The notion of a right to economic self-determination stems from the 1952 GA Resolution 626 (VII) on the Right to Exploit Freely Natural Wealth and Resources⁶⁹. This concept continued to develop and in 1962 the GA Resolution 1803 (XVII) on Permanent Sovereignty over Natural Resources⁷⁰ was adopted. Then came the Declaration on the Establishment of a New International Economic Order (GA Resolution 3201) in 1974⁷¹ and some months after the General Assembly adopted the Charter of Economic Rights

⁶⁸ The Preamble in The General Assembly Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (1970); GA Resolution 2625 (XXV).

⁶⁹ The General Assembly Resolution 626 (VII) on the Right to Exploit Freely Natural Wealth and Resources, 1952

⁷⁰ the General Assembly Resolution 1803 (XVII) on Permanent Sovereignty over Natural Resources, 1962

⁷¹ The Declaration on the Establishment of a New International Economic Order, General Assembly Resolution 3201, 1974.

and Duties of States (GA Resolution 3281 (XXIX))⁷². This aspect of the right is also found in the second paragraph of the International Covenants on the right to self-determination which reads as follows: “The people may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law”⁷³.

The doctrine of Permanent Sovereignty over Natural Resources encompasses, *inter alia*, “the inalienable right of all States to freely dispose of their natural wealth and resources in accordance with their national interests” and the “respect for the economic independence of States”⁷⁴.

In the Charter of Economic Rights and Duties it is declared that:

“Economic as well as political and other relations among States shall be governed, *inter alia*, by the following principles:

- (a) Sovereignty, territorial equality and political independence of States;
- (b) Sovereign equality of all States;
-
- (d) Non-intervention;
- (e) Mutual and equitable benefit;
-
- (g) Equal rights and self-determination of peoples;
-
- (i) Remedying of injustices which have been brought about by force and which deprive a nation of the natural means necessary for its normal development;
-
- (l) No attempts to seek hegemony or spheres of influence;
- (m) Promotion of international social justice;
- (n) International cooperation for development;
- “

⁷² The Charter of Economic Rights and Duties of States, General Assembly Resolution 3281(XXIX), 1974.

⁷³ Article 1, paragraph 2 in the ICCPR and the ICESCR (1966).

⁷⁴ The 1962 GA Resolution 1803 (XVII) on Permanent Sovereignty over Natural Resources.

Articles 1 and 2 read as follows:

“Article 1

Every state has the sovereign and inalienable right to choose its economic system as well as its political, social and cultural systems in accordance with the will of its people, without outside interference, coercion or threat of any kind whatsoever.

Article 2

1. Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities.
2. Each State has the right.
 - (a) to regulate and exercise authority over foreign investment, within its national jurisdiction in accordance with its laws and regulations and in conformity with its objectives and priorities. No State shall be compelled to grant preferential treatment to foreign investment;
 - (b) to regulate and supervise the activities of transnational corporations with its national jurisdiction and take measures to ensure that such activities comply with its laws, rules and regulations and conform with its economic and social policies. Transnational corporations shall not intervene in the internal affairs of the host State. Every State should, with full regard to its sovereign rights, cooperate with other States in the exercise of the right set forth in this subparagraph;
 - (c) to nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to controversy, it should be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of sovereign equality of States and on accordance with the principle of free choice of means.”

This gives quite a clear picture of what economic self-determination covers and shows its link to sovereignty, sovereign equality, non-intervention, non-interference and so forth. The question is what the legal status of these texts is. Keeping in mind the GA Resolutions are not legally binding as such. Only if the principles declared enter the domain of customary international law can we speak of a legal status. They have to concern general norms of international law and also show evidence of expressing the

opinions of governments in which case a majority vote, a unanimous adoption or an adoption by consensus, “no vote”, provides such evidence⁷⁵.

The problem in this particular field is to establish whether these Resolutions convey general norms or principles of international law. On the one hand, the UN has dedicated an unbelievable amount of time and effort regarding these issues and so it has produced, as I have mentioned, a huge number of texts. But does this mean that there has been a development in international law and that economic self-determination and its elements are to be considered as norms? After all, there is a clear dividing line between the West and the Third World on the subject. There is no clear answer, but there is one possible way to look at it. Regarding the above mentioned Resolutions Brownlie writes:

“Such Resolutions are vehicles for the evolution of state practice and each must be weighed in evidential terms according to its merits. The Charter [Of Economic Rights and Duties] has a strong political and programmatic flavour and does not purport to be a declaration of pre-existing principles. The opinion has been expressed that Article 2 of the Charter is merely a *de lege ferenda* formulation...the attitude of states opposed to Article 2 indicates all too clearly that governments are aware of the need to ‘contract out’ of such formulations by reservations of position either by explanations of negative votes and abstention or by the making of specific reservations after adoption of a Resolution by consensus (without formal vote)”⁷⁶.

And assuming that article 2, for instance, *does* have an affect on customary international law, it will not be binding on the US and its allies since they have taken the position of persistent objectors, Brownlie continues⁷⁷. This of course renders such provisions useless because the States that should abide by them the most in affect are those who will not obey and are not bound. In my opinion Brownlie’s interpretation regarding the legal status of economic self-determination is most probably an accurate one.

⁷⁵ Brownlie, 2003, p. 14-15.

⁷⁶ Ibid, p. 518.

⁷⁷ Ibid. p. 518.

6 The different interpretations regarding the right to self-determination

The basic problems with the right to self-determination are of course its vagueness, as the scope of the right is not clearly defined, and its duality due to the two contradicting elements, namely the right to territorial integrity and freedom from intervention on the one hand and the right of peoples to govern themselves on the other. This naturally gives rise to many different interpretations on the international scene which is clearly demonstrated by the two different views of the industrialized world and the developing world.

6.1 The West

As I went through the literature and other material during the research process concerning the right to self-determination, it was very apparent what the focus was on for Western authors. In the eyes of the West the decolonization process was over by the eighties and is definitely not relevant today⁷⁸, save for the few colonies remaining in the world today. In fact, many authors in the West today criticize the form that the right to self-determination took during decolonization, which is not to be understood as criticism against decolonization itself. The view is that the anti-colonial results became more important than the realization of actual self-determination⁷⁹. The following statement is quite typical:

“...self-determination, during the period which the Afro-Asian voice in the United Nations and world affairs had most resonance, was defined as the right held by the majority of the colonially defined territory to external independence from colonial domination by metropolitan powers alien to the continent or pseudo-European colonial rule. It did not apply to ethnic groups within these territories nor to majorities that were being oppressed by indigenous “alien” elites. Neither

⁷⁸ See for example James Crawford, “The Right to Self-determination in International Law: Its Development and Future”, in Alston, Philip, Peoples’ rights, New York, 2001, p.39 and Gerry J. Simpson, “The Diffusion of Sovereignty: Self-determination in the Post-colonial Age”, in Sellers, Mortimer, The new world order, Oxford/Washington D.C., 1996, p. 45.

