SELF-DETERMINATION, HUMAN RIGHTS AND DEMOCRACY IN THE NEW INTERNATIONAL LEGAL ORDER.

SELF-DETERMINATION AND HUMAN RIGHTS BEFORE 1945

INTRODUCTION

i. The Nature of International Law and its Mode of Operation

A student of International Law must have the patience, psychology, fortitude and spirit of the long distance runner, otherwise he will be rendered insane somewhere along the way, by the frustratingly slow pace at which International Law is formulated, and the even more frustratingly slow pace at which it is observed and implemented. Lawyers whose familiarity with Law is limited to municipal Law tend to reject International Law as Law, because of the slow pace of formation and enforcement already referred to, and because there is no established legislative machinery like the National Assembly or the Supreme Military Council, Armed Forces Ruling Council or a Military President to make instant Law for the International Community. Worse still, there is also no standing Police Force, or Armed Forces or a Court with unlimited jurisdiction, to be employed in enforcing International Law.

Inspite of these obvious short-comings, International Law, is still Law, unless one adopts the most primitive positivist stance in jurisprudence. For as Oppenheim has rightly declared, Law is a Body of rules for human conduct within a Community which by

common consent of this Community shall be enforced by external power.[1] External power here refers to any power external to the entity against whom such law if enforced. This form of external power exists in International Law as we all know in the from of the U.N. Charter system, collective self-defence systems and individual States.

In view of the above, International Law is therefore the system of Law which governs relations between States and between States and International Organisations, and also between the latter. In modern times, even, municipal corporate bodies and individuals, have rights and duties under International Law, although it s still true to say that International Law is primarily concerned with States.[2]

So International Law is Law, but the absence of a Central Government above the Governments of all the States of the world, which could in every case secure the enforcement of the Rules of International Law as compared with Municipal Law, means that International Law by comparison is the weaker of the two systems of Law.[3] This is responsible for the slow pace at which International Law is formulated and implemented. This peculiarity has been most apparent in the application of International Law to the Southern African Situation and the length of time it has taken for its full effects to be felt and its impact made manifest in that region. This is why the triumph of International Law in Southern Africa, from 1980 - 1994 can only be honestly and correctly described as eventual triumph, not just triumph. It took a long time and by the very nature of International Law, it had to take that time.

Now let us look at the manner in which International Law operates generally, particularly with regard to its violations, and inevitable process of its restoration and application to the situation. In each case of major violations:

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1 Oppenheim's International Law, by Lauterpacht, Vol. 1; Peace, 8th Ed., p. 10.

2 M. Akehurst, A Modern Introduction to International Law, 3rd Ed. 1977, p. 1

3 Oppenheim, Op.Cit., p. 14

i) A situation is recognised or identified as being contrary to International Law;

ii) The organised International Community (UN) then, requests, or calls on the party concerned to take steps to reverse the situation and bring it in line with International Law. The call is usually ignored;

iii) This is followed by constant and consistent repetition of the call, at times accompanied by economic and social sanctions;

iv) By maintaining its stand year in year out -- the International Community wears out the intransigent or lawless entity;

v) The defiance of the delinquent state or entity gradually gives way to compromise and willingness to negotiate, and thereafter agreement to abide by International Law. The process is long and frustrating to both students and official Practitioners of International Law. It is a process of gradual accumulation of legal right based on moral might, which progressively weakens the capacity of the delinquent state or entity to resist the Rule of Law.

Where there is a clear International consensus that, a recognised Rule of International Law applies to a given situation, there is never any problem. The situation is resolved almost as fast as a similar situation in Municipal Law. One good example of this phenomenon is the establishment of the regime governing the exploration and use of outer space. Between 1957 when the Soviet Union launched the first satellite into outer space and 1963 when the U.N. General Assembly adopted the Declaration of the Legal Principles governing the exploration and use of outer space, an international regime had been established. Amongst the most important provisions of the Declaration, which in effect was legislation governing the use of outer space, is the stipulation that outer space and celestial bodies are free for exploration and use by all States in conformity with International Law and are not subject to national appropriation

or claim of sovereignty by means of use or occupation or by any other means.[4] A Treaty on this very subject confirming all the principles in the Declaration was concluded in 1967. Apart from stating that no area of outer space is to be appropriated by any State, the Treaty provides that "exploration and use of outer space, including the moon and other celestial bodies, shall be carried out for the benefit and in the interests of all Countries, irrespective of their degree of economic or scientific development and shall be the province of all mankind.[5]

This Rule of International Law has enjoyed full and universal observance since its establishment. The reason for this is that there is no conflict of interest in this subject matter amongst States. Man has hardly mastered the science of space travel yet. All that is at presently known about other planets, does not indicate the presence of valuable, and exploitable resources which will vastly enrich any State. So there is an absence of conflict of interests.

A similar situation would arise, when there is a concurrence or mutuality of interests, i.e., where most States have an interest in protecting a point of view, or concept. Thus the notion of sovereignty over the continental shelf which hardly existed before the United States (Truman) proclamation of 28 September 1945,[6] had become universally accepted as a Rule of Customary International Law by 1950 when the British Government issued the Falkland Islands (Continental Shelf) Order in Council.[7] A similar 'sudden' emergence of a new Rule of International Law occurred in relation to the development of the exclusive economic zone. In these two latter cases, there was a concurrence or convergence of States interests at least of all coastal States, which not only constitute by far the largest number of States, but, significantly, the most powerful.

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4 Res. 1962 (XVII) of 13th December 1963.

5 Outer Space Treaty. U.K.T.S. 10 (1968) CMND 3519; U.N.T.S. 205

6 A.J.I.L. Vol. 40 (1945) Suppl. pp. 45-48.

7 Statutory Instruments, 1950 No. 2100

They all had much to gain and the law, practice and observance of sovereignty over the exclusive economic zone developed almost overnight.

By contrast, when a subject matter of International Law involves a conflict of interests, and this is by far the more frequent situation, its development into Law is long drawn out and even after that its implementation, involves a long, slow and painful process. Examples abound. Let us take the definition of aggression for instance. A Committee of the General Assembly started defining aggression in 1967, and did not complete their work until 1974 when the Assembly was able to adopt a resolution on the subject.[8] The reason again simply was the sensitive nature of the subject and the conflicting views of what constituted aggression. Concepts like anticipatory self-defence, collective self-defence, and situations like the cold war and the Middle East situation created conflicting views on the subject which have not even been fully resolved today.

ii. International Law: A Personal Perspective

From what I have said so far, it should be clear that my perspective of international law does not tally with that of the major western scholars. Because of their domestic or national back grounds those brought up in the common law tradition tend to test the emergence of a new rule of international law with the tools of domestic law.

They look for the stamp of an elected Parliament or National Assembly and the imprimatur of a Queen or President. In the absence of such clearly positivist accutrements our great western scholars have tended to deny the emergence of a new rule of international law until long after its arrival and have constantly been left behind by major international law developments. They frequently declare U.N. General Assembly resolutions as being recommendatory only, ignoring the obvious fact that apart from its status as the 'National Assembly' of the International Community it is also

[8] Res. 3314 (XXIX)

a permanent diplomatic conference where the opinio juris sive necessitatis of nations, develop into rules of international law in a dynamic and inexorable process. The emergence of self determination, prohibition of racial discrimination, general human rights and particularly the right to democratic governance as principles of international law, binding on all States, with correlative rights of enforcement in the international community were, rejected by Western Scholars long after they had become established as legal principles. Even now, a great scholar like Brownlie is still resisting the emergence of fundamental human rights as international law rights impinging directly on individuals in various countries, enforceable in cases of gross violations, by members of the international community and Crawford, the leading scholar on International Law and Democracy cannot yet bring himself to admit that illegal and forceful seizure of government should be automatically visited by the international sanction of non-recognition. Judge Cassese of the International Court of Justice, whose book on self-determination is the greatest modern work on the subject, still doubts whether democracy, a component of self-determination, has become an international legal right of all peoples enforceable by the international community. We shall soon see whether these great scholars should not now begin to doubt their doubts and have faith in the strength and proliferation of evidence.

Thirty years ago, there were similar doubts above the legal status of self-determination and the prohibition of racial discrimination. Many of us did not believe that Namibia and South Africa would be free in our lifetime. And yet the General Assembly of the U.N. had declared again and again that those political principles had developed into legal principles, creating legal obligations and that the South African mandate for Namibia had been terminated and that South Africa was now on illegal occupant of territory. The same applied to the domestic situation in South Africa in respect of which the General Assembly declared that apartheid was a crime against humanity, and that the peoples of South Africa were legally entitled to self-determination and majority rule. All these resolutions, dirisively referred to as "mere recommendations" without any legal effect, have been fully implemented and no one is

in any doubt about their legal character anymore. Knowledge and wisdom have come long after the event.

1. Anecdote 1

a) My supervisor's reaction to my conclusion on racial discrimination as alleged in international law
b) My external examiner (Brownlie's reaction to the same conclusion.

2. General Assembly
Resolution Potency compared to the word (curse) of a good christian.

iii. The meaning of Self-Determination

Self-determination may be defined as "the right of all peoples to determine their political future and freely to pursue their economic, social and cultural development. Politically this is manifested through independence as well as self-government, local autonomy, merger, association or some other form of participation in government. It operates both externally and internally to ensure democratic government and the absence of internal or external domination.[9] Umozurike's definition bears a striking resemblance to the definition in Article 1 common to the two international Covenants on Human Right adopted by the U.N. General Assembly and opened for signature, ratification and accession on 16 December, 1966, which states as follows:

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

[9] Umozurike, Self-Determination in International Law p.3

social and cultural development."[10] in July 1993.