⁷⁹ Simpson in Sellers, 1996, p. 45.

secession nor democratic representation was regarded as part of this novel right to self-determination.”⁸⁰

The disregard from other means of self-determination such as autonomy, devolution and secession is strongly criticized. It is however not implied that all these models are flawless, on the contrary, it is admitted that each model has problems that need to be solved. The important thing is that there is a discussion where different solutions are considered⁸¹. At the end of the day, it is believed that the best way to putting an end to conflicts of ethnic nature is through these models. This is illustrated by this statement:

“...self-determination must be imbued with meaning if it is to possess renewed legal relevance. The post-charter distortion of the principle arose partly because of the attempt to outline a right to self-determination while denying rights to autonomy or devolution or democratic representation or, in extreme cases, secession. In other words, self-determination had been detached from the very modalities through which it was most likely to enjoy success.”⁸²

The focus regarding self-determination has shifted elsewhere compared to the period of decolonization. The post-colonial period entails two important contexts, namely the context of the two International Covenants on Human Rights on the one hand and the post-Cold War period with the fall of the Soviet Union and the disintegration of States in Eastern Europe on the other. In one case, the case of Ex-Yugoslavia this happened, as we all know, with bitter and bloody wars and ethnic conflicts. Communism was replaced by nationalism, which in many cases was, and still is, extreme and destructive. During this period human rights grew in importance, as did *peoples’ rights*⁸³, which sometimes equated to *minority* (ethnic) rights. Here the question to be answered is how to ensure the observance of all human rights, partly through the observance of the right to self-determination. The expressions of the right include internal self-determination in all its

⁸⁰ Ibid. p. 45.

⁸¹ Ibid. p. 56.

⁸² Ibid. p. 56.

⁸³ The concept of peoples’ rights was actually developed in the colonial context by Third World advocates (see section below) and was never of great interest for Western jurists. However, the post-cold War era of self-determination that has caught the attention of Western commentators could, according to Crawford (see p. 21 in Alston, 2001), breath new life into the idea of peoples’ rights.

forms, like democratic governance or autonomy. The right to self-determination is also invoked as a justification for secession, although secession is a very controversial matter.

Self-determination beyond colonialism takes aim at the violations of human rights committed against ethnic groups. These violations are no longer viewed as a matter of human beings suffering within the jurisdiction of a sovereign State but are regarded as a threat against international peace and security as well. This brings us to the subject of intervention. Some interpret intervention in cases of gross violations of human rights against ethnic groups as a form of supporting and protecting the right to self-determination of this particular group. An example of this is seen in the case of the UN sanctioned intervention for the protection of the Kurds in northern Iraq in 1991 under Security Council Resolution 688. One author deems it pointless to make a distinction between intervention for the protection of human rights and intervention in support of the right to self-determination, and possibly even secession⁸⁴.

The general view is simply that self-determination in the post-colonial era is more relevant in the context of minorities or ethnic groups which claim the right to self-determination as a remedy to denied political, civil, cultural and other human rights and this is sometimes used as a justification for secession. The answer here, according to Western commentators, is to review the current position on territorial integrity. The principles of sovereignty and territorial integrity of States are still considered to be the main rule, but they should not be obsessively applied without exceptions. As for the most extreme expression of self-determination, unilateral secession, although controversial still, the idea is not considered completely contrary to international law. To begin with, an entity that has seceded is more likely to be recognized by the international community if the secession was peaceful, if it is successful and results in effective control over the entity. Furthermore, the more serious or horrendous the crimes against the group of people in question, the more acceptance the secession is likely to achieve. In accordance with these views many Western commentators put a huge emphasis on determining the exact scope of the right and therefore the need for a better or more precise definition of

⁸⁴ Simpson, in Sellers, 1996, p. 55

the “people” or the “self”⁸⁵. In fact, this is regarded as “the key issue in analyzing the scope of the right”⁸⁶.

I have found that the discourse surrounding self-determination in the West hardly ever includes the right to economic self-determination. There is also a lack of interest in the calls from Third World advocates concerning the global market and the international economic system and institutions. This disregard or lack of interest may exist at the political and academic levels but at the media level it is a different story. Western media is paying more and more attention to the demands and calls of the Third World, including the critique against Western policies and corporations operating in the developing countries. Much of the criticism aimed at the industrialized world can be traced back to the colonial system, its expressions and mechanisms as far as the Third World advocates are concerned. I will come back to this issue below.

6.2 The Third World

As the struggle for decolonization was taking place, the issues of exploitation and dependency of the Third World and the inequity of the international economic order were a natural part of the discourse. The relevance of these issues did not diminish however, much less disappear, with the ending of the decolonization process, at least as far as the Third World is concerned. These issues are still on the agenda and the post-colonial economic relationship between the West, the “core”, and the Third World, the “periphery”, as the dependency theorists⁸⁷ describe it, is as exploitative as ever. Decades might have passed since the issues first appeared and 25 years have passed since Mohammed Bedjaoui, a renowned Algerian international lawyer and an ex-President of the ICJ, who can be said to represent the view of the Third world, wrote “Towards a new

⁸⁵ See Raic, Hannum and Rosalyn Higgins, in Steiner and Alston, *International human rights in context*, New York, 2000, p. 1285.

⁸⁶ Hannum, in McCorquodale, 2000, p. 229.

⁸⁷ See section 7.2 below for definition of dependency theory.

international economic order”⁸⁸ but the discourse never ceased at the UN and in the Third World. The author Balakrishnan Rajagopal, a professor of international law and development and the Director of the Program on Human Rights and Justice at MIT wrote “International Law from Below, development, social movement and Third World Resistance” in the year 2003 and his work received praise by important authors⁸⁹.

An important moment in this context is when the Third World bloc at the UN caused an international political and economic crisis in an attempt to create what is referred to as a New International Economic Order (NIEO) as apposed to the “old” colonially shaped economic order. The Declaration on the Establishment of a New International Economic Order was adopted in 1974. NIEO signified a call for fundamental structural and institutional changes in the world economy, the declaration called for an order “based on equity, sovereign equality, interdependence common interest and cooperation among all States...”⁹⁰. The developing countries had now risen up against the industrialized world, the US, its European allies, Israel and Japan⁹¹. Many States however condemned not only Western imperialism but also Soviet colonialism, proving that “...contrary to popular and scholarly misunderstanding in the West, the attempt to articulate a Third World voice was genuine, and was not an extension of Soviet domination”⁹². The period leading up to this, namely the 1950s, 1960s and 1970s starting with the Bandung conference of 1955, was characterized by the new spirit of solidarity among African and Asian States as they for the first time revolted against the West. These States took charge of the UN and its agencies, the Group of 77 (G-77) and the Non Alignment Movement (the Declaration on NAM of 1967) were created and through the GA Resolutions attempts were made to change the order of things. NIEO contained many elements such as the doctrine of Permanent Sovereignty over Natural Resources and regulation of multi-national

⁸⁸ This work was done within the framework of the UNESCO as part of a body of work dedicated to the NIEO that was emerging as a solution for the huge problems and needs of the Third World. Mohammed Bedjaoui, *Towards a new international economic order*, UNESCO, Paris, 1979.

⁸⁹ For example professor Martti Koskenniemi, University of Helsinki, professor Richard Falk, Princeton University and professor Noam Chomsky, MIT.

⁹⁰ Quoted in Rajagopal, 2003, p. 79.

⁹¹ Rajagopal, 2003, p. 77-79.

⁹² States that supported this view included Pakistan, Iran, Iraq, Turkey, Lebanon, Libya, Liberia, the Philippines, and the Sudan. See Rajagopal, 2003, p. 75.

corporations⁹³. Further, the Charter on Economic Rights and Duties of States was adopted in 1974 and the Declaration on the Right to Development in 1982 by the GA. These demands were significant on many levels. Sovereignty was now being used both as a shield and a sword by the weak States, which as we know is still the case today, and through the NIEO the Third World attempted to shift the political balance in international law. The Third World also aimed to claim some power against western corporations that had a record of intervening in local politics⁹⁴.