The concept of self-determination consists of three fundamental aspects:

(1) The external aspect, by virtue of which peoples determine their international political status, i.e., whether to enjoy complete political independence, or merely, self-government, merger with another state, or one form of association or another includes the right to decide to retain a dependent or even colonial status;[11]

(2) The first internal aspect is by virtue of which the right of peoples to be the complete masters of their own territories is recognised. Thus, a state may be theoretically independent, and yet may denied its right of self-determination as a result of the political domination of another state or states, or because it is prevented from exercising its right to "freely pursue its economic, social and cultural development." Thus, soon after many Afro-Asian states assumed political independence in the sixties, they realised that as a result of the economic domination of the developed states and existing practices in international trade, they were not free to pursue, for their own ends, their economic, social and cultural development, and consequently, both their political independence and their right of self-determination were curtailed. This has led to the development of the concept of neo-colonialism, and the notorious IMF conditionalities imposed on hapless African debtor States

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10 The International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, both ratified by Nigeria

11 A few illustration will suffice. The inhabitants of Gibraltar have consistently preferred their colonial status with Britain, to independence as a separate state or as part of Spain. The same applies to the Falkland Islands which prefers to remain a Britain Colony than as part of independent Argentina and Pueuto Rico which prefers to remain in some form of association with the United States, rather than be fully independent.

is illustrative of this type of loss of self-determination.[12]

(3) The second internal aspect involves the right of the people freely to choose their political institutions, representatives and to participate in the process of governance. Thus internally self-determination could be used as a vehicle of enfranchisement, domestic autonomy, and ultimately, the full panalopy of human rights themselves. This will be clearer later.

The definition of the concept in the late post-colonial era, that is in the eighties and nineties have not shown any significant change. Thus F. Prazetanic defines it as "the right of a people or a nation to determine freely by themselves without any outside pressure, their political and legal status as a separate entity, preferably in the form of an independent State, the form of government of their choice and the form of their economic, social and cultural system[13]

Judge Rosalyn Higgins now of the International Court of Justice, summarises the contents of the doctrine as the right of a people "to determine their political and economic and social destiny."[14] Equally brief and precise is that earlier given by Shaw in which he describes it as the right of all peoples to determine their political Status and

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12 Christos Theodoropoulos has subjected this question to a very incisive analysis in his unpublished LL.M. thesis entitled The Process of Restoration of Sovereignty to the People of Namibia in the light of Contemporary International Law, 1878-1917" see pp.19-24.

13 "The Basic Collective Human Right to Self-determination of peoples and Nations as a prerequisite for peace; Its Philosophical Background and practical Application" In Reveue de droit International, 69(1991) 263

14 "Post-modern Tribalism and the Right of Secession" Comments by R. Higgins in Peoples and Minorities in International Law, Op.Cit. P.32.

pursue their own economic, social and cultural development.[15] All the above definitions are similar and recognise the existence of certain basic factors in the doctrine, namely, the right of a people to determine freely their political status and the form of their economic, social and cultural system.

iv. Self-Determination And Human Rights Before 1945

Human rights are well known and fully documented. Special chapters of the constitutions of third world countries are usually devoted to listing and guaranteeing these rights. They are also found in U.N Declarations, Covenants, and Conventions and Charters of all the major regional organisations of the United Nations. Nevertheless, a satisfactory definition of Human Rights remains elusive. One writer has described them as the rights human beings have simply because they are human beings and independent of their varying social circumstances and degrees of merits.[16]

Perhaps, one of the most perceptive descriptions of Human Rights was made by Mr. Justice Kayode Eso in the Nigerian Supreme when he stated that a fundamental (human) right is one "which stands above the Ordinary Laws of the land and which is infact antecedent to the political society itself. It is a primary condition to a civilised existence and what has been done by our constitutions since independence ... is to have these rights enshrined in the Constitution, so that the rights could be "immutable" to the extent of the non-immutability of the Constitution itself"[17]

v. Origins Of Self-Determination And Human Rights

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15 Title to Territory in Africa, Clarendon Press 1986, p.93.

16 Jerome Shestack, "The Philosophic Foundations of Human Rights, in Human Rights. Vol. 20 1998, 201 at 203.

17 Chief Dr. (Mrs) Olufunmilayo Ransome-Kuti & Ors v. Attorney-General of the Federation & Ors [1985] & NWLR (Pt.6) 211

The ancient Origins of Human Rights and Self-determination can be traced many centuries back to the era of Medieval Christian philosophers, such as Thomas Aquinas, who put great stress on natural law as conferring immutable rights upon individuals as part of the law of God. Moreover, the direct democracy practiced by the Greek city States centuries before Christ was born, constituted a practical example of self-determination, though qualified by the limitation of participation to free men only.

A more modern development in this respect had its roots in England. I refer to the famous Magna Carta or Great Charter of 1215 wherein King John of England gave some historic undertakings to the Barons of the land. In the most famous provision of this Charter, King John declared as follows:

> "No freeman shall be taken or imprisoned or disseised, (of his freeholds or liberties or free customs) or out-lawed, or exiled, or in any wise destroyed; nor shall we go upon him, not set upon him, but by the lawful judgement of his peers or by the law of the land."

The Magna Carta was re-issued by King Henry III in 1225 and that re-issue still remains in the English statute book in full force and effect. The famous English legal historians, Pollock and Maitland, described Magna Carta as " a sacred text, the nearest approach to a fundamental statute that England has ever had." It should be noted that the term "law of the land" has exactly the same meaning as our modern term "due process of law."

The Magna Carta has become over the centuries, a stirring battle cry against oppression and tyranny . The constant repetition from generation to generation of its principal pledges as liberties and right helped powerfully among all classes to form the English national character, and later the legal culture of the nations of the British Commonwealth which has culminated in a legal tradition common to all these nations, including and especially Nigeria, that every citizen has inherent in him, fundamental and

inalienable liberties and rights, which no power by whatever name called, should violate - whether King, President, Head of State, Parliament, Supreme Military Council, Armed Forces Ruling Council or Provisional Ruling Council.[18]

Among the foremost and cardinal principles of the Magna Carta was the idea that the individual had natural rights as against the King, and that those rights were secured to him by fundamental, pre-societal laws which ought to be permanent. Thus the very first chapter of the Charter, contains the concept that he "shall procure nothing from anyone, directly of indirectly, whereby any part of these concessions and liberties might be revoked or diminished,; and if any such thing has been procured, let it be void and null."

In confirmation of this solemn covenant and undertaking, the English Parliament enacted another statute in 1369 with the consent of the then reigning King, Edward III, to the effect that the Great Charter should be "holden and kept in all points and if any Statute be made to the contrary that shall be holden for none."[19] In other words, the Magna Carta should remain in full force and effect and any subsequent statute attempting to derogate from it or erode its contents in any way, would be null, void and of no effect. This statute of 1369, like the Magna Carta itself and all pre-1900 statutes, applies to Nigeria.

However, the modern Origins of self-determination and by necessary implication, general human rights can be traced to the American Declaration of Independence in 1776 and the French revolution of 1789. These revolutions rejected the notion of the divine right of Kings and the notion that individuals and peoples were objects who could

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[18] For an illuminating Article on the Origins and Significance of the Magna Carta, see William D. Guthrie in The Lawyers Treasury (1963) Published by the American Bar Association, at pp. 78 and 81.

[19] Ibid

be transferred, alienated to added from sovereignty to sovereignty without their consent or even knowledge. "The core of the principle lies in the American and French insistence that government was responsible to the people.[20]

The American declaration of independence is particularly illuminating.

"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed."

This remarkable declaration with natural law roots has been proved valid beyond doubt in the course of the 20th century. Life, Liberty and the pursuit of happiness are but a succinct summary of the full panalopy of Human Rights including self-determination, the rule of law and democracy.

The Landmark French Declaration of the Rights of Man, promulgated by the French Revolutionary Assembly in 1791 and the proclamation of self-determination in Article 2 of Tile XIII of the French Constitution of the 1793, constitute a major source of modern human rights and self-determination.

These ideas and principles continued to develop throughout the 19th Century and were rejuvenated into dynamic policies and pronouncements in the 20th Century. The Bolshevik Revolution in 1917 resulting in the overthrow of the Russian monarchy and the establishment of a Communist Russia and later the Soviet Union, was based, inter alia, on the principle of self-determination, and the liberation of oppressed peoples.

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[20] See Anthonio Cassese, Self-Determination of Peoples Cambridge University Press, (1995)

p.11

vi The 1st World War and its Aftermath

a) The Mandates System

However, it was during the First World War that the principle self-determination was first given wide international recognition. Indeed, it was referred to as the war of self-determination. As a result of that war, not only did a host of new European states emerge from former Empires where they existed as subject peoples, but the non-European colonial territories of defeated Turkey and Germany were released from colonialism and given a new international status known as mandated territories. This status brought their administration under international supervision and control.

b) Wilsoman Principles

During the progress of the war itself, spokesman of the Allied powers stated on numerous occasions that the allied war aims did not include any desire for annexation of territory belonging to Germany, Austria-Hungary or Turkey.

They proclaimed in the clearest possible terms that their aim in the war was the liberation of peoples subject to German and Turkish misrule rather than any desire for further territorial expansion on the part of the Allies. The entry of the U.S.A. into the war led to further emphasis of this principle and both in regard to the German colonies and the non-Turkish provinces of the Ottoman Empire, the declared intentions of the Allied Powers received increased support. Thus, on 8 January 1918, in his Fourteen Points address to Congress, President Wilson stated that there should be a "free, open-minded, and absolutely impartial adjustment of all colonial claims based upon a strict observance of the principle that in determining all such questions of sovereignty, the interests of the population concerned must have equal weight with the equitable claims of the government whose title is to be determined." In the same speech, he also stated that the nationalities then under Turkish rule would be assured "an undoubted security

of life and an absolutely unmolested opportunity of autonomous development", for according to him, "the day of conquest and aggrandizement" had gone by.

In his address to Congress on 11 February 1918, President Wilson stated as follows with regard to the former German colonies:

> There shall be no annexations, no contributions,no punitive damages. Peoples are not to be handed from one sovereignty to another by an international conference on an understanding between rivals and antagonists. National aspirations must be respected, peoples may now be dominated and governed only by their own consent. It is an imperative principle of action, which statesmen will henceforth ignore to their own peril.