Yet, by the end of the 1970s the NIEO was deemed a failure. The West, with the US in the forefront, had blocked any chance of fundamental reforms of the international economic order and the cooperation of the Third World bloc began to crumble. The critics dismissed the NIEO for being too radical and lacking in realism. One author, Thomas Franck, heavily criticized the strategies of the Third World for being too confrontational and according to him they were based only on “winning anti-colonial strategies”⁹⁵. He continues: “the campaign against colonialism, after all, had been won not in India and Algiers – except in the a fortiori fiction of post-colonial nationalist mythology – but in London and Paris”⁹⁶. Rajagopal comments on this statement by Franck as being entirely dismissive of the role played by the mass resistance against colonialism in the Third World⁹⁷. In my the view, what Thomas Franck expresses is not only a dismissive attitude but also an offensive one because to me it conveys the idea that the colonized peoples were paralyzed and inferior to the Westerners who *gave* them independence, as opposed to the idea of them fighting for their independence.

Rajagopal presents a different analysis of the NIEO than traditionally done (by Western historiographers, it is safe to say). In his view the NIEO was not as radical as the critics claimed, nor was it a failure. It *did* have important effects, “...the NIEO constituted a moment of radical challenge to international law that resulted in transforming and

⁹³ Rajagopal, 2003, p. 73-75.

⁹⁴ Ibid, p. 79

⁹⁵ Cited in Rajagopal, 2003, p. 80

⁹⁶ Ibid, p. 80-81.

⁹⁷ Rajagopal, 2003, p. 81.

expanding the reach of international law...”⁹⁸. Needless to say the system was not flawless. According to Rajagopal, the limits of the system lie in the repetition or copying of the colonial and developmental way of thinking in the quest for modernization where the “primitive” had to reach the level of western modernity, according to the same model, abiding by the same rules. This led to the limiting of the effects the NIEO could have had and the proposals made by international lawyers were not meant to challenge the western rationality and modernity inherent in the political and economic system that were supported by international law. These tendencies were not only found in the attitude towards economic development but also in relation to the UDHR where common standards of achievement were laid down. The Third World countries were not opposed to it, although they had a very small part in the drafting of the declaration.⁹⁹

Third World advocates tend to view the right to self-determination (and the right to development) not only as a fundamental right but as *the most* fundamental right and a *prerequisite* for the realization of democracy, the individual human rights and minority rights. Georges Abi-Saab is one of the international lawyers advocating these views¹⁰⁰. Abi-Saab also represents the Third World view regarding the definition of “people”. He states that while the distinction of “people” and “State” is significant to make in theory, both in the context of self-determination and that of development, it is not in practice¹⁰¹. Moreover, these lawyers are consistent in their approach as they are opposed to the idea of a right of secession, as opposed to their western counterparts. Abi-Saab for instance, treats secession claims as an internal matter of the State in question and places a responsibility on other States as well as international organizations to treat it likewise or else it would constitute a breach of the principle of non-intervention¹⁰². Abi-Saab does not categorically refuse the recognition of secession. Once effectively successful, secession may be acknowledged as leading to independence, since this is not prohibited

⁹⁸ Ibid. p. 73.

⁹⁹ Ibid. p. 74 and 76.

¹⁰⁰ See for instance Georges Abi-Saab, “The legal formulation of a right to development”, in Steiner and Alston, 2000, p. 1320-1321.

¹⁰¹ Ibid. P. 1321.

¹⁰² Rendered in James Crawford, in Alston, 2001, p. 48.

outside the scope of self-determination and the phenomenon is not regulated in international law¹⁰³.

As for the human rights violations in general and the conflicts of ethnic nature, Third World advocates are of the opinion that a solution will only be reached through the observance and promotion of the fundamental rights of self-determination and development.

In my opinion the Third World view takes aim at the big picture where the powerful industrialized countries intervene, politically, militarily and economically, directly or indirectly in the internal affairs of the developing countries. The practices of multinational companies, having their epicenter of power in Western countries, include putting pressure on their own governments and intervening in local politics of Third World countries. Further, it is no secret that many if not most of the totalitarian regimes in these countries receive outside support from interest groups, governments and companies not only in the region but also in the West. These views seem too be widespread among people living in Third World countries. Or at least this is the impression I get whenever the voice of people of the Third World is heard in the media.

Another issue that is given much attention by Third World advocates is the issue of bloody conflicts, especially those in Africa. They are to a large part attributed to the military-industrial complex, which, again, is essentially controlled in the West, where the US is the major player in the field. The armament issue leading or contributing to the destabilization of States already lacking in political stability, is thus seen, together with the complete absence of democracy or even the chance of democratization, as a huge obstacle for the realization of human rights, starting with the fundamental rights, the right to self-determination and the right to development¹⁰⁴. The most famous example of these kinds of intervention is the United States record of interference and intervention in its

¹⁰³ *ibid.* P. 49.

¹⁰⁴ N. J. Udombana, "The Third World and the Right to Development: Agenda for the Next Millennium", the John Hopkins University Press, *Human Rights Quarterly* 22.3 (2000), at http://muse.jhu.edu/journals/human_rights_quarterly/v022/22.3uombana.html.

own “backyard”, Central- and South-America, but also in the Middle East and Southeast Asia¹⁰⁵, and it has effectively been found guilty of grave breaches of international law in the Nicaragua case.

Finally, I would like to conclude with a few remarks. I have come to the conclusion that in the eyes of Third World advocates, the protection of group rights can therefore only be efficiently protected if the aforementioned problems are dealt with. However, in my view it is very important to make a distinction between Third World advocates and Third World regimes in this respect. The former do not attribute *all* human rights abuses in their countries to the historical process of colonization and its continuation in the form of neo-colonialism and imperialism, but admit that many complex factors, including internal political conditions, interact to create the present situation. The latter on the other hand conveniently use and distort arguments like sovereignty, territorial integrity, cultural relativism, western cultural imperialism, the precedence of collective and solidarity rights (such as the economic, social and cultural rights) over civil and political rights and so forth to justify their actions and label any form of outside critique as intervention in the internal affairs of a State.

7 The right to self-determination and the colonial heritage

7.1 The right in the colonial context

The right to self-determination in the context of decolonization raises virtually no problems. To begin with, decolonization is one of the most important historical events in modern time and the struggle of the colonized and the process leading to independence resulted in the total rejection of the old view of the “civilized Europeans” who were entitled to dominate and exploit the “uncivilized”. It simply became morally unacceptable while it was completely valid and normal prior to this period. Secondly, this new “ethical” standpoint was so strong that it translated into the area of law. It is today

¹⁰⁵ See Jack Donnelly, *International Human Rights*, Boulder, 1998, the chapter on Human Rights and Foreign Policy.

unthinkable to question the legal status of the right to self-determination in this particular context.

Having said this, one must not forget, as I believe is often the case in the West, that the process of decolonization was not a flawless and praiseworthy historical event. The consequences of colonization and mistakes made while decolonizing are still felt throughout the Third World today. I will come back to the issue below but I do wish to make one remark here. As the colonial powers, when dividing the colonized areas amongst themselves, obviously did not take into consideration the ethnic composition of the colonized peoples, which is especially noticeable in the African continent. Looking at the map of the continent it is plain to see how the borders were drawn. They consist mostly of straight lines which testify of the fact that the colonial leaders simply grabbed a map and a ruler and drew the borders, plausibly more with consideration to the natural resources than anything else. The scene was in fact set for bloody and horrific conflicts with ethnic overtones which have not ceased till this day. Rwanda being the most infamous and horrendous example, given it was brought to the attention of the rest of the world, albeit too late. While many other examples unfortunately are never given the attention they deserve in the media, or else if they are only for the world, through the UN, manifests its paralysis once again as in the current example of the conflicts in the Darfur region in Sudan.