The statements of President Wilson are of vital importance because they were taken as the basis for the peace negotiations.

However, these principles were not peculiar to President Wilson. They were implicit in the general philosophy of the Allied cause and had already in fact been enunciated with greater clarity and definition by Mr. Lloyd George, then Prime Minister of the United Kingdom. In Glasgow on 29 June 1917, he had stated that the fate of the conquered German colonies must be decided by the Peace Conference and that in determining the future trustees of these territories, the wishes, desires and interests of the people themselves must be the dominant factors.

Again, in an address to the Trade Union Conference in London on 5 January 1918, he further stated as follows:

> With regard to the German colonies, I have repeatedly declared that they are held at the disposal of a conference whose decision must have primary regard to the wishes and interest of the native inhabitants of such

> colonies. None of these territories are inhabited by Europeans. The governing consideration, therefore, in all these cases must be that the inhabitants should be placed under the control of an administration acceptable to themselves, one of whose main purposes will be to prevent their exploitation for the benefit of European Capitalists or Governments.... The general principle of self-determination is, therefore, as applicable in their cases as in those of occupied European territories.

The question of independence for the European Nationalities was taken for granted since this was in fact one of the causes of the war itself. Thus, in a note to President Wilson dated 10 January 1916, the Allies stated as their war aims the following, inter alia:.

> The reorganisation of Europe, guaranteed by stable settlement, based alike upon the principle of nationalities, on the right which all people whether small or great, have to the enjoyment of full security and free economic development and also upon territorial and international agreements so framed as to guarantee land and sea frontiers against unjust attacks. The liberation of Italian, Slavs, Roumanians, Greeks, and Slovaks from foreign domination.
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> The liberation of non-Turkish peoples who then lay beneath the murderous tyranny of the Ottondu Empire.

c) The Period of the League

Rather disappointingly, the principle of self-determination, though recognised as a principle during the period of the League of Nations, was never recognised as a binding rule of international law. Thus, inspite of the emergence of several new independent states in Europe, and the establishment of the mandates system which led inevitably to self-determination and independence for the inhabitants of the territories involved, the principle itself was not recognised as a legal right. This phenomenon did not occur before the adoption of the U.N. Charter in 1945. Thus, in

the Aalands Islands dispute between Sweden and Finland in 1920 involving the question whether the Islanders who were under Finish Jurisdiction could opt to join Sweden in the exercise of the right of self-determination, the Committee of Jurists, appointed by the League of Nations to investigate the issue, observed that international law did not recognise the right of self-determination of peoples to separate themselves from the parent state, not withstanding international practice and the recognition of the principle in "a certain number of treaties." Consequently, it was left to the U.N. to nurture and develop the principle into a binding rule of international law. The Jurists declared that;

> Positive International Law does not recognise the right of national groups, as such, to separate themselves from the State of which they from part by the simple expression of a wish, any more than it recognises the right of other States to claim such a separation. Generally speaking, the grant or refusal of the right to a portion of its population of determining its own political fate by plebiscite or by some other method, is, exclusively, an attribute of the sovereignty of every State which is definitively constituted. A dispute between two States concerning such a question, under normal conditions therefore, bears upon a question which International Law leaves entirely to the domestic jurisdiction of one of the States concerned. Any other solution would amount to an infringement of [the] sovereign rights of a State and would involve the risk of creating difficulties and a lack of stability which would not only be contrary to the very idea embodied in the term 'State', but would also endanger the interests of the international community.

d) The Minorities Treaties

The Post World War Peace Treaties of 1919 contained provisions for the protection of certain ethnic and racial minorities in the new States which emerged from the break-up of the Turkish and Austria-Hungarian Empires. By special

agreements known as the Minorities Treaties, the Principal Allied and Associated Powers obtained stipulations from Poland, Czechoslovakia, Serb-Croat-Slovene State, Roumania, Greece, Austria, Bulgaria, Hungary and Turkey for the just and equal treatment of their racial religious and linguistic minorities. The treaties contained provisions for securing the protection of human rights such as life and liberty without distinction as to race; equality of treatment before the law; equal enjoyment of political and civil rights and a rule preventing the State concerned from barring persons from admission to public employment or functions, or the exercise of professions because of race.

The protective clauses contained in the Albanian Agreement illustrate the comprehensive nature of these human rights provisions.

Article 2

> Full complete protection of life and liberty will be assured to all inhabitants of Albania, without distinction of birth, nationality, language, race or religion.....

Article 4

> All Albanian nationals shall be equal before the law, and shall enjoy the same civil and political rights without distinction as to race, language or religion.....

Article 5

> Albanian nationals who belong to racial, religious or linguistic minorities will enjoy the same treatment and security in law and in fact as other Albanian nationals....

The Minorities Treaties also provided for freedom of organisation for religious and educational purposes and the provision by the State for the elementary instruction

of the children of a minority group through the medium of their own language in districts where a particular minority forms a considerable proportion of the population.

These comprehensive provisions has led one writer to observe that the 'equality of treatment in fact and in law sometimes demanded a more favourable treatment for the minorities.' Thus in protecting the minority schools from measures that operated against other schools in Albania the international court said in an advisory opinion 'equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations.'

The effective observation and application of the Minority Treaties were secured in two ways. In the first place, each contracting State recognised the principal clauses of each treaty as 'fundamental laws,' and undertook that 'no law, regulation, or official action shall conflict or interfere with them.' Secondly, the parties recognised expressly that the provisions affecting persons belonging to racial, religious and linguistic minorities constituted obligations of international concern. They were therefore placed under the guarantee of the League of Nations and could not be modified without the assent of the majority of the Council of the League. Thirdly, any member of the Council of the League had the right to bring to the attention of the Council any infraction or danger of infraction and 'the Council may thereupon take such action and give such directions as it may deem proper and effective in the circumstances.'

Any difference of opinion as to questions of law or fact arising out of the Treaties between the contracting State and any one of the Principal Allied and Associated Powers or any member of the Council was to be regarded as a dispute of an international character, and had to be referred to the Permanent Court of International Justice if any such member of the Council so demanded. The decision of the Court was final and had the same force and effect as an award or judicial decision under Article 13 of the covenant.

Although these first efforts at human rights protection were concerned only with specific categories of peoples in specific countries, they establish the beginnings of a recognition, that human rights had an international character, and that oppression of whole ethnic, religious or minority populations inside a country, was a matter of international interest which could give rise to international intervention.

2. THE UNITED NATIONS AND HUMAN RIGHTS

The horrors and barbarism committed by Nazi Germany and Japan in the course of the second world war, 1939 - 45, conclusively established the close relationship, between outrageous behaviour by a government against its own citizens and aggressive conduct towards other states and between respect for human rights and the maintenance of peace.[21]

The really major developments in the international protection of human rights occurred after the 2nd world war with the establishment of the U.N. and the International Military Tribunals at Nuremberg, Germany and Tokyo, Japan.

The atrocities of the Nazi Regime against Jews, its own population and inhabitants of occupied territories, aroused general revulsion, and the Allies agreed to include a commitment to the International protection of Human Rights in the post war settlement. The protection of human rights was to have in international character such that no state could claim that the manner it treated its citizens was within its exclusive domestic jurisdiction. Where national protection of Human rights was defficient it became a matter of legitimate international concern. The declaration by the Nuremberg Tribunal that crimes against humanity constituted crimes in international law, established the basic principle that the manner a state treated its own citizens was now a legitimate matter of international concern.

(i) U.N. CHARTER

The U.N. Charter contains several provisions affirming the right of international protection and recognition of human rights. The fact that apart from international

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[21] See U.N. Publication entitled, United Nations Action in in the Field of Human Rights, 1980 p.5.

security, the major focus of the U.N. is the respect for and protection of Human Rights, is made clear from the very preamble of the Charter. Thus one of the goals of the U.N. is the re-affirmation "of faith in fundamental human rights, in the dignity and worth of the human person, in equal rights of men and women and of nations large and small....."

Article I states that one of the purposes of the U.N. is the development of friendly relaionships amongst nations, based upon the principle of equal rights and self-determination of peoples on human rights generally. Article 1 (3) States that one of the purposes of the U.N. is the achievement of international cooperation in solving international problems of an economic social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

More provisions on human rights are contained in Articles 55 and 56 which state as follows:

> "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on resepct for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
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> (a) higher standards of living, full employment, and conditions of economic and social progress and development;
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> (b) solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and
>
> (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.
>
> All Members pledge themselves to take joint and separate action in co-operation with the Organisation for the achievement of the purposes set forth in Article 55."

It should be noted that throughout the Charter, human rights are referred in a general sense and no list of individual rights are contained in it. This is because there

was already a move to draft, what President Truman of the United States described as "an international bill of riths"

The work of drafting the U.N. Declaration of Human Rights was assigned to the Commission on Human Rights under the leadership of Eleanor Roosevelt, wife of the previous U.S. President. The Human Rights Commission, was a subsidiary organ of the U.N. Economic and Social Council, and was composed of government representatives. The Commission decided that the list of individual human rights, should be adopted as a declaration (a superior form of resolution) by the General Assembly. This Declaration, was to be "a common standard of achievement of all peoples and all nations." The Universal Declaration in its final form contained a list of civil and political rights, as well as economic, social and cultural rights to which all persons were entitled without discrimination.

Although many member states of the U.N., particularly those from Western Europe and North America, regarded the contents of the Declaration as non-binding and as merely laying down standards to which nations should aspire, as things turned it was treated by a substantial number of other member States as binding particularly in relation to the aspects relating to non-discrimination, and self-determination. As one Writer, has put it, "subsequent practice has transformed it into an instrument of considerable juridicial potency, although ite precise legal status is still the subject of some debate"[22]

(ii) Universal Declaration of Human Rights 1948

The real catalyst for the emergence of a regime or regimes for the international protection of human rights, was the rise, of the German third Reich, and the crimes against humanity committed by that regime under Hitler, from 1936 to 1945. The horror

[22] Scott Davidson, Human Rights open University Press, (1993) at p.13.

of the international community, found expression in the 1st two paragraphs of the Universal Declaration of Human Rights as follows:

> "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,
>
> Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people".