One last comment regarding the right to self-determination in the colonial context is in order before moving on to the issue of the colonial heritage. Given the fact that there are, with a few exceptions, no colonies left in the world, one might wonder why this context is even relevant. Obviously, this rule of international law transcends the classic definition of a colony to comprehend other forms of foreign, alien or racist subjugation, domination or exploitation, as has been stated and restated by the UN since the Declaration on Colonial Peoples and the Friendly Relations Declaration. The question of apartheid in South Africa was a clear case where the dominated black majority had the right to strive for self-determination in the sense that they had the right to change the structures of the apartheid society to establish new democratic structures and a new foundation to their

society where vile racist laws did not deprive them of their fundamental political and human rights¹⁰⁶. Another indisputable example is the right of the Palestinian people to self-determination, which has been given enormous attention in the UN and by the international community, even though the complexity and sensitivity of this particular issue have left us short of consistent State practice and of any real solutions although over half a century has past since the beginning of the conflict. Lastly, another vivid and most certainly current example is the Iraqi people's right to self-determination as they are under foreign rule, formally until two years ago and effectively, at least many would claim, today still.

7.2 The colonial heritage

Ever since decolonization and to this date Third World advocates have tirelessly sought to redraw the conceptual picture of international relations, human rights and international law. This was brought on by their concern for the growing gap between the wealthy North and the impoverished South. They tried to develop a new group of rights, *peoples' rights*. Self-determination was a peoples' right and it belonged to a bigger picture, namely one which contained economic self-determination and the doctrine of non-intervention. It was linked to the controversial Charter of Economic Rights and Duties of States and it was basically evoked by developing countries against developed countries¹⁰⁷.

In the eyes of the advocates of the developing countries the effects of colonialism not only still exist but are as grave as ever albeit not in the blatant form of classic colonialism. The term neo-colonialism is thus used. Ultimately the right to self-determination is linked to the territorial integrity of States and the principle of non-intervention on the one hand and to the right to development, the right to dispose freely

¹⁰⁶ GA resolution 48/94 on Importance of the universal realization of the right of peoples to self-determination and of the speedy granting of independence to colonial countries and peoples for the effective guarantee and observance of human rights, <http://www.un.org/documents/ga/res/48/a48r094.htm> and Human Rights, Historical Images of Apartheid in South Africa, <http://www.un.org/av/photo/subjects/apartheid.htm>

¹⁰⁷ Crawford, in Alston, 2001, p. 21.

over one's natural wealth and resources and the economic, social and cultural human rights on the other. We must simply be clear about one thing, Third World advocates refuse to see other than the big picture because in their view, everything (poverty, the wide gap between the West and the Third World, human rights violations, ethnic conflicts and minority issues and so forth) is connected and everything, not solely but essentially, is connected to the colonial heritage. A postcolonial resistance against colonialism is thus taking place.

As I have already stated, it is often overlooked that the decolonization process not only was flawed with shortcomings but also partly intentionally disrupted by the colonial powers in order to save what they could in a losing battle against peoples striving for independence

After decades of struggle for independence throughout Africa and Asia, the colonial powers could no longer sustain their power, especially in the aftermath of World War two and all that it meant in terms of the emergence of human rights as we know them today and the condemnation of ideas of domination and superiority. And even though the colonizers were reluctant to losing their colonies they caved in one by one to the demands for independence and the right to self-determination. As this was taking place a position was taken by the European powers on the one hand and by the international community as a whole, represented in the form of the UN, and the peoples wanting independence on the other. This mistake would have grave consequences. The colonial peoples were not completely ready, in terms of having the right structures of society or system to carry on as independent peoples. Their own indigenous structures had been destroyed by the colonizers in order to rule the colonies effectively or as Mohammed Bedjaoui described it: "It [colonialism] meant the destruction or distortion of certain local structures and the creation of others which were an expression of the fact of dependence"¹⁰⁸. Naturally, no attempts were made to restore these structures before or as independence was given. However, this position was the only appropriate one to take seeing that it was declared in the Declaration on Colonial Peoples: "3. Inadequacy of political, economic, social or

¹⁰⁸ Bedjaoui, 1979, p. 82.

educational preparedness should never serve as a pretext or delaying independence”¹⁰⁹, otherwise exactly *that* would happen, independence would not be given as a *pretext* by the colonial powers.

Another serious problem is related to the principle of *uti possidetis* which in the absence of an agreement, simply “freezes” the colonial borders at the time of independence.

First of all, it was convenient for the colonizing powers to clear their names from the moral shame that colonization entailed and quickly give independence without having to solve problems of territorial conflicts originating from the diversity of culture and ethnicity in the colonies that the colonizers had ignored and previously not shown any interest in to begin with. Secondly, it was genuinely believed, by the international community as a whole, that utilizing the principle of *uti possidetis* would prevent conflicts and serious instability that would compromise the lives of the “new” States. This was however one of the factors leading to political instability and armed conflicts for all days to come, in other words until this day. For most former colonies in Africa and Asia political stability is actually synonymous to dictatorships as apposed to the instability of one coup d’état, military or not, after another in short periods of time.

The other factor contributing to the political instability and bloody wars is the colonially trained elites that were given the power to rule the newly independent States. The former colonial powers, historically having amicable relations to certain groups in the colonies naturally preferred to see them rule so that they can continue to look after their interests. At the same time, these groups would be regarded by other groups as the symbol of injustice and be hated for it. This would spark rivalry for the power, sometimes spiked with immense hatred leading to long-lived and bloody conflicts. In Rwanda, for example, the resurfacing of ethnic violence and conflicts during the decades that followed decolonization led to a horrendous genocide. The racist colonial classification of peoples and the giving of privileges to a certain group, in this case the Tutsis who were viewed as more intelligent and superior, and at the same time denying other groups, mainly the

¹⁰⁹ Article 3 in the 1960 GA Resolution the Declaration on the granting of Independence to Colonial and Countries and Peoples (GA Resolution 1514 (XV)).

Hutu who were classified as an inferior people, of certain rights created the foundation for the ugly ethnic conflicts.¹¹⁰

Another devastating practice that is used today in the developing countries and that is huge obstacle to reaching democracy and upholding human rights is the use of emergency laws. Declaring a state of emergency is very “popular” among regimes that use it to suppress their people and deny them their civil and political rights in the name of law and order. This practice is, according to Rajagopal and others, a legacy of the way the British handled anti-colonial wars and struggles in the 1940s and 1950s¹¹¹. The first and obvious factor contributing to the implementation of emergencies is the need of the British Empire to deal with the mass resistance against colonialism. The second factor is their fear of the “savage masses”. The racist colonial way of thinking defined western nationalism as “a rational and universal concept of political liberty”¹¹², whereas eastern nationalism as irrational, savage, primitive, driven by “the mysteries of ancient times” and so forth. This was not found exclusively in the British colonial way of thinking but in the Anglo-American social sciences too, writes Rajagopal. In any case, this practice, the use of the state of emergency, was passed on to leaders after independence¹¹³.

Last but not least, the most devastating of the colonial legacies is the one that left Third World countries in a state of dependency due to the international economic order. There are two theories to explain the situation in Third World countries today. The first is the modernization theory. According to modernization theorists, modernization and development is an inevitable evolutionary process of increased societal differences that will result in economic, political and social structures and institutions similar to those in the West. A free market system and liberal democratic political institutions will thus follow, as will the rule of law¹¹⁴. The General Agreement on Tariffs and Trade (GATT)

¹¹⁰ Pamphile Sebahara, “The creation of ethnic division in Rwanda”, UN-NGLS (United Nations Non-Governmental Liaison Service) at <http://www.unngls.org/documents/publications.en/voices.africa/number8/7sebahara.htm>.

¹¹¹ Rajagopal, 2003, p. 176-180.

¹¹² Hans Kohn, *The Idea of Nationalism*, quoted in Füredi Frank, *Colonial Wars and the Politics of Third World Nationalism*, 1994, p. 117. Füredi’s book gives a good illustration of these issues.

¹¹³ Rajagopal, 2003, p. 176-180.

¹¹⁴ Udombana, 2000, 759.

represents the embodiment of modernization, promoting a liberal international trading system. This theory is often criticized by Third World advocates for being yet an expression of the idea of Western superiority and representing what the rest of the world should strive for, which is to become as developed as the West, according to the terms and conditions set by the West. Moreover, the liberal trade system codified in GATT was based on the equality between trading partners, when in reality it was a different story. Third World countries were disadvantaged by external measures and pressure that actually meant that there was no equality on the international economic scene¹¹⁵.

The other theory, which Third World advocates usually choose, is the dependency theory. Dependency theorists have other explanations for underdevelopment than those of the modernization theory. They attribute underdevelopment to the historical and political factors of colonialism, imperialism and neo-colonialism. Dependence, the looting of resources and the creation of zones of influence shaped the system of “institutionalized” disorder in international relations. During the era of colonialism the colonizers exploited the resources and labor of the colonized. Products from the colonized areas were restricted from competing with products produced in the colonizers own countries. Corporations, plantations and white settler enclaves were set up and protected. The colonial structures entailed exclusive licensing and trade rights as well as legal regimes from the colonizing nations. At the same time, the colonizers own countries were leading the industrial revolution and they were the first world powers which of course meant they could control the external conditions of development, to their advantage and to the disadvantage of the colonized. Moreover, their colonial exploitation provided them with even greater advantages and acquisitions. This head start without obstructions for the Western powers provided for the development of the of East-West and North-South dichotomy. To make matters worse, the rules and conditions of free trade were forced upon the developing countries at an early stage, completely ignoring the indigenous conditions, which resulted in single-crop farming structures and other disorders, the fatal consequences of which we are still witnessing today¹¹⁶.

¹¹⁵ Rajagopal, 2003, p. 84.

¹¹⁶ Udombana, 2000, p.759-760.

Third World advocates and anyone who has any knowledge of the conditions of Third World countries would claim that this inequity still exists today. One example is the trade policies of the European Union. Products of the EU are benefited through different measures. Tariffs are imposed on products from the developing countries. For instance, these countries can export raw products but as soon as a product is refined, and even if it is as banal as roasting coffee beans, heavy tariffs are imposed. Another devastating example of Western doing is the enormous amounts of food, like grain, that are given to Ethiopia for example. This so called relief aid only has price dumping effects which have catastrophic results for the country's farmers¹¹⁷.

In short, the conditions we are witnessing on the international scene cannot be contested. Third World advocates make a good case when trying to explain the reasons for underdevelopment and the state of inequity in the world.

8 Self-determination in practice

One can draw a clear pattern that describes the conflicting opinions regarding the right to self-determination but this pattern will not always reflect reality perfectly. It is important to stress that, while a dividing line *does* exist, there are many nuances in this complex picture. In reality, the biggest problem regarding the right is the manner in which States act on the international scene. There is inconsistency regarding the statements, positions and actions of States. The right to self-determination is a two-faced right that is hand in glove with the inconsistency of State practice. This is the reality of international relations. A reality that, in my opinion, more often than not alters international law rather than the other way around.

¹¹⁷ See the documentary, "Jorden, maten, makten, folket", Dokument Utifrån, the 11th of December 2003 on SVT.

8.1 State vs. people

The dilemma concerning the right to self-determination can ultimately be described in terms of who the holder of the right to self-determination is, a State or a people. This brings us back to the question of how to define a people, a question that Western authors place emphasis on, which I have shown above. We see the other side of the same coin in the frame of the UN where this problem is presented through the question of territorial integrity. Here, the strong position of the principle of territorial integrity is questioned but mainly in accordance with the North-South divide. This means that, which I have already touched on above, Third World countries have a negative attitude towards a weakening of the principle, while Western States tend to demand a revision of the status of this principle. This revision is called for in cases where a State fails to comply with the provisions of the UN Charter regarding human rights for *all people* within the State's territory. These issues are thoroughly accounted for in the closing speech of the 1999 Annual Conference of the Canadian Council of International Law by Hans Corell, the Under-Secretary-General for Legal Affairs in the Legal Counsel of Legal Affairs of the United Nations¹¹⁸. Because of the sensitive nature of this issue, he finds it important to make a disclaimer regarding his position stating that it does not necessarily reflect the opinion of the UN¹¹⁹. Corell's position is in line with what I call the Western view. He stresses that a State must demonstrate with credibility its compliance with human rights for all its citizens in order to protect itself from intervention from the outside. Further, he points out the North-South divide regarding these issues and admits that while many States do not categorically reject a more flexible take on the principle of territorial integrity, most States have a negative attitude towards the weakening of the principle.

He underlines the principles of territorial integrity and equal rights and self-determination of peoples that are stipulated in the UN Charter and the Friendly Relations Declaration but stresses that these provisions are not to be looked at in isolation. He states that they

¹¹⁸ "From Territorial integrity to Human Security" by Hans Corell, Under-Secretary-General for Legal Affairs, the Legal Counsel of Legal Affairs of the United Nations, the 1999 Annual Conference of the Canadian Council of International Law at <http://www.un.org/law/counsel/ottawa.htm>.

¹¹⁹ Ibid.

must be examined together with the provisions that affirm the protection of human rights for *all* without any distinction. Nevertheless, and while he makes his own position clear, he does stress the need for a restrictive application of his view for two reasons. Firstly, he admits there are risks associated with this line of argumentation, risks that can encourage or lead to the fragmentation of States in the name of self-determination. In his view, the fragmentation of States for the reason of ensuring the protection of self-determination and human rights of peoples does not guarantee peace and security, rather the opposite. Secondly, he acknowledges the importance of borders and territorial integrity¹²⁰. He states:

“When it comes to the question how the peoples of the world should be governed, to me there is really no alternative to the sovereign State. There must be some order in the world community, also (or should I say: in particular?) in a world that is increasingly affected by cyberspace and transnational enterprises.”¹²¹

Corell also asserts the fact that there is no clear definition on “territorial integrity” in the doctrine, although many attempts have been made to give one. Moreover, he states that a definition is not even emerging. But according to him, it is important to have a discussion about the issue¹²², or as he puts it:

“However, the important thing is that sovereignty is under discussion [...] and that the traditional concept is being disputed. As one writer (Koskenniemi) puts it, it is impossible to define sovereignty in such a manner as to contain our present perception of the State’s full subjective freedom and that of its objective submission to restraints to such freedom.”¹²³

He points out that international law is undergoing changes and underlines the significance of the events that struck the world in the post-Cold War period especially in former Yugoslavia. What Corell is in search of is a revision of the fix term of sovereignty,

¹²⁰ Ibid.

¹²¹ Ibid.

¹²² Ibid.