The Universal Declaration contains 30 articles covering every aspect of human rights.

The first substantive paragraph states that all human beings are born free and equal in dignity and rights., and that they are endowed with reason, conscience and should act towards each other in a spirit of brotherhood.

The next two chapters declare the entitlement of everyone to the rights contained in the Declaration regardless of race, colour sex, language religion, political or other opinion, national or social origin, property, birth other status. Also it applies to everyone regardless of political, jurisdictional or international status of every country or territory, be it independent, Trust, non-self-governing etc.

There after the rights protected are listed. These are rights with which every Nigerian student is familiar and are to be found in chapters 2 and 4 of the 1979 and 1995 constitutions.

The purposes, obligations and contents of the provisions of the U.N. on human

rights, were given more secficity and detail in the Universal Declaration, unanimously adopted by the U.N. General Assembly on December 10 1948. The Declaration was very comprehensive, covering (i) Civil and Political Rights, (ii) Social, Economic and Cultural rights and (iii) developmental rights. These are popularly referred to as first, second and third generational rights respectively. Thus the declaration covered (1) the rights to and security of the person, (2) freedom from slavery (3) prohibition of torture, inhuman and degrading treatment, (4) the rights to privacy and family life, (5) Association, (6) equality before the law, prohibition of arbitrary arrest, right to fair trial before an (7) independent tribunals for any alleged criminal offence, (8) freedom of movement, (9) right to asylum from persecution, (10) right to a nationality, (11) right to marry and found a Family, (12) right to property, (13) freedom of thought conscience and religion, (14) freedom of expression, (15) freedom of peaceful assembly and association, (16) right to participate in government, (17) right of equal access to the public service of one's country, (18) right to institute government by free, fair and genuine elections (19) the right to social security, economic, social and cultural rights indispensable to his security, (20) the right to work, (21) free choice of employment, (22) just and favourable conditions of work, (23) protection against unemployment, (24) equal pay for equal work, (25) just and favourable remuneration, (26) the right to join trade Unions, (27) right to rest and leisure, (28) right of an adequate standard of living for the adequate health of himself and his family, (29) including food, clothing, housing medical care, social services, (30) and social security when unemployed, and during sickness, disability, widowhood, or old age, (31) the right to education which will be free at least in the elementary and fundamental stages and (32) the right to a cultural life. etc.

There were rigorous debates in the early years of the Declaration whether it spelt out binding obligations on member States of the U.N. as a detailed elaboration of the obligations of States under the charter, i.e. an authoritative interpretation of existing charter obligations, or was merely a statement of standards to which states were encouraged to aspire.

The preamble to the Declaration does not point conclusively to either view. Thus while paragraphs 5 and 6 of the Declaration remind states of their obligations under the Charter in which they "re-affirmed their faith in fundamental human rights and the dignity and worth of the human person, and their pledge in cooperation with the U.N. to promote the Universal respect for and observance of human rights and fundamental freedoms," other paragraphs give the impression that it is a common standard to which man must aspire in order to achieve the inherent dignity and the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace.

The Declaration is also proclaimed as "a common standard of achievement of all peoples and all nations, to the end that every individual and every organ of society, keeping this declaration constantly in mind shall strive by teaching and education to promote respect for all these rights and freedoms by progressive measures. ".....These latter provisions give the impression that the Declaration is a standard setting documents, rather than a binding one.

According to a respected scholar, the most obvious way in which a General Assembly resolution can be linked with an unquestionably binding source of law is for it to elaborate in specific terms an obligation found in the United Nations Charter. 'The legal force of such an elaboration is analogous to the effect given generally to subsequent interpretations of a treaty.'

Indeed the framers of the United Nations Charter had originally intended to include a detailed chapter on Human Rights. One of the early drafts of the Charter prepared by the United States Department of State in 1942 included a Bill of Rights containing a common programme of human rights to which all members of the United Nations would have to subscribe. Although agreement was reached on all the substantive provisions, no measures of implementation was agreed upon. In particular the proposals for establishing an international tribunal to review national decisions on human rights gave rise to much controversy. In the next U.S. draft of the Charter, of 14

August 1943, it was proposed that a human rights instrument entitled 'Declaration of Human Rights' should be annexed to the Charter. This included a provision that 'The Members of the United Nations agree to give legislative effect to the Declaration of Human Rights annexed to the Charter. Measures of enforcement shall be applied by the administrative and judicial authorities of each member without discrimination as to nationality, language, race, political opinion or religious belief.' Later the idea of including in or annexing to the United Nations Charter, a detailed Declaration of Human Rights was given up for the broader and more general provisions later included in the preamble and in Articles 1, 55, 56, 60, 62, 68, 73, 76 and 87 of the Charter, on the understanding that a Declaration on Human Rights, spelling out in detail the obligations of Members States under the Charter, would later be adopted by the Organisation. This is amply confirmed by the speech of the U.S. Secretary of State, Mr. Edward Stettinius ast the San Francisco Conference in which he stated that one of the immediate tasks of the United Nations Human Rights Commission would be the preparation of the international bill of rights accepted by all member nations as an integral part of their own systems of law 'just as our Bill of Rights has been an integral part of our system of law.'

In fact many delegations at the San Francisco Conference envisaged that a Human Rights Declaration, defining in clear and detailed terms the obligations of Member States of the United Nations would follow immediately on the establishment of the Organisation. Thus Uruguay proposed that a 'Charter of Mankind' defining human rights should be prepared within six months of the establishment of the United Nations. This was to contain not only a declaration of rights, but also 'a system of effective international juridical guardianship of rights.' This view was espoused by several other delegations including, Mexico, Cuba, Ecualor, Chile, Norway and New Zealand. It is therefore not surprising that in his closing speech to the Conference, President Truman stated as follows:

> '.....We have good reason to expect the framing of an international bill of rights, acceptable to all nations involved. **That bill of rights will be as**

> **much a part of international life as our own Bill of Rights is a part of our constitution.** The Charter is dedicated to the achievement and observance of human rights and freedoms. Unless we can attain those objectives for all men and women, everywhere -- without regard to race, language or religion ---- we cannot have permanent peace and security.'

In addition to the above, the power of the organs of the United Nations to interpret the provisions of the Charter in the process of fulfilling their functions, is part of a widely accepted practice with regard to multilateral treaties, in which the organs set up by such treaties clarify and fill in the provisions of such treaties by a process of interpretation.

> It would seem ..... that nothing prevents the Assembly from adopting a declaration intended to make more explicit the following: the relationship of the Assembly with other organs, the powers of the organisation, or the rights and duties of Member States.

Thus with regard to the Universal Declaration of Human Rights, the French Delegate to the United Nations in 1948 stated as follows:

> The Universal Declaration, per se, is not compulsory. The obligation of Members is based upon the Charter. **But the Assembly determined by means of the Declaration, what the content and scope of these obligations are.** Its legal value derives from that circumstance, frorm the fact that it is an interpretation of the Charter, or, if preferred, from the fact that the purpose of the Declaration was to define the content of a legal obligation imposed by the Charter.

I myself prefare this view point, that is, that the Universal Declaration was an elaboration of obligations that were already existing under the Charter of the U.N.

However, the debate regarding the binding character of the Declaration has been rendered largely unnecessary and irrelevant by the conclusion of the two covenants on Civil and Political Rights and Economic, Social and Cultural Rights respectively in 1966. Both came into force in 1976.

(iii) The 1966 Covenants on Civil and Political Rights and Economic Social and Cultural Rights: A General Comment

In order to give greater specificity to the principles established by the Universal Declaration and to provide an instrument which would have a direct binding effect on ratifying states, the U.N. proceeded to prepare a comprehensive Covenant on Human Rights. The original concept was to have a single Covenant covering all the rights set forth in the Universal Declaration. However in the course of drafting the instrument, it became clear that because of the clear distinction between Civil and Political Rights on the one hand, and Economic, Social and Cultural rights on the other hand, it was not feasible to have them in a single document. There were clear differences in the nature of the legal obligations and systems of supervision that could be imposed. Thus the obligations arising from civil and political rights, like the prohibition against torture and inhuman and degrading treatment, were basically negative and capable of immediate implementation and judicial enforcement, by all states. On the other hand the Economic, Social and Cultural Rights (Social Welfare Rights)[23] were positive rights which required specific programs and measures by various governments for their realisation. With regard to remedies, within the U.N. System, it was felt that whereas the breaches of Civil and Political Rights could properly be challenged through a system of petitions, the essentially programatic and conditional nature of economic, social and cultural rights obligations made them unsusceptble for enforcement or supervision by

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[23] A term popularised by David M. Trubek. See "Economic, Social and Cultural Rights in the Third World: Human Rights Law and Human Needs Programs" in Human Rights in international Law, Legal and Policy Issues, Theodore Meron, Ed. O.U.P., 1984, p. 205

petitions. The fact that their implementation involved many complex state activities like programme development plans, budgeting etc., meant that their contents could neither be specific within a state, nor uniform amongst states. What programs could be embarked upon, depended on the level of social and economic development of a state, and indeed its social, political and economic philosophy of the state.

For example, what proportion of the budget should be devoted to health as against education, or housing as against agriculture? How much of the budget should be devoted to social welfare generally as against defence, information, police, industrial development, commerce and foreign affairs? These are issues that are difficult to quantify or even determine. Thus even within the state system, social welfare rights have remained largely non-justiciable. The enforcement of civil and political rights could even be undertaken, not only by domestic tribunals, but also by international courts as we have in Western Europe and the Americans. But no court like structure, created at the international level could supervise rights to work, to food, housing, health, etc.

Apart form the unique nature of social welfare rights, there were political disagreements as to whether or not they should be included in a Human Rights Covenant. Some states (mainly Western) which were prepared to support a covenant guaranteeing Political and Civil Rights were not willing to accept an instrument that would commit them to social welfare rights and the specific social programs that would entail.[24] However, the general Assembly insisted that both Civil and Political Rights, and economic social and cultural rights should be included in the Covenant. As a way out of their dilemma, the Committee on Economic, Social and Cultural Rights, decided to prepare two Covenants, one for each type of rights. This enabled them to comply with the General Assembly's directive and still establish different approaches to the implementation to the two categories or rights. Furthermore, this devise, enabled some states which would have refused to ratify a Covenant containing both classes of rights,

[24] See David Trubek, Op.Cit at p. 211-1

to ratify the one they accepted, instead a total rejection of a single Covenant.

U.N. Enforcement Machinery and Practice

The Committee on Human Rights (CHR)

The Committee is composed of 18 members who must be nationals of parties to the covenant under the optional protocol of the Convention Civil and Political Rights, individuals in a State have a right to put sent petitions or complaints against their states to the C.H.R. Apart from this there is a system of mandatory reports under which states parties undertake to submit reports on the measures tehy have adopted when give effect to the rights recognised by the covenant. The committee studies the report, draws up of questions which the state's representatives is required to answer. After that the Committee prepares its comments, which are sent to the state concerned and the economic and social council of the U.N. (Ecosoc).

An annual report is also submitted to the General Assembly, thus exposing the status of the implementation of human rights in a State to the international community, and for debate.

In addition to the optional system of individual complaint there is also an inter state complaint proceedure.

3. The Development of Self-Determination into a Legally Binding Principle

The U.N. Period

i) The Charter

In a joint declaration made in August 1941 between President Roosevelt of the United States of America and Mr. Winston Churchill, Prime Minister of the United Kingdom, known in diplomatic history as the Atlantic Charter, the two leaders stated inter alia that "they desire to see no territorial changes that do not accord with the freely expressed wishes of the peoples concerned" and that "they respect the right of all peoples to choose the form of government under which they will live; and they wish to see sovereign rights and self-government restored to those who have been forcibly deprived of them."

The signatories of the Atlantic Charter thus pledged themselves to incorporate the right of peoples to self-determination in the new post-war international order.

It is therefore not surprising to find provisions recognising the right of self-determination in the U.N. Charter, although these provisions were introduced by the Soviet delegation at San Francisco with the support of Latin American and Arab delegations, and not by the U.S. and U.K. delegations as one would have expected. The relevant provisions are contained in Articles 1, 55, 73, 75 and 76 of the Charter. According to paragraph 2 of Article 1, one of the purposes of the U.N. is to "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples...." Article 55, which is part of Chapter IX dealing with international economic and social co-operation, states that stability and well being necessary for peaceful and friendly relations among nations are based on respect for the principle of equal rights and self-determination.

Under Article 73, which forms part of the chapter on non-self-governing territories, colonial powers undertake to ensure inter alia the political, economic, social and educational advancement of the inhabitants of colonial territories and to "develop self-government, to take due account of the political aspirations of the peoples and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its people and their varying stages of advancement." It will be noted that this article does not refer specifically to self-determination or independence. This omission was to give rise to lengthy arguments as to whether the principle of self-determination was applicable to colonial territories as a Legal right.

Paragraphs 75 and 76 come under the chapter dealing with the Trusteeship System applicable to mandated territories which were not yet independent by 1945. Paragraph 76 states quite clearly that one of the basic objectives of the Trusteeship System was "to promote the political, economic, social and educational advancement of the inhabitants of trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned...." According to the Western delegations in the General Assembly of the U.N., whilst there was clearly a legal obligation to apply self-determination to trust territories and grant them independence if their inhabitants so wished, there was no such obligation in the case of territories under colonial rule. The colonial powers had almost unlimited discretion, and neither self-determination nor independence was an automatic right of the inhabitants of such territories.

As will soon be evident, in the practice of the U.N. no distinctions whatsoever were made between territories under colonial rule, trust territories and other non-self-governing territories. All non-self-governing territories were classed together under that heading and the same principles and obligations were declared to be applicable to them. Particularly, the General Assembly stressed at all its annual sessions that the

principle of self-determination was as applicable to territories under colonial rule as it was to trust territories.

In assessing the importance of the inclusion of the right of self-determination in the Charter, Nincic has this to say:

> It [self-determination] had become part of a multilateral international treaty of a universal scope, and had thus become a source of definite and universally valid legal rights and obligations. Its insertion among the fundamental principles and purposes of the United Nations made it an integral part of the general system of values of the Charter and brought it into a relationship of mutual interdependence and interaction with the other elements of that system, and more especially with the principle of sovereign equality and other related provisions of the Charter. The incorporation of the right of self-determination in the Charter was certainly one of the most significant, and in a sense also the most revolutionary steps accomplished in San Francisco.

This view is confirmed by Hanna Bokor-Szego in her book entitled New Sates and International Law:

> It certainly follows from Article 1 paragraph 2 (as well as Article 55) of the U.N. Charter that member states are obliged to respect the right of self-determination. Through this provision, which is included in the chapter on the purposes and principles of organisation, the U.N. Charter recognises the right of self-determination as a statutory norm...

ii) U.N. Resolutions

As was stated above, there was an initial clash between the colonial or administering powers and other members of the U.N. as to the scope of the right of self-determination. The administering powers argued that in accordance with Article 2(7) of the Charter, the administration of a colonial territory was a matter within the exclusive jurisdiction of each administering authority, and the role of the U.N. was therefore very limited. They buttressed their views by referring to the omission of the term "self-determination" in Chapter XI dealing with non-self-governing territories. Whilst they admitted an obligation to develop the territories under their administrations to the stage of self-government they insisted that they alone were competent to determine whether the conditions of self-government had been fulfilled in each case. They also denied that they were under any obligation to apply the principle of self-determination to the territories under their control. Portugal, and in some cases France, went so far as to state that their colonial territories formed part of their metropolitan territories and could therefore not be regarded as non-self-governing territories. On that basis they refused to submit the information about these territories required under Article 73 of the Charter to the Secretary-General. Nevertheless, the view of the majority of the members of the U.N. was that self-determination was applicable to non-self-governing territories because the doctrine was part of the larger Charter system as adumbrated in Article 1, and that in any case, it was clearly implied in Chapter XI by references to "self-government" and the duty "to take account of the political aspirations of the people". Indeed, in the practice of the United Nations there has been a consistent affirmation of the principle of self-determination as a legal and basic human right applicable to all human beings.

Thus, at its fifth session, the General Assembly recognised that self-determination was a fundamental human right. At its sixth session, the Assembly requested the Commission on Human Rights to draw up recommendations concerning "international respect for the self-determination of people" as part of the Covenants on Human Rights it was then drawing up. The Commission on Human Rights therefore adopted two resolutions which came before the Assembly for adoption during its seventh session. After discussions during which objections were raised on the grounds

of Article 2(7), the Assembly adopted an amended version of the first of the two resolutions. Referring in its preamble to the provisions on self-determination in Articles 1(2) and 55 of the U.N. Charter, the resolution states as follows in operative paragraph 2:

> The States Members of the United Nations shall recognise and promote the realisation of the right of self-determination of the peoples of non-self-governing and trust territories who are under their administration and shall facilitate the exercise of this right by the peoples of such territories according to the principles and spirit of the Charter of the United Nations in regard to each territory and to the freely expressed wishes of the people concerned, the wishes of the people being ascertained through plebiscites or other recognised democratic means.....

The Assembly then requested the Commission on Human Rights to continue preparing its recommendations on self-determination. In spite of strong opposition by colonial powers based on the domestic jurisdiction provision, the Commission re-affirmed its previous recommendation, which was then brought before the General Assembly.

The Assembly at its eight session thereupon adopted the epoch-making resolution 742 (viii) of 27 November 1953. This resolution not only elucidated the legal content of self-determination in respect of non-self-governing territories, but also mentioned independence as the main object of the application of the principle. Thus, the resolution states that " ..... the manner in which territories referred to in Charter XI of the Charter can become fully self-governing is primarily through the attainment of independence, although it is recognised that self-government can also be with a state or group of states if this is done freely and on the basis of absolute equality."

During its twelveth session, the General Assembly adopted another resolution in which it repeated the terms of Article 1(2) of the Charter and added that the disregard of the right of self-determination undermines the basis of friendly relations among nations.

The resolution declared inter alia that:

(a) Member states shall, in their relations with one another, give the respect to the right of self-determination;

(b) Member states having responsibility for the administration of non-self-governing territories shall promote the realisation and facilities the exercise of this right by the people of such territories.

It should be noted that the Assembly deliberately used the word right rather than principle of self-determination. This is a significant indication of the Assembly's view on the status of self-determination.

On subsequent occasions, the Assembly re-affirmed the right of self-determination, generally and in relation to specific non-self-governing territories.

iii) The Declaration on the Granting of Independence to Colonial Countries and Peoples

The greatest single event in the legal history of the principle of self-determination was of course the famous Declaration on the Granting of Independence to Colonial Countries and Peoples adopted by the General Assembly on 14 December 1960, with 89 votes in favour, none against and 9 abstentions. This Declaration constitutes the most concrete manifestation of state practice to the effect that self-determination had become a legal right of all peoples and that there now existed a legal obligation on all states not to obstruct the realisation of this right, but to promote it actively in cooperation with the United Nations. It is interesting that the arch enemies of self-determination, namely the administering states, the Western Powers and sympathisers like the U.S.A. and South Africa, did not have the courage to vote against the Declaration. They

merely registered the fact that they were not happy about this irrestible development in international law by merely abstaining.

The terms of the Declaration are indeed far reachng, although in view of past events in the Assembly, not surprising. After a preamble which clearly revealed that self-determination was regarded by the General Assembly as one aspect of fundamental human rights (contained in the U.N. Charter) which were regarded as being universally binding, the operative part of the Declaration followed thus:

1. The subjection of peoples to alien subjugation domination and emploitation constitutes a denial of fundamental human rights, is contrary to the charter of the United Nations and is an impedement to the promotion of world peace and co-operation.
2. All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

3. In adequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.

4. All armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the intergrity of their national territory shall be respected.