¹²³ Ibid.

including territorial sovereignty in the context of self-determination¹²⁴. But his speech offers much more. It reflects the different views regarding territorial integrity and self-determination. It reflects the inherent limitations that exist in the legal tools of international law, in this particular case first and foremost the Charter of the UN and the Friendly Relations Declaration.

8.2 Self-determination and politics

States are consistent in their practice regarding certain issues and inconsistent regarding others. The consistent practices of States regard specific policies and situations that affect, either directly or indirectly, the interests of the State in question. One clear example is reflected in the GA Resolutions regarding the right of the Palestinian people to self-determination the adoption of which Israel and the US always vote against¹²⁵. This kind of State practice and these policies raise no questions per se because it is easy to understand the logic behind them.

As for the inconsistencies in State practice concerning the right to self-determination there are, in my opinion, three types. The first is the double-standards demonstrated when the official position of a State is contradicted by its actual actions. There are many examples that illustrate this kind of behavior. There are some undemocratic Third World regimes for instance, that consistently state the importance of the right to self-determination for *all* while in reality denying part or parts of their population of their fundamental rights. The second is the situation where a State changes position on certain issues depending on the international political climate. The third is when States, regarding certain questions or conflicts, choose a position contrary to their obligations under international customary and treaty law. These inconsistencies make it almost impossible for the right to self-determination to develop towards a more clearly defined right. I have examined many GA Resolutions regarding the right to self-determination in

¹²⁴ Ibid. In his speech he also discusses (humanitarian) intervention, which is outside the scope of this essay, although it is closely linked to the issues dealt with here.

¹²⁵ See for instance the voting record of the latest GA Resolution on the Right of the Palestinian People to Self-Determination, A/RES/59/179 of 20 December 2004.

the hope of finding a pattern of inconsistency (and sometimes of consistency) in State practice. I will now present an example which combines the first and third of the above mentioned inconsistent behaviors of States.

The GA has adopted numerous Resolutions entitled “Use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination”, the last one adopted on 20 December 2004¹²⁶. These Resolutions affirm the right to self-determination of peoples and the principle of non-intervention within the territory of a sovereign State. The General Assembly states:

*“Recalling also all of its relevant resolutions, in which, inter alia, it condemned any State that permitted or tolerated the recruitment, financing, training, assembly, transit and use of mercenaries with the objective of overthrowing the Governments of States Members of the United Nations, especially those of developing countries, or of fighting against national liberation movements, and recalling further the relevant resolutions and international instruments adopted by the General Assembly, the Security Council, the Economic and Social Council and the Organization of African Unity, inter alia, the Organization of African Unity Convention for the elimination of mercenarism in Africa, as well as the African Union.”*¹²⁷

The voting record on these Resolutions shows a clear pattern. Most Western European States vote against the adoption of these Resolutions, the remaining abstain from voting. The US, Israel, Australia and New Zealand always cast a no-vote and finally some East European States always abstain from voting. This leaves us with the remaining Member States of the UN, which are almost exclusively developing countries, and they always vote in favor of these Resolutions. The inconsistency, in my view, is to be found on many levels. Firstly, I find it hard to believe that all States that vote for the adoption of these Resolutions have a clean record concerning non-intervention and mercenarism. Secondly, as for the States that object to the adoption of the Resolutions and those who abstain from voting, their voting record might be consistent, but it is not in line with the fundamental

¹²⁶ GA Resolution on Use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, A/RES/59/178, 20 December 2004.

¹²⁷ Ibid.

principles of international law, the principles of territorial integrity and non-intervention, especially considering the fact that the aforementioned Resolutions deal with cases of flagrant violations of the fundamental principles of customary international law and treaty law. Principles which *all* States at one point or another have agreed to abide by. In my opinion, there is only one way to interpret the positions, whether negative or positive, taken by every State regarding these Resolutions¹²⁸ and vis-à-vis the principles of international law. These principles apply to all States in theory, but in practice all States choose to abide by or acknowledge them only when appropriate.

This example shows the attitude of States regarding intervention in the internal affairs of sovereign States. There are other examples of inconsistency in State practice that relate to the other side of the right, namely the right of a people to govern itself. The international community chooses, seemingly in a random manner, which people to offer support to in their struggle for self-determination. There are “popular” groups, like the Tibetans and there are “unpopular” groups, like the Tamils in Sri Lanka as Hannum puts it¹²⁹. The examples of liberation movements and parties¹³⁰ first labeled as terrorist organizations and then accepted as legitimate political actors when the political climate in the world has shifted are many. The Palestinian Liberation Organization (PLO) and the African National Congress (ANC) in South Africa are two of the more famous examples.

State practice and international relations are not necessarily arbitrary, on the contrary. The behavior of States depends on a multitude of factors that prompt them or the international community as a whole to choose which people and which struggle to support. The position of a State depends on anything from simple publicity (the degree of information on the international scene about a certain people and their situation) to the foreign policies of a State regarding the people or territory in question. A very important factor is for example whether the national interests of a State are affected by a particular situation or conflict.

¹²⁸ Keeping in mind that these Resolutions are non-binding per se but nonetheless reflect the position of States on the issue!

¹²⁹ Hannum, 1998.

¹³⁰ A whole essay can be dedicated to the question of liberation movements alone and it is naturally not an issue I deal with in this essay. However, it is closely related to the right to self-determination.

9 Conclusions

I have thus established that the right to self-determination is a legal right under public international law and human rights law, although its exact scope is not clear and it is doubtful that it ever will be given the political nature of the right. I have further established that the one element that is more or less free from contentions is the right to self-determination in the colonial context, since the actual emergence of the right took place in the light of colonialism and the process of decolonization. It is also this aspect that I set out to examine in order to determine whether it is still relevant today or whether it belongs to the pages of history books.

The important issues and the problems regarding the right to self-determination emerged early in the writing process of this essay. The first complicated issue is the two conflicting faces of the right to self-determination. On the one hand self-determination means independence, territorial integrity, unity and the right to freedom from intervention and interference in the internal affairs of a *State*. On the other hand, self-determination means *peoples'* right to determine their own destiny. With this inherent contradiction come many controversies and differences of opinion regarding this legal principle. This brings us to the second problem concerning this right, namely the dichotomy that seems to exist, a sort of North-South division. Ultimately, there is huge inconsistency in State practice and the application of the right to self-determination due to its ambiguous and political nature.

9.1 Two opposing views

I have presented a dividing line between the two opposing views, a Third World and a Western view. This line is partly real and partly fictional, magnified and abused through the rhetoric of regimes. In any case, it is an oversimplification of reality, especially a complicated reality such as the world of international law and politics. But the tendencies of a division in the world are nonetheless real. If only this model of the world is used

with caution, it might even be useful, as long as all other factors are taken into consideration and as long as one is aware of the fact that this model can be used in a dangerous way to create a polarization in the world. I will briefly comment on the two different views.

First of all, the Western view is, in many ways, correct. There is an attempt made to develop the right to self-determination in accordance with the historical changes that have occurred. For it is true that the chain of events that occurred with the fall of the iron curtain and the disintegration of the Soviet Union and some East-European States have raised new issues of minority rights and ethnic conflicts. It is however typical that this change of position by Western jurists towards the right to self-determination should occur only after the historical events that struck Europe and its neighbors. Minority issues and ethnic conflicts have turned the African continent and the Middle East into bloody scenes ever since the struggle for decolonization began. Moreover, one question forces itself upon us in the context of the disintegration of the East-European States, in particular of former Yugoslavia: What role did the right to self-determination play in this context? Here is my answer. Its role before and during (and, should I add after?) the bloody conflicts that tore former Yugoslavia apart is a negative role where self-serving extremist political goals prompted leaders to abuse this slogan in a way that ethnic violence and ultimately ethnic cleansing was made possible. This was first and foremost a tragedy because of all the innocent civilian lives that were taken but also a tragedy in the sense that the wounds of ethnic tension had yet again been tore wide open for a long time to come.