5. Immediate steps shall be taken, in trust and non-self-governing territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.

6. Any attempt aimed at the partial or total disruption of the national unity and the territorial intergrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.

7. All states shall observe faithfully and strictly the provisions of the Charter of the United Nations, 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.

As was stated above, this Declaration completed the process of the development of self-determination from a political doctrine into a rule of international law. This is the unanimous view of publicists of various nations. Thus Rosalyn Higgins states that the "Declaration, taken together with seventeen years of evolving practice by U.N. organs, provides ample evidence that there now exists a legal right of self-determination..... It should also be added that a denial of self-determinaton is now widely regarded as a denial of human rights, and as such a fitting subject for the United Nations."

In his own contribution, Umozurike states that "The United Nations has not only facilitated the ascertainment of the views of states on self-determinaton, it has also through its declarations, resolutions and its own practice accelerated the emergence of the principle as one of international customary law." According to Hanna Bokor-Szego, "an opinio juris has evolved to the effect that, as required by the right of self-determination, states are bound in accordance with the wishes of the people of dependent territories to grant them independence.

Brownie considers self-determination to be "an aspect of jus congens," i.e., a peremptory norm of general international law; a norm recognised by the International Community of States as a whole, as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having

the same character. This view is not as radical as some writers think. For, beginning from the late fifties, there has been an increasing tendency to link the right of self-determination with the principle that any attempt to obstruct its exercise by any non-self-governing peoples constitutes a threat to international peace and security. This process reached its climax in the famous "Declaration on the Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations adopted unanimously by the General Assembly on 24 October, 1970.

(iv) Post-Declaration Era

Since the adoption of the Declaration on the Granting of Independence to Colonial Countries and Peoples, all subsequent developments have confirmed the existence in international law of the right of self-determination. Thus, by resolution 1654(xvi) of 17 November 1961, the Assembly referred to the Declaration and condemned violations of its provisions. It then established a Special Committee of 17, "on the situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples."

The General Assembly requested the Special Committee, among other things, to seek the most suitable ways for the speedy and total implementation of the Declaration in all territoris not yet independent, to propose specific measures for the complete application of the Declaration, to submit to the General Assembly a report with recommendations on each territory, and to apprise the Security Council of any developments in these territories which might threaten international peace and security.

By resolution 1810 (xvii) of 17 December 1962, the Assembly increased the composition of the Special Committee from 17 to 24 in order to increase its effectiveness.

The activities of the Special Committee have led to the adoption of many resolutions by the General Assembly since 1961, re-affirming the Declaration and the

right of self-determination, condemning colonialism and recognising the legitimacy of liberation struggles in territories under colonial rule.

The 1966 Covenants on Human Rights most significantly, the first three operative paragraphs the 1966 International Covenants on Human Rights are based on the recognition of the right of self-determination. Article 1 states as follows:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
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 upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

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

In 1970, the General Assembly unanimously adopted the Declaration, on the principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations. In the preamble, the Assembly stated that the subjection of peoples to alien subjugation, domination and exploitation constituted a major obstacle to international peace and security and that the principle of equal rights and self-determination of the peoples constituted "a significant

contribution to contemporary international law, and that its effective application is of paramount importance for the promotion of friendly relations among states....." In the operative parts, the Declaration devoted a whole section to the principle of equal rights and self-determination. The section on self-determination contains the following provision inter alia

> The territory of a colony or other non-self-governing territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or non-self-governing territory have exercised the right of self-determination in accordance with the Charter, and particularly its purposes and principles.

As can be seen, this Declaration confirmed and indeed elaborated further, the 1960 Declaration on the Granting of Independence to colonial countries and peoples. As it was unanimously adopted, its provisions can be legitimately regarded as an interpretation of the Charter by the parties to the treaty on the U.N. In order words the parties to the Treaty (the U.N. Charter) were in that Declaration, interpreting their obligations under the Treaty. Thus, the Declaration is binding on all members of the U.N.

Furthermore, the numerous resolutions of the U.N., including the two Declarations discussed above, have had the legal effect of creating a customary rule of international law on the right of self-determination. According to Bokor-Szego ".....the recently evolved particular rules of international law on the right of self-determination should be regarded as rules established through customary law. Admitttedly, a considerable part was played in this process by the U.N. General Assembly resolutions regarding self-determination, among them mainly the Declaration" [1960]

The impact of this new rule of international law, which developed from its cradle in the U.N. Charter in 1945 to full adulthood in 1960, can best be appreciated when it is realised that more than 70 formerly non-self-governing territories had become independent and joined the U.N. as sovereign states between 1945 when the U.N. was established and 1978. Of these, about 50 with a total population of over 70 million attained independence between 1960, i.e. after the Declaration on the Granting of Independence to Colonial Countries and Peoples, and 1977. Of the remaining 28 territories, whose cases were not yet resoved by 1978, virtually all have become either fully independent or have assumed some form of self-government, voluntarily within an alreay independent state.

(v) The Legitimacy of Liberation Struggles as an Application of the Right of Self-Determination

The principle of International Law recognising the legitimacy of liberation struggles and wars is clearly an offspring of the right of self-determination. For once peoples are recognised as having a right to self-determination, it follows logically, and inevitably, that they must also be legally entitled to resist any action aimed at denying them that right. A liberation struggle involving the use of armed force to achieve freedom and independence against colonial tyranny and oppression is a legitimate exercise of the right of self-determination enshrined in Article 51 of the U.N. Charter.

The legitimacy of the struggle of colonial peoples to achieve freedom and independence has been recognised by the General Assembly, the Security Council and other organs of the United Nations and has been affirmed and re-affirmed in numerous resolutions and decisions. In one of these, the General Assembly **inter alia** re-affirmed.

> ".....that the recognition by the General Assembly the Security Council and other United Nations organs of the legitimacy of the struggle of colonial peoples to achieve freedom and independence entails, as a corollary, the extension by the organisations within the United Nations System of all the necessary moral and material assistance to the peoples of colonial Territories and their national liberation movements."

As part of a general international effor to revise existing Conventions on Humanitarian International Law (particularly the Geneva Conventions), widen their scope, ensure better protection of civilians, prisoners of war and combatants in all armed conflicts, the International Committee of the Red Cross, at the instigation of the U.N. convened between 1971 and 1977 a series of Conferences of Government Experts to deliberate on the question of the re-affirmation and development of international humanitarian laws Applicable to armed conflicts. At the conclusion of these conferences, two protocols to the 1949 Geneva Conventions on the Laws of War were adopted on 8th June, 1977. The first protocol dealt with the protection of victims of international armed conflicts, whilst the second dealt with the protection of victims of non-international armed conflicts.

The first protocol (i.e. on international armed conflicts) confirmed the international legal status of liberation struggles. Thus under article 1, paragraph 4, an international armed conflict is defined to include "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations...."

One of the consequences of the classification of liberation struggles as international armed conflicts is that the freedom fighters are fully protected by International Law. When captured they must be treated as prisoners of war and

the civilian populations under their control are also protected by Law. Furthermore, it is also legitimate to render liberation movements, moral and material support, including arms, ammunition, financial aid, training and transit facilities.

The full backing by International Law, the U.N. and its agencies, including the O.A.U. were in my view decisive in the successful liberation struggles in Guinea-Bissau, Cape Verde, Mozambique, Angola and Zimbabwe, which led to the freedom and independence of those peoples and territories.

(vi) Self-Determination in the Post Colonial Era
Mordern Dimension of the Concept

(a) The Dimensions of the Problem

In Africa, there were in 1945, only two independent states, these were Ethiopia and Liberia. Thanks to the implementation of the right of self-determination, over 50 former colonies including Nigeria have become independent since 1945.

In the seventies, the world watched in some fascination, how the Portuguese and Spanish empires in Africa crumbled under the might of self-determination, giving rise to the states of Angola, Mozambique, Guinea-Bissau and Mauritania. But above all, the real miracle of our time must be the collapse of the white minority regimes of Rhodesia, now Zimbabwe, Nambia and South Africa. None of us, researchers and analysts of international law and relations dared to predict these events as possibilities within our life times. But it happened thanks to the principle of self-determination and the dogged determination of the International - Community to enforce it.

But that is not all. The very success of the principle has brought in its wake, a host of problems, all over the world, Africa included. Once the external

concept of self-determination was being fully realized, the international community, became increasingly confronted with the internal aspect that is, the rights of peoples within an independent state, to freely choose their political institutions including the right to break-away from their state to from a new state or to join another existing state.

Thus the question arose, whether self-determination was limited to territories under colonial rule or whether within independent states, constituent ethnic groups and nations or peoples, were also entitled to self-determination which could undermine the territorial integrity of such independent states.

As Caesese has noted:

> Article 1 has been a major impetus to self-determination's development into a legal principle encompassing the internal decision-making process, for it is Articel 1(1) which established permanent link between self-determination and civil and political right. Since the advent of Article 1, the issue of whether a State has respected its peoples' right to self-determination cannot be resolved without inquiry into the State's decision-making process. In short, there is no self determination without democratic decision-making.
>
> This leads to an important point: the right to self-determination provided for in the Covenants is a **continuing right**. The language of Article 1 and the attendant preparatory work compel such a conclusion. Although the draft of Article 1 proclaimed, 'all peoples **shall have** the right self-determination, the final text reads, 'all peoples **have** the right to self

determinaton'. This change was intended 'to emphasize the fact that right referred to is **permanent** one'.[25]

In short, the drafters of Article 1 advanced a broad approach to self- determination, one to a very large extent different from the political doctrine which had evolved in the years immediately following the Second World War. As we have seen above, in the era immediately after the Second World War, the majority of States equated the achievement of independent status by colonial countries with the final realisation of self-determination (we will see that an exception was then made for racist States). Under the Covenant, however, the right to self-determination does not end with independence. The issue of whether the government of a sovereign State is in compliance with Article 1 is a legitimate question, with reference to any State, at any point in time."

This problem reared its head in Africa, soon after the massive flood of independence swept into the continent in 1960. It is well known that the boundaries of African states are artificial, with nations and ethnic groups split into two or three between different states, and incompatible peoples and nations grouped together in states.

It is ofcourse common knowledge that these artificial states were delimited at the Berlin Conference of 1884 and other follow-up exercises in 1904 and 1920. The latter involving the division of German colonies amongst the victorious Allied and Associated Powers under the League of Nations Mandates system.

As the front line Scholar of African Boundaries, A.I. Asiwaju has observed,

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[25] Comment made by the Chairman of the Working Party of the Third Committee presenting the draft to the Third Committee (U.N. Dc., A/C.3/SR.668, para 3

"It does not take much erudition to show the arbitrariness and artificiality of the inter-colonial boundaries so negotiated for Africa under European domination. As indicated in an often quoted after-dinner humor by Lord Salisbury, the British Prime Minister, at the signing of the Anglo-French Convention of 1890 in respect of Nigeria's northern boundary, the Europeans themselves acknowledged the arbitrary manner of the boundary arrangements. Observed Lord Salisbury:"

"We have been engaged in drawing lines on maps where no white man's foot ever trod; we have been giving away mountains and rivers and lakes to each other, only hindered by the small impediment that we have never known where the rivers and lakes and mountains were."

"Another Briton, an official who participated in the drawing of the southern section of the Nigerian-Cameroon border, is also recorded to have recalled, years after that-

"In those days we just took a blue pencil and ruler, and we put it down at Old Calabar, and drew that blue line to Yola.... I recollect thinking when I was sitting having an audience with the Emir of Yola surrounded by his tribe, that it was a very good thing that he did not know that I, with a blue pencil, had drawn a line through his territory."

Consequently, hardly had the African States attained independence, when claims and counter-claims were being made by one African State or the other on large territorial tracts of the other. Thus Somalia claimed large territories in Southern Ethiopia (Ogaden) and Northwest Kenya and in Djibouti; territories in which there were large settlements of Somali speaking people. Morocco claimed

the whole of Western Sahara, Mauritaria and parts of Algeria. Mauritania and Mali were engaged in territorial disputes, as were Ghana and Togo.

These claims brought to the fore, the question whether self-determination was limited to territories under colonial rule, or whether within the independent African States, constituent ethnic groups, Nations or Peoples were also entitled to self-determination which could undermine the territorial integrity of such States.

As was stated above, Somalia had never disguised its major objective of uniting all Somali people in Somalia, Ethiopia, Kenya and Djibouti into what it called "Greater Somalia". To justify these irredentist claims, Somalia relied on the right of self-determination of all peoples, including the Somali population living in the other territories mentioned above. This claim was not limited to the population of Somalis abroad only, but also to the territories occupied by them in Ethiopia and Kenya. In other words, the reliance on the principle of self-determination involved transfer of territory and populations from the Ethiopia and Kenya, to Somalia. The argument is that although there was no Somali State, prior to colonisation which resulted in the splitting of Somali clans under different colonial masters, there was a Somali Nation and the Somalis now scattered in different States were entitled to exercise their right of self-determination to join Somalia in a single Nation/State.

The principle of self-determination applied in this manner to independent States, was opposed by other African States as being contrary to another major principle of international law, that of the territorial integrity of States. The O.A.U. States made their stand on this matter very clear when they passed the Cairo resolution of 1964, confirming the validity or even the sanctity of colonial boundaries.

In their resolution adopted on 21st July 1964 at Cairo, the Heads of State and Government of African States held that the borders of African States on the day of independence, constituted, a tangible reality and therefore re-affirmed solemnly "the strict respect of all Member States of the Organisation for the principle laid down in Article IV paragraph 3 of the Charter" of the O.A.U. on respect for territorial integrity and pledged themselves to respect the frontiers existing on their achievement of independence.

The intention and spirit of the resolution is that the borders of African States at the date of the resolution should remain inviolable and sacrosanct. No African State can lay claim to any part of the existing territory of another African State. The borders were to become 'frozen' as they were. Consequently, the question of claim to territories 'owned' before the European partition could not arise once such territories were within the borders of another African State. As to the question of self-determination, the resolution made it clear, by omitting the issue, that there could be no question of self-determination of people within an independent African State. The attitude of the O.A.U. to Morocco's claim to Western Sahara and Biafra's claim to independence, clearly 'demonstrated at that time (the sixties) the fact that no loopholes or exceptions were permissible in the application of the resolution. But as will be seen later, time has brought with it a change of attitudes.

There is of course some paradox in a situation in which the independent African States were giving validity to the boundaries arbitrarily drawn up by the justifiably maligned Berlin Conference.

The reason for this attitude was obvious [26]. There was hardly an African State that was not afflicted by the plague of artificial boundaries and to accept the

[26] See Jeffry Herbst in "The Creation and Maintenance of National Boundaries in Africa" in International Organisation 43, 4 Autumn, 1989, p. 673.

concept of self-determination as being applicable to the various national groups in a State, was to institute a state of collective insecurity. Every member wanted to protect itself from an attack on its vulnerable soft under-belly of artificial boundaries.

And so the question that immediately arises is whether there is no concept of self-determination outside de-colonisation. In other words, is it only the peoples of non-self-governing territories who are entitled to self-determination or are peoples in independent States also entitled to exercise the right? Of course if the answer to the first question is that there is no right of self-determination outside the process of de-colonisation, then one immediate consequence would be that the concept has become redundant, since virtually every territory is now independent. As one Writer has observed humorously, self-determination in the African context was not a doctrine interpreted as creating a populist entitlement to democracy, since de-colonisation was always followed in short order by the single party State and authoritarian rule "It seemed that the new governments of the former colonies regarded self-determination as a unique event occurring only at the moment of a colony's independence. What has been called "one man, one vote, one time."[27]

The issue of self-determination was prominent in the Western Sahara case. All parties supported the right of the peoples of Western Sahara to self-determination, but appeared to apply differing and self-serving contents to the concept.

Thus whilst recognising that the principle applied to the territory, Morocco argued that in that particular context, it had to co-exist with the principle of territorial integrity, and that in certain cases self-determination was deemed

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[27] Thomas Franck, "Post modern Tribalism and the right of secession" in Peoples and Minorities in International Law ed.C. Brolmann et al Martinus Nijhoff 1993, p. 10.

subordinate to territorial integrity. In an attempt to reconcile the two concepts to suit its own particular claim Morocco made three propositions.

(i) That the right of self-determination existed with regard to non-self-governing territories in areas where no State had been recognised by the international community in the 19th Century.

(ii) That the right did not exist in respect of independent States so as to destroy the unity of such countries.

(iii) That in the case of States which had enjoyed international recognition prior to colonisation and had been dis-membered, such as Morocco, self-determination gave way to reunification and the re-establishment of the former State's territorial integrity.[28]

The fine distinction between the Somalian and Moroccan arguments are worth noting. Whilst both are claiming a pre-colonial existence for their larger nations, Somalia based its case on prior existence as a nation of Somali clans, whilst Morocco based its on prior existence as a State, i.e. an internationally recognised State which included Western Sahara. Again Somalia's call for the exercise of the principle of self-determination for the Somali people of Kenya, Ethiopia and Djibouti, entailed their participation in a referendum to decide whether or not they wanted to join Somalia, or remain in their current State.

The States concerned opposed this call for referendum or Plebiscite on the ground that it was against their right of territorial integrity. In contrast to Somalia, Morocco did not want a plebiscite of the people of Western Sahara to decide whether they wanted to be independent by themselves as State or they preferred to merge with Morocco. Morocco's view was that self-determination

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[28] I.C.J. Reports 1975, Pleadings, CR. 75/8 pp. 11-16.

for the people of Western Sahara, could be realised by their merger (re-unification) with Morocco, without a referendum to determine the true wishes of the people on the ground that self-determination in that sense, gave way to the re-unification and re-establishment of the pre-colonial State's territorial integrity.

It is therefore necessary to consider, the meaning, implications and present scope and status of the doctrine of self-determination.

(b). The Scope and Present Status of the Doctrine

As stated above, there is currently a great controversy as to the present status of the doctrine. One school of thought accepts the O.A.U. position that the doctrine is applicable to non-self-governing territories and peoples and that once a State gains independence, the doctrine stops applying to it. The issue then becomes that of the sanctity of the State's territorial integrity. Self-determination and territorial integrity were therefore two stages in the same process, the transition from a non-self-governing territory to an independent State. The phenomenon is lucidly explained by Thomas Franck when he states that the notions of Uti Possidetis (territorial integrity) and self-determination were quite simply treated as aspects of the same entitlement.