As for the Western view that the strong position of territorial integrity should be revised and that secession and autonomy are possible solutions for minority issues, there is one major problem. It is best illustrated by this statement by Boutros Boutros-Ghali, the former Secretary General of the United Nations:

“If every ethnic, religious or linguistic group claimed Statehood, there would be no limit to fragmentation, and peace, security and economic well-being for all would become ever more difficult to achieve. One requirement for solutions to these problems lies in commitment to human rights”¹³¹

The need to give an exact definition of the term “people” is also associated with this view. I find this obsession by Western jurists not only useless, for how could it solve any problems, but simply impossible to realize. Who is to define who *a people* is? Even peoples that share the same cultural heritage, religious identity and sometimes language cannot always agree upon the use of terms and definitions among themselves. I agree with the disapproving voices such as that of Boutros Boutros-Ghali. It is only through the realization of human rights that respect for others and peaceful co-existence can flourish. And the realization of human rights in the Third World depends, to a significant extent, on the way the world order is. The question is whether the current world order will change.

One last remark regarding the position of territorial integrity is in order. The issues I have raised in this essay must ultimately be put in a big picture that contains the question of so called humanitarian intervention. The fact that Western jurists call for a looser attitude towards the principle of territorial integrity cannot be isolated from their growing acceptance for humanitarian intervention. This must be stressed although it does not fall within the scope of my essay.

The Third World view, where the external aspect of the right to self-determination is seen as absolute, can be dangerous. The right of the *people* is, in practice, the rights of the *State*. This is perfectly illustrated by the huge emphasis put by Third World regimes, often authoritarian, on non-interference and non-intervention. These principles are used to avert any criticism directed at them. On the other hand, there is, *in practice*, a similar attitude towards the external aspect of the right to self-determination in the West as well. In reality a State will do anything in its power to protect its borders¹³². The theoretical aspirations to revising the position of the external aspect of the right to self-determination

¹³¹ Boutros Boutros-Ghali, *Agenda for peace*, cited in McCorquodale, 2000, p. 12.

¹³² Hannum emphasizes this particular point in his article. Hannum, 1998.

are either fruitless or hypocritical because they will not be used consistently in international relations.

The economic aspect of the right to self-determination, including the right to one's own natural resources and the right to development, seems to have an important position in the work and the statements of the UN. It is affirmed and reaffirmed in numerous important Resolutions and declarations. In the West the emphasis on these issues has declined since the 60's, the UN Decade for Development, whereas in the developing countries the corrupted and totalitarian regimes have been using these issues in their rhetoric directing it both towards the Western States and their own populations with the purpose of shifting the attention and the responsibility for democracy and development off of themselves on to the West.

What can be said about the right to economic self-determination is that it does not hold an uncontested legal status, and more importantly, even if it did, its implementation is simply an unrealistic aspiration given the way economic power is divided in the world. I will comment more on the colonial heritage and the demands of Third World advocates in that context below.

To erase the notion of polarization that I have helped asserting, I would like to point out that the calls of Western jurists to put bigger emphasis on the internal aspect of the right and its elements like democratic governance, governance that would guarantee and protect minority rights, resonate with the calls of Third World advocates and their belief that democracy and genuine self-determination are a prerequisite for peaceful co-existence and for the observance of all human rights.

9.2 The dilemma of the two conflicting aspects of self-determination

The inherent paradox of the right to self-determination is nothing short of notorious. This problem puzzles every author and jurist that sets out to examine the right and its implications. This duality is what makes the right so weak, and yet at the same time so

powerful. Its weakness stems from the fact that it is a very difficult legal tool to use in international law, which becomes very apparent when examining the Friendly Relations Declaration. It is laid down as an unmistakably fundamental legal principle, but the language of the declaration is impossibly limiting because of the vagueness surrounding it, a vagueness that reflects the political nature of the right.

At the same time this right can, as a political slogan, be immensely powerful, for example when used by a people seeking their freedom and independence as was done during decolonization. But it can also be dangerous when used to stir up feelings of extreme nationalism in people. The ethnic conflicts in former Yugoslavia did not start nor end in the nineties, but have a much longer and more complicated history. Similarly, what led to the genocide in Rwanda was a complex situation that dates back to the colonial period. Surely, democracy must be the remedy here and not the redefining of the term “people” or the principle of territorial integrity.

In any case, this dilemma does not seem to have a solution for the moment, nor in the foreseeable future as one author admits¹³³. In my opinion there is clearly a need for the double nature of the right to self-determination in international law and relations. It is therefore difficult, bordering on impossible, to reach an agreement on a more precise definition of the right, its content and scope.

9.3 The colonial heritage

While the historical wave of decolonization was practically over by the 70's, the sense of empowerment and victory that the formerly colonized felt would soon be a shattered dream as they woke up to a different reality than the one which they dreamt of creating. The aftermath of colonization left the former colonies with so many complex and dire problems that the history of colonization, or the colonial heritage as I have called it, remains. I have described the most significant problems usually pointed out by Third World Advocates. The inequity that led to the development of some nations on the

¹³³ Ibid.

expense of others, led to the underdevelopment of the latter. The dependency and the looting of the colonized went on not only for many decades but, in some cases, for nearly a century and a half. In addition, the racist or inhumane practices of the colonizers, who had destroyed the native structures, were passed on to the newly independent nations infecting, at birth, the political and social lives of the fragile new States and making healthy development very difficult to achieve. How can the marks of a hundred years of colonialism be wiped out in a matter of decades? But perhaps the single most toxic factor that impedes these countries from healthy development is the lack of democracy. The lack of democracy is aggravated by the fact that the political and economic life of developing countries is often meddled with by powerful nations, most often Western States (being the former colonial powers).

When scrutinizing the right to self-determination, especially in the frame of the UN, it is overwhelmingly apparent that the issues that Third World advocates raise and which I have accounted for above are still on the agenda of the UN to this date. In the year 2000 a GA Resolution was adopted without a vote, The United Nations Millennium Declaration¹³⁴. One of the first paragraphs reads as follows:

“We are determined to establish a just and lasting peace all over the world in accordance with the purposes and principles of the Charter. We rededicate ourselves to support all efforts to uphold the sovereign equality of all States, respect for their territorial integrity and political independence, resolution of disputes by peaceful means and in conformity with the principles of justice and international law, the right to self-determination of peoples which remain under colonial domination and foreign occupation, non-interference in the internal affairs of States, respect for human rights and fundamental freedoms, respect for the equal rights of all without distinction as to race, sex, language or religion and international cooperation in solving international problems of an economic, social, cultural or humanitarian character.”¹³⁵

¹³⁴ United Nations Millennium Declaration, GA Resolution A/RES/55/2, 8 September 2000.

¹³⁵ Ibid.

There are countless other Resolutions which declare practically the exact same principles and goals. This is a non-binding Resolution but it was adopted by consensus and most points in the paragraph above belong to the area of customary international law, so the legality of the Resolution is not at question. What is eye-catching however is that these issues constantly resurface due to the fact that most Member States of the UN are developing countries.