Peoples entitled to self-determination were defined as inhabitants of a colony. "The exercise of self-determination must occur, it was reasoned, within colonial boundaries, which would remain sacrosanct, unless the people as a whole within those boundaries freely elected to change them by integrating with another State."[29]

Thus Shaw, a proponent of this restrictive view of self-determination states that the doctrine as a legal principle under international law has been restricted to

[29] Post modern Tribalism Op.Cit. p.9

the colonial situation. For according to him, where a non-self-governing territory has attained independence, the principle of self-determination coupled with territorial integrity will operate to protect the territorial unity and framework of the new State. "Indeed a basic presumption of the application of self-determination is that it will be exercised by the people in question within the territorial framework of the entity administered by the colonial power before independence."[30] Consequently in framing propositions on the content of the doctrine, Shaw, rules out a right of self-determination by resident minorities in an independent State.[31] On the same basis, he has also concluded that secession from a State cannot be based on the right to self-determination.[32]

This is by no means an isolated view. Thus according to Ambruster, the sovereignty and self-determination are mutually exclusive. "The principle of sovereignty excludes logically the right to self-determination. If international law guarantees the sovereignty of the existing States it cannot permit, at the same time, that this sovereignty is infringed under the title of the right of self-determination."[33]

In the Frontier Dispute case between Burkina Faso and Mali, the International Court of Justice (I.C.J.) appears to have given some support to this restrictive view of self-determination, although its claim that the doctrine and that of Uti Possidetis in the context of territorial integrity, are reconcilable, reduces the effect of its pronouncement in this regard. According to the Court, although at

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30 OP.cit. p.9

31 Op.cit., p. 93

32 Ibid pp. 102, 215 and 216.

33 Quoted by Dietrich Murswick in his paper, "The Issue of Secession - Reconsidered" in The Modern Law of Self-Determination, edited by Christian Tomuschat, Martinue Nijhoff 1993, p. 23.

first sight the principle of Uti Possidetis conflicts outright with that of self-determination;

> "In fact, however, the maintenance of the territorial" status quo in Africa is often seen as the wisest course, to preserve what has been achieved by the peoples who have struggled for their independence, and to avoid a disruption which would deprive the continent of the gains achieved by much sacrifice. The essential requirement of stability in order to survive, to develop and gradually consolidate their independence in all fields has induced African States judiciously to consent to the respecting
> of colonial frontiers, and to take account of it in the interpretation of the self-determination of peoples.[34]"

The content of the Court's Statement seem to limit the Principle to self-determination in the African context and furthermore, the weight given to political, rather than legal considerations, greatly reduce the potency of this passage as a legal authority for the restrictive view of self-determination.

It is worthy of note that even the Writers who take the restrictive view of self-determination, admit that under certain circumstances, usually involving grave breaches of human rights, coupled with the fulfillment of some conditions, there is a universal right of self-determination, outside the process of decolonisation. Thus John Dugard who states that self-determination does not

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[34] Case concerning the Frontier Dispute (Burkina Faso v. Mali), I.C.J. Reports 1986, 554 at 567.

normally include a right to secede, provides the following stringent exception to the rule.[35]

Where there is no agreement on the part of the component parts of a state to secession, the international community will not recognise the secession unless the following circumstances are present:

(a) the people of the seceding territory constitute a distinct people, having regard to their language, culture and historical experience.

(b) the people have a clear historical claim to the territory in question;

(c) the territory occupied by the secessionist group came under the control of the existing State by some unjustifiable historical event (as in the case of the Soviet Union's annexation of the Baltic States);

(d) the will of the people of the territory has been expressed by means of a referendum or election and shows very clear support for secession;

(d) the human rights of the people have been seriously violated and they have been denied proper participation in the Government of the State from which they wish to secede."

The opposing school of thought contends that self-determination is a dynamic and versatile principle which is equally applicable to all peoples

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[35] "Secession: Is the case of Yugoslavia a precedent for Africa?" In African Journal of International and Comparative Law. vol. 5 (1993) p. 163 at 173.

regardless of whether they belong to a non-self-governing territory or a fully independent State.

Thus, Franck notes for example, that both the Covenants on Political and Civil Rights and on Social and Economic Rights, state in their first Article that all peoples have the right of self-determination. By virtue of that right they freely determine their political Status and freely pursue their economic, social and cultural development. He also refers to principle VIII of the Helsinki Accord of 1975 which stipulates that participating States will respect the equal rights of peoples and their right of self-determination, and that "all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference." Franck then points out that since the end of the cold war era and decolonisation, the meaning of the self-determination entitlement and its "territorial integrity counterpart has had to be considered in the context of burgeoning post-modern tribalist secessionism, including separatist movements in the disintegrating Soviet Union and Yugoslavia, Eritrea, Kurdistan, the Basque and Corsican regions, Scotland, Wales, Tibet, Slovakia.....Quebec and in various "homelands" of Canada, Australia, New Zealand and the United States."[36]

In his commentary on the Article one of the 1966 Covenants on the Human Rights comments Cassese declares that the choice of words is instructive and its meaning, two fold.

> "First and here lies the primary significance of the provision - Article 1(1) requires that the people choose their legislators and political leaders free from any manipulation or undue influence from the **domestic** authorities themselves. In this respect, in order to understand the exact parameters of internal self-determination one

[36] Op.Cit. p.15

> must refer to the other provisions of the Covenant on Civil and Political Rights. Internal self-determination presupposes that all members of a population be allowed to exercise those rights and freedoms which permit the expression of the popular will Thus, internal self-determination is best explained as a manifestation of the totality of rights embodied in the Covenant, with particular reference to: freedom of expression (Article 19); the right of peaceful assembly (Article 21); the right to freedom of association (Article 22); the right to vote (Article 25b); and, more generally, the right to take part in the conduct of public affairs, directly or through freely chosen rights can it be said that the whole people enjoys the right of internal self-determination. Consequently, one can claim a breach of Article 1 of the Covenant if a State abuses or gravely disregards the limitations on civil and political rights authorised by the Covenant."[37]

Also agreeing that developments in the areas of human rights have had far reaching consequences on the scope and status of self-determination, Rosaline Higgins declares that self-determination is a contemporary, non-secessionist right of peoples within an independent State. A bridge has been built from self determination as a process of decolonising to self determination as a human right, a right of peoples.

In the two 1966 Covenants on Human Rights, the right of self-determination is presented as a free standing precept, no longer confined to colonisation. Higgins believes that the Committee on Human Rights established under the covenants, played a key role in this evolutionary process. The Committee addressed the matter in virtually every single examination of a State upon the report that it is required to submit periodically. In this regard "the

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[37] Cassese Op.Cit P.53

committee took a robust view about continued application of self-determination to post-colonial situations."[38]

Also making a case for a universally applicable doctrine of self-determination based on human rights, Christian Tomuschat stresses the fact the emergence of international human rights law and its consolidation amounts to a general recognition that states are no longer the sole subjects of international law and that the main objective and raison d'etre of a State is to provide a service to their citizens. If they fail in a fundamental way to meet their essential responsibilities, they begin to lose their legitimacy and thus their very existence can be called into question.

This situation is not one which can easily occur. The conditions that call for such a development are very grave and include failure to protect the life and physical integrity of citizens and a State machinery being turned into an apparatus of terror which persecutes specific groups of the population. In that case such groups cannot be held to be bound to remain under the jurisdiction of that State.[39]

In this seminal article on democracy and the legitimacy of governments entitled "The Emerging Right of Democratic Governance",[40] Franck traced the emergence of a universal right of self-determination historically and identified three phases of its development, first after the first world war, applicable to the territories of the defeated European Powers, Germany and Turkey, then after the second world war, and the establishment of the U.N, it became applicable to all colonies and trust territories, and the third phase when it became a right

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38 Op.Cit., p.31

39 "Self-determination in a Post Colonial World", in Modern Law of self-determination, Ed. C. Tomouschat, Martinus Nijhoff 1993, p. 9

40 AJIL (1992) 46 at 58 - 9.

applicable to everyone as a consequence of the provisions of the Universal Declaration of Human Rights and the two 1966 Covenants.

The Covenants, according to Franck, clearly intend to make the right of self-determination applicable to the citizens of all nations, entitling them to determine their collective political status through democratic means. "It also, at least for now, stopped being a principle of exclusion (Secession) and become one of inclusions; the right to participate. The right now entitles people in all States to free fair and open participation in the democratic process of governance freely chosen by each State. When such participation is denied, when a people that, "is geographically separate and is distinct ethnically and/or culturally," has been placed "in a position or status of suburdination" perhaps a secession option may re-emerge as an international entitlement"[41]

The pre-occupation of Writers with secession and self-determination is of course quite understandable. After all the earlier stages of the doctrine involved the political and legal separation ("secession") of the colony from the colonial power. It is therefore quite understandable when Writers discuss modern self-determination in the context of the right of secession. But it should be stressed that self determination encompasses secession. Indeed the latter must be seen as the last option. Self-determination entails, the right to participate in deciding, the structure of the state, the type of government and the persons to be entrusted with political power in a state.

It also entails, the civil and political rights like the rights of association, to form political opinions, free expression including freedom of the press, liberty of the person and so on. It includes the right of respect for one's religion and recognition and autonomy for distinct and different groups occupying different

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41 Ibid p.59

parts of the territory of a State. Thus the issues of federation and confederation, are all part and parcel of the concept of self-determination[42]

It would be difficult to deny such rights to peoples in independent States, even minorities. The question of secession therefore cannot be seen or considered in isolation. The question must surely be the circumstances in which a denial of fundamental rights reaches a level when the very survival of a group is at stake or when the degree of inhuman and degrading treatment of such a group reaches an intolerable degree. Will such a group not have a right to self-determination outside the oppressive State? Thus the issue cannot be whether self-determination exists in the post colonial international law; it does. The question is the criteria for its application to different situations.

The point being made above has been graphically illustrated by Klabbers and Lefeber in their paper on Africa and the conflicting concepts of Uti Possidetis and self-determination. In the first place, they asked "What remains of the right of internal self-determination if a people pursues reasonable demands for constitutional reforms in vain? In particular it must be examined whether the right to internal self-determination, in such a situation converts into a right to external self-determination."

Next the Writers examine State practice in order to determine whether the preservation of the territorial status quo is never overridden by a right of Self-determination. After a very careful analysis of secessions and attempted secessions and the reaction of the international community, they conclude that, albeit grudgingly, the international community has accepted secessionist claims in the appropriate cases thus:

> "There is considerable doctrinal support for legal entitlement to external self-determination, if a people have been deprived of its right of internal

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[42] See J. Klabbers and R. Lefeber in "Africa: Lost between Uti Possidetis and self-determination in C. Brolman et al peoples and Minorities in International Law Martinus Nijhoff 1993, pp. 43-44

self-determination, in particular if this is accompanied by serious human rights violations. For a right to external self-determination to arise, the violation of the right to internal self-determination must be serious and persistent, and it must not have been possible to enforce the right by judicial means."[43]

[43] Op.Cit., pp. 46, 47 - 49.