9.4 Where does the right to self-determination stand today?

What remains now is to answer the question of whether the colonial aspect of the right to self-determination is obsolete and of historical importance only. Not surprisingly the answer is complex. This aspect of the right is considered obsolete in the sense that decolonization is considered over and done with. At the same time, freedom from colonization is still considered a fundamental right in international law, first and foremost, for the few remaining colonies. Furthermore, the right to self-determination was established in the context of decolonization, which is a limited context, but international law and the right to self-determination have evolved to cover a broader spectrum of situations and not only colonialism. It is established that all forms of foreign or racist domination, subjugation or exploitation are prohibited in international law, which makes it irrelevant to distinguish between colonialism in the classic sense of the word and other forms of domination, even though many non-western regimes, in their rhetoric, make a distinction between western imperialism and other forms of domination. In any case, a large part of the world, namely the developing countries, together with Third World advocates cannot seem to let go of the colonial past. To them, the colonial heritage is still relevant today and in addition there is a colonial mentality and behavior that is still present, though in a neo-colonial costume. Furthermore, the right has developed into the area of international human rights law. In this particular area the right to development has emerged, although it is not yet a legal principle and it is unclear if it ever develops into one. This right is closely connected to the right to self-determination and the aspects of it that can be traced back to decolonization, namely the right to economic self-determination and the doctrine of the free disposal of one's natural

resources. So even though the colonial aspect of the right to self-determination is on the verge of legal obsolescence, there are political and ideological forces in the world that wish to keep the light shed on the right to self-determination in its colonial context and the evidence for this can, first and foremost, be seen in the area of international human rights law and within the cadre of the UN.

Ultimately, the right to self-determination, although viewed as a fundamental right with a legal status of huge significance, is ambiguous and its scope unclear. Its two contradicting aspects give it the double role of being both a useful and a useless tool of international law. In the end, the inconsistency in State practice makes it virtually impossible for a more precise definition and clear scope to emerge.

The right to self-determination is a powerful political and legal tool that can be bended into any shape. For this reason, it is hard to see that it will ever take a more clear-cut form. Nor will there ever be complete consensus on its elements and mode of application. Nonetheless, what makes this right so powerful is the fact that it, no matter how it is interpreted, appeals to the very core of every human being. This is the nature of the right to self-determination.

List of references

Bibliography

Alston, Philip (editor), Peoples' Rights, Oxford University Press, New York, 2001.

Bedjaoui, Mohammed, Towards a New International Economic Order, UNESCO, Paris, 1979.

Bring, Ove, FN-stadgan och världspolitiken - om folkrättens roll i en föränderlig värld, Nordstedts Juridik AB, Stockholm, 2002

Bring, Ove and Lysén, Göran (editors), Materialsamling i Folkrätt, Iustus förlag, Göteborg, 2000.

Brownlie, Ian, Public International Law, Oxford University Press, New York, 2003.

Cassese, Antonio, Self-Determination of Peoples – A Legal Reappraisal, Cambridge University Press, Cambridge, 1995.

Castellino Joshua, International Law and Self-Determination, The Interplay of the Politics of Territorial Possession with Formulations of Post-Colonial “National” Identity, Martinus Nijhoff publishers, The Hague, 2000.

Donnelly, Jack, International Human Rights, Dilemmas in world politics, Westview Press, Boulder, Colorado, 1998.

Füredi, Frank, Colonial Wars and the Politics of Third World Nationalism, I.B. Tauris Publishers, London/New York, 1994

McCorquodale, Robert (editor), Self-Determination in International Law, Ashgate Publishing Company, Vermont, 2000.

Raic, David, Statehood and the Law of Self-Determination, Kluwer Law International, The Hague, 2002.

Rajagopal, Balakrishnan, International Law from Below - Development, Social Movement and Third World Resistance, Cambridge University Press, Cambridge, 2003.

Sellers, Mortimer (editor), The New World Order - Sovereignty, Human Rights and the Self-Determination of Peoples, Berg, Oxford/Washington D.C. 1996.

Shaw, Malcolm N., International Law, Cambridge University Press, Cambridge, 1997.

Steiner, Henry J. and Alston, Philip (editors), International Human Rights in Context - Law Politics Morals, Oxford University Press, New York, 2000.

UN documents

The Charter of the United Nations

The International Covenant on Civil and Political Rights

The International Covenant on Economic, Social and Cultural Rights

General Assembly Resolution 626 (VII) on the Right to Exploit Freely Natural Wealth and Resources, 1952.

Declaration on Granting of Independence to Colonial Countries and Peoples; General Assembly Resolution 1514 (XV), 1960.

General Assembly Resolution 1541 (XV) on Principles Which Should Guide Members in Determining Whether or Not an Obligation Exists to Transmit Information Called for under Article 73 of the Charter, 1960.

General Assembly Resolution 1803 (XVII) on Permanent Sovereignty over Natural Resources, 1962.

Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, General Assmebly Resolution 2131(XX), 1965.

The General Assembly Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations; General Assembly Resolution 2625 (XXV), 1970.

The Declaration on the Establishment of a New International Economic Order General Assembly Resolution 3201, 1974.

The Charter of Economic Rights and Duties of States, General Assembly Resolution 3281 (XXIX), 1974.

Declaration on the Inadmissibility of Intervention and Interference in the Internal Affaires of States General Assembly Resolution A/RES/36/103, 1981.

Declaration on the Right to Development, General Assembly Resolution 41/128, 1986.

General Assembly Resolution on Importance of the universal realization of the right of peoples to self-determination and of the speedy granting of independence to colonial countries and peoples for the effective guarantee and observance of human rights, A/RES/48/94, 1993.

General Assembly Resolution 52/181 on Unilateral Economic Measures as a Means of Political and Economic Coercion against Developing Countries, 1997.

United Nations Millennium Declaration, GA Resolution 55/2, 2000.

General Assembly Resolution on the Right of the Palestinian People to Self-Determination, A/RES/59/179, 2004.

General Assembly Resolution on Use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, A/RES/59/178, 2004.

“From Territorial integrity to Human Security” by Hans Corell, Under-Secretary-General for Legal Affairs, the Legal Counsel of Legal Affairs of the United Nations, the 1999 Annual Conference of the Canadian Council of International Law.

Other documents

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment 27 June 1986, the ICJ Reports 1986.

East Timor (Portugal v. Australia), Judgment 30 June 1995
ICJ Reports 1995.

The Charter of the Organization of American States.

The Helsinki final Act.

Articles

“The Third World and the Right to Development: Agenda for the Next Millennium” by N. J. Udombana, the John Hopkins University Press, Human Rights Quarterly 22.3, 2000.

“The creation of ethnic division in Rwanda” by Pamphile Sebahara UN-NGLS (United Nations Non-Governmental Liaison Service).

“The right to self-determination in the twenty-first century” by Hannum Hurst, Washington and Lee Law Review, vol. 55, no. 3, Summer 1998.

Documentaries

Jorden, maten, makten, folket”, Dokument Utifrån, December 11 2003 on SVT.

Web sites

<http://www.un.org>

<http://www.un.org/documents/>

<http://www.un.org/av/photo/subjects/hrhis.htm>, 040308

<http://www.un.org/av/photo/subjects/apartheid.htm>

<http://www.un.org/law/counsel/ottawa.htm>.

<http://www1.umn.edu/humanrts/instree/z1afchar.htm> University of Minnesota, Human Rights Library.

<http://svt.se>, Sveriges Television

http://www.findarticles.com/p/articles/mi_qa3655/is_199807/ai_n8801110/pg_